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The Deference That Is Due: Rethinking the Jurisprudence of Judicial Deference to the Military

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THE DEFERENCE THAT IS DUE: RETHINKING THE JURISPRUDENCE OF JUDICIAL DEFERENCE TO THE MILITARY

STEPHANIE A. LEVIN*

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Of all faces of the present age in America, the military face would almost certainly prove the most astounding to any Framers of the Constitution, any Founders of the Republic who came back to inspect their creation on

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(1009)
the occasion of the bi-centennial. . . . Well over three hundred billion dollars a year go into its maintenance; it is deployed in several dozen countries around the world. The returned Framers would not be surprised to learn that so vast a military has inexorable effects upon the economy, the structure of government, and even the culture of Americans; they had witnessed such effects in Europe from afar, and had not liked what they saw.¹

I. INTRODUCTION

IN 1958, Sergeant James B. Stanley volunteered for an Army program he had been told was designed to test protective clothing and equipment.² Instead, he was given lysergic acid diethylamide (LSD) without his knowledge or consent. This made him one of many unknowing guinea pigs in a series of top secret chemical warfare experiments intended to study the effects of LSD on human beings.³ Many years later, when Stanley discovered what had occurred,⁴ he sued the Army for damages,⁵ claiming a violation of his constitutional right to due process of

³. See id. A 1976 Senate Report indicates that in the 1950s military intelligence agencies and the Central Intelligence Agency conducted a surreptitious program of testing chemical and biological materials, including LSD, on human subjects in order “to determine the potential effects of chemical or biological agents when used operationally against individuals unaware that they had received a drug.” S. Rep. No. 755, 94th Cong., 2d Sess., Book I, at 385 (1976). Stanley’s lawsuit was not the only one to result from this series of clandestine chemical and biological warfare experiments. See also Nevin v. United States, 696 F.2d 1229 (9th Cir.) (wrongful death action for death allegedly resulting from simulated biological warfare attack on San Francisco), cert. denied, 464 U.S. 815 (1983); Sweet v. United States, 687 F.2d 246 (8th Cir. 1982) (tort action seeking damages for alleged after-effects of LSD experiments); Barrett v. United States, 660 F. Supp. 1291 (S.D.N.Y. 1987) (wrongful death action on behalf of mental hospital patient used as unknowing subject in Army-sponsored test of mescaline derivative); Schnurman v. United States, 490 F. Supp. 429 (E.D. Va. 1980) (suit concerning injuries from non-consensual exposure to mustard gas during secret experiments in 1944); Thornwell v. United States, 471 F. Supp. 344 (D.D.C. 1979) (suit by soldier unknowingly drugged in tests of LSD).
⁴. Stanley became aware of his unwitting participation in these experiments in 1975, when the Army sent him a letter soliciting his participation “in a study of the long-term effects of LSD on ‘volunteers who participated’ in the 1958 tests.” Stanley, 483 U.S. at 671.
⁵. Stanley claimed he had suffered hallucinations, episodes of violent behavior, incoherence and memory loss as a result of his unknowing exposure to LSD. Id. These effects led to his discharge from the Army and the break-up of his marriage. Id.
Ultimately, Stanley’s claim reached the United States Supreme Court. His claim presented the Justices with a difficult dilemma. On the one hand, the Army had apparently violated Stanley’s constitutional rights in a particularly disturbing manner. On the other hand, the violation had occurred as part of Stanley’s military service while he was a soldier. Permitting Stanley’s claim to go forward could open a Pandora’s box of other possible claims against the military. Such claims might interfere with the military’s efficient exercise of its job of protecting national security.

The Supreme Court Justices had faced a similar dilemma in a series of earlier cases in which other members of the armed forces raised claims against the military for violations of their constitutional rights. In each of these cases, as in Stanley, a slim majority of the Court decided—over vigorous dissent—that the claims must be denied. In denying each of these claims, the majority articulated a special standard of judicial review for constitutional

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6. Stanley’s complaint included claims under both the United States Constitution and the Federal Tort Claims Act (FTCA). The FTCA is the legal mechanism for compensating persons injured by negligent or wrongful acts of federal employees committed within the scope of their employment. See 28 U.S.C. §§ 2671-2680 (1988). The FTCA claims were dismissed by the district court. See United States v. Stanley, 549 F. Supp. 327, 330 (S.D. Fla. 1982). These FTCA claims were subsequently held to be potentially viable by the court of appeals. See United States v. Stanley, 786 F.2d 1490, 1499 (11th Cir. 1986). The Supreme Court, however, vacated the portion of the court of appeals’ decision which allowed Stanley to replead his FTCA claims. Stanley, 483 U.S. at 678. The main issue before the Court in Stanley was the viability of his constitutional claims. Id. at 676.

7. These violations were outlined by the district court:

This court views the conduct alleged in the Amended Complaint as an egregious intrusion on the most precious right protected by the Constitution—the right not to be deprived of life, liberty or property without due process of law. The surreptitious administration of LSD to an unwitting serviceman . . . constitutes a violation of the rights of privacy and bodily integrity, and of the right of an individual to control his mind, his private thoughts and his intellectual process. Stanley, 549 F. Supp. at 351. Involuntary experimentation on human beings is also a violation of a central precept of the Nuremberg Code, which mandates that "[t]he voluntary consent of the human subject is absolutely essential." Military Tribunal No. I; Case I; United States v. Brandt ("the Medical Case"), 2 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 181 (1949).

claims against the military. This standard was highly deferential to the military, much more deferential than the standard that the court would apply in evaluating similar claims against civilian institutions. In response, the often-outraged dissenters objected that the majority was abdicating its judicial duty to protect the Bill of Rights. 9

Part II of this article examines this line of cases, which I will call "the Stanley cases," tracing the positions of both the majority and the dissent. It demonstrates that the seemingly irreconcilable difference between the two sides is a reflection of the tension inherent in the dilemma of reconciling our constitutional aspirations toward civil liberty with the demands of military need. Although both sides recognize this conflict, neither fully appreciates or wrestles with it. Instead, both majority and dissent seek a too-easy resolution of the tension: the majority in favor of military institutions by commanding judicial deference to the military; the dissent in favor of individual liberty by ignoring military reality. Both approaches are ultimately unsatisfactory because both attempt to sidestep the tension between military institutions and civil liberties rather than face it directly.

The Court appears to have forgotten that this very tension was the subject of intense and passionate debate during the nation's founding days. In Part III, I review this debate which is known as the "standing army" controversy. As Part III describes, the American revolutionary generation strongly distrusted professional military institutions as dangerous to liberty. Indeed, during the drafting of the Constitution in Philadelphia, and in the ensuing ratification debates, the new Constitution was opposed in part because of the fear that it would permit large national peacetime military forces to develop. A desire to limit this possibility was one important, if often overlooked, motivation behind the demand for a Bill of Rights.

This too-often neglected slice of constitutional history is important for its own sake. In addition, as I suggest in Part IV, this historical perspective can help us to rethink the nature of the dilemma presented by the Stanley cases. In the eighteenth century, debate about the conflict between civil liberties and military institutions focused on the proper structural place of those institutions in the developing life of the new nation. Without recon-

9. See, e.g., Goldman, 475 U.S. at 515 (Brennan, J., dissenting) (Justice Brennan, consistent dissenter in these cases, labels majority's approach the "sub rational-basis standard").
sideration of this broader question, contemporary attempts to reconcile the continuing tension between military institutions and claims of individual liberty are doomed to fail.

II. ARTICULATING A STANDARD OF DEFERENCE: THE STANLEY CASES

Although the Supreme Court has adjudicated constitutional issues arising in connection with our military forces since the earliest days of the nation, it is only relatively recently that the Court has faced a series of claims by individual members of the armed services alleging that the military had infringed upon their constitutional rights. The recent appearance of these cases is a result both of the enormous growth of the national military establishment since the end of World War II and the new political understanding of the possibilities for individual rights within the military which grew out of Nuremberg and the G.I. protest movements of the Vietnam War era. The development and expansion of constitutional civil rights doctrine in civilian contexts by the Warren Court provided the legal matrix within which civil rights claims against the military could be framed.

