

# STUDENT NOTE

## The Militia Clauses and the Original War Powers

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Today, the Militia Clauses of the Constitution lead a curious double life. The Second Amendment’s preamble stars in gun rights debates,<sup>1</sup> but when the

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1. The Second Amendment literature exploring the institutional nature and role of the militia is extensive. For one account putting the military dimension front and center, see David S. Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 612 (2000). For an important smattering, see, e.g., SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* 2 (2006); CLAYTON E. CRAMER, *FOR THE DEFENSE OF THEMSELVES AND THE STATE* 14, 34 (1994); JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* 3 (1994); PATRICK J. CHARLES, *ARMED IN AMERICA: A HISTORY OF GUN RIGHTS FROM COLONIAL MILITIAS TO CONCEALED CARRY* 12 (2018); Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 L. & HIST. REV. 139, 140 (2007); David T. Hardy, *The Rise and Demise of the Collective Interpretation of the Second Amendment*, 59 CLEV. ST. L. REV. 315, 318-19 (2011); Don Higginbotham, *The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship*, 60 WM. & MARY Q. 39, 39 (1998); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 212 (1983); Robert E.

conversation shifts to the War Powers, these Clauses drop almost entirely from view. The result is a War Powers literature strikingly silent about the Militia Clauses.<sup>2</sup> Yet the founders regarded the militia as a key military resource. To them, the militia was the “great Bulwark of our Liberties and independence,”<sup>3</sup> and they structured the Constitution with this bulwark in mind.<sup>4</sup> The term “Militia” appears in the Constitution four times in three separate clauses, a fifth time in the crucial-to-ratification Second Amendment, and a sixth time in the Fifth Amendment.<sup>5</sup> Between the Constitution and Bill of Rights, it features four times more than “commerce,” “army/armies,” “navy,” and “religion/religious,” once more than “jury,” and the same number of times as “tax.” It also receives extended analysis in six *Federalist* Papers and reference in eight others.<sup>6</sup> The result was a complex, carefully operating system that incorporated an important institution into the Constitutional scheme and provided Congress with a key tool to shape the exercise of the War Powers and federal responses to military emergencies.

This analysis returns the Militia Clauses to view, exploring how they shaped the War Powers. While scholars have occasionally considered the clauses in

Shalhope, *The Armed Citizen in the Early Republic*, 49 L. & CONTEMP. PROBS. 125, 125 (1986); David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551, 553 (1991); Eugene Volokh, “Necessary to the Security of a Free State,” 83 NOTRE DAME L. REV. 1, 7 (2007); and Randy E. Barnett, Book Review, *Was the right to Keep and Bear Arms Conditioned on Service in an Organized Militia?* 83 TEX. L. REV. 237, 237 (2004). See also Akhil Reed Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 146 (2008) (bringing the Fourteenth Amendment into play).

2. The only article-length treatment of the Militia Clauses dates to 1940, and it focuses exclusively on the militia’s practical ineffectiveness, not its constitutional role. See Frederick Bernays Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181 (1940). In the War Powers literature, the Militia Clauses feature only in passing. See, e.g., Robert J. Delahunty, *Structuralism and the War Powers: The Army, Navy and Militia Clauses*, 19 GA. ST. U. L. REV. 1021, 1052-55 (2003) (offering only about three pages of analysis); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of the War Powers*, 84 CALIF. L. REV. 167, 227-28 (1996) (offering only cursory analysis, primarily through the lens of state constitutions). They have also surfaced in the rare debates over National Guard. See *Perpich v. Dep’t of Def.*, 496 U.S. 334, 345-46 (1990) (explaining that, since the National Guard is authorized both under the Militia Clauses and the Army and Navy clauses, the Militia Clauses impose no real restrictions on the National Guard’s use). Stephen Vladeck brings the Militia Acts back into the emergency powers debate, but his analysis narrowly targets whether the president’s authority to use military force in response to domestic crises derives from the Acts or is inherent in Article II. See Stephen I. Vladeck, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 151-52 (2004).

3. George Washington, Sentiments on a Peace Establishment (May 1, 1783), <https://perma.cc/U9LK-VGZL>.

4. Amar noted the relationship between institutions and the Constitution in his important article, Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1132 (1992), observing that the Bill of Rights’ main purpose was “not to downplay” “various intermediate associations” like “church, militia, and jury,” but to “deploy” them.

5. U.S. CONST. art. I, § 8, cl. 15-16, art. II, § 2, cl. 1., amends. II & V.

6. See THE FEDERALIST NO. 4 (John Jay), NOS. 8, 24, 25, 26, 28, 29, 69, 74 (Alexander Hamilton), NOS. 41, 45, 46, 53, 56 (James Madison). The militia receives extended discussion in or dominates *Federalist* Nos. 4, 25, 26, 28, 29, 45, 46. Even those papers that attack the militia’s efficacy demonstrate its importance—at the outset of the debates, the question was whether the federal government could create an army at all. The militia’s popularity was so great that the institution had to be critiqued to open people to the possibility of an army.

isolation,<sup>7</sup> the full dimensions of this regime only become visible when the clauses are examined intratextually—that is, in dialogue with each other and the rest of the constitutional text.<sup>8</sup> Doing so both illuminates the original functioning of the War Powers and prevents misunderstandings that can arise when individual clauses are considered in isolation. Overall, this analysis illustrates how the Constitution endowed Congress, the states, and the people with substantial formal and functional checks on the executive’s use of the War Powers through its allocation of control over the militia. It also reveals how historically distinct these checks were, and how difficult they would be to recover today.

At heart, the Militia Clauses empowered the federal government by allowing it to command state militias while simultaneously endowing Congress with a powerful tool. The militia’s institutional features created substantial political restraints on the executive. In contrast to the regular army’s hierarchical, apolitical nature, the militia was distinctly popular, loyal to the states, deliberative, and democratic, both in its internal functioning and its relationship to the polity. Thus, by incorporating the militia into the constitutional scheme, the Constitution gave Congress a choice of two military paradigms to employ. It could either authorize a large regular army, or it could force the executive to rely on the popular militia. Given the militia’s institutional characteristics, if the executive was forced to rely on the militia, that reliance would place substantial formal and political limits on his scope of action.

These constraints manifested in four distinct ways. First, giving the militia a central role in military affairs generated a powerful democratic feedback loop. Militiamen were soldiers, but they were also constituents. By placing an institution containing every citizen aged eighteen to forty-five at the heart of the nation’s defensive scheme, the Congress could force the executive to be more solicitous of public opinion in deciding questions of war and peace. Yoking the war powers to “the People” themselves produced dialogue, checked civic apathy, and forced the federal government to approach war and peace more deliberatively and persuasively. Of course, involving the people did not necessarily make war more or less likely—the people might shrink from battle, but they could also demand it over the objections of federal officials.

Second, the Militia Clauses forced interbranch dialogue. The Constitution assigned the power to summon the militia and to command the militia to the president. However, it granted the power to structure the militia and to set the conditions when it could be summoned to Congress. Each actor held half the key; only through communication could they adjudicate their different interests. Furthermore, the Constitution also barred the militia from serving abroad. Through this limitation, the Constitution multiplied Congress’ options for structuring America’s military forces. If Congress chose to rest the national defense primarily on the militia—a force that

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7. See, e.g., Stephen I. Vladeck, *The Calling Forth Clause and the Domestic Commander in Chief*, 29 CARDOZO L. REV. 1091 (2008).

8. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999).

could not go abroad—rather than a standing army, it guaranteed that the president would need to lobby Congress to authorize an army before embarking on any foreign campaign. In other words, the executive could not act unilaterally.

Third, the Organizing Clause forced federal-state dialogue. The framers vested the authority to design the militia's training with Congress, but they left the actual responsibility for training with the states. This division—especially when combined with the states' power to appoint militia officers—left state officials with substantial influence. To field an effective fighting force, federal officials would have to gain the cooperation of their state counterparts.

Finally, the militia functioned as a constitutional ejection seat. The founders specifically sought to ensure the militia's loyalty to the states by giving the states training authority and the authority to commission militia officers. If the federal government became tyrannical, the militia, as an institution primarily loyal to the states rather than the federal government, could eject the tyrant. Of course, this extreme check was intended only to function in extreme circumstances. However, even less-than-enthusiastic participation by militiamen could hamper the executive's ability to implement its will. Thus, unpopular programs might founder even when they posed no tyrannical threat.

To elaborate these features, this article proceeds in four parts. Part I identifies the militia's institutional character, tracing its function and philosophic underpinnings from British roots through the early Republic. Part II turns to the Constitution's text and ratification debates, parsing the militia's constitutional role. For the sake of clarity, this study refers to Article I's first militia clause as the "Calling Forth Clause" and its second as the "Organizing Clause." The Commander-in-Chief Clause remains the Commander-in-Chief Clause, and the Second Amendment remains the Second Amendment. Part III examines how the constitutional text cashes out, studying early practice to assess the Militia Clauses' "liquidated meaning"<sup>9</sup> and to assess its actual impact on federal action. Finally, Part IV identifies the implications of these insights for contemporary debates about the War Powers.

Of course, nothing in the Constitution made the militia's use mandatory. Congress could displace the militia by authorizing a large regular army, and eventually it did. When it did so, reliance on the militia ceased, and the Militia Clauses' checking function fell dormant. Some may object that the militia has gone extinct, like the sabre, sloop, or horse. However, even if the Clauses were not obligatory, their exploration still illuminates. First, they offer a valuable case study of an innovative mechanism for checking abuse of the War Powers, revealing both the mechanism's advantages and its shortcomings. Second, as William Treanor observes, "The roster of scholars engaged in the controversy over the original understanding of the war-making powers reads like a who's

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9. For the idea of liquidation, see THE FEDERALIST NO. 37 (James Madison), and for a careful analysis, see also William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019).

who of constitutional scholars of foreign affairs.”<sup>10</sup> Scholars and policymakers continue to tread this period of American history heavily; setting the record straight about the Militia Clauses facilitates history’s use and guards against its abuses.

Finally, this institution represents an important set of American constitutional values—ethos, as Philip Bobbitt<sup>11</sup> and Akhil Amar<sup>12</sup> have developed the concept—that have since vanished from War Powers debates. Though the militia may have gone extinct, unlike horses, sloops, and sabers, the militia was not merely a technology—it was a vital institution, and the founders’ incorporation of it reflected and embodied a series of judgments about democratic society and military role. The founders understood the militia to be an institution of the people, one that shaped individual identity and corporate identity. Inasmuch as militia service shaped what it meant to be an American, we cannot understand our national identity without it. Inasmuch as placing an institution of the people at the heart of the war powers shaped how the founders understood the use of force in our polity, we cannot understand our polity’s understanding of force without examining the militia. Recovering those understandings expands our horizons and gives us a fuller sense of the possibilities and tradeoffs as we continually adapt the War Powers to changing times. Such a study yields benefits both historical and prudential. Even today, the Militia Clauses and their legal regime may inspire or provoke.

### I. THE MILITIA: A HYBRID INSTITUTION

The practices and qualities of the founders’ militia lack contemporary analogue. Before we can assess the Militia Clauses’ impact on the War Powers, we must first grasp the nature of the institution they governed. Today, professionalism marks the American military. Boot camp transmits not just technical skills—it deliberately breaks down civilian identity and reconstitutes the individual as a professional soldier,<sup>13</sup> a shooter<sup>14</sup> trained and ready to kill. With non-judicial punishments and court martials at officers’ disposal, hierarchy and command culture defines military life,

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10. Treanor’s list includes Alexander Bickel, John Hart Ely, Louis Fisher, Harold Koh, Leonard Levy, Charles Lofgren, Arthur Schlesinger, Jr., William Van Alstyne, Phillip Bobbitt, Robert Bork, Edward Corwin, Henry Monaghan, Eugene Rostow, Robert Turner, W. Michael Reisman, John Yoo, and many others. William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 696-97 (1997). To this number many more may now be added. See, e.g., Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by “Declare War,”* 93 CORNELL L. REV. 45, 46 (2007); Michael D. Ramsey, *The President’s Power to Respond to Attacks*, 93 CORNELL L. REV. 169, 169 (2007).

11. PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 123-76 (1986).

12. AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY*, at ix-xvi (2012).

13. THOMAS E. RICKS, *MAKING THE CORPS* 192 (1998).

14. See NANCY SHERMAN, *STOIC WARRIORS: THE ANCIENT PHILOSOPHY BEHIND THE MILITARY MIND* 120 (2005).

as do strong norms of deference to civilian leadership.<sup>15</sup> Soldiers pursue technical knowledge of their craft avidly with Defense Department support. Men and women augment basic skills with years of study and training in follow-on programs ranging from the military academies, specialized unit schools, and the war colleges, along with Masters and PhD programs at civilian universities. Physical separation, separate judicial systems, and strong norms segregate military and civilian life. Soldiers often live on bases or near them, removed from civilian counterparts. The country regards them as, and they understand themselves to be, responsible to their civilian bosses and the American people to defend the country and to offer policy options and expert advice.<sup>16</sup> In short, today's American military is command-oriented, nationalized, and professional,<sup>17</sup> in principle (and largely in reality) an apolitical tool existing only to serve.<sup>18</sup>

The professionalized and apolitical nature of this institution reflects our military leaders' long struggle to develop an effective fighting force,<sup>19</sup> America's expanded global role,<sup>20</sup> a reaction against fascism's toxic combination of militarism and nationalism,<sup>21</sup> and the demise of conscription.<sup>22</sup> As Baron von Steuben once noted, "the use of arms is as really a trade as shoe or boot making."<sup>23</sup> After centuries it operates as such, a repository of technical skill and professional identity, well suited to a federal government marked by delegation, administrative expertise, and bureaucratic politics.

This professionalized military, in turn, can trace its roots to the Continental Army of the American Revolution. While the Continental Army may have been lauded, though, in general regular armies held a poor reputation at the time of the founding.

15. Risa A. Brooks, *Militaries and Political Activity in Democracies*, in *AMERICAN CIVIL-MILITARY RELATIONS: THE SOLDIER AND THE STATE IN A NEW ERA* 213 (Suzanne C. Nielsen & Don M. Snider eds., 2009).

16. See, e.g., Jim Garamone, *Active-Duty Personnel Must Remain Apolitical, Nonpartisan*, *Dunford Says*, *DOD NEWS* (Aug. 1, 2016), <https://perma.cc/X9R9-TJ4E>.

17. For the canonical discussion of professionalization and civil-military relations, see SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS* 8-10 (1956). Huntington identifies expertise, responsibility, and corporateness as the three key markers of professionalism.

18. At the highest levels, generals do meddle in policy decisions. See, e.g., Bryan Bender & Wesley Morgan, *Generals Win Key Fight over Afghanistan They Lost with Obama*, *POLITICO* (Aug. 22, 2017), <https://perma.cc/RA6D-QP6A>. However, their limited political involvement, and the limited range of policies they attempt to influence—typically only policies directly related to the military and not, say, domestic affairs—is the exception that proves the rule.

19. See, e.g., ALLAN R. MILLETT & PETER MASLOWSKI, *FOR THE COMMON DEFENSE* 123, 127-28 (Free Press, rev. ed., 1994) (detailing various early efforts to preserve and expand a professional military); see also Washington's, Knox's, and von Steuben's proposals, *infra* Part III; HUNTINGTON, *supra* note 17, at 214-21.

20. See, e.g., HUNTINGTON, *supra* note 17, at 326-27.

21. See HUNTINGTON, *supra* note 17, at 98-139 (describing the dangers of the German and Japanese examples).

22. ANDREW J. BACEVICH, *THE NEW AMERICAN MILITARY: HOW AMERICANS ARE SEDUCED BY WAR* 28 (2005) (describing our contemporary All-Volunteer Force as "a euphemism for what is, in fact, a professional army").

23. LAWRENCE DELBERT CRESS, *CITIZENS IN ARMS: THE ARMY AND THE MILITIA IN AMERICAN SOCIETY TO THE WAR OF 1812*, 75 (1982).

For the founders, these institutions summoned to mind Britain's Hessian mercenaries and the British troops who had occupied Boston in 1770. The colonists perceived these standing armies, comprised as they sometimes were of the poor and down-on-their-luck, as rootless,<sup>24</sup> divorced from local affections and politics, beholden only to the executive, not subject to civil authority,<sup>25</sup> and interested only in money.<sup>26</sup> Armies had yet to develop their professional ethos or positive reputations.

The militia of the founders, by contrast, operated quite differently. Whereas the professional military prizes its distinctness, the militia of the founders lived among and trained with their communities. Although the professional military has usually represented only a tiny fraction of citizens, at the founding every voter aged eighteen to forty-five served in the militia. While a professional ethos permeates today's military, for the founders, militia service was like jury service—a duty of citizenship,<sup>27</sup> a chance for amateurs to counterbalance professionals,<sup>28</sup> and although certainly a source of pride, not a citizen's primary identity. While the professional military is national in character, the militia operated of itself as a local and state institution. While command and hierarchy characterize decision-making within the professional military, deliberations and democracy shaped much of the militia's internal affairs. In short, the militia of the founders was a defensive institution of a very different stripe. It was local, non-professional or even anti-professional, and surprisingly democratic. This was a hybrid institution—and the founders chose to place it at our Constitution's core.

#### A. *English Roots*

Institutions may be understood as “stable, valued, recurring patterns of behavior.”<sup>29</sup> When the framers referenced the militia in the Constitution's text, they were not just naming an object. They were invoking a set of practices defined by long tradition. The origins of the militia stretched back into some quasi-mythic pre-Norman past,<sup>30</sup> but in 1641 the militia's institutional identity as such first began to play a major role in British politics. That year, the Long Parliament wrested the institution away from the king, and the following year these pro-

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24. RODNEY ATWOOD, *THE HESSIANS: MERCENARIES FROM HESSEN-KASSEL IN THE AMERICAN REVOLUTION* 7-11 (1980) (describing how Hessians were recruited from “uprooted people” who “drifted into town” and enlisted for bounty money); STEPHEN CONWAY, *THE BRITISH ISLES AND THE WAR OF AMERICAN INDEPENDENCE* 33-34 (2000) (noting, though, that while the perception was that British soldiers were the dregs of society, records suggest that the British Army included more artisans and fewer convicts than previously thought).

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

26. Republican theory in particular scorned mercenaries. *See, e.g.*, NICCOLO MACHIAVELLI, *THE PRINCE* 43 (Quentin Skinner & Russell Price eds., Cambridge Univ. Press 1988) (1532) (Mercenaries are “disunited, ambitious, undisciplined, and treacherous. . . . The reason for all this is that they have no . . . reason to fight for you except a trifling wage.”). On republican theory, see *infra* pages 6-7.

27. Accordingly, substitutes were discouraged, and Black men, American Indians, and aliens were excluded from service. *Id.* at 80.

28. AMAR *supra* note 12, at 435.

29. SAMUEL P. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* 12 (2006).

30. William S. Fields & David T. Hardy, *The Militia and the Constitution: A Legal History*, 136 MIL. L. REV. 1, 2-3 (1992).

Parliament militiamen barred Charles I from Hull, initiating the English Civil War.<sup>31</sup> In 1659 Charles II attempted to reassert royal control over the militia by disarming militiamen he believed disloyal. The English objected that the militia should represent all the people—the better to resist royal cooption—and the House of Commons declared Charles II’s 1659 Militia Act “grievous to the subjects.”<sup>32</sup> When the British finally ejected Charles II’s successor in the Glorious Revolution, they made William and Mary’s accession to the throne conditional on the couple’s renunciation of the monarch’s power to disarm the militia.<sup>33</sup>

This early history began sketching the outlines of the militia institution. First, these precedents established that militia represented the people, and that it did so as a check on executive power. Second, the militia began to serve as a tool of popular review. When the people—via Parliament—chose to eject the sovereign, they relied on the power of the militia to do so. Finally, Parliament’s assertion of control over the militia began to link the militia to democratic institutions. Under this new order, the militia were not servants of the king, but rather representatives of the people.

The simultaneous development of English republican theory further defined the militia’s institutional role and character, infusing it with concepts of civic virtue and linking it to political liberty. Writing during the English Civil War, James Harrington popularized in England the republican thought of Machiavelli and renaissance Italy.<sup>34</sup> Contrary to today’s democratic theory, which rests on notions of self-interest and interest group pluralism, republican theory understood politics as “self-rule by the people” where identifying the public good—not interest groups “impress[ing] their private preferences on the government”—was “the object of the governmental process.” Thus, sound government required citizens willing and capable of “subordinat[ing] their private interests to the general good,”<sup>35</sup> through the cultivation of civic virtue and freedom from coercion and corruption. Only the “economic independence of the citizen and his ability and willingness to become a warrior were . . . dependable protections against corruption” and coercion.<sup>36</sup> Accordingly, republican theorists idealized “the citizen-warrior as the essential foundation of a republic.” In the English context, this meant the celebration of the independent armed yeoman.<sup>37</sup>

In Harrington’s view, a yeoman militia became the ideal vehicle for cultivating the sorts of virtue republican self-rule required. The militiaman—armed and trained—could assert his independence and develop a love for liberty. Simultaneously, the act of collective training cultivated civic identity and

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31. EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 55 (1988).

32. Fields & Hardy, *supra* note 30, at 21.

33. *Id.* at 20-21.

34. MORGAN, *supra* note 31, at 156-57.

35. Cass R. Sunstein, *Interest Groups in American Public Law*, 38 *STAN. L. REV.* 29, 31 (1985).

36. Shalhope, *supra* note 1, at 125.

37. MORGAN, *supra* note 31, at 156-57.

prepared citizens for political life. As Harrington declared, “only the armed freeholder was capable of independence and virtue.”<sup>38</sup> Such qualities stood in stark contrast to those of the professional soldier—landless, rootless, without social connections, brutalized into submission by officers, and interested only in pay.<sup>39</sup> While the regular army and militia were both military institutions, republicans understood militia service to buttress civic and political capacity. By contrast, the regular army drained it. As such, standing armies became subjects of suspicion, fit tools for empowering tyrants, in contrast to the rugged militiamen, who developed republican self-reliance.

Whig theorists developed and expanded Harrington’s work over the next century. Dubbed “as great a school of virtue as of military discipline,”<sup>40</sup> the militia came to symbolize the “responsibilities and rights” of freemen.<sup>41</sup> Men who shirked military life were liable to surrender freedom for comfort; men who served in the military too long lost connection with their community and its civilizing influences.<sup>42</sup> John Trenchard, Thomas Gordon, James Burgh, and others also began transmitting this ideology to the colonies.<sup>43</sup>

These theories were striking. While the political precedents of the Long Parliament and Glorious Revolution had established the militia’s institutional role, these republican theorists portrayed militia service as intrinsic to self-rule. Through a militia, the people could acquire the qualities required for republican life; without a militia, civic virtue would wither, and the people almost certainly would collapse back into subjugation. The English politician James Burgh made this point explicitly. In his 1775 tract, *Political Disquisitions*, Burgh argued that the British people, having “forgot[ten] the military virtues of their ancestors,” now lived “precariously, and at discretion.”<sup>44</sup> In other words, the loss of militia culture rendered the Englishman ripe for subjugation. Burgh’s American audience took his message to heart: those who received the first printing of his tract included John Adams, George Washington, Samuel Chase, John Dickinson, Silas Deane, John Hancock, Thomas Mifflin, James Wilson, and Thomas Jefferson.<sup>45</sup>

### B. *The American Militia as a Republican Institution*

By the time of the Revolution, republican norms were deeply entrenched in America,<sup>46</sup> and they can be seen in the distinction Americans drew between the militia and professional armies. To Americans, professional armies were politically sterile institutions—and worse yet, easy for a dangerously ambitious leader

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38. MALCOLM, *supra* note 1, at 27 (quoting Harrington).

39. See *supra* notes 24-26.

40. Cress, *supra* note 23, at 21.

41. *Id.* at 3.

42. *Id.* at 20.

43. *Id.* at 22-23.

44. Shalhope, *supra* note 1, at 130-31.

45. Cress, *supra* note 23, at 35.

46. For example, George Washington references the lodestones of republican theory, Greece and Rome, in his letter, “Sentiments on a Peace Establishment.” Washington, *supra* note 3.

to commandeer. Regular soldiers were “a species of animals, wholly at the disposal of government.”<sup>47</sup> Indeed, writers asked, what freeman would “relinquish[] voluntarily the blessings of freedom, for a state in which they are arbitrarily beaten like slaves?”<sup>48</sup> The response? No man “who has the disposition or the constitution of a freeman” would enlist in “regular armies.”<sup>49</sup> Professional soldiers were “the dregs of the people”—the indigent, the landless—and they possessed none of the qualifications needed to participate in a republic, lacking self-will, freedom, or, in the case of foreign mercenaries, actual citizenship and the accompanying attachment to the republic necessary to produce civic mindedness.<sup>50</sup> In turn, states policed regular army soldiers with suspicion. Most states barred regular army officers from holding elected office, but only Maryland barred militia officers from doing so.<sup>51</sup>

By contrast, the militia was anything but politically sterile. Indeed, it was virtually impossible for the militia to be so, comprised as it was of virtually the entire citizenry of the colonies and future states. As John and Kathleen Kutolowski note, “militia musters naturally became prime ground for partisan discussion. No other occasion called together so many eligible voters.”<sup>52</sup> Men served in the militia “alongside their families, friends, neighbors, classmates and fellow parishioners.”<sup>53</sup> While wealthier citizens typically filled out the officer ranks—giving rise to historian Edmund Morgan’s characterization of the militia as a “school of subordination”—subordination played no greater role in the militia than in political parties or other contemporary institutions that often promoted the wealthy and landed.<sup>54</sup> Indeed, the militia were surprisingly democratic institutions, both in internal governance and external role.

Internally, a markedly less draconian punishment system and markedly more deliberative decision-making process and leadership structure distinguished the militia from professional armies. At the most basic level, discipline functioned much less oppressively in the militia. Colonial militiamen often served under civil law,<sup>55</sup> just as English militia did,<sup>56</sup> meaning that local juries—the fellow

47. MORGAN, *supra* note 31, at 162 (quoting Alexander Smyth).

48. *Id.*

49. *Id.* n.17 (quoting John Steele).

50. See also AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 53 (1998) (observing that professional soldiers had “sold themselves into virtual bondage to the government [and] were typically considered the dregs of society—men without land, homes, families, or principles”).

51. David E. Engdahl, *Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 IOWA L. REV. 1, 29 (1971).

52. John F. Kutolowski & Kathleen Smith Kutolowski, *Commissions and Canvasses: The Militia and Politics in Western New York, 1800-1845*, 63 N.Y. HIST. 4, 20 (1982).

53. See AMAR, *supra* note 50, at 55.

54. MORGAN, *supra* note 31, at 169. He has a point, but it borders on the banal: that power exists, and institutions channel it.

55. Cress, *supra* note 23, at 7.

56. 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* \*415 (George Sharswood ed., 1893) (1753) (observing that juries judged militiamen even in times of war).

citizens of the accused—could acquit if they found him innocent or the judgment too harsh. When states did convene courts martial, the officers who sat as judges and jurors were often elected by the very men they were judging.<sup>57</sup> The accused also possessed numerous procedural protections.<sup>58</sup> As such, both procedural and popular protections guarded militiamen from hierarchical control.

The net effect of this was to entirely short-circuit the punitive system that turned regular soldiers into a “species of animals.” As Randolph observed during Virginia’s ratification debate, “the members of [the state legislature] courted popularity too much to enforce a proper discipline.”<sup>59</sup> Militiamen talked back to or cussed out officers,<sup>60</sup> challenged fraudulent elections and ignored officers perceived to have been illegitimately elected,<sup>61</sup> and sometimes ignored arrest warrants or even refused to attend their own trials.<sup>62</sup> In turn, the courts martial often acquitted the accused, declined to punish them, or issued nominal penalties.<sup>63</sup> These results are a far cry from what one might expect of a “school of subordination,” and they were certainly not the “school of the nation” that conscription was in nineteenth and twentieth century Europe, inculcating discipline and muting democratic or liberal impulses.<sup>64</sup> As Morgan himself concedes, militia enrolment did not “violate the yeoman’s independent spirit.”<sup>65</sup>

More striking still was the deliberative quality of militia decision-making. Today, we typically associate military governance with hierarchy and commands, while we associate deliberation with political organizations. In the military, command rules, while in politics, one’s only authority “is the power to persuade.”<sup>66</sup> Richard Neustadt neatly captured the modern dichotomy in a comment from Truman. Truman, upon learning of Dwight Eisenhower’s election to the presidency, reportedly exclaimed, “Poor Ike—it [the presidency] won’t be a bit like the Army.” He will sit at his desk “and he’ll say, ‘Do this! Do that!’ And nothing

57. Cress, *supra* note 23, at 62.

58. Christopher Alan Bray, *Disobedience, Discipline, and the Contest for Order in the Early National New England Militia*, at 77 (2012) (unpublished Ph.D. dissertation, UCLA) (on file with author).

59. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 466 (Jonathan Elliot ed., 2d. ed. 1836) [hereinafter DEBATES IN THE SEVERAL STATE CONVENTIONS].

60. Bray, *supra* note 58, at 12. The cussing is all the more remarkable given that American constitutional law did not repudiate seditious libel until *New York Times Co. v. Sullivan*. See Harry Kalven, Jr., *The New York Times Case: A Note on “the Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191, 193 (1964). That Americans could cuss out their officers, in a military organization where the value of deference was at its zenith, underscores this institution’s striking representative democratic aspects.