In seeking protection for their rights of free speech, gender equality, religious freedom, and due process, members of the military have asked the Court to apply to military institutions complex bodies of civil rights law developed in civilian contexts. Given the intricacy of these civil rights doctrines, and the complicated nature of the factual settings, these would be difficult decisions under any circumstances. But what is striking about the majority's approach in the Stanley line of cases is that it decided not to apply the legal standards and tests developed in civilian contexts to the different factual setting of military life. Instead, the majority articulated a separate, and highly deferential, standard of judicial review.

The majority first suggested an especially deferential standard of review for constitutional claims against the military dur-

11. See Brown, 444 U.S. 348; Parker, 417 U.S. 733.
ing the Vietnam War era. In *Parker v. Levy*,15 Army Captain Howard Levy challenged his court-martial convictions for violations of Articles 133 ("conduct unbecoming an officer and a gentleman") and 134 ("disorders and neglects to the prejudice of good order and discipline in the armed forces") of the Uniform Code of Military Justice.16 Levy was Chief of Dermatology at a United States Army Hospital in South Carolina during the Vietnam War. When Levy was ordered to train Special Forces aide men, he refused on the basis that his medical ethics prohibited such a practice. He also made a series of public statements to enlisted men at the base, expressing his strong opposition to the war and his opinion that he and others should refuse to obey orders to go to Vietnam.17

Levy challenged his convictions under Articles 133 and 134 on the grounds that these articles were both void for vagueness and overbroad in violation of the first amendment. The United States Court of Appeals for the Third Circuit held that "as measured by contemporary standards of vagueness applicable to statutes and ordinances governing civilians," Articles 133 and 134 "do not pass constitutional muster."18 Reversing the decision of the court of appeals, the five-Justice majority opinion written by Justice Rehnquist articulated and emphasized a conception of the military as "a specialized society separate from civilian society,"19 subject to different norms and freer of the constitutional constraints which apply to civilian life.

In *Parker*, the majority returned again and again to the theme that military life calls for a different standard of constitutional review than civilian life.20 Even so, it appears the majority may

18. Id. at 741 (quoting Levy v. Parker, 478 F.2d at 793 (3d Cir. 1973)).
19. Id. at 743.
20. See, e.g., id. at 742 (noting that even court of appeals acknowledged that in some circumstances "different standards might . . . be applicable in considering vagueness challenges to provisions which govern the conduct of members of the Armed Forces"); id. at 744 (citations to various authorities suggesting military society is "a society apart from civilian society"); id. at 756 (Congress has more latitude in legislating for military than for civilian society); id. at 758 (first amendment to be applied differently to military than to civilian life); id. at 760 (same).
have been uncomfortable resting its decision solely on the foundation of a separate legal standard for the military. This discomfort is suggested by the fact that although the Justices in the majority articulated a separate standard of review, they also sought to demonstrate that Levy's conviction under Articles 133 and 134 would be acceptable even under ordinary principles of vagueness and overbreadth. The majority opinion asserted that even if on their face the phrases "conduct unbecoming an officer and a gentleman" and "disorders and neglects to the prejudice of good order and discipline" appear unconstitutionally vague, they were rendered valid by the specificity supplied by military usage, narrowing decisions by the United States Court of Military Appeals, and illustrative examples in the Manual for Courts-Martial.21 Furthermore, the opinion stated that the conduct for which Levy was convicted—"that of a commissioned officer publicly urging enlisted personnel to refuse to obey orders which might send them into combat"—is "unprotected under the most expansive notions of the First Amendment."22

The dissent was dismayed by the articulation of a separate standard of constitutional review for the military.23 It also rejected the majority's conclusion that Levy's conviction would be constitutional under generally accepted standards of constitutional jurisprudence. The dissenters did not agree that the facial vagueness of the articles was cured by narrowing military constructions,24 or that Levy's conduct was indisputably beyond the protection of the first amendment.25 These disputes, in turn, reflect differing views about the nature of military institutions.

Justice Blackmun, in his concurring opinion, recognized this "crucial difference"26 between the perceptions of the majority and the dissent. He pointed out that the dissent was worried by the possibility of arbitrary enforcement of the general articles

21. See id. at 752-55.
22. Id. at 761.
23. Id. at 766 (Douglas, J., dissenting). Justice Douglas caustically commented on the majority's analysis:
So far as I can discover the only express exemption of a person in the Armed Services from the protection of the Bill of Rights is that contained in the Fifth Amendment which dispenses with the need for "a presentment or indictment" of a grand jury "in cases arising in the land or naval forces . . . ."
Id. (Douglas, J., dissenting).
24. See id. at 777 (Stewart, J., dissenting).
25. See id. at 772 (Douglas, J., dissenting).
26. Id. at 762 (Blackmun, J., concurring).
leading to the suppression of dissent in the military. But Blackmun himself feared not suppressed freedom, but anarchy. He wrote:

The general articles are essential not only to punish patently criminal conduct, but also to foster an orderly and dutiful fighting force. One need only read the history of the permissive—and short-lived—regime of the Soviet Army in the early days of the Russian Revolution to know that command indulgence of an undisciplined rank and file can decimate a fighting force.²⁷

Justice Blackmun suggested that, by their nature, military institutions cannot permit the liberties of civilian life. As detailed in Part III, this perception was widely shared by eighteenth century Americans and was one reason for their deep distrust of the military. It is ironic that the same perception which fueled a wariness of military institutions in the eighteenth century is now offered as a rationale for special deference.²⁸

The themes first articulated in Parker v. Levy were further developed in Brown v. Glines²⁹ and the companion case of Secretary of the Navy v. Huff.³⁰ Both Glines and Huff concerned first amendment challenges by members of the Air Force and Marine Corps to similar sets of military regulations which required prior approval by commanding officers before the circulation of any petition.³¹ In Glines, the United States Court of Appeals for the Ninth Circuit found that the challenged Air Force regulations were unconstitutionally overbroad because of the possibility that “virtually all controversial written material” might be suppressed.³² The Supreme Court reversed, in an opinion written by Justice Powell and joined by Chief Justice Burger and Justices White, Blackmun, and Rehnquist. That opinion cited the language from Parker v. Levy which approved the “different application” of first

²⁷. Id. at 763 (Blackmun, J., concurring).
²⁸. This irony is further developed in Part IV.
³¹. In addition to challenging the regulations on first amendment grounds, the servicemen also claimed that the regulations violated a provision of general military law, 10 U.S.C. § 1034, which limits the military’s power to restrict a member of the armed forces in communicating with a member of Congress. Glines, 444 U.S. at 351; Huff, 444 U.S. at 456. The Court rejected both the statutory challenge and the constitutional claim. Glines, 444 U.S. at 361.
³². Glines, 444 U.S. at 353 (quoting Glines v. Wade, 586 F.2d 675, 681 (9th Cir. 1978)).
amendment protections in the military context. Discipline, and the need to exclude speech which might interfere with discipline, was the key theme articulated by the Glines majority to support the validity of the regulations.

In his dissent in Glines, Justice Brennan deplored the majority’s reliance on “a series of platitudes about the special nature and overwhelming importance of military necessity.” Brennan approached the problem as a straightforward exercise in applying ordinary first amendment doctrine concerning the right to circulate petitions, and found that this doctrine clearly invalidated the challenged regulations. Brennan concluded that if the Court had approached the case with a properly stringent, as opposed to an “unduly acquiescent,” standard of review, there would have been a different result.

Despite his conclusion that these regulations could not stand, Justice Brennan did recognize that there may be “[m]ilitary (or national) security” interest which would weigh against first amendment liberties in certain circumstances. He admitted that the needs of “military discipline, morale, and efficiency are undeniably important.” He recognized that in wartime, when national survival itself may be threatened, civil liberties often are curtailed. Yet he noted that the regulations at issue in Glines and Huff “apply to all military bases, not merely to those that operate under combat or near-combat conditions.”

Justice Brennan

33. Id. at 354 (quoting Parker, 417 U.S. at 758).
34. The majority opinion in Glines referred to “discipline,” and the critical need to maintain it, at least 10 times in the course of a relatively short (12 page) opinion. See, e.g., id. at 352 (“[R]equirements of military discipline could justify otherwise impermissible restrictions on speech.”); id. at 357 n.14 (“[T]he prior approval requirement supports commanders’ authority to maintain basic discipline.”); id. at 360 (“The unrestricted circulation of collective petitions could imperil discipline.”).
35. Glines, 444 U.S. at 368 (Brennan, J., dissenting).
36. Id. at 370 (Brennan, J., dissenting).
37. Id. at 369 (Brennan, J., dissenting).
38. Id. at 365 (Brennan, J., dissenting).
39. Id. at 370 (Brennan, J., dissenting). In Glines, the serviceman challenging the prior restraint regulations was a captain in the Air Force Reserves serving at Travis Air Force Base in California. While on a routine training flight to Guam, he circulated a petition protesting grooming standards in the Air Force. Since he had failed to receive prior approval for this petition as required by the regulations, it was confiscated and he was demoted. Id. at 351. In Huff, three servicemen stationed at a Marine Corps Air Station in Japan were either prevented from, or disciplined for, circulating petitions concerning United States support for the government of South Korea, amnesty for Vietnam draft resisters and deserters, use of the military in labor disputes, and military restrictions on petitioning. Id. at 454.
found the reliance on military necessity in these "rear echelon" situations particularly troubling.40

In this regard, the majority opinion in Glines extended the deferential standard first announced in the Levy case into a new arena. In Levy, the special demands of the military mission were invoked by the majority to permit limits on first amendment freedom during a period of actual (if undeclared) war, in the presence of troops about to enter combat. In Glines, by contrast, this same deference to the military is relied on in a peacetime setting. As discussed in Part III, one of the concerns expressed in the eighteenth century controversy over military institutions and civil liberties was the fear that military institutions would expand their influence beyond periods of war into periods of peace.41 Many participants in that debate were leery, as Brennan was, of permitting the anti-libertarian pressures of military necessity to persist into peacetime.

The high court again faced the question of deference to the military in peacetime when President Carter resumed draft registration in 1980. In Rostker v. Goldberg,42 the registration of males only was challenged as unconstitutional gender discrimination. In Rostker, the majority denied this challenge43 again and articulated a standard of deference in the military arena which expressly went beyond the ordinary degree of judicial deference to Congress: "[T]his is not, however, merely a case involving the customary deference accorded congressional decisions. The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference."44

The Rostker majority cited Parker v. Levy and Brown v. Glines to support its position that military matters required an especial degree of judicial deference.45 In the view of the majority, this deference was appropriate not only because the scope of Congress's power in the area of national defense and military matters is so broad, but also because the lack of judicial competence in this area is so "marked."46

40. Glines, 444 U.S. at 370 (Brennan, J., dissenting).
41. For a discussion of the "standing army" controversy during the drafting of the Constitution, see infra notes 107-59, 201-14 and accompanying text.
43. Id. at 78-79.
44. Id. at 64-65.
45. See id. at 66.
46. Id. at 65.
The Solicitor General had argued that since this issue of potential sex discrimination arose in the area of military affairs, the Court should drop its normal approach of giving heightened scrutiny to government action based on sex, and instead apply a mere rational relation test. Although the majority declined to adopt this "further 'refinement' in the applicable tests," it apparently agreed with the basic premise that decisions involving military matters need not pass heightened scrutiny. The bottom line for the majority was that judicial deference must be at its maximum during the review of claims of unconstitutional government action in the military arena. Just as the standard for reviewing free speech claims against the military became more deferential than the standard in a civilian context after Levy and Glines, so the standard for reviewing gender-based discrimination claims against the military will be much more deferential after Rostker.

Justice Marshall, in a strong dissent, criticized the majority's reliance on "hollow shibboleths" about deference. He objected to the majority's sub silentio abandonment of the standards of review which had characterized all of the Court's earlier "mid-level" scrutiny equal protection decisions. Yet at the same time, Justice Marshall did concede that he had "no particular quarrel with" the majority's notion that particular deference should be paid to government decision-making in the area of military affairs. Like Justice Brennan in Glines, Justice Marshall found himself stuck with an uncomfortable incongruity. On the one hand, he desired to review constitutional claims against the military under a standard with the same bite as that developed in civilian cases. On the other hand, he had to acknowledge that the needs of military institutions seemed to command a different, less rigorous, review. This same internal conflict surfaced even more sharply in Justice O'Connor's dissenting opinion in Goldman v.

47. The Court has consistently applied a "mid-level" scrutiny test in the area of sex discrimination. See, e.g., Craig v. Boren, 425 U.S. 190 (1976).
49. Id. at 112 (Marshall, J., dissenting). Justice Brennan joined both this dissent and the separate dissenting opinion of Justice White. Id. at 83 (White, J., dissenting).
50. See id. at 104 n.17 (Marshall, J., dissenting). Justice Marshall pointed out that, if the party challenging the gender-based classification has the burden of proof, this would draw all the Court's earlier sex discrimination jurisprudence into question.
51. Id. at 89 (Marshall, J., dissenting).
In *Goldman*, the high court decided that Air Force Captain Simcha Goldman, an Orthodox Jew, had no first amendment right to wear his yarmulke while in uniform. By this time, the majority's invocation of the now-familiar theme of judicial deference to the military had become almost platitudinous. Justice Rehnquist's majority opinion, however, articulated a degree of deference even more explicit and farther reaching than that of the earlier opinions: "Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society."  

The *Goldman* case represents a full flowering of the notion, first articulated in *Levy*, that the military is a separate community subject to separate norms different from those of civilian life. What is remarkable about the factual context for this opinion, however, is how strikingly it resembles civilian life. Goldman worked as a clinical psychologist at a mental health clinic at a California Air Force base. Even more than in *Glines*, this carried the institutional structures of the military, and the constraints that accompany them, far from anything resembling the front lines. Yet, the majority stressed the same key elements which supported judicial deference in the earlier cases involving more combat-like conditions: the need for unimpeded military discipline and the need to rely on military expertise. According to the majority, if the Air Force was convinced that the wearing of non-uniform headgear by officers like Captain Goldman would be detrimental to military discipline, then the officers in the Air Force "are under no constitutional mandate to abandon their considered professional judgment." As noted by the dissent, this level of judicial scrutiny bears no relationship to the approach which would be taken in a freedom of religion case in a civilian setting.

While Justice Brennan's dissenting opinion relied heavily on outrage, Justice O'Connor concentrated on the idea expressed

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52. 475 U.S. 503 (1986).
53. *Id.* at 510.
54. *Id.* at 507.
55. *Id.* at 505.
56. *Id.* at 509.
57. See *id.* at 515 (Brennan, J., dissenting), *id.* at 529-30 (O'Connor, J., dissenting).
58. See *id.* at 514 (Brennan, J., dissenting). Justice Brennan wrote that the Court's response to *Goldman* "is to abdicate its role as principal expositor of the Constitution and protector of individual liberties in favor of credulous deference..."
in earlier dissenting opinions by Justices Brennan and Marshall that the majority should attempt to apply free exercise jurisprudence derived from civilian cases in the military context, rather than articulating a more deferential standard of review.\textsuperscript{59} Similar to Justices Brennan and Marshall, however, Justice O'Connor also ended up acknowledging that it is appropriate to "take account of the special role of the military" and agreeing that "in order to fulfill that mission, the military is entitled to take some freedoms from its members."\textsuperscript{60} Although Justice O'Connor pressed the Court to apply the same freedom of religion standards to military as to civilian life, she nonetheless ended up quoting with approval the majority's statement that the military "must insist upon a respect for duty and a discipline without counterpart in civilian life."\textsuperscript{61} As in the earlier dissents, Justice O'Connor's desire to bring general constitutional norms to bear on the military continued to bang up against the special, anti-libertarian nature of military life.

For the majority, this tension was resolved by deferring to the military and disregarding the otherwise applicable constitutional norms. But despite the dissenters' wish to apply neutral principles of constitutional adjudication to military life, they were forced to recognize that the special character of military institutions seems to demand something different. While the weakness of the majority's position was its overly facile disregard of civil liberties, the weakness of the dissenters' position was its evasion of the enormous difficulty of reconciling these values with the actual nature of military life.