61. Bray, *supra* note 58, at 202.

62. *Id.* at 54-55.

63. *Id.* at 251-71 app. A (listing New England courts martial from 1792-1826).

64. See, e.g., Ronald R. Krebs, *A School for the Nation? How Military Service Does Not Build Nations, and How It Might*, 28 INT’L SEC. 85 (2004) (describing how universal conscription in Germany, Russia, Japan, and elsewhere facilitated nationalism at the cost of liberalism).

65. MORGAN, *supra* note 31, at 171.

66. RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS* 11 (1960); see also BRYAN GARSTEN, *SAVING PERSUASION: A DEFENSE OF RHETORIC AND JUDGMENT* 5-10 (2006) (developing the concept of persuasion and its role in democracy).

will happen. . . . He'll find it very frustrating."<sup>67</sup> The militia inverted this dichotomy. It was military organization run on persuasion. The Lexington militia at the Battle of Lexington offers a particularly strong example of this institution's democratic, deliberative quality. When the minutemen mustered in the pre-dawn hours of April 19, 1775:

The men of Lexington did not assemble to receive orders from Captain Parker . . . They expected to participate in any major decisions that would be taken. Their minister wrote that the purpose of the muster was first and foremost to 'consult what might be done.' They gathered around Captain Parker on the Common, and held an impromptu town meeting in the open air.<sup>68</sup>

While we should not overstate this incident's typicality, it does capture the militia's internal democratic character. To be sure, militiamen were subordinates. But they were also the constituents and sometimes the counselors of the very men who led them into battle. As such, and also due to the militia's weak disciplinary structure, the militia institution functioned more on persuasion than pure command or hierarchy. The militia of Lexington did not follow orders that morning—they collectively decided their course of action. By law, militiamen in many states typically nominated their officers or elected them directly, sometimes even up to the rank of Brigadier General.<sup>69</sup> In the years leading to the Revolution, the militiamen took advantage of that power to purge loyalist captains from their ranks.<sup>70</sup> In the years after the Revolution, as the early Republic matured, election procedures became even more democratized.<sup>71</sup> Admittedly, this made for poor discipline and slowed decision-making, but it certainly fostered civic mindedness.

### *C. The Militia in Social Context*

In turn, this civic mindedness reflected itself in the militia's broader role. Socially, the militia served four functions: military, legal, political, and civic. Of course, the militia was primarily a military institution, and, as it turned out, not a routinely effective one. This was a popular, participatory institution, not one founded on expertise or efficiency. George Washington complained of the militia's shortcomings frequently, once declaring, "If I was

67. An Eisenhower aide later confirmed Truman's speculation: Eisenhower "still feels that when he's decided something, that ought to be the end of it . . . and when it bounces back undone or done wrong, he tends to react with shocked surprise." NEUSTADT, *supra* note 66, at 10.

68. DAVID HACKETT FISCHER, *PAUL REVERE'S RIDE 151* (1994) (emphasis omitted).

69. Cress, *supra* note 23, at 62; see also Paul S. Gillies, *The Militia Governed by the Civil Power: The Fitful Collision*, VT. B.J., Spring 2018, at 14 (describing Vermont's militia, and that Vermonters elected their officers directly).

70. Fields & Hardy, *supra* note 30, at 25.

71. For example, in 1822, New York changed from a nomination system (where militiamen nominated candidates for officer and state officials made the final selection) to one of formal, tiered elections for officers (where militiamen voted directly for officers and state officials played no role at all), further constraining Morgan's "deference politics." See Kutolowski & Kutolowski, *supra* note 52, at 16-18.

called upon to declare upon Oath, whether the Militia have been most serviceable or hurtful upon the whole I should subscribe to the latter.”<sup>72</sup> However, the American Revolution did not fatally wound the militia’s credibility. During the war, the militia won a mixed record, and those frustrated with the institution contemplated its reform, not its abolition. For each humiliating route like the one at Guilford Courthouse<sup>73</sup> came a modest triumph against the Cherokee,<sup>74</sup> loyalist militias,<sup>75</sup> or British Regulars in guerilla campaigns.<sup>76</sup> A remark by Lord Cornwallis captured the record’s ambivalence: “I will not say much in praise of the militia . . . but the list of British officers and soldiers killed and wounded by them . . . proves but too fatally they are not wholly contemptible.”<sup>77</sup> When the war ended, local communities and states still relied upon the militia to put down insurrections and ward off American Indian attacks.

The other side of the militia’s security role was its law enforcement function. When normal means proved inadequate, the militia stopped smugglers,<sup>78</sup> apprehended fugitives, and put down insurrections<sup>79</sup> and slave uprisings.<sup>80</sup> To this law-and-order role, the militia brought a sense of local, popular justice. Local officials and officers controlled the militia,<sup>81</sup> giving them—and their men—ample opportunity to underenforce the law or to intimidate. Vested with no power to nullify court decisions, though they did try,<sup>82</sup> militiamen could facilitate underenforcement, making themselves scarce to avoid an unpopular muster or carry out orders halfheartedly. For example, Thomas Jefferson records how the New York militia responded when called upon to protect a doctor accused of stealing cadavers. “The militia thinking the mob had just provocation,” Jefferson writes, simply “refused to turn out.” He offered no criticism of the militia’s inaction.<sup>83</sup> Alexis de Tocqueville records another such instance where the Baltimore militia similarly declined to intervene to protect

72. Letter from George Washington to John Hancock (Sept. 25, 1776), <https://perma.cc/ZLJ8-S773>.

73. MILLETT & MASLOWSKI, *supra* note 19, at 69.

74. *Id.* at 78.

75. *Id.* at 75.

76. *Id.* at 71.

77. *Id.* at 58.

78. DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 59, at 419.

79. ROBERT COAKLEY, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1789-1878, at 71-73, 81, 85-86, 88 (1988) (describing the Fries Rebellion, the pursuit of Aaron Burr, and unrest in Vermont and New York).

80. *See, e.g.*, MARTIN ALAN GREENBERG, CITIZENS DEFENDING AMERICA: FROM COLONIAL TIMES TO THE AGE OF TERRORISM 23 (2005) (describing how New York City’s militia put down a slave uprising in 1741).

81. Cress, *supra* note 23, at xiii.

82. Saul Cornell records one instance in 1809 where Pennsylvanian militiamen stopped a federal marshal from serving an adverse federal judgment on two elderly women. A court ultimately tried the officer in charge, General Michael Bright, and sentenced him to a fine and three months in prison. Madison pardoned Bright to diffuse tensions, and a celebratory crowd of three hundred greeted Bright at his release. CORNELL, *supra* note 1, at 117-23.

83. Letter from Thomas Jefferson to Peter Carr (Aug. 19, 1785), <https://perma.cc/8VCV-R3DM>.

the printshops of the controversial *Federal Republican*.<sup>84</sup> As Pauline Maier describes, the militia “institutionalized the practice of forcible popular coercion.”<sup>85</sup> Bluntly put, the militia enforced rough, popular justice.

Third, the militia also facilitated political engagement and channeled ambition. Militia commissions directed striving men toward public service. Even a minor position, John Adams remarked, “tempt[ed] . . . little Minds, as much as Crown and Stars and Garters will great ones.” Political office and militia service were not understood to be incompatible.<sup>86</sup> Pennsylvania’s Constitution, drafted during the Revolution, stipulated that legislators could hold no other public office—except for a post in the militia.<sup>87</sup> Describing the phenomenon, Gordon Wood observed, “The more equal the society, the more ferocious the scrambling ‘for any little distinction.’”<sup>88</sup> When Patrick Henry tried to replace militia captains with freshly retired Continental Army officers, the state legislature promptly reversed him.<sup>89</sup> To Virginians, the militia’s political role mattered more than its military effectiveness.

More broadly, the militia facilitated political mobilization. While Delaware barred the militia from mustering on election day,<sup>90</sup> Morgan reports militia units marching in formation to ballot boxes to cast their votes for the selected candidate.<sup>91</sup> In Maryland, militias “formed an interlocking directorate with the Republican party.”<sup>92</sup> Men often joined militia companies drawn from their neighborhoods, their same political party, or their socio-economic peer groups. In Philadelphia, the Federalist First City Troop of Cavalry contended with the working class Democratic Republican Volunteer Light Infantry Company for place of pride during celebrations.<sup>93</sup> Democratic Republican militiamen thumbed their noses at John Adams in response to the Alien and Sedition Acts by marching on Independence Day.<sup>94</sup> Meanwhile, in Massachusetts, federalist militiamen cut down a Democratic Republican “liberty pole,” gaining plaudits from local federalist papers for “patriotic[ally]” cutting down the “sedition pole.”<sup>95</sup>

84. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 242 (Harvey C. Mansfield & Delba Winthrop, eds. & trans., Univ. of Chi. Press 2000) (1835, 1840); see also CORNELL, *supra* note 1, at 124-26.

85. PAULINE MAIER, *FROM RESISTANCE TO REVOLUTION: COLONIAL RADICALS AND THE DEVELOPMENT OF AMERICAN OPPOSITION TO BRITAIN, 1765-1776*, at 16-17 (1991).

86. Maryland was the only exception. Engdahl, *supra* note 51, at 29.

87. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 158 n.58 (1998).

88. GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 80 (1991).

89. Morgan puts it nicely: “Henry . . . was brought up short . . . when he . . . momentarily ignored the social function of the militia.” MORGAN, *supra* note 31, at 171.

90. Cress, *supra* note 23, at 62.

91. MORGAN, *supra* note 31, at 173.

92. *Id.*

93. SIMON P. NEWMAN, *PARADES AND THE POLITICS OF THE STREET: FESTIVE CULTURE IN THE EARLY AMERICAN REPUBLIC*, 112 (1997).

94. *Id.* at 109-11.

95. James Morton Smith, *The Federalist “Saints” Versus “the Devil of Sedition”: The Liberty Pole Cases of Dedham, Massachusetts, 1798-1799*, 28 *NEW ENG. Q.* 198, 198 (1955).

Finally, the militia helped knit communities—first the colonies and then the young republic—together. As already noted, the militia musters often constituted the largest assembly of eligible voters on a community’s calendar. These musters were not dour affairs, but celebratory occasions: entire towns turned out to watch the militiamen parade.<sup>96</sup> The militia also participated in early civic holidays like Washington’s Birthday and Independence Day that helped unite the young republic. On these days, they would parade past crowds to a deputation of women, who would present them with new colors, symbolizing national reaffirmation and renewal.<sup>97</sup> The actual transmission of military skill was often an ancillary consideration. Militiamen not infrequently mustered to train only once a year,<sup>98</sup> and only fired a few shots—or none—at the annual musters.<sup>99</sup> Although the founders did believe that the military arts fostered virtue,<sup>100</sup> the militia often served a more important role promoting shared civic identity. Accordingly, militiamen often focused more on uniforms than marksmanship or marching.<sup>101</sup>

#### D. *The Militia of the Constitution*

In short, the militia was not just a semi-competent reserve force at the founding; it played a major institutional role. The militia brought voters together, fostered civic mindedness, built social cohesion, and provided both military security and law enforcement. It blurred the distinction between politics and military affairs that we have since firmly entrenched. The militia’s capacity to bridge these divides derived from its popular, democratic nature—if the militiaman were not also an amateur and an independent, self-respecting citizen, combining war, politics, law enforcement, and democracy would have been impossible. As it was, tradition and republican ideology fostered a strong popular attachment to this institution.

Thus, the institution that the framers inherited can be understood as a military force belonging to the people, marked by a popular ethos internally and facilitating civic politics. While the founders accepted republican thought only to varying degrees, the militia’s institutional structure, civic function, and ideological underpinnings were apparent to all. When the framers incorporated the militia into the Constitution, they understood they were apportioning control over and integrating a complex, important hybrid institution into the Constitution, not just a low-cost reserve fighting force. Indeed, as the militia’s mediocre military record suggested, its fighting ability was

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96. NEWMAN, *supra* note 93, at 17.

97. *Id.* at 106-07.

98. Michael A. Bellesiles, *The Origins of Gun Culture in the United States, 1760-1865*, 83 J. AM. HIST. 425, 435 (1996).

99. *Id.* at 435 & n.22 (describing how the New Haven Grays fired four shots apiece at annual musters, while another township in Massachusetts voted to terminate target practice entirely to avoid embarrassment).

100. For example, Thomas Jefferson warned his nephew Peter Carr to take up shooting, because “it gives boldness, enterprize [sic], and independance [sic] to the mind” whereas other games “stamp no character on the mind.” Letter from Thomas Jefferson to Peter Carr (Aug. 19 1785), <https://perma.cc/N3JX-YNNU>.

101. Bellesiles, *supra* note 98, at 435.

not its chief selling point. The institution of the militia was not designed to maximize military efficiency. Rather, it brought the people into military affairs.

## II. INCORPORATING THE MILITIA INTO THE CONSTITUTION

Geopolitical concerns were one of the key forces motivating the Constitution's drafting.<sup>102</sup> Dangerous nations, Indian tribes, and rebellious frontiersmen<sup>103</sup> loomed all around. The Articles of Confederation had created a federal government too weak to perform even basic security functions. In 1786, when Shays' Rebellion broke out in Massachusetts, mirrored by smaller uprisings in other states, the federal government failed to even field a force. Instead, state governors leading state militiamen put down the rebels and restored order.<sup>104</sup> While the militia performed imperfectly, they did not embarrass themselves,<sup>105</sup> and the professional army appeared no more reliable; just three years earlier, Continental Army officers at Newburgh nearly mutinied over pay.<sup>106</sup> Thus, the militia not only continued to play a major social role—it also represented an important military resource. Any replacement to the Articles would need to take the militia into account.

### A. *Considerations at Philadelphia*

Thus, as the delegates descended on Philadelphia in 1787 for the Constitutional Convention, three objectives guided their thinking about the militia. First, the federal government needed the ability to provide for the common defense by fielding a federal force. That meant giving it the power to summon the militia and to augment it with a standing army. Second, the framers needed to assure the people—and themselves—that the new Constitution would not lead to tyranny. While expanding executive power,<sup>107</sup> the new document also needed to reserve sufficient influence to the states and establish sufficient interbranch checks to prevent any person or branch from accumulating too much power. Here, the militia presented an opportunity. By dividing control over this institution between multiple actors, including the states, the framers could reduce the risk that any one actor would

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102. FREDERICK W. MARKS III, *INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION*, at xv-xxii (1973); AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 40-51 (2005). One particular goal was to strengthen the executive, who, under the Articles of Confederation, possessed almost no power. WOOD, *supra* note 87, at 466-67, 550-51.