In \textit{United States v. Stanley},\textsuperscript{62} the divergence among the majority and dissenting positions reached its sharpest point. The majority, continuing to apply its highly deferential approach, denied Stanley's constitutional claim.\textsuperscript{63} The majority adhered to the po-

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\textsuperscript{59} Id. at 530 (O'Connor, J., dissenting) ("There is no reason why these general principles should not apply in the military, as well as the civilian, context.").

\textsuperscript{60} Id. at 531 (O'Connor, J., dissenting).

\textsuperscript{61} Id. (O'Connor, J., dissenting).

\textsuperscript{62} 483 U.S. 669 (1987).

\textsuperscript{63} Id. at 683-84.
sition expressed in the earlier cases that the military institutions must be permitted to make their own evaluations of the requirements of military discipline, whatever the costs in civil liberties. In *Stanley*, this broad deference to military judgment was maintained even though the result was to deny liability for secret, non-consensual experiments on human beings.

The dissenters were outraged by this result. But although the specific facts of the case appalled them, they continued to acknowledge—as they had in earlier cases—that as a general matter, the special nature of military life and the needs of military discipline required lessened protection for constitutional rights.

Is there any way out of this dilemma? If we wish to preserve constitutional liberties, but recognize that military institutions are by their nature ill-suited to such liberties, must we be trapped unavoidably in the deadlock between civil rights and military institutions, between liberty and military need? In eighteenth century America, thinkers who had been wrestling with just this question thought that they might have an answer. Viewed through the lens of that earlier debate, perhaps the split between the majority and the dissent in the *Stanley* cases can be seen in a new light.

64. Justice Brennan, joined by Justice Marshall, wrote:

Having invoked national security to conceal its actions, the Government now argues that the preservation of military discipline requires that Government officials remain free to violate the constitutional rights of soldiers without fear of money damages. What this case and others like it demonstrate, however, is that Government officials (military or civilian) must not be left with such freedom. *Id.* at 689 (Brennan, J., concurring in part and dissenting in part). Justice O'Connor stated: "In my view, conduct of the type alleged in this case is so far beyond the bounds of human decency that as a matter of law it simply cannot be considered as part of the military mission." *Id.* at 709 (O'Connor, J., concurring in part and dissenting in part).

65. For example, Justice Brennan accepted as a general matter that there was a "need for 'special regulations in relation to military discipline' " in the context of the uniquely hierarchical and command-driven nature of military life. *Id.* at 700 (Brennan, J., concurring in part and dissenting in part) (quoting *Chappell v. Wallace*, 426 U.S. 296, 300 (1983)). He concluded that in situations where immunity from constitutional liability was essential to maintenance of military discipline, such immunity should be granted. *Id.* at 708 (Brennan, J., concurring in part and dissenting in part). Similarly, Justice O'Connor accepted "that the special circumstances of the military mandate" require that civilian courts deny recovery for many injuries caused as a result of military service that would be otherwise compensable in civilian life. *Id.* at 709 (O'Connor, J., concurring in part and dissenting in part).
JUDICIAL DEFERENCE TO THE MILITARY

III. HISTORICAL ROOTS

A. Introduction: The "Standing Army" Debate

Today, when the very phrase "standing army" seems archaic, it is difficult to appreciate how serious a debate took place at the time of the framing and ratification of the Constitution about the possible dangers of such an institution. Yet any reading of the proceedings at the constitutional convention in Philadelphia and of the literature supporting and opposing ratification of the proposed constitution reveals that this topic excited strong feelings among both the leadership and the general public.

The American revolutionary generation had been inspired by a tradition of English dissent that fervently opposed the maintenance of professional peacetime armies, believing such institutions inevitably dangerous to liberty. Colonial experience with the hated British army, and revolutionary aspirations to develop the new continent without the scars of Old World militarism, only reinforced these ideological predispositions against military establishments.

The thinking of the founding generation was shaped by these views, and the idea that "standing armies are dangerous to liberty" was widely held in late eighteenth century America. As developed below, however, the consensus on this point began to shatter during the drafting of the Constitution. Some supporters of the Constitution espoused strong national military institutions despite a widespread public fear and distrust of them. Others, however, opposed the proposed Constitution because they believed that it would permit the growth of large standing national military forces. This opposition to standing armies was one of the

66. For a discussion of the English opposition to standing armies, see infra notes 74-91 and accompanying text.

67. For a discussion of the colonists' experience with the British standing army, see infra notes 92-100 and accompanying text. For a discussion of the treatment of the new nation's military under the Articles of Confederation, see infra notes 101-06 and accompanying text.

68. I use the term "founding generation" to cover broadly both those who were federalist supporters of the Constitution and also those who were in the anti-federalist opposition. This term not only avoids the unnecessarily patriarchal ring of the conventional "founders" or "founding fathers," but also helps us to remember that there were significant differences of opinion and outlook, as well as commonalities, among the members of that generation.

69. This language appeared in the original constitution of Virginia, as well as in those of a number of other states. For the text of the original Virginia constitution, see infra note 99 and accompanying text.
forces behind the demand for the Bill of Rights.\textsuperscript{70}

The questions raised by this "standing army" debate about the relationship between military institutions and civil liberties remain illuminating today. Of course, this eighteenth century history does not yield any easy contemporary answers. Nonetheless, it sheds a valuable light on the problem which will help us to reframe the issues in an important, useful way.\textsuperscript{71}

\textbf{B. Ideological Origins of the Opposition to Standing Armies}

Ideologically, the founding generation's suspicion of "standing armies" had its roots in English opposition thought of the seventeenth and eighteenth centuries, a republican political tradition which promoted decentralized power and institutions countering the central control of court and crown.\textsuperscript{72} The phrase "standing army" seems to have arisen from the contrast between the images of a "marching" and a "standing" army: that is, between one "taking the field against a real enemy or present danger" and one not actively engaged in necessary military activity, but literally "standing around."\textsuperscript{73} An army actively engaged in necessary military operations might be honorable, but this political tradition considered a permanent professional peacetime army to be potentially dangerous.

English opposition thought identified two broad categories of danger in a permanent standing army. First, there were the dangers that arose from the nature of the institution itself. Ar-

\begin{itemize}
\item \textsuperscript{70} For a discussion of the standing army debate during the formulation of the Bill of Rights, see \textit{infra} notes 201-14 and accompanying text.
\item \textsuperscript{71} Part IV suggests a way to rethink the problem posed by the \textit{Stanley} cases in the light of this history.
\item \textsuperscript{73} J.G.A. POCOCK, \textit{supra} note 72, at 411.
\end{itemize}
Armies were hierarchical and harshly disciplined: the conjunction of a commanding, aristocratic officer corps with a servile, lower-class rank and file was seen as contrary to the free-thinking, independent-spirited character that the English opposition tradition celebrated. The soldiers themselves, being idle and without civilian occupation or companionship, were prone to moral debauchery and depravity. Since they were not a part of the local community where they were based, they might well wreck or plunder neighboring civilians. From an economic point of view, a “standing army” was a drain on the civilian population; the cost of its support, whether raised through forced quartering and levies on the local people or through taxes assessed more generally, was an economic burden without the justification of immediate military need. Officers and troops alike, becoming accustomed to being supported without working, might begin to expect such a free ride.

The second source of danger was that a standing army loyal to the crown was potentially a dangerous political tool. Such an army would strengthen the hand of the monarchy at the expense of other groups in the population. Troops could be used for repression at home and for costly and vainglorious foreign expeditions abroad to serve the private interests of the crown without meeting genuine national needs.