103. George Washington dubbed these men "combustables." Letter from George Washington to Henry Knox (Dec. 26, 1786), <https://perma.cc/2M57-5ZXV>. For fears that Daniel Shays and local rebels were conspiring with the British, see the newspaper reports that the British of Montreal had supplied Shays with gunpowder. JOHN K. ALEXANDER, *THE SELLING OF THE CONSTITUTIONAL CONVENTION: A HISTORY OF NEWS COVERAGE* 55 (1990). The geopolitical dimension never dropped from sight.

104. Cress, *supra* note 23, at 96-97; J. Terry Emerson, *Making War Without a Declaration*, 17 J. LEGIS. 23, 37 (1990).

105. Early in the insurrection, some militiamen deserted to the rebels at the battle of Springfield. However, in the end the militia succeeded in putting down the rebellion. Cress, *supra* note 23, at 96.

106. RICHARD H. KOHN, *EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783-1802*, at 32-34 (1975).

107. WOOD, *supra* note 87, at 466-67, 550-51.

aggrandize itself. Giving the militia a central constitutional role would go a long way to assuaging the fears of those skeptical of a stronger federal government. Finally, the militia played an important social role. Accordingly, the framers also needed to protect the institution from abuse or oppression that could lead to its destruction.

Achieving these goals would, in turn, win over critics. By incorporating the militia into the constitutional text in a way that empowered federal crisis response while simultaneously checking against abuses and guarding the militia itself from oppression, the framers could attract support for the new document. Incorporating the militia into the new Constitution—i.e. bringing the voters and also states directly into the nation’s defensive framework—allowed the framers to ease the fear of tyranny. Many anti-federalists worried that the tyrant, the “ambitious man who may have the army at his devotion, may step up into the throne, and seize upon absolute power.”<sup>108</sup> The framers could deploy the militia in the Constitution to mitigate these prudential concerns. Common defense by militia, via a federal summoning power, reduced the need for a standing army and guarded against its misuse if one were created. The people could remain in control. So long as the militia existed, Noah Webster argued:

The Supreme Power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretense, raised in the United States. A military force, at the command of Congress, can execute no laws, but such as the people to be just and constitutional; for they will possess the power, and jealousy will instantly inspire the inclination, to resist the execution of a law which appears to them unjust and oppressive.<sup>109</sup>

James Madison echoed this argument in *The Federalist* No. 46, arguing that the “highest number” of soldiers the federal government field was “not . . . more than twenty-five or thirty thousand men,” and “[t]o these would be opposed a militia amounting to near half a million citizens.”<sup>110</sup> Depending how they deployed the militia in the Constitution, the framers could argue that it prevented the federal government from tyrannizing its citizens.

By reserving some control for states over the militia, the ratifiers could also satisfy state officials jealous of their prerogatives. As the legislature’s sharp rebuke of Patrick Henry’s attempt to install Continental Army officers over local favorites had shown, the states carefully guarded their control over the militia, both for ideological reasons and to preserve a valuable source of political patronage.<sup>111</sup> However, by leaving

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108. THE COMPLETE ANTI-FEDERALIST 164 (Herbert J. Storing ed., 1981) [hereinafter ANTI-FEDERALIST].

109. Noah Webster, *A Citizen of America* (Oct. 17, 1787), in 1 HARRY L. WILSON, GUN POLITICS IN AMERICA: HISTORICAL AND MODERN DOCUMENTS IN CONTEXT 25 (2016).

110. THE FEDERALIST No. 46, at 243 (James Madison).

111. MORGAN, *supra* note 31, at 171-72.

certain powers in the hands of the states, the framers could convert this potential source of opposition into a source of support. Incorporating a state-captained militia into the national defensive scheme would give favorite state sons larger role on the national stage, giving ambitious state leaders a reason to support the new Constitution. The militia clauses could thereby align state ambitions and national interests.

The militia was also cost-effective. The young republic was strapped for cash, and a state-funded citizen military offered a “cheap rhetorical substitute”<sup>112</sup> for a standing army. In turn, lower taxes would also reduce the risk the federal government would tyrannize the people. Bostonians especially still remembered the Stamp Acts and Townshend Acts, enacted to pay for the French and Indian War and the mostly professional armies that fought it.<sup>113</sup> No standing army meant no debt, no taxes, and no oppression.

Beyond the political possibilities the militia offered, republican ideology also shaped the framers’ thinking. Regardless whether they themselves subscribed to republicanism, the ideology was still a potent force in the young nation, and its adherents celebrated the militia as “the most natural defense of a free country.”<sup>114</sup> The influential Charles Lee remarks on enlistment bounties illustrated republicanism’s sway. Even in the depths of the Revolution, with the Continental Army chronically short on men, he opposed the bounties on principle. If Americans lacked “virtue enough to submit to laws which obliged every citizen to serve his turn as a soldier,” he declared, Americans did not deserve their freedom.<sup>115</sup> Samuel Adams pointed out that Blackstone linked ““the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression”” to the right to bear arms.<sup>116</sup>

The events of the Revolution had further burnished the militia’s republican reputation while dimming that of standing armies. The minutemen had fought gallantly at Lexington and Concord; the Crown’s armies committed the Boston Massacre and enforced the Coercive Acts.<sup>117</sup> The Declaration of Independence itself had underscored the suspicion of a standing army, denouncing King George III for having “kept among us, in times of peace, Standing Armies without the Consent of our legislatures.”<sup>118</sup> Even George Washington, whose realism tempered his faith in republican ideals or civic virtue,<sup>119</sup> acknowledged its power. Admitting that the importance of maintaining a militia was “conceded on all

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112. *Id.* at 165.

113. Fields & Hardy, *supra* note 30, at 25.

114. THE FEDERALIST NO. 29 at 142 (Alexander Hamilton). Hamilton proves this point well. Though he himself viewed the militia skeptically, he paid it lip service, as in *Federalist* No. 29. For his skepticism, see THE FEDERALIST NO. 25 at 127-28 (Alexander Hamilton), where he writes that “adherence” to the militia alone “had like to have lost us our independence.”

115. Cress, *supra* note 23, at 55.

116. 1 THE WRITINGS OF SAMUEL ADAMS, at 317-18 (Harry Alonzo Cushing ed., 1904).

117. Fields & Hardy, *supra* note 30, at 25.

118. THE DECLARATION OF INDEPENDENCE para. 13 (U.S. 1776).

119. During a controversy over whether to pay Continental officers in retirement, Washington argued for pay, observing, “Motives of public virtue may for a time . . . actuate men to the observance of a conduct purely disinterested but they were not of themselves sufficient.” “Few men,” he warned, “are

hands,” making pro-militia arguments “totally unnecessary and superfluous,”<sup>120</sup> Washington allowed that if it were necessary to make arguments for the militia, one need only “have recourse to the Histories of Greece and Rome in their most virtuous and Patriotic [sic] ages to demonstrate the Utility of such Establishments.”<sup>121</sup> Republican ideology, whether or not held by individual framers, was an inescapable force, and one that the new Constitution could either harness or crash upon.

All of these considerations—republican ideology, fiscal considerations, state interests, and distrust of standing armies—swirled about as the framers debated and drafted in Philadelphia. The framers approached their task with care, marrying robust federal controls with carefully tailored checks to appease states and assure skeptics that the government could neither destroy the militia through oppression nor coopt it through domination. When the framers finally emerged from their secret conclave with their draft on September 17, 1787, the Constitution they produced reflected these complicated, cross-cutting imperatives. The resultant debates produced one more provision to protect the militia in the form of the Second Amendment. Ultimately, these provisions accomplished the framer’s tasks: giving the federal government the power to provide for the common defense, checking tyranny by apportioning power over the militia between the states, Congress, and the president, and protecting the militia from federal oppression, domination, or neglect.

### *B. Triplet Federalism Checks*

Each Militia Clause reflected careful consideration and balancing.<sup>122</sup> Article I, § 8’s Organizing Clause created two federalism checks, intended to protect both the militia and the people from federal tyranny.<sup>123</sup> The Organizing Clause’s checks were designed to prevent the federal government from making militia service so oppressive that the institution would collapse. They also kept the militia robust and loyal to the states—and thus capable of repulsing federal oppression. More subtly, by giving states extensive control over the militia, the framers also insulated the militia’s democratic character from federal interference.

The Organizing Clause gave Congress the power to “provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States,” while “reserving to the States respectively, the Appointment of the Officers, and the Authority of training the

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capable of making a continual sacrifice of . . . private interests or advantage, to the common good.” Cress, *supra* note 23, at 71.

120. Note that by treating the militia question as settled, Washington shrewdly avoided having to voice his own personal views on the subject. See Washington, *supra* note 3.

121. Washington, *supra* note 3.

122. See Akhil Reed Amar, *Some Opinions on the Opinions Clause*, 82 VA. L. REV. 647, 653 (1996).

123. As Amar notes, these checks derive from the following principle: “We, the People, must rule and must assure ourselves that our military will do our bidding rather than its own.” AMAR, *supra* note 102, at 323.

Militia according to the discipline prescribed by Congress.”<sup>124</sup> In other words, the Constitution split both training and punishment between state and federal governments. It also allocated the power to appoint officers exclusively to the states. Although these divisions might not appear important to modern eyes, to the ratifying generation this clause was vitally significant.

First, the ratifiers saw the division of organizational, disciplinary, and governance authorities as both protecting the militia and ensure its efficacy. To answer the frustration with the militia’s ineffectiveness, the Framers sought to ensure uniform and effective training. In part, their concerns stemmed from the leniency of state legislatures, that exempted their citizens from meaningful training to curry political favor.<sup>125</sup> However, anti-federalists feared that the federal government, if given total power over militia training, might neglect that training to undermine the institution. As George Mason warned, “Should the national government wish to render the militia useless, they may neglect them, and let them perish, in order to have a pretense of establishing a standing army.”<sup>126</sup>

The solution the framers hit on was to divide training authorities between the federal government and the states. The federal government would set the floor, and states could augment. As the Supreme Court later ruled in *Houston v. Moore*, “The powers of legislation over [the militia] are concurrent in the general and state government.”<sup>127</sup>

[A]s state militia, the power of the state governments to legislate on the same subjects, having existed prior to the formation of the Constitution, and not having been prohibited by that instrument, it remains with the states, subordinate nevertheless to the paramount law of the general government, operating upon the same subject.<sup>128</sup>

In short, while the federal government’s training would preempt state regimes, its laws were not meant to have preclusive effect. The Organizing Clause effectively allowed federal and state governments to look over each other’s shoulders so that if one neglected the institution, the other could step in.

Second, the Constitution gave the federal government no power to punish the militia in peacetime. In the Organizing Clause, the word “discipline” refers to training while the term “govern” refers to the power to punish. To today’s readers, the term “discipline” may bear sinister connotations, conjuring images of boot camp or the lash.<sup>129</sup> In the context of the Constitution, though, “discipline” meant skill or training, while “governance” meant punishment. Although the colloquial usage of the

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124. U.S. CONST. art. I, § 8, cl. 15.

125. See DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 59, at 466 (quoting James Randolph) (warning that “the militia were every where neglected by the state legislatures”).

126. *Id.* at 379.

127. 18 U.S. (1 Wheat.) 1, 17 (1820).

128. *Id.* at 17-18.

129. Indeed, corporal punishment has a storied history in the professional army and navy. See, e.g., JAMES E. VALLE, ROCKS AND SHOALS: ORDER AND DISCIPLINE IN THE OLD NAVY, 1800-1861 (1980)

founders varied,<sup>130</sup> its constitutional and legislative usage was consistent.<sup>131</sup> The framers limited the federal governance authority because the ratifiers “feared that the militia [would] be subjected to martial law when not in service.”<sup>132</sup> If the federal government retained peacetime authority, many feared that the government would use the power to punish to cower the militia, destroy it, or convert it into a tool of oppression.<sup>133</sup> Anti-federalists voiced concern that militiamen might “be subjected to punishments of the most disgraceful and humiliating kind.”<sup>134</sup> During the Virginia ratification debates, George Mason

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(describing naval punishments); KOHN, *supra* note 106, at 70-71 (describing the early army’s summary execution of border post deserters).

130. For example, when Washington complained of an “undisciplined” militia in his letters, he meant untrained and poorly organized. *See, e.g.*, Letter from George Washington to John Rutledge (Sept. 12, 1780), <https://perma.cc/YQR4-7A6E>. Conversely, Alexander Smyth used the term ambiguously when he wrote that the “severity of discipline” made regular soldiers “fit instruments of tyranny.” MORGAN, *supra* note 31, at 162. Randolph could have meant either “hard training” or “punishment” when he said that legislators “courted popularity too much to enforce a proper discipline.” DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 59, at 466.

131. The Constitution’s text itself linked training and discipline: “reserving to the States . . . [the] training the Militia according to the discipline . . .” U.S. CONST. art. I, § 8, cl. 16. Furthermore, in the legislative context, Congress passed multiple bills governing militia “discipline,” and in each, the focus was on inculcating a common military training. In 1779, the Continental Congress passed a law instituting uniform regulations for troops. The purpose of these “Rules for the Order and Discipline” was to “introduc[e] a uniformity in their formation and maneuvers and in the service of the camp.” FRIEDRICH KAPP, LIFE OF FREDERICK WILLIAM VON STEUBEN, MAJOR GENERAL IN THE REVOLUTIONARY ARMY 216 (1859). To this end, Congress prescribed “Steuben’ [sic] Regulations for the Order and Discipline of the Troops of the United States.” Congress then readopted Steuben’s Regulations in the Uniform Militia Act of 1792. An act more effectually to provide for the national defence [sic] by establishing an uniform militia throughout the United States, ch. 33, 1 Stat. 271 (repealed 1795) [hereinafter Uniform Militia Act of 1792]. The Table of Contents of Steuben’s Regulations give a sense of its focus. Representative chapters include “Of the March in Line” and “Of the different Beats of the Drum.” *See* FRIEDRICH BARON VON STEUBEN, REGULATIONS FOR THE ORDER AND DISCIPLINE OF THE TROOPS OF THE UNITED STATES, at vi-vii (Boston, William Pelham, 1807). Furthermore, to read “discipline” to mean punishment would render “governance” partially superfluous. In short, the federal government’s peacetime “disciplinary” authority only extended to training.

132. DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 59, at 391.

133. The Bill of Rights may also have created a far subtler protection for intransigent militiaman. *Houston v. Moore* applied a rule of strict construction to militia summons. Since, “fair[ly] construct [ed],” the Militia Act of 1792 did not explicitly designate when a militiaman began “actual service,” the Court construed when service starts narrowly and held that Houston never actually entered into it. 18 U.S. (5 Wheat.) 1, 18-19 (1820). Thus, while the federal government could punish him for refusing its summons, these punishments would have to be civil or criminal in nature, since he was not in federal service and thus not under military jurisdiction. Houston would enjoy the Sixth and Seventh Amendments’ jury rights, and his peers could nullify his prosecution if they too regarded it as unwarranted. In *Mills v. Martin*, the New York Supreme Court of Judicature (the state’s highest court until 1847) reached this conclusion. 19 Johns. Cas. 7, 7-10 (N.Y. Sup. Ct. 1821). The federal judiciary never faced this question head on. *Houston* decided a different question—whether a state could pass legislation to penalize those who failed to obey a federal militia summons. This was a state matter, and therefore federal jurisdiction was never at issue. In *Martin v. Mott*, the Court cited *Houston* as establishing federal jurisdiction, 25 U.S. (1 Wheat.) 19, 34 (1827), but in fact *Houston* never actually considered the question because *Houston* was punished by Pennsylvania. In reality, it is doubtful under *Houston* that the federal government could try a militiaman who refused federal summons before a court martial. Of course, the states could, if the militiaman was enrolled in his state militia.

134. ANTI-FEDERALIST, *supra* note 108.

voiced those concerns pointedly, worrying that Congress might “inflict . . . ignominious punishments” on the militia so severe that the people would vote to “utterly abolish[]” the militia and “assent to the establishment of a standing army.”<sup>135</sup> To this Madison retorted, “The militia will be subject to the common regulations of war when in actual service; but not in time of peace.”<sup>136</sup> And Edmund Randolph,<sup>137</sup> William Nicholas,<sup>138</sup> and Zachariah Johnson<sup>139</sup> all repeated Madison’s argument. In fact, Madison himself made it twice.<sup>140</sup> This federalism check proved a winning point for the framers, and they hammered it again and again and again.

The Commander-in-Chief Clause contained a provision mirroring the Organize Clause’s federalism check. Just as the Organize Clause limited Congress’ governance power to when the militia was actually in federal service, the Commander-in-Chief Clause limited the president’s authority over the “Militia of the several States” to “when [it was] called into the actual Service of the United States.”<sup>141</sup> The explicit reference to the “Militia of the several States” underscored that the militia belonged to the states, and not to the federal government.

Finally, the Organizing Clause incorporated one more important federalism check, the reservation of officer appointment power to the states. While protecting this source of patronage likely increased the Constitution’s attractiveness to state powerbrokers, the framers presented it as a measure to help fulfill the militia’s “ejection seat” role. Hamilton declared that “[i]f it were possible seriously to indulge a jealousy of the militia upon any conceivable establishment under the Federal Government, the circumstance of the officers being in the appointment of the States ought at once to extinguish it.”<sup>142</sup> During the ratification debates, Madison echoed the point:

From the chief officers to the lowest, we shall find the scale preponderating so much in favor of the states, that, while so many persons are attached to them, it will be impossible to turn the balance against them. There will be an irresistible bias towards the state governments.<sup>143</sup>

As Akhil Amar observed, “[i]n a pair of *Federalist* essays penned separately by Hamilton and Madison, Publius elaborated the argument that, in the highly improbable scenario of a national military despotism run amok, states could ride to the rescue.”<sup>144</sup> Without state governments, Publius warned, “citizens must rush

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135. DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 59, at 402.

136. *Id.* at 407.

137. *Id.* at 401.

138. *Id.* at 391.

139. *Id.* at 645.

140. *Id.* at 424.

141. U.S. CONST. art. II, § 2, cl. 1.

142. THE FEDERALIST NO. 29 (Alexander Hamilton).

143. DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 59, at 259.

144. AMAR, *supra* note 102, at 117.

tumultuously to arms, without concert, without system, without recourse.”<sup>145</sup> With states, though, “the state governments, with the people on their side, would be able to repel the danger. . . . officered by men chosen from among themselves.”<sup>146</sup> In the picture painted by Madison, the Organizing Clause was playing its part—ensuring that the militia’s officers would remain loyal to their states, and the militiamen to their officers.<sup>147</sup>

### C. *The Separation of Powers Check*

While these federalism concerns dominated the Virginia debates, the framers had also added an important separation of powers check. Specifically, the Constitution divided the power to call forth and command the militia and the power to “provide for” its calling forth, placing the first to Article I and the second to Article II. Congress would specify the conditions for summoning the militia, while the president would do the summoning and lead in the field.

Most obviously, this division allowed each branch to balance the other. If Congress did not trust the president, it could refuse to pass the required enabling legislation or pass conditions making calling forth the militia difficult. Conversely, the president’s control over the militia when summoned prevented Congress itself from using the militia to oppress the people. The division also created interbranch dialogue. The president’s command responsibility vested him with an interest in its composition and quality. Thus, the division of powers incentivized the President to lobby Congress to organize the militia effectively, generating dialogue and deal making.

While the Army and Navy Clauses also created similar checks and dialogue, the militia division also had a third check that the other two lacked. During the early years of the republic, the Army and Navy never numbered more than a few thousand men. Often sailing overseas or stationed deep in backwoods territory, this handful of men could never play a decisive role in national elections. By contrast, the militia contained the vast bulk of the electorate. As Randolph observed, the Constitution vested the national defense with “those who are the objects of defence.”<sup>148</sup> The government called the militia forth, but if these citizens disapproved, they could simply vote their representatives out of office at the next election.

By separating powers between the branches, the framers multiplied electoral checks. While Pennsylvanian anti-federalists assailed Congress’ “absolute unqualified command” “over the militia,” warning that it “may be made instrumental to the destruction of all liberty,”<sup>149</sup> this criticism was better leveled against the Articles.

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145. THE FEDERALIST NO. 28 (Alexander Hamilton).

146. THE FEDERALIST NO. 46 (James Madison).

147. When, precisely, a state could invoke such powers the *Federalist Papers* and the Constitution never specify. The legitimacy of such an act depends on Lockean contract theory and underlying legal principles. See THE DECLARATION OF INDEPENDENCE para. 13 (U.S. 1776) (enumerating some grounds for overthrowing tyranny); Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1392-97 (1989) (discussing Lockean contract theory).

148. DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 59, at 401.

149. ANTI-FEDERALIST, *supra* note 108.

Under the Articles all power lay with Congress. Conversely, under the Constitution citizens had two opportunities to check the federal government: they could vote out their congressional representatives, and if that failed, they could attempt to vote out the president. As Randolph observed, “The President, who commands [the militia] . . . is appointed secondarily by the people. . . . [adding] further security.”<sup>150</sup> In short, by dividing the powers between Congress and the president, the Constitution not only arranged the two branches as checks on each other—it also created multiple electoral checks.

Furthermore, as Randolph’s “secondarily” alluded to, the presidential and senatorial election provisions also enhanced state oversight. Since states chose presidential electors and state legislatures chose Senators, the division of federal power over the militia provided states with yet another bite at the apple—any senator who legislated over the militia did so in the shadow of his state legislature, while congressmen did so under the eyes of the voters themselves. Since militiamen, as citizens, elected both officers and representatives, and since many of the officers were well connected to the congressmen, senators and presidents who called them up and ordered them into battle, the division of powers created a very tight electoral feedback loop.

This feedback loop facilitated strong state pushback against federal encroachment on the militia. Shortly after the British burned Washington, D.C., during the War of 1812, James Monroe proposed a hundred-thousand-man draft. The states’ ties to the militia prompted a harsh response. At the Hartford Convention, where Federalists gathered to express discontent with the war, their grievances included “acts . . . subjecting the militia . . . to forcible drafts, conscriptions, or impressments, not authorized by the constitution of the United States.” The Convention ultimately urged state legislatures to “adopt all measures as may be necessary effectually to protect the[ir] citizens” from such legislation.<sup>151</sup> Even the Democratic Republican Congress, strongly opposed to the Federalists of Hartford, rejected Monroe’s proposal.<sup>152</sup>

Of course, Congress and the president could temper this feedback loop by limiting the units they called forth or restricting federal militia service to younger men with fewer attachments to the community. However, such measures dampened the feedback loop only so much. Even when the nation has drafted disproportionately unattached and underprivileged young men,<sup>153</sup> this check remains

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150. DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 59, at 401.

151. *Amendments to the Constitution Proposed by the Hartford Convention: 1814*, AVALON PROJECT, <https://perma.cc/HL6E-N2W8>.

152. HARLOW GILES UNGER, *THE LAST FOUNDING FATHER: JAMES MONROE AND A NATION’S CALL TO GREATNESS* 249-51 (2009). Both Amar and Yassky cite Monroe’s 1814 proposal and its defeat as an important moment in the evolution of the Second Amendment. See AMAR, *supra* note 50, at 57-58; Yassky, *supra* note 1, at 612 n.95; I cite it here for a less dramatic claim—that congressional representatives think twice before conscripting their constituents’ sons.

153. AMY J. RUTENBERG, *ROUGH DRAFT: COLD WAR MILITARY MANPOWER POLICY AND THE ORIGINS OF VIETNAM-ERA DRAFT RESISTANCE* 174-76 (2019) (describing how the U.S. draft structure during the Vietnam War systematically exempted the affluent, educated, and married in favor of the poor, unattached, and young).

powerfully potent, as Vietnam War draft demonstrated.<sup>154</sup> Meanwhile, Congress could—and, in 1792, did—amplify the feedback loop by expanding the militia to include all men ages eighteen to forty-five. Similarly, when the military shifted to an all-volunteer force after Vietnam, savvy pentagon leaders restructured the Army to make it difficult to deploy without calling up reserves or National Guard components. This was intended to raise the political cost of deploying a military force that was otherwise too small to possess political power of its own.<sup>155</sup>

Finally, despite Constitution's checks, Articles I and II did still cumulatively give the federal government the military power it needed to meet geopolitical challenges.<sup>156</sup> As Hamilton observed in *The Federalist* No. 29, the Constitution placed the militia "at the disposal of that body which is constituted the guardian of the national security."<sup>157</sup> The framers cast this power as liberty producing, eliminating the need for standing armies. As Hamilton put it, "[t]o render an army unnecessary" with a "well-regulated militia," "will be a more certain method of preventing its existence than a thousand prohibitions upon paper."<sup>158</sup> Madison echoed this sentiment in the ratification debates, arguing:

The most effectual way to guard against a standing army, is to render it unnecessary. The most effectual way to render it unnecessary, is to give the general government full power to call forth the militia, and exert the whole natural strength of the Union, when necessary.<sup>159</sup>

The framers ensured that even with the checks, the federal government could command the militia when needed. Crucially for any War Powers debate, the framers also portrayed the militia as being so central to the common defense as eliminating the need for a standing army. In ratifying the Constitution, the people granted the federal government greater power over the militia, and they did so with the understanding that it might have this displacement effect. The Constitution separated powers, but it did not render them ineffectual.

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154. ROBERT DALLEK, *FLAWED GIANT: LYNDON JOHNSON AND HIS TIMES, 1961-1973*, at 569-70 (1998) (describing Johnson's reasons for not running); Daniel E. Bergan, *The Draft Lottery and Attitudes Towards the Vietnam War*, 73 *PUB. OPINION Q.* 379, 379 (2009) (discussing the impact of the draft on support for the war).

155. Lewis Sorley, *Creighton Abrams and Active-Reserve Integration in Wartime*, 21 *PARAMETERS* 35, 45-46 (1991).

156. The states would test this power during the War of 1812, but the Supreme Court settled the matter in *Martin v. Mott*, holding that the Constitution vested Congress with the exclusive power to determine when the militia could be called forth. 25 U.S. (12 Wheat.) 19, 31-32 (1827).

157. *THE FEDERALIST* NO. 29 (Alexander Hamilton).

158. *Id.*

159. *DEBATES IN THE SEVERAL STATE CONVENTIONS*, *supra* note 59, at 381.

#### *D. Limitations on Deployment*

By specifying that the militia could be called forth in only three circumstances<sup>160</sup>—“to execute the Laws of the Union, suppress Insurrections and repel Invasions”<sup>161</sup>—the Calling Forth Clause wove in one more potent protection into the Constitution’s text. Absent from the Clause was the power to call forth the militia to serve abroad. Insurrections, by definition, could only occur where the federal government actually ruled—i.e. on American soil.<sup>162</sup> Meanwhile, the United States’ legal jurisdiction only extended as far as its territorial boundaries.<sup>163</sup> And the Clause only authorized “repel[ling] Invasions,” not preemptively invading.

The limits this clause established both protected the militia and multiplied Congress’ options when designing the nation’s defensive forces. It prevented the federal government from destroying popular enthusiasm for militia service by committing the militia to arduous deployments. Anti-federalists repeatedly worried that the federal government would march northern militiamen to the south and southerners north to destroy their love for the institution.<sup>164</sup> How much more so would popular enthusiasm be jeopardized with foreign deployments?<sup>165</sup>

This prohibition on foreign service was in keeping with long tradition. Parliament renounced its power to force the militia to serve abroad in 1648.<sup>166</sup> Blackstone wrote that the militia “are not compellable to march out of their counties, unless in case of invasion or actual rebellion within the realm . . . nor in any case compellable to march out of the kingdom.”<sup>167</sup> British tradition repeated in the colonies, as local legislation and state constitutions imposed restrictions on

160. The ratification debates show the framers understood these three circumstances to be exclusive. As George Nicholas declared, the government “can not call [the militia] forth for any other purpose than to execute the laws, suppress insurrections and repel invasions.” *DEBATES IN THE SEVERAL STATE CONVENTIONS*, *supra* note 59, at 392.

161. U.S. CONST. art. I, § 8, cl. 15.

162. No founder ever suggested that this clause was meant to give the federal government the power to suppress other countries’ insurrections. Reading this provision that way—given that such a reading entirely lacks historical support and directly contradicts the traditional domestic limits on militia service—is entirely unfounded.

163. The “Laws of the Union” probably did include treaties. See Jade Ford & Mary Ella Simmons, Comment, *The Treaty Problem: Understanding the Framers’ Approach to International Legal Commitments*, 128 *YALE L.J.* 843, 844–46 (2019) (noting that treaty enforcement helped motivate the Constitution’s framing and ratification). However, absent congressional action, they probably did not automatically include the Law of Nations. If the framers had meant “the Laws of the Union” to include the “Law of Nations” as a matter of course, Article 1, § 8, cl. 10, requiring Congress to define and punish offenses against the law of nations, would be superfluous. Therefore, the Calling Forth Clause did not authorize the militias to serve as roving international enforcers.

164. Alan Hirsch, *The Militia Clauses of the Constitution and the National Guard*, 56 *CIN. L. REV.* 919, 937 (1988).

165. As Alan Hirsch has observed, the idea that the militia could be taken abroad was so ridiculous that the anti-federalists never even considered it. “Opponents of clause fifteen expressed concern that militiamen would be marched far across the states, but never so much as hinted that they could be sent abroad.” *Id.* at 933–34.

166. *Id.* at 941.