As an alternative to the detested “standing army,” the English opposition tradition celebrated the ideal of the armed citizenry, known as the militia. The militia had all the virtues which a professional “standing army” lacked. Composed of free, independent citizens, the militia had no need for either imperious commanders or slavish followers. When the need for military defense arose, the citizens would band together to defend themselves as necessary; as soon as peace was restored, they would return to their homes and normal occupations. Unlike a standing

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74. Prior to the seventeenth century, the military was understood to be solely within the prerogative power of the crown, and thus beyond the control of Parliament or the common law. See A. Sofiaer, War, Foreign Affairs and Constitutional Power: The Origins 7 (1976). One central aspect of the English revolutionary struggles of the seventeenth century was Parliament’s effort to wrest more control of military power from the crown, an effort which bore significant fruit by the century’s end. For further discussion of the struggles between Parliament and the crown, see infra notes 75-91 and accompanying text. Even when the legislature attains formal control over the military, however, this does not erase the continuing problem of executive control. For a contemporary treatment of this problem, see generally Koh, Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair, 97 Yale L.J. 1255 (1988).
army, therefore, the militia could never become an economic burden. Nor could the militia pose any political danger. Being of the people, it could never become a tool against the people as could a standing army in the hands of the crown. Firmly rooted in local soil and tied to local institutions, the militia could never feed the ambitions of a centralized court or monarch. Unlike a standing army which centralized the power of the sword, a militia-based defense dispersed the coercive power of society, spreading it widely among the citizens. This ideal was to exert a powerful influence on American thought in the eighteenth century.

C. The Opposition to Standing Armies in English Constitutional Thought

The English opposition to standing armies developed and manifested itself in the course of tumultuous events of English constitutional history of the seventeenth and eighteenth centuries. These events exerted a powerful influence on the thought of the American founding generation. The 1628 Petition of Right, for example, which was a crucial turning point in the historical power struggle between Parliament and the Crown, resulted from Charles I’s attempts to coerce financial support for his standing army.\footnote{75. See The Petition of Right, 1628, reprinted in 1 THE ROOTS OF THE BILL OF RIGHTS 19 (B. Schwartz ed. 1980) [hereinafter 1 ROOTS].} Parliament, devoid of sympathy for his disastrous foreign policies, had refused to vote for taxes to support these troops.\footnote{76. See L. SCHWOERER, supra note 72, at 19. Charles had pursued an unpopular foreign policy which left England embroiled in war on the continent and which failed to support French and German protestants who had the sympathies of Parliament. When Parliament refused to support these unpopular policies, Charles resorted to extra-legal expedients to raise money, including the forced quartering of troops and the exaction of involuntary loans from the well-to-do. When several people refused to pay these loans, the legality of which the courts would not affirm, Charles had a number of them summarily imprisoned. See id. at 19-25; see also C. HILL, GOD’S ENGLISHMAN 28-29 (1985).} The Petition articulated the key principle of “no taxation without legislative consent” which would later play such a central role in the American revolutionary crisis. But in their Petition, Parliament demanded something more than just the right to consent to the raising of taxes—it wanted the troops actually disbanded. The Petition prayed that “your majesty would be pleased to remove the said soldiers and mariners; and that your people may not be so burdened in time to come.”\footnote{77. The Petition of Right, 1628, supra note 75, at 21. In his commentary on this document, Schwartz points out that since Sir Edward Coke was one of the key men behind this Petition in Parliament, and was also a critical intellectual
After Parliament overthrew the monarchy and executed the King in 1649, a tremendous outpouring of constitutional writing and debate rushed to fill the political vacuum left by his death. In the feverish discussion of how a post-monarchial commonwealth should be constituted, the question of how to structure the military emerged as a central concern.

The Levellers, who represented the radical strand of anti-royalist thinking, drew up a proposed constitution for a republican commonwealth called the Agreement of the People. This constitution, which contained both a framework for establishing a representative government and also a series of checks on the powers of that government, later influenced the drafting of the American Constitution. Restraints on the central government's military powers were explicitly incorporated into the Agreement. The first limitation listed in the Agreement was on the legislature's power to compel any military force other than a citizen militia:

(1) We do not empower [the elected representatives] to impress or constrain any person to serve in foreign war, either by sea or land, nor for any military service within the kingdom; save that they may take order for the forming, training, and exercising of the people in a military way, to be in readiness for resisting of foreign invasions, suppressing of sudden insurrections, or for assisting in execution of the laws.

Detailed Leveller proposals for structuring the militia gave the national legislature the power to appoint the militia commander-in-chief and his general staff, but provided that all other officers were to be elected by the local citizens from the districts in which the troops were raised.

influence on the American revolutionary leadership, the Petition had a vital impact on the American founding generation. See 1 Roots, supra note 75, at 17, 19.

78. See Agreement of the People, 1649, reprinted in 1 Roots, supra note 75, at 24.

79. The Agreement of the People was known to and studied by the "Real Whigs" or "Commonwealthmen" of the eighteenth century—people like John Trenchard, Robert Molesworth and Catharine Macaulay—who were important sources of political inspiration for the founding generation. See B. Bailyn, supra note 72, at 71-73; C. Robbins, supra note 72, at 4, 19, 383.

80. Agreement of the People, 1649, supra note 78, at 27. For a discussion of the events surrounding the drafting of this document, see C. Hill, supra note 76, at 53-54; L. Schwoerer, supra note 72, at 90-92, 104-05.

81. L. Schwoerer, supra note 72, at 54.
It was not only the radicals who opposed standing armies: opposition came from the right as well as the left.\textsuperscript{82} The influential tract \textit{The Peaceable Militia}, which expressed "criticism of the army from the right,"\textsuperscript{83} pulled together and popularized all of the arguments discussed earlier against a standing army and in favor of a militia-based defense.\textsuperscript{84} During this same period, James Harrington, who later was to exercise such an important influence on the thinking of the American founding generation, wrote \textit{The Commonwealth of Oceana},\textsuperscript{85} his utopian vision of an English commonwealth. In \textit{Oceana}, he paid careful attention to issues of military power and argued for an armed citizenry of landed yeoman. It was his view that with the demise of feudalism, either the now-independent freeholders of the nation would take up arms on their own behalf so as to constitute a community of armed citizens, or military power would lodge in a standing army beholden to the king. He thought that if the latter occurred, this would be fatal to the liberties of the nation.\textsuperscript{86}

After the restoration of the monarchy in 1660, as Parliament struggled to reach an acceptable accommodation with the crown, concern about the dangers of a standing army persisted.\textsuperscript{87} The 1689 Bill of Rights, in which Parliament set out the terms on which the monarchy would be restored under William and Mary, specifically included a prohibition against "raising or keeping a standing army within the kingdom in time of peace" except with the consent of Parliament.\textsuperscript{88}

Although many in Parliament were satisfied once the Bill of Rights recognized that the crown could not raise troops without parliamentary consent, a continuing radical opposition took the

\begin{footnotes}
\item[82.] \textit{Id.} at 55 ("Gentry in and out of Parliament who, on other issues, would have liked to see the Levellers 'levelled to the very ground' shared their objections to a standing military power . . . .").
\item[83.] \textit{Id.}
\item[84.] \textit{Id.} at 56 (quoting ANONYMOUS, \textit{The Peaceable Militia} (1648)).
\item[87.] See H. Neville, \textit{Plato Redivivus} (1680), reprinted in \textit{Two Republican English Tracts} (C. Robbins ed. 1976). This book, which later became well-known to the American Revolutionary leadership, again expressed abhorrence of a standing army and promoted reliance on a citizen militia. See L. Schwoerer, \textit{supra} note 72, at 133-34.
\item[88.] Bill of Rights, 1689, reprinted in \textit{1 Roots}, \textit{supra} note 75, at 41, 43.
\end{footnotes}
position that even parliamentary establishment of a standing peacetime army was dangerous and unconstitutional. This group believed that national standing armies had no place in society. In the 1690s, King William’s attempt to raise a sizeable army to fight abroad provoked a new outpouring of anti-army pamphleteering from such members of this opposition group as John Trenchard, Algernon Sidney and Robert Molesworth. Trenchard’s 1697 pamphlet, An Argument, Shewing That a Standing Army Is Inconsistent with a Free Government, and Absolutely Destructive to the Constitution of the English Monarchy, was widely circulated and read in America as well as in England. These writers were critical sources of eighteenth century American views.

D. Colonial Experience

For the founding generation, concrete experience amply reinforced the ideological opposition to standing armies which had been transmitted across the Atlantic from the English opposition tradition. From their earliest years, the English colonies had been embroiled in the local reflections of European wars, including King William’s War (1688-97), Queen Anne’s War (1701-14), King George’s War (1740-48), and the French and Indian War (1756-63). Although some in the colonies supported these wars and grew rich from the commerce associated with them, others abhorred them as unwanted extensions of Old World quarrels onto American soil, occasions for increased militarism, impressment of reluctant colonial soldiers and ever-increasing taxes levied to support the British war effort.