167. BLACKSTONE, *supra* note 56, at \*412.

militia service away from their homes.<sup>168</sup> Early practice and executive branch interpretation affirmed this check. As late as 1912, Attorney General George Wickersham presented a formal opinion to President Taft that the militia could only cross international borders when in hot pursuit of an enemy force.<sup>169</sup>

By giving Congress more options when tailoring force structure, this limitation also promoted interbranch dialogue. If the president and Congress disagreed over the size of the army, Congress could keep the nation safe by bulking up the militia instead. The provision allowed Congress to avoid the Hobson's choice of either leaving the nation defenseless or giving the president a large internationally deployable force. If the president wanted to fight abroad, he would have to ask Congress to raise a separate army.

Of course, Congress could create a standing army but restrict its funding to domestic operations. Republican theory warned, however, that such an army would be easy for the president to corrupt. Once it was funded, what was to stop an ambitious president from ordering it over American borders, and what was to stop rootless, machinelike professional soldiers from obeying? Conversely, the militiaman's interests reinforced the constitutional bar: he did not want to serve far from his livelihood and family, and the Constitution forbid the president from obligating him to so do. The prohibition became self-enforcing—the militia themselves could enforce the boundary if the president overstepped his bounds, as they did at the Battle of Queenston Heights in 1812.<sup>170</sup>

#### E. The Second Amendment

As the ratification debates dragged on, the depth of anti-federalist's anxiety became apparent. Without further provisions ensuring that the federal government would neither attempt to disarm the militia nor allow it to atrophy, the Constitution might not have passed. During the ratification debates, Patrick Henry warned that if the Constitution entered force, not “a single musket” would be left in state armories—the federal government would seize them all.<sup>171</sup> Accordingly, the framers included one more protection in the Bill of Rights: the Second Amendment, guaranteeing the right of the people to keep and bear arms. As Amar notes, with its passage “no Congress should be allowed to use its Article I, § 8 authority over the militia as a pretextual means of dissolving

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168. See, for example, the *Essex Result*, which explained that the town of Essex rejected the proposed Massachusetts state constitution of 1788 in part because the proposed document lacked a provision limiting the governor's ability to force the militia to serve outside the state. Barron & Lederman, *supra* note 18, at 784 (quoting the *Essex Result*); see also Cress, *supra* note 23, at 4. Of course, these restrictions came at a price. For example, these jurisdictional limits aided Aaron Burr's flight as he moved from state to state. See COAKLEY, *supra* note 79, at 80-81.

169. Auth. of President to Send Militia into a Foreign Country, 29 Op. Att'y Gen. 322, 324 (1912).

170. COAKLEY, *supra* note 79, at 80-81; see also David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb: A Constitutional History*, 121 HARV. L. REV. 941, 957 (2008) (noting the control this restriction gave to Congress).

171. Cress, *supra* note 23, at 100.

America's general militia structure."<sup>172</sup> In a republican wrinkle, the framers tied this right specifically to the people, cementing the relation between citizenship and arms bearing.<sup>173</sup>

The framers had created a striking array of structural checks to apportion control over the militia. They had insulated the militia against federal oppression or coercion. By reserving extensive powers to the states and to the people, the framers ensured that no future tyrant would use the militia for his own ends or abuse or neglect it in order to raise a standing army in its place. As events would later prove, the state reservations would ultimately create trouble for the institution.

By incorporating this popular institution into the constitutional order, the framers also multiplied the number of stakeholders involved in exercising military force (as least so long as Congress continued to give the militia an important role). The state power to appoint officers and manage the militia ensured that governors and state officials would have a voice in crises and in peace. The identity between the citizens and the militia itself also created a powerful feedback loop, one that would force the federal government to lead by persuasion even during emergency. Finally, the Constitution's new executive—a branch that did not exist under the Articles, would create new interbranch dialogue. Even if the Constitution required no deliberation formally, giving so broad an array of actors a stake in the militia made deliberation inevitable whenever they were activated.

Finally, the Constitution situated the militia at the heart of the nation's defensive scheme, a fact recognized by both framers and anti-federalists repeatedly during the ratification process. The three interlocking provisions in Articles I and II allowed the federal government to make the militia an effective fighting force and to federalize it when needed. This entangled structure might not produce the most powerful fighting force, but it established a remarkably deliberative process for exercising the War Powers, one that satisfied state, federal, popular, and fiscal interests.

### III. EARLY PRACTICE: THE CONTINUATION OF POLITICS BY OTHER MEANS

But text and ratification form only part of the story. The Constitution was born of crisis, and its meaning clarified in the fires of future crises. This the founders understood—as Madison observed, “All new laws . . . are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a

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172. AMAR, *supra* note 102, at 323.

173. See AMAR, *supra* note 50, at 51; AKHIL REED AMAR, *THE LAW OF THE LAND* 212 (2015) (“[T]he Second Amendment says that voters should bear arms and that arms-bearers should vote: the voting electorate (“the people”) and the democratic military (“the Militia”) should in republican principle be one and the same.”). The choice of “people” is striking. In the Constitution, the “people” appear in the preamble as the text’s enactors, and as the voters in the House of Representatives in Article I. The people then appear again in the First Amendment’s right to assemble, in the Fourth Amendment’s right to be secure from unreasonable searches, and in the Ninth and Tenth Amendments. Cumulatively, the use of people in the Second Amendment ties the right to keep and bear arms to us, the sovereign American people. Military power is delegated.

series of particular discussions and adjudications.”<sup>174</sup> While the ratification debates suggested the militia’s role as a constitutional ejection seat and in promoting interbranch and federal-state dialogue, three cases—the legislative process to create and define federal control over the militia, the Whiskey Rebellion, and the *Caroline* Affair—illustrate and clarify the Militia Clauses’ effects. These cases involve important firsts: the first federal attempt to legislate its Militia Clause authority; the first summoning of the militia; and the first modern legal dispute over the preemptive right to self-defense. In each case, the federal government found itself wrestling with novel problems and exercising its militia powers in new ways. In turn, these three cases reveal how the Militia Clauses operated in practice, illustrating how the militia could shape the exercise of the War Powers. Finally, this Part also examines the militia’s institutional instability, a factor that limited its effectiveness and ultimately led to its decline.

### A. *Organizing the Militia: Interbranch Dialogue*

Indeed, the Militia Clauses did spark remarkable the interbranch dialogue. In fact, the militia had already generated a dialogue of sorts even since 1783, though technically the Articles did not include an executive branch. Despite his frustrations with the militia, neither George Washington nor his advisors ever considered dissolving the institution.<sup>175</sup> Rather, from the moment the Revolution ended, Washington began pushing for reform, first expounding proposals in *Sentiments on a Peace Establishment*.<sup>176</sup> The Constitution’s division of militia powers entrenched this dialogic dynamic.

Even Washington’s titanic popularity was not enough to secure the legislation he wanted. Secretary of War Henry Knox distilled Washington’s ideas and presented the Confederation Congress with a Plan for the General Arrangement of the Militia in 1776. The Knox Plan, building on one of Washington’s ideas,<sup>177</sup> proposed dividing the militia into three corps based on age. The youngest cohort of men ages eighteen to twenty-five were to receive training in the military arts in “Camps of Discipline.” These camps were to “form[] the manners of the rising generation on principles of republican virtue; . . . [and] infus[e] into their minds, that the love of their country, and the knowledge of defending it, are political duties of the most indispensable nature.”<sup>178</sup> Though Knox pitched his proposal in republican terms, the idea gained no traction.<sup>179</sup> The relationship between the individual and his community was vital to republicanism, and in the early Republic the states guarded their status as the individual’s primary community jealously. Unlike today, where proposals

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174. THE FEDERALIST NO. 37 (James Madison).

175. See KOHN, *supra* note 106, at 44-45.

176. *Id.* at 45.

177. MAX M. EDLING, A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE 124 (2003).

178. Cress, *supra* note 23, at 75.

179. EDLING, *supra* note 177.

for communal service are often pitched at the national level, the founders understood virtue to spring from local soil. Knox's proposal went nowhere.

During the ratification debates, Baron Von Steuben, the hero of Valley Forge, again proposed creating a select militia, this time with a core of twenty-one-thousand federally armed and specially trained militiamen. Again, the proposal went nowhere, attacked by one Pennsylvania delegate as a standing army masquerading as a militia force.<sup>180</sup> The federal government, critics worried, could disarm the people; or, alternatively, the protection such a force provided would accustom people to civilian life, leading them to disarm themselves. Either way, the result was unappealing to Congress.

The ratification of the Constitution perpetuated and intensified this dialogue. After ratification, Knox revived his proposal a third time, again featuring an "Advance Corps" of young men. Again he couched his proposal in republican language, describing the Advance Corps' training as a place to introduce a "glorious national spirit" where "youth will imbibe a love of their country; reverence and obedience to its laws; courage and elevation of mind; openness and liberality of character."<sup>181</sup> And again Congress rejected it,<sup>182</sup> concerned over cost, the plan's impact on state control over the militia, and its similarity to a standing army.<sup>183</sup>

For two years after ratification, the new Congress passed no comprehensive militia bill. Instead, debates raged over the role of the federal government and the militia's structure. Only Arthur St. Clair's crushing defeat at the Battle of the Wabash River on November 4, 1791, broke the logjam. The battle literally decimated the United States' tiny standing army, and the crisis revealed the United States' vulnerability. The nation was now without an army, and without enabling legislation the president lacked the authority even to summon the militia.<sup>184</sup> Its attention focused by crisis, Congress not only authorized a larger standing army—the Legion of the United States—but also passed the 1792 Uniform Militia and Calling Forth Acts. In this legislation, Congress also reaffirmed the 1779's Act's disciplinary regulations and established a framework permitting the president to summon the militia. It still rejected, though, the executive branch's proposed classification system. Instead, the Act would enroll all men ages eighteen to forty-five in the militia, regardless of their familial obligations or age.<sup>185</sup>

This back-and-forth continued into 1795: that year, Congress amended the framework for calling forth the militia in response to the Whiskey Rebellion, enhancing presidential discretion by eliminating judicial certification as a prerequisite for summoning the militia. However, in 1795, Congress still refused to create a classification system.<sup>186</sup>

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180. Fields & Hardy, *supra* note 30, at 33-34.

181. KOHN, *supra* note 106, at 130.

182. Cress, *supra* note 23, at 120.

183. *Id.* at 119-20.

184. KOHN, *supra* note 106, at 134.

185. Uniform Militia Act of 1792, ch. 33, § 1, 1 Stat. 271.

186. The Militia Act of 1795, ch. 36, 1 Stat. 424 (repealed in part 1861 and current version at 10 U.S.C. §§ 331-335 (2000)).

Of course, Congress enjoyed plenary power and could create a select militia if it wished. While the debate over a select militia stretched back to Charles II's 1662 militia act and raged during ratification, the Constitution did not prohibit it.<sup>187</sup> Its only limitation, found in the Second Amendment, barred the federal government prohibiting the states from augmenting a select militia with additional militia classes.<sup>188</sup>

Instead, the history of this debate reveals just how much interbranch dialogue the Militia Clauses' division of the training and calling forth powers did generate. Even George Washington, the most popular man in America, could not get his preferred militia plan passed by fiat. Rather, the structure of the Militia Clauses compelled Washington and his closest advisors to lobby Congress repeatedly, generating compromises and evolving legislation.<sup>189</sup>

In short, the Militia Clauses gave Congress a powerful tool to entrench its role in War Powers deliberations. While the Constitution vested the Commander-in-Chief power with the president, and while it created a much stronger executive than the Articles, it did not banish Congress from War Powers debates. To the contrary, it preserved Congress' optionality in that domain. Through the War of 1812, the Militia Clauses continued to buttress Congress' power as it refused the executive branch's requests for an expanded army and even a draft.<sup>190</sup> Instead, Congress exercised prerogative to create a small army to man border posts, while leaving the bulk of the national defense to the militia.

### B. *The Whiskey Rebellion: Federal-State Dialogue*

The Militia Clause's federalism checks also manifested in greater federal-state dialogue. Even as General Antony Wayne was marching the new Legion of the United States to Ohio to avenge St. Clair's defeat, another crisis was brewing in the backcountry. From Kentucky to Pennsylvania, frontier Americans opposed Alexander Hamilton's excise tax on whisky, one of their chief sources of revenue. Tensions roiled ever since the tax's proposal in 1790,<sup>191</sup> and after its passage affairs turned violent. Backwoodsmen frequently assaulted federal excise officers, tarring and feathering them. As a letter to Pennsylvania governor Thomas

187. Fields & Hardy, *supra* note 30, at 14, 20-21, 30 n. 104 (citing 6 WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE U.S. 197 (C. Adams ed. 1851)).

188. See AMAR, THE LAW OF THE LAND, *supra* note 173 (explaining that the Amendment identifies the right to keep and bear arms with the people—in other words, all the voting citizens of a state). Since the “right of the people to keep and bear arms shall not be infringed,” the federal government could create a select militia, but it could not bar those excluded from the federal select militia from serving in a state militia.

189. The 1795 Act removed the requirement that a judge certify that an insurrection exists before the president could summon the militia. It also eliminated the requirement that the president first order the insurrectionists to desist before calling forth the militia. Compare Calling Forth Act of 1792, Ch. 28, § 2, 1 Stat. 264, 264 (repealed 1795) with Militia Act of 1795, Ch. 36, 1 Stat. 424, 424 § 2 (repealed in part 1861 and current version at 10 U.S.C. §§. 331-335 (2020)).

190. When Monroe proposed a draft during the War of 1812, Congress said no. See Yassky, note 1, at 612.

191. THOMAS P. SLAUGHTER, THE WHISKEY REBELLION 109 (1988).

Mifflin recounts, one crowd “beat and abused [a federal excise official] severely, and burnt him with a hot iron, both behind and before, for he was an excise man.”<sup>192</sup> Hamilton may have accelerated the standoff by pressing Washington to issue a proclamation condemning a Pittsburg assembly’s statement of protest.<sup>193</sup> In 1794, the violence finally boiled over. News that an excise man was nearby reached a militia unit just mustered to respond to American Indian aggression.<sup>194</sup> The militia decided to confront him. The excise officer hid in a home in Bower Hill, near Pittsburg, protected by an emergency detachment of troops dispatched from Fort Pitt. In the ensuing confrontation, five hundred to seven hundred militiamen besieged ten federal soldiers. The battle left dead on both sides.<sup>195</sup>

This crisis challenged the authority of the new federal government and implicated geostrategic concerns.<sup>196</sup> When news reached Washington, his initial instinct was to react swiftly and decisively. However, as Richard Kohn describes, Washington then abruptly altered course. Several factors weight on his mind. First, Justice James Wilson delayed judicial certification of the crisis, requiring authentication for the reports Washington’s cabinet had received.<sup>197</sup> Washington also watched the political dimension, acutely aware that if he used force quickly, “there would be the cry at once, ‘The cat is let out; We now see for what purpose an Army was raised.’”<sup>198</sup>

Most important, though, were the federalism considerations. Since the constitutional structure vested the states with training and officer-appointment authority over the militia, Washington needed the states’ cooperation to call forth the militia in an orderly and effective manner. While neither the states could legally defy a presidential summons, halfhearted compliance could derail the campaign. Accordingly, Washington called a conference with not only Pennsylvania Governor Thomas Mifflin, but also Pennsylvania Secretary of State Alexander Dallas, Pennsylvania Chief Justice Thomas McKean, and Pennsylvania Attorney General Jared Ingersoll.<sup>199</sup>

Pennsylvanians were already frustrated with Washington since he had forced the state to suspend planned building projects to avoid provoking the Six Nations.<sup>200</sup> Furthermore, state officials were highly sensitive to local politics. Until Washington had exhausted peaceful options, he realized he could not count on Pennsylvania’s leaders for their support. In the words of Kohn, “Mifflin’s intransigence and the fear that the militia might not turn out forced Washington

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192. *Id.* at 109, 254 n.1.

193. *Id.* at 123-24.

194. *Id.* at 178.

195. *Id.* at 179-81.

196. During the crisis, the insurrectionists reportedly asked both the British and Spanish for aid. *Id.* at 191.

197. KOHN, *supra* note 106, at 161.

198. *Id.* at 160 (quoting Washington).

199. *Id.* at 162.

200. *Id.*

for the first time to question whether he had the public backing to justify force.”<sup>201</sup> Reliant as the federal government was on this hybrid state-federal institution of the militia, Washington decided to table immediate action. He agreed to delay the expedition, to lend his legitimacy to the response by calling out the militia personally, and to give Governor Mifflin time to convene the Pennsylvania legislature and seek a resolution of the crisis on his own before resorting to federal action.<sup>202</sup> In short, the constitutional scheme endowed states substantial, albeit informal, leverage in War Power deliberations, so much so that Governor Mifflin succeeded in imposing his preferences on President Washington.

Ultimately, Washington delayed twice—first in calling out the militia to demonstrate that Pennsylvania’s and federal efforts to negotiate were made in good faith,<sup>203</sup> and again after summoning the militia on September 5, to permit public opinion to fully swing against the insurrectionists.<sup>204</sup> By the time the federal force did march, with Washington symbolically at its head, he had garnered the Pennsylvania militia’s enthusiastic support, and the insurrection simply melted away.<sup>205</sup> While states had no power to constrain the activities of the federal navy or the army, the buy-in the militia system required gave them great, even if indirect, influence over any crisis involving the militia.

### C. *The Caroline Affair: Dialogue with the People*

President Washington’s commitment, extracted by Mifflin, to legitimize the federal expedition by summoning the militia himself, by leading it personally, and by explaining his reasons publicly, hints at how the Militia Clauses forced the executive to explain its actions to the people. The *Caroline* Affair highlights this dynamic still further. While the Whiskey Rebellion showcased the federal-state dialogue the constitutional structure produced, this incident highlights how the reliance on the system the Militia Clauses enacted fostered direct dialogue between the federal government and the people.

While military historians date the militia’s demise to the War of 1812,<sup>206</sup> the *Caroline* Affair shows that this institution continued to shape national life at least until 1837. In addition, the *Caroline* Affair—known for its international dimensions—underscores how the militia’s role constrained executive action even in the foreign affairs context.<sup>207</sup> In brief outline, in 1837 a Canadian rebel group occupied an island

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201. *Id.* at 163.

202. *Id.*

203. *Id.* 164-65 (noting the commissioners Washington sent had extensive powers to negotiate and issue blanket amnesties).

204. *Id.* at 169.

205. SLAUGHTER, *supra* note 191, at 202-03.

206. MILLETT & MASLOWSKI, *supra* note 19, at 136-37.

207. For the foundational discussion of the *Caroline* Affair’s role in international law, see R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT’L L. 82, 92 (1938) (describing the case as the “*locus classicus* of the law of self-defence.”). See also, Michael Wood, *The Caroline Incident—1837*, in *THE USE OF FORCE IN INTERNATIONAL LAW: A CASE-BASED APPROACH* 5 (Tom Ruys, Olivier Corten & Alexandra Hofer eds., 2018).

in the Niagara River after an abortive uprising. There, between Canada and New York, they continued to agitate against the Canadian government while supplying themselves with an American steamship, the *Caroline*. To cut the rebels' supply lines, a group of Canadian militiamen, led by a British naval captain, snuck across the border on December 29 and burned the ship. In the process, they killed one American. The event, which the British justified as self-defense, ignited a tense standoff along the New York-Canadian border, nearly leading to war.

When the British crossed the Niagara and burned the *Caroline*, the young nation's small army was already committed elsewhere. The Seminoles tied down nine of the Army's thirteen regiments in Florida, while the remaining four were scattered along the western frontier. Only two hundred troops occupied forts along the northern border, and these were in Michigan.<sup>208</sup> While the U.S. Marshal for the District of New York promptly threatened to arrest anyone taking up arms "for war against a nation with whom your country is at peace,"<sup>209</sup> only the militia was available to enforce the edict. The federal government had treated the militia as the first responders of choice, and again that reliance would compel the federal government to enter into dialogue.

When news of the crisis reached Washington on January 4, President Martin van Buren dispatched General Winfield Scott to contain the crisis. Secretary of War J.R. Poinsett provided Scott with letters to the Governors of New York and Vermont authorizing Scott to call for the militia on the president's authority. In a separate letter to Scott, though, Poinsett gave the general a pointed warning. Although Scott could call forth "such a militia force as [he] deem[ed] necessary," Poinsett cautioned that "[i]t is important that the troops called into service should be, if possible, exempt from that state of excitement." Instead, Scott was to "impress upon the governors of these border States the propriety of selecting troops . . . distant from the theater of action."<sup>210</sup> The nation's reliance on the militia transformed Scott's authority. Though Scott lacked legal authority to avert war by preemptively detaining Americans, a large army could have allowed Scott to make a show of force and interpose himself between the locals and the British, deterring the British and impressing and overawing combative New Yorkers. Without regular soldiers, he could not. As Craig Forcece put it, "Scott was reduced, in essence, to suasion."<sup>211</sup> The *New York Herald* described Scott's mission as a "fool's errand."<sup>212</sup>

Instead, Scott embarked on what was essentially a speaking tour. Traveling at night and addressing crowds by day, he put on "ostentatious . . . exhibitions," "sham[ing]

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208. CRAIG FORCESE, DESTROYING THE CAROLINE: THE FRONTIER RAID THAT RESHAPED THE RIGHT TO WAR 51 (2017).

209. *Id.* at 50.

210. Letter from J.R. Poinsett, Sec'y of War, to Winfield Scott, Brev. Mag. Gen. (Jan 5, 1838), in 3 THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 403 (James D. Richardson ed., 1896).

211. FORCESE, *supra* note 208, at 51.

212. Scott Kaufman & John A. Soares, Jr., "Sagacious Beyond Praise"? Winfield Scott and Anglo-American-Canadian Border Diplomacy, 1837-1860, 30 DIPLOMATIC HIST. 57, 61 (2006).

misdoers” and “excit[ing] pride in the friends of the Government and country.”<sup>213</sup> His speeches typically began with the rhetorical maneuver of declaring the British actions “a national outrage,” winning over his crowd before urging them to remain calm, arguing that the “subject was in the hands of the President.”<sup>214</sup> He also met with the Canadian rebels, apparently persuading them to stand down. In a particularly shrewd maneuver, Scott outbid the rebels when they tried to purchase a replacement steamer, denying them the materiel necessary to continue their fight.<sup>215</sup> He then sailed the newly purchased steamer up the river, asserting American sovereignty in the face of the British while soothing his fellow Americans’ injured pride.<sup>216</sup> Scott’s theatrics lasted over a year as negotiations with the British dragged on.<sup>217</sup>

Nor was the experience in New York *sui generis*. In 1841, Scott diffused the Maine-Nova Scotia “Aroostook War” by similar means.<sup>218</sup> These encounters demonstrated how reliance on the militia dramatically transformed the federal government’s power, even in the face an international crisis. Bound to a weak military force with a mind of its own, federal officials—even generals—had to pay far closer attention to popular sentiment, winning the people with words as much as by command. While the Constitution did not literally require suasion, the need for it arose from the logic of its structure whenever Congress favored the militia over a standing army. Today, with a vastly expanded and professionalized military, officers no longer need to persuade.

#### *D. An Unstable Institution*

Of course, no one wants a general’s rhetoric to be all that stands between the nation and war. While the Militia Clause’s structure—and the institutional character of the militia itself—generated dialogue and served political and democratic functions, it also guaranteed that the militia would remain unreliable along two key axes. First, the militia, as a quasi-democratic, populist institution composed of amateurs, would be difficult to control and militarily unreliable. Second, the Militia Clauses’ diffusion of power to local and state actors facilitated opposition to lawful federal orders. Together, this rendered the militia ineffective and reliance up on it dangerous.

In many respects, the militia’s tendency to facilitate illegal insurrection was its most troubling characteristic. Although the militia and juries are similar, the militia possessed no analogous nullification power. They could not refuse musters—no historical precedent, constitutional text, statute, or ratification history ever contemplated giving them that power—and yet they often did. For example,

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213. WINFIELD SCOTT, MEMOIRS OF LIEUT.-GENERAL WINFIELD SCOTT 158-60 (Timothy D. Johnson ed., 2015) (1864).

214. *Id.* at 160.

215. Kaufman & Soares, *supra* note 212, at 63.

216. *Id.* at 63.

217. *Id.* at 60-64.

218. *Id.* at 68.

during the Whiskey Rebellion, one Maryland militia in Hagerstown refused its summons, “beat[ing] their officers from the field.”<sup>219</sup> This mutiny in miniature forced Maryland to divert another militia unit, the Baltimore Light Dragoons, to Hagerstown to restore order.<sup>220</sup> Even more symbolically, the confrontation that triggered the Whiskey Rebellion, the standoff between militiamen and federal troops at Bower Hill, only occurred because of a militia muster.<sup>221</sup> The very concept of placing military power in the hands of undisciplined local citizens created a dangerous temptation for those citizens to use that power. Though not legal, the threat of disobedience or even less-than-enthusiastic compliance gave militiamen a powerful if informal veto over military action. While militiamen did not consistently abuse it, it still posed a constant threat, forcing state and federal officials to think carefully about when and where to activate units as well as whether to keep some units in reserve in case of insurrection. While insurrection was never desirable, during crises like 1794 or 1837 it could be particularly disastrous, leading to revolution or to war.

Nor were individual unites the only source of resistance. States could also engage in such behavior, as Connecticut and Massachusetts did when they refused to accept federal control during the War of 1812.<sup>222</sup> The Massachusetts’ Supreme Judicial Court’s 1812 advisory opinion notwithstanding, the Constitution’s text, its structure, and the ratification debates clearly demonstrate that the founders placed the power to provide for the calling forth and actually to summon the militia in federal hands.<sup>223</sup> The Supreme Court affirmed this explicitly *Martin v. Mott*.<sup>224</sup>

And even when cooperative, the militia was often ineffective. At Bladensburg in 1814, the American militia force ignominiously routed, opening the route to Washington for the British.<sup>225</sup> Although these disasters did not dampen the pro-militia republican rhetoric of many of the militia’s boosters in Congress and the press,<sup>226</sup> the federal government tacitly acknowledged each failure by expanding the federal army with each crisis.<sup>227</sup> Nor was the composition of the militia always consistent with its republican ethos: the widespread use of

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219. SLAUGHTER, *supra* note 191, at 210.

220. *Id.*

221. *Id.* at 179-81.

222. Many histories gloss these states’ intransigence. Massachusetts and Connecticut did not categorically refuse to use their militia during the war. Rather, they insisted on keeping their militia at home, calling them out when they—and not the president—deemed it necessary. Coastal raiders posed the main threat to these states during the war. The states also preferred local officers. When the federal government sent the politically sensitive General Thomas Cushing, a man loyal to the region, to head New England’s militia, the states accepted his authority. DONALD R. HICKEY, *THE WAR OF 1812: A FORGOTTEN CONFLICT* 265-70 (2012).

223. Hirsch, *supra* note 164, at 952-54.

224. 25 U.S. (12 Wheat.) 19, 28-30 (1827).

225. Robert L. Kerby, *The Militia System and the State Militias in the War of 1812*, 73 *IND. MAG.* . 102, 103 (1977).

226. C. EDWARD SKEEN, *CITIZEN SOLDIERS IN THE WAR OF 1812*, at 176 (1999).

227. *Id.* at 178.

substitutes produced a militia that skewed disproportionately poor.<sup>228</sup> It was often not the representative citizen force that its boosters claimed. Instead, after the War of 1812, the nation increasingly turned to volunteer companies to supply its military needs.<sup>229</sup>

In short, both the militia's institutional character and Militia Clauses' structure generated an unreliable, less-than-effective, and often unrepresentative fighting force. While the Militia Clauses, when Congress utilized them, succeeded in cabin-ing federal power and producing dialogue, they also jeopardized the federal government's ability to discharge its duties. Though the founders did not predict it, this instability ultimately doomed the institution and led to the professional military's embrace. Rather than integrate the citizenry and the military, America adopted almost the exact opposite approach: dividing the military from the civilian world. To minimize the risk it poses to democracy, the military has studiously embraced an apolitical, professional ethos. Today's officer corps strives to be an "impartial, nonpartisan, objective career service, loyally serving whatever administration [is] in power."<sup>230</sup> Legal divisions further entrench this cultural separation, with a series of Supreme Court decisions cutting soldiers off from the civilian courts, forming a "military pocket republic."<sup>231</sup> While the military still involves itself politically in national security matters,<sup>232</sup> this ethos has largely kept the military out of domestic political issues or from being misused by a would-be tyrant.

#### IV. THE WAR POWERS AND CHECKING

In the end, the militia played its checking function too well. The framers incorporated this institution into the Constitution precisely because they expected it to limit and channel executive discretion. Its military shortcomings came as no surprise. Washington himself criticized the militia as "a 'broken staff.'"<sup>233</sup> However, excessive checking jeopardized the Republic's safety. In times of crisis, the United States could not afford to rely on an obstreperous, poorly governed institution. The dilemma the militia posed—the more it succeeded as a check, the less qualified it was to meet exigencies—illustrates the crux of the War Powers problem.

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228. Cress, *supra* note 23, at 124.

229. The War Department documents an uptick in arms bearing during the 1820s followed by a fairly substantial drop in the 1830s. Bellesiles, *supra* note 98, at 431.

230. HUNTINGTON, *supra* note 17, at 258; see also Deborah N. Pearlstein, *The Soldier, the State, and the Separation of Powers*, 90 TEX. L. REV. 797, 807 (2012) (discussing this process).