The British plan after the French and Indian War to maintain

89. As one member of the House of Commons put it: [T]he raising or keeping up a Standing Army within the kingdom, in time of peace... is inconsistent with our constitution; for though a law agreed to by Kings, Lords, and Commons, cannot be said to be against law, yet it may be, and may properly be said to be, inconsistent with our constitution.


90. B. Bailyn, supra note 72, at 62, 84-85.


a ten thousand man standing army in the colonies aroused particular opposition. Colonial hatred of the British regulars only grew more intense in the eighteenth century, when greater numbers of British military officers and troops were headquartered in the colonies. As is well known, the British red coats headquartered in Boston after 1768 provoked deep resentment. To the revolutionaries, the Boston Massacre and the declarations of martial law in Boston and Virginia in 1775 were the concrete manifestations of all the dangers of a standing army about which the English opposition writers had warned.\footnote{For a discussion of the conjunction between the presence of the British troops, the Boston Massacre, and the anti-standing army ideology in the minds of the revolutionary generation, see B. Bailyn, \textit{supra} note 72, at 112-16.} It was as if the English anti-army ideology, with which the revolutionary generation was so imbued, had come alive. When Samuel Adams attacked the British military presence in a series of letters in the \textit{Boston Gazette}, he used language drawn directly from this tradition:

> It is a very improbable supposition that any people can long remain free, with a strong military power in the very heart of their country. . . . Even where there is a necessity of the military power, within the land, which by the way but rarely happens, a wise and prudent people will always have a watchful and a jealous eye over it; for the maxims and rules of the army, are essentially different from the genius of a free people, and the laws of a free government.\footnote{S. Adams, \textit{Article Signed "Vindex,"} in \textit{1 The Writings of Samuel Adams} 264-65 (H. Cushing ed. 1904).}

Just as concrete experience confirmed the colonials' ideological pre-dispositions against standing armies, so too did their experience underscore the value of that preferred alternative, the citizen militia. The revolutionary generation enthusiastically adopted the militia as their model for structuring the national defense. The image of the citizen-soldier drilling on the town common became central to the Americans' view of themselves as a special people of special virtues, inventing a new world free from the corruption and decadence of the old.\footnote{As Thomas Paine put it, in \textit{Common Sense}, "Every spot of the old world is overrun with oppression" and "[w]e have it in our power to begin the world over again." T. Paine, \textit{Common Sense}, in \textit{1 The Complete Writings of Thomas Paine} 3, 30, 45 (P. Foner ed. 1945). For a general discussion of Paine's utopian republicanism, see Foner, \textit{Tom Paine's Republic: Radical Ideology and Social Change}, in \textit{The American Revolution: Explorations in the History of American Radicalism} 187-232 (A. Young ed. 1976). Foner links Paine's ideas to the social...} As John
Adams told his audiences in Europe in the 1780s, it was “[t]he Towns, Militia, Schools and Churches” which were “the source of ‘the Virtues and talents of the People.’”\(^{97}\) To the American revolutionaries, it was as if Harrington’s utopian Oceana could at last be born on their virgin soil—a republic of free citizens, harvesting by the plow and protected by their own swords.

It was not just the imperialist British army which the revolutionary generation hated, but the very idea of a professional army itself.\(^{98}\) The revolutionaries did not want to leave protection against such a dreaded “standing army” to chance; they explicitly incorporated their distaste for military establishments and their deep attachment to their local militia into their state constitutions. The original constitutions of eight of the states—Delaware, Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, Vermont and Virginia—contained language expressly endorsing the militia as the proper organ of national defense and disapproving standing armies.\(^{99}\)

The War for Independence, however, drew the revolutionaries into a difficult conflict. The militia alone, however revered, could not win the war: “[A] standing army—no matter how suspect and unwelcome—was necessary.”\(^{100}\) After the war, what lesser and political changes occurring in Philadelphia during the pre-revolutionary period, noting that the institution of the militia played a critical role in these changes as a “school of political democracy.” Id. at 196.

\(^{97}\) R. Kohn, supra note 91, at 8 (quoting III Diary and Autobiography of John Adams 195 (L.H. Butterfield ed. 1961)).

\(^{98}\) See C. Royster, A Revolutionary People at War 36 (1979) (“The revolutionaries felt a strong distaste for an army in repose, an army as an institution, an army as an organ of the state.”).

\(^{99}\) The language of Virginia’s constitution, the earliest, is typical:

That a well-regulated Militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State; that Standing Armies, in time of peace, should be avoided as dangerous to liberty; and that, in all cases, the military should be under strict sub-ordination to, and governed by, the civil power.

Virginia Declaration of Rights (1776), reprinted in 2 The Roots of the Bill of Rights 234, 235 (B. Schwartz ed. 1980) [hereinafter 2 Roots]. For the provisions of the other state constitutions, see id. at 266 (Pennsylvania), 278 (Delaware), 282 (Maryland), 287 (North Carolina), 324 (Vermont), 342-43 (Massachusetts) and 378 (New Hampshire).

\(^{100}\) C. Royster, supra note 98, at 37. Royster’s argument, developed with greater subtlety than I can do justice to here, and with an illuminating wealth of concrete detail, suggests that the experience of fighting the Revolutionary War led to an internal ambivalence within many Americans between their ideological distrust of professional armies and their reluctant admiration of the accomplishments of the Continental Army. He suggests that this same experience also led to an external split between those who came away from the War convinced of the importance of professional military institutions and eager to strengthen them, and those who wanted to return as quickly as possible to a demilitarized
son should the newly independent colonies draw from this unwelcome military fact? For many, perhaps the majority, the right answer was to view the military needs of the war as a temporary aberration, to demobilize the army as quickly as possible and return to reliance on the militia, to put wartime behind them and move on to civilian pursuits. But others, among them former officers in the Continental Army, took away a different lesson. They had come to believe that a permanent professional national military force was vital. Conflict between these two viewpoints would continue to flare through the drafting of the constitution, the ratification debates, and beyond.

E. The Military in the New Nation

This country's first governance scheme, the Articles of Confederation, put the power of national defense (except for cases of actual or imminent invasion of the states) into the hands of the confederation Congress. A complicated mechanism, however, which carefully protected state control, limited Congress's power to raise land forces. The states were explicitly prohibited from raising troops in time of peace without the consent of Congress, but they were commanded to maintain effective state militia at all times: "Every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred...." The same preference for a militia-based national defense and distrust of standing armies which had been expressed in the original state constitutions was now incorporated into the national constitutional structure.

These somewhat ambiguous provisions in the Articles led to a vociferous debate in the confederation Congress about whether Congress had any constitutional power at all to raise troops in civilian life. For a discussion of this split, and its impact on the constitutional convention and during the ratification debates, see infra notes 107-201 and accompanying text.

101. See Articles of Confederation art. IX, reprinted in M. Jensen, The Articles of Confederation 268-69 (1970). Article IX provides that the Congress may, with the assent of at least nine states, "agree upon" a number of land forces to be raised, and then requisition each state for its quota, but it is the state legislatures themselves which are to "appoint the regimental officers, raise the men and cloath, arm and equip them in a soldier like manner, at the expense of the united states." Once these troops assemble at the place and time decided on by the Congress, then it shall have the sole power to make rules for their governance, and to direct their operations.

102. Articles of Confederation art. VI, reprinted in M. Jensen, supra note 101, at 265.
In this period, public anti-army sentiment was running very high. In addition to the ideological tradition and antagonistic sentiments toward the British army described above, public opposition had been fueled by alarm over events occurring at the end of the Revolutionary War. Former Continental Army officers created the Society of the Cincinnati, an elite and semi-secret organization which many feared might be the source of an aristocratic coup which would lead to the installation of a ruling oligarchy in place of the deposed British monarchy. For many, such behavior by former army officers was just another illustration of the dangers posed by professional military establishments and the need to keep them carefully confined.

Now that the war was finally over, the general population wanted a quick demobilization. Any talk of creating new peacetime military establishments provoked strong opposition. In New England, sentiment ran particularly high. The Massachusetts legislature, for example, passed a resolution instructing its congressional delegation to “oppose, and by all ways and means ... prevent the raising of a standing army of any number, on any pretence what ever, in time of peace.” Those who, like Alexander Hamilton, were eager to build a strong national army had to hold off on their efforts in the face of this overwhelming public opposition.

F. Debates About the Military at the Constitutional Convention

The delegates who assembled for the constitutional convention in Philadelphia in 1787 were familiar with these arguments surrounding the structure of the national defense. Indeed, many had been active participants in the debates of the confederation period. As a group, these men generally favored strengthening the central government. They differed, however, in their opin-
ions of how the government should provide for its military, or self-defense needs. Some were staunchly anti-army and pro-militia, while others sought a strong national military establishment as part of a strong central government.

Those who opposed giving the central government expansive powers to create a permanent national military and who instead supported a healthy militia system, did so for the reasons already described. Those delegates in the opposite camp, who supported a strong professional national military, had several reasons. Delegates who had been Continental Army officers and staff remembered how hard it had been to raise, field, and provision the army under the suspicious eye of the Continental Congress. They were eager to increase the ability of military men to generate the resources they believed necessary to field an effective military force. There was also great concern on the part of many delegates about the danger of internal rebellion in the new nation, and the need for effective military power to suppress it.

Shays' Rebellion in western Massachusetts in the summer of 1786 had made a strong impression on many who attended the Convention. Secretary of War Henry Knox, for example, "painted lurid pictures of anarchy and imminent civil war" after travelling in his home state of Massachusetts. This description prompted Washington and others to alarmed concern about the need for a national military force to combat such popular upheaval. Remembering the bitter and unresolved debates about whether Congress had the power under the Articles of Confederation to raise troops in peacetime, these delegates wanted the military powers of the new national government to be clear.

The key question the delegates had to resolve in structuring

107. For a discussion of the reasons underlying opposition to a permanent national army, see supra notes 72-74, 93-95 and accompanying text.
108. George Washington, Henry Knox, Alexander Hamilton, Timothy Pickering, Henry Lee and Charles C. Pinckney were among the delegates who had been Continental Army officers. The United States Army continues to this day to take "special pride" in these "Soldier-Statesmen" who were among the nation's founders, noting that they "had become convinced by their wartime experiences in the Army that a strong central government was essential." U.S. ARMY CENTER OF MILITARY HISTORY, THE UNITED STATES ARMY BICENTENNIAL SERIES: THE RATIFICATION OF THE CONSTITUTION (1989).
109. See C. ROYSTER, supra note 98, at 66; L. SMITH, supra note 92, at 22.
110. R. KOHN, supra note 91, at 74.
111. Id. For a general discussion on Shays' Rebellion and its powerful impact on the thinking of convention delegates, see SHAYS' REBELLION: SELECTED ESSAYS (M. Kaufman ed. 1987); L. SMITH, supra note 92, at 17-18; A. SOFAER, supra note 74, at 18-25; H. ZINN, supra note 93, at 90-95.
the country's military forces was whether to retain the decentralized state militia system as the heart of the national defense or to authorize and encourage the creation of a professional military establishment at the national level.\textsuperscript{112} Disagreements over this issue ultimately revealed the fault line which would split the federalist delegates from those who would join the anti-federalist opposition and plunge the country into the turbulent ratification debate.

The issue of Congress's power to raise troops was in contention from the beginning of the convention. In his opening address to the delegates on the first day, Edmund Randolph identified the lack of a national troop-raising power as one of the specific "defects" of the Articles of Confederation.\textsuperscript{113} Nonetheless, his "Virginia Plan" did not specify any particular troop-raising power. It apparently assumed one, however, for it included a clause giving the national legislature the power "to call forth the force of the Union [against] any member of the Union failing to fulfill its duty under the articles thereof."\textsuperscript{114}

The alternative plans by South Carolina (the Pinckney Plan) and New Jersey do not appear to have contained any particular innovations in this area.\textsuperscript{115} But Alexander Hamilton's strongly nationalistic plan clearly stated that total control over the military should be transferred from the states to the national government.

\textsuperscript{112} A separate, but importantly related question, was whether the power over war and peace—agreed by all to be a national power—should be controlled by the legislative or the executive branch of the central government. Although close attention to this topic is beyond the scope of this article, it is instructive that those like Elbridge Gerry, who were most suspicious of professional military establishments, were also most adamant that Congress, not the executive branch, must hold the war power. Gerry's response to Pierce Butler's suggestion that the President should have the power to declare war is famous: he "never expected to hear in a republic a motion to empower the Executive alone to declare war." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318 (M. Farrand rev. ed. 1966) [hereinafter 2 RECORDS]. The proper allocation of this power between the legislative and executive branches has continued to be the subject of much political debate throughout American history, as well as much scholarly commentary. See, e.g., T. Eagleton, War and Presidential Power (1974); C. Rossiter & R. Longaker, The Supreme Court and the Commander in Chief (expanded ed. 1976); King & Leavens, Curbing the Dog of War: The War Powers Resolution, 18 HARV. INT'L L.J. 55 (1977); Koh, supra note 74; Lofgren, War-Making Under the Constitution: The Original Understanding, 81 YALE L.J. 672 (1972).

\textsuperscript{113} I THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 19 (M. Farrand rev. ed. 1966) [hereinafter 1 RECORDS].

\textsuperscript{114} Id. at 21.

\textsuperscript{115} For the text of the Pinckney Plan, see 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 595 (M. Farrand rev. ed. 1966) [hereinafter 3 RECORDS]. For the text of the New Jersey Plan, see id. at 611.
Article XI of his proposal read: "No State to have any forces land or Naval; and the Militia of all the States to be under the sole and exclusive direction of the United States, the officers of which to be appointed and commissioned by them." 116

After debating these various proposals, the delegates directed the Committee of Detail to draw up a draft plan incorporating their views. That draft, in the provisions relevant to this discussion, gave Congress the powers “[t]o raise armies; [t]o build and equip fleets; [and] [t]o call forth the aid of the militia, in order to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasions.” 117 When the “raise armies” clause came up for discussion on August 18, Nathaniel Gorham of Massachusetts moved to add the words “and support” after “raise.” Thus amended, the clause was agreed to.118 Elbridge Gerry, who had earlier led opposition in the Confederation Congress to the creation of a peacetime army, spoke out against the amendment. As Madison’s notes report:

Mr. Gerry took notice that there was [no] check here agst. standing armies in time of peace. The existing Congs. is so constructed that it cannot of itself maintain an army. This wd. not be the case under the new system. The people were jealous on this head, and great opposition to the plan would spring from such an omission. . . . He thought an army dangerous in time of peace & could never consent to a power to keep up an indefinite number. He proposed that there shall not be kept up in time of peace more than — thousand troops. His idea was that the blank should be filled with two or three thousand. 119

Gerry and Luther Martin later made a formal motion to limit the number of peacetime troops: “provided that in time of peace the army shall not consist of more than — thousand men.” 120 Madison’s notes indicate that several delegates spoke against this motion, feeling it would cramp necessary peacetime preparations for war. Hugh Williamson of North Carolina reminded Martin and Gerry that George Mason’s suggestion of a time limitation on

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116. 1 RECORDS, supra note 113, at 283.
117. 2 RECORDS, supra note 112, at 182.
118. Id. at 329-33.
119. Id.
120. Id. at 330.
The appropriation of revenue for raising troops would be "the best guard" against abuse. The motion was voted down.

The delegates then moved on to discuss the militia. George Mason had suggested that a federal power to regulate the militia should be added to the list of legislative powers. Mason later made a formal motion to give the central government the power "to make laws for the regulation and discipline of the Militia." General Pinckney, citing unfortunate experiences with different state militias during the war, agreed, saying: "Uniformity was essential. The States would never keep up a proper discipline of their militia." Oliver Ellsworth from Connecticut thought Mason's motion "went too far." Although Ellsworth accepted federal control over the militia when it was in the actual service of the United States, or when the states failed to provide regulations themselves, he believed that "[t]he whole authority over the Militia ought by no means to be taken away from the States." John Dickinson of Delaware agreed, saying "the States never would nor ought to give up all authority over the Militia." Mason, perhaps sensing resistance to his original motion, suggested a compromise—the so-called "select militia." Under this compromise, a small portion (he suggested one-tenth) of each state's militia would be put under federal control each year, thereby gradually extending federal discipline to the entire body.