231. Jonathan Turley, *The Military Pocket Republic*, 97 NW. U. L. REV. 1, 1, 37-40 (2002).

232. See, e.g., Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 107 (2018) (quoting HUNTINGTON, *supra* note 17, at 177 (noting observation that the separation of powers serves as "a perpetual invitation, if not an irresistible force, drawing military leaders into political conflicts")); see also Pearlstein, *supra* note 230, at 798-99 (describing literature on the military's influence in security matters).

233. Letter from George Washington to John Hancock (Sept. 25, 1776), <https://perma.cc/Y4PP-NEB7>.

The War Powers necessarily entail the delegation of tremendous power. Employed often in the context of emergency, this power is hard to channel, oversee, or review. Fast-paced events, the lack of information, unexpected contingencies, and novel challenges all conspire to place many—though not all—exercises of the War Powers beyond legal review. These observations are not novel. Statesmen have grappled with this challenge since the Roman Republic devised the office of dictator. In turn, framers also grappled with this dilemma,<sup>234</sup> as did theorists including John Locke,<sup>235</sup> Carl Schmitt,<sup>236</sup> and a host of contemporary scholars.<sup>237</sup>

Recognizing as *The Federalist* did the executive's need to act with "decision, activity, secrecy, and dispatch,"<sup>238</sup> the Constitution<sup>239</sup> and American law<sup>240</sup> expressly exempt many military activities from legal review. To manage the risk that these legal black holes—areas exempted from judicial oversight—pose, our republic has created with a variety of mechanisms. These range from interpreting constitutional protections as changing in wartime;<sup>241</sup> extending civilian legal principles to the military context;<sup>242</sup> refusing to create legal black holes in the first place and thereby forcing the executive to violate the law and seek indemnification;<sup>243</sup> enacting fuzzy standards;<sup>244</sup> passing legislation delegating emergency powers;<sup>245</sup> generating dialogue and oversight through the separation of powers;<sup>246</sup> designating state officials to carry

234. See, e.g., THE FEDERALIST NO. 23 (Alexander Hamilton) (writing that powers relating to the common defense "ought to exist without limitation: because it is impossible to foresee or define the extent and variety of national exigencies, or the corresponding extent and variety of the means which may be necessary to satisfy them").

235. Lobel, *supra* note 147, at 1392-93.

236. See, e.g., Adrian Vermeule, *Our Schmittian Administrative State*, 122 HARV. L. REV. 1095, 1098-1101 (2009).

237. *Id.*; see also, e.g., Lobel, *supra* note 147; Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and its Design*, 94 MINN. L. REV. 1789 (2010).

238. THE FEDERALIST NO. 70 (Alexander Hamilton).

239. U.S. CONST. amend. V.

240. See, e.g., Vermeule, *supra* note 236, at 1123-24 (describing the Administrative Procedure Act's military and foreign affairs function exemption from judicial review).

241. See Matthew C. Waxman, *The Power to Wage War Successfully*, 117 COLUM. L. REV. 613, 618-19 (2017).

242. *Boumediene v. Bush*, 553 U.S. 723 (2008) (granting foreign detainees Habeas relief); JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* (2012) (describing the legalization of national security).

243. Lobel, *supra* note 147, at 1392-94.

244. Vermeule, *supra* note 236, at 1095 (describing legal "grey holes" governed by standards so flexible they are in effect ungoverned).

245. Lobel, *supra* note 147, at 1407-09.

246. Charles Tiefer & Kathleen Clark, *Congressional and Presidential War Powers as Dialogue: Analysis of the Syrian and ISIS Conflicts*, 49 CORNELL INT'L L.J. 683, 686-92 (2016); Levinson & Balkin, *supra* note 237, at 1793.

out federal functions;<sup>247</sup> developing guiding norms;<sup>248</sup> or relying on individual character or virtue.<sup>249</sup>

In the Militia Clauses, the founders hit upon another solution: bring the people, through a robust institution, into the exercise of delegated power. If the president must exercise unreviewable authority, who better to charge with the execution of that authority than the people themselves? That way, the people can exercise a final, extralegal check on the executive. The framers accomplished this by incorporating the militia—a popular, democratic institution with strong state ties—into the Constitution.

The Militia Clauses represent an innovative and underappreciated effort to respond to the problem of managing power in military emergencies. As the foregoing analysis has demonstrated, by forcing the executive to rely on the militia, Congress could and did substantially check its power. Incorporating the militia into the nation's defense created interbranch dialogue, nudged Washington into adopting a diplomatic response to the Whiskey Rebellion, and forced Scott to engage in a campaign of persuasion during the *Caroline* Affair. The militia even self-enforced constitutional limits on their deployment by refusing to cross into Canada at the Battle of Queenston Heights.

As a separation of powers check, the Militia Clauses are not novel. The Constitution separates many powers, including in power to raise and fund the Army and Navy.<sup>250</sup> However, by involving a popular institution directly into the War Powers' execution, the Militia Clauses created more than just an interbranch check.

To appreciate this, consider the effect of separating powers. By dividing the power to fund and organize the militia and the power to command it, the Constitution does generate interbranch dialogue and oversight. At some point, though, Congress' power substantially weakens. Once Congress authorizes the executive to employ force and provides the tools to do so, Congress' ability to manage affairs declines substantially. If emergencies are to be met, delegations must be made, and eventually the power to act inevitably condenses into the hands of a single branch.

However, the militia's popular character allowed it to check executive action even after Congress had made its delegation. First, the people themselves, armed and un beholden to the executive, could enforce legal limits where Congress could not, as the militia did at Queenston Heights. Furthermore, because the states exercised substantial influence over this institution, the executive had to secure local

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247. Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256, 1343 (2006) (noting that during the early Republic using state enforcers was seen "as a means of restraining" the federal government's power).

248. Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187 (2018). While Renan does not specifically apply norms to the War Powers context, their prevalence is obvious.

249. See, e.g., Thomas P. Crocker, *Presidential Power and Constitutional Responsibility*, 52 B.C. L. REV. 1551 (2011).

250. See, e.g., Levinson & Balkin, *supra* note 237, at 1793.

support before acting. Finally, because the militia was comprised of the citizenry, the executive had to rely as much on persuasion as on command when leading this force. These soldiers were, after all, voters with strong community ties.

In short, the militia was a very different sort of tool than the regular army, and by employing it, Congress could generate constraints that interbranch checks alone could not. Given how accustomed we are to conceptualizing the military as a purely professional institution, this check is easy to miss. But the Militia Clauses are not the only instance of the framers insulating an institution with constitutional provisions so that it could perform a checking function. The First Amendment also does this, protecting the institution of the press from governmental oppression so that that institution too can check the government.<sup>251</sup> In this way, the First Amendment parallels the Second Amendment and elements of the Organizing Clause.

Bringing the militia and its checking function to the fore serves as a valuable corrective to the literature on the War Powers in the early Republic. Some have argued that the framers employed a simplistic approach to dealing with emergencies. The Militia Clauses, however, demonstrate that the framers actually created a fairly sophisticated system, at least insofar as emergencies implicating the War Powers were concerned. The prevailing account of the early Republic's legal approach to emergencies is what Jules Lobel calls the "classical liberal paradigm."<sup>252</sup> According to Lobel, the founders' strategy for dealing with emergencies was simple: they refused to authorize any emergency powers. Instead, when the president found its normal peacetime powers insufficient, he would simply have to break the law. Such law breaking involved an exercise of the executive's prerogative power, as theorized by John Locke. After the crisis abated, the executive would throw himself at the mercy of the people to indemnify him or punish him as they saw fit.<sup>253</sup>

Though Lobel's paradigm may correctly describe the early Republic's response to emergencies generally,<sup>254</sup> it plainly falls short insofar as the War Powers are concerned. In fact, the militia represents the first congressional delegation of emergency powers to the executive in American history. What is more, the Militia Clauses allowed Congress to insert a popular institution into the exercise of those emergency powers, placing informal *ex ante* constraints on the executive's exercise of prerogative in addition to the *ex post* limits Lobel describes. This paradigm is best described not as liberal, but as republican, in keeping with the thinking of Machiavelli, Harrington, and others, who regarded armed freeholders as the bulwark of liberty. Furthermore, the delegations mirror the Roman Republic's delegation of dictatorial power, albeit more carefully constrained,

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251. See, e.g., Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (1977).

252. Lobel, *supra* note 147, at 1392.

253. *Id.* at 1392-93.

254. Lobel casts a wide net—for example, he counts the Louisiana Purchase as an important example.

divided, and channeled.<sup>255</sup> As such, it may be more appropriate to characterize the early Republic as containing two competing paradigms for addressing emergencies and the exercise of the War Powers: liberal and republican. Aziz Rana's observation that Americans during this period believed that "meaningful security was undermined—not enhanced—when removed from the purview of the wider public" further buttresses this observation.<sup>256</sup>

At a functional level, the Militia Clauses also shed light on the original operation of the War Powers. This insight do not alter the outcome of many of the intractable disputes over the Declare War Clause<sup>257</sup> or the degree of the Commander-in-Chief's preclusive effect on Congress.<sup>258</sup> However, the functional impact of the Militia Clauses suggests that the debate over such binaries is too much energy in the wrong direction. As Phillip Bobbitt has observed, the War Powers form "a system of linked and sequenced powers. . . . [T]he pattern of required cooperation in war [is] sequential, . . . [each] branch can act within certain boundaries, thereby having an impact on the choices open to the other branches but not determining the outcome of those choices."<sup>259</sup> When we take a broader, functional view of the war powers, the stakes of debates over issues like who authorizes war do not disappear, but they diminish substantially.<sup>260</sup> The framers did not consider issues such as the Declare War Clause's nature or the question of preclusion in isolation. Rather, the framers imagined they would operate within a complex system of institutional and interbranch checks. Viewed in this light—as part of a more complex system—the relative importance of any single power or decision diminishes. Of course, expected application and original meaning are two different things—while the framers expected Congress, the states, and the people to avail themselves of the tools the Constitution gave them, they were by no means legally compelled to. Even so, as the Militia Clauses grew vestigial, it placed greater weight on a handful of provisions than framers had expected them to bear.

255. Levinson & Balkin, *supra* note 237, at 1836-40 (describing how discretion distributes through the American system).

256. Aziz Rana, *Who Decides on Security?*, 44 CONN. L. REV. 1417, 1440 (2012).

257. For an example of the intractable quality of such a debate, see the colloquy between Prakash, *supra* note 10; Robert J. Delahunty & John Yoo, Response, *Making War*, 93 CORNELL L. REV. 123, 123-24 (2007); Ramsey, *supra* note 10, at 169; and Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1543-44 (2008).

258. See, e.g., David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb: Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 704-11 (2008).

259. Philip Bobbitt, Book Review, *War Powers: An essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*, 92 MICH. L. REV. 1364, 1388 (1994).

260. Waxman makes a similar point. Waxman, *supra* note 241, at 683 ("The matter of which branch can take the country to war was for most of U.S. history not even the most consequential war powers question, let alone constitutional question. Through much of that history, the president had limited practical means to initiate unilateral war because he commanded only modest national military power except when Congress declared war and thereby temporarily provided those means. In practice, any power to initiate war was constrained by limited standing military might.").

Taken in this light, the key insight studying the Militia Clauses yields is how much the current interbranch balance has departed from what the framers originally envisioned. The framers believed they were endowing Congress with substantially more power than it currently exercises. The framers deliberately built a tool into the Constitution that allowed Congress to force interbranch dialogue and to employ a force that would resist unpopular commands. The framers may have created a stronger executive, but they certainly did not create an uncheckable one. And while these restraints were contingent on Congress exercising its authority, nothing on the record suggests that the framers thought it would not do so. Accordingly, the Militia Clauses undercut the claims of the presidency's strongest boosters, revealing that, as an original matter, a powerful potential limitation existed on executive power.<sup>261</sup> At least in theory, presidential power could be checked.

Of course, congressional disfunction has become a mainstay of current American politics,<sup>262</sup> and if Congress chokes to surrender its prerogatives, the Constitution permits it to do so. No one can reclaim these powers save Congress itself. Furthermore, since the militia did in fact turn out to be militarily ineffective and politically destabilizing, an assertive Congress would not want to rely on the Militia Clauses, but on some other set of tools to reclaim its role in the exercise of the War Powers.

At the same time, the Militia Clauses also indicate some sharp limitations to federal power, limitations that may no longer obtain. While the Militia Clauses did allow Congress the check the executive, it did so by integrating a semi-independent institution into the constitutional order. In practice, the militia was not necessarily any more responsive to Congress than to the executive. It was a local institution, led by state officers. Accordingly, while Congress could increase its leverage over the executive by favoring the militia over the regular army, it traded off federal power against state and local actors. Congress could check the executive, but only by weakening federal authority in the process. Thus, the institution created a subtle link between interbranch balance and federal-state balance.

The fact that such a prominent aspect of the original constitutional order could fall into disuse demonstrates the enormous flexibility of our constitutional regime. However, it should also caution against simplistic appeals to restore

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261. In particular, this study's findings buttress the more nuanced analyses of authors like Sai Prakash, who carefully disaggregate the executive's power from his limitations. *See, e.g.*, Saikrishna B. Prakash, *Fragmented Features of the Constitution's Unitary Executive*, 45 WILLAMETTE L. REV. 701, 701-02 (2009). It also pours cold water on maximalist readings of executive power, like that of John Yoo. Yoo, *supra* note 2, at 227-28. For further analysis of Yoo's work, see Julian Davis Mortenson, Book Review, *Executive Power and the Discipline of History*, 78 U. CHI. L. REV. 377 (2011).

262. Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?* 115 COLUM. L. REV. 1689, 1690-92 (2015).

the original constitutional order in security affairs.<sup>263</sup> A complex web of institutions and powers governed the original War Powers, and with the militia's end, a significant chunk of that web is gone, never to return. Simply restoring the other pieces will not return the original system to working order.

Ultimately, the Militia Clauses underscore the pluralist, republican nature of the constitutional order of the early Republic. The people, as sovereigns, exercised their authority through a multitude of representative institutions. These included Congress and the presidency, but they also included state governments and bodies like the militia and the jury. The people channeled and organized their will through a variety of institutions, and these institutions in turn checked each other, both formally and informally. These structures channeled and adjudicated the competing duties and roles of the citizen, creating a vibrant, albeit tumultuous, governing order. Meanwhile, the quest for a workable War Powers regime continues.

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263. See, e.g., Morton H. Halperin, *Take Back: How Congress Can Reclaim Its Power*, JUST SECURITY (Jun. 10, 2019), <https://perma.cc/K3F6-YT7E> (declaring that “[f]or too long, Congress has ceded power to the presidency in a way that the drafters of the Constitution never would have imagined,” without acknowledging that the original “balance” rested in part on institutions that are not recoverable).

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