General Pinckney and Madison, however, wanted to stick with Mason's original motion. Madison argued that just as the power of the purse was being entrusted to the central govern-
ment under this constitution, so too should be the power of the sword. General Pinckney went on to reveal that in any event the militia was not his primary concern: "[I have] but a scanty faith in Militia. There must be [also] a real military force—This alone can [effectually answer the purpose]. The United States had been making an experiment without it, and we see the consequence in their rapid approaches toward anarchy."\(^{131}\)

Roger Sherman of Connecticut took issue with Madison's attempt to draw a parallel between the powers of the purse and of the sword. The states, he said, had not given up their power of taxation to the federal government, but retained a concurrent power to raise money for their own use.\(^{152}\) Similarly, he doubted that the states would agree to give up their power of the sword. Gerry agreed, saying that if such a surrender were incorporated into the Constitution, the document would "have as black a mark as was set on Cain."\(^{133}\) Mason's original motion, as well as an alternative version allowing the states to retain control over "such part of the Militia as might be required . . . for their own use," were committed to the Committee of Eleven.\(^{134}\)

Despite the earlier defeat of the Martin-Gerry amendment limiting troop size, the subject of placing a constitutional limit on the government's power to maintain a standing army reappeared. On August 20, the delegates referred three new proposals concerning military establishments to the Committee of Detail: first, "[n]o troops shall be kept up in time of peace, but by consent of the Legislature;" second, "[t]he military shall always be subordinate to the Civil power, and no grants of money shall be made by the Legislature for supporting military Land forces, for more than one year at a time;" and third, a prohibition against the quartering of soldiers in private homes in peacetime without the consent of the owners.\(^{135}\)

Meanwhile, the Committee of Eleven had prepared its own suggested clause addressing federal power over the militia: "To make laws for organizing, arming & disciplining the Militia, and for governing such parts of them as may be employed in the service of the U.S. reserving to the States respectively, the appointment of the officers, and authority of training the militia

\(^{131}\) Id. at 332. According to a footnote in Madison's notes, Pinckney was referring to Shays' Rebellion. Id.

\(^{132}\) Id.

\(^{133}\) Id. at 332.

\(^{134}\) Id. at 333.

\(^{135}\) Id. at 341.
according to the discipline prescribed." The delegates discussed this clause on August 23, arguing back and forth about the advantages and disadvantages of centralizing control over the militia. Madison strongly supported a national approach: "The Discipline of the Militia is evidently a National concern, and ought to be provided for in the National Constitution." The first part of the proposed clause, up to the "reserving" language, was approved by the group.

Madison then suggested amending the next part to read "reserving to the States respectively, the appointment of the officers, under the rank of General officers." This prompted strong outcries from both Connecticut's Roger Sherman and Massachusetts's Gerry. Sherman said he "considered this as absolutely inadmissible. . . . If the people should be so far asleep as to allow the Most influential officers of the Militia to be appointed by the Genl. Government, every man of discernment would rouse them by sounding the alarm to them." And Gerry suggested with bitter irony:

Let us at once destroy the State Govts have an Executive for life or hereditary, and a proper Senate, and then there would be some consistency in giving full powers to the Genl Govt. . . . He warned the Convention agst pushing the experiment too far. Some people will support a plan of vigorous Government at every risk. Others of a more democratic cast will oppose it with equal determination. And a Civil war may be produced by the conflict.

Suddenly, on the seemingly minor point of the power to appoint general militia officers, the chasm between the federalists and the anti-federalists split open. To eighteenth-century eyes, there could be no better symbol of the people's loss of power to their government than the transfer of the power of the sword. In the tradition of the Leveller's Agreement of the People or Harrington's Commonwealth of Oceana, the dispersion of liberty throughout the society was embodied in the notion of an armed citizenry, a militia, rather than a centralized, professional army.

136. Id. at 384-85.
137. Id. at 387 (emphasis in original).
138. Id. at 387-88.
139. Id. at 388 (emphasis in original).
140. Id.
141. Id.
In this tradition, the local militia was both metaphor and actuality: metaphor for the self-governing community of citizens\textsuperscript{142} and actuality of the active practice of that citizenship to guard against the corruption of the central state.

Interestingly, Madison countered these fears about the undermining of the state militias not by a defense of centralization, but by invoking the even-greater fear of standing armies.\textsuperscript{143} Madison may have genuinely believed that only a strengthened national militia system could avoid the far-worse prospect of a national standing army. Earlier in the convention he had expressed his belief that without stronger national union, the states would fall into “incessant wars” like those in Europe, and raise standing armies that would “not long be safe companions to liberty.”\textsuperscript{144}

Other delegates, however, like General Pinckney and Hamilton, had already made it clear that they thought it was foolish to rely on the militia. They saw all militia issues as secondary; their true goal was, as Pinckney had already indicated, to establish a professional national military force.\textsuperscript{145} Governor Morris, an active participant in the convention and a strong nationalist, provided some evidence that many convention delegates shared this disdain for the militia. In a letter written many years after the convention, he stated:

> When, in framing the Constitution, we restricted so closely the power of government over our fellow citizens of the militia, it was not because we supposed there would ever be a Congress so mad as to attempt tyrannizing over the people or militia, by the militia. The danger we meant chiefly to provide against was, the haz-

\textsuperscript{142} Of course, it should not be forgotten that citizenship at the time was limited to property white males. Although considerable progress had been made in some states in democratizing the militia, nowhere did it include blacks, native Americans or women. For a discussion of the democratization of the militia, see H. APTHEKER, THE AMERICAN REVOLUTION 70, 85 (1960); Foner, \textit{supra} note 96, at 195-96. For a discussion of the exclusion of women from the military and its consequences for republican ideology, see J. ELSHTAIN, \textit{supra} note 72, at 70-71; Bloch, \textit{The Gendered Meanings of Virtue in Revolutionary America}, 13 SIGNS 37 (1987).

\textsuperscript{143} 2 RECORDS, \textit{supra} note 112, at 388. Madison declared: “[A]s the greatest danger to liberty is from large standing armies, it is best to prevent them by an effectual provision for a good Militia.” \textit{Id}.

\textsuperscript{144} 1 RECORDS, \textit{supra} note 113, at 464-65. For a discussion of Madison’s repetition of these arguments in support of ratification in \textit{The Federalist Papers}, see \textit{infra} notes 199-200 and accompanying text.

\textsuperscript{145} For a discussion of Hamilton’s and Pinckney’s views, see \textit{supra} notes 116 (Hamilton) & 151 (Pinckney) and accompanying text.
arding of the national safety by a reliance on that expensive and inefficient force. . . .

Those, who, during the Revolutionary storm, had confidential acquaintance with the conduct of affairs, knew well that to rely on militia was to lean on a broken reed.\textsuperscript{146}

Whether the reason was genuine concern for the local autonomy of the militia or a disguised attempt, as Morris later suggested, to sabotage that institution, the delegates voted down Madison’s motion to permit the central government to appoint general militia officers and left the power of appointing all militia officers explicitly to the states.\textsuperscript{147} The clause giving the states the authority to train the militia was also approved by the delegates.\textsuperscript{148} A final change relevant to limiting central control over the militia transpired when the clause making the President the Commander in Chief “of the Army and Navy,” which had originally also made him Commander in Chief “of the Militia of the several States,” was amended to add “when called into the actual service of the United States.”\textsuperscript{149}

On September 5, the Committee of Eleven brought forward its version of Mason’s proposal to put a time limit on appropriations for a standing army. The suggestion was made to add to the clause “to raise and support armies” the words “but no appropriation of money to that use shall be for a longer term than two years.”\textsuperscript{150} Once again, Elbridge Gerry rose in opposition. Why had the originally suggested limitation of one year been extended to two? The clause, he said, “implied there was to be a standing army which he inveighed against as dangerous to liberty, as unnecessary . . . and if necessary, some restriction on the number & duration ought to be provided.”\textsuperscript{151} Sherman agreed with Gerry that he would “like a reasonable restriction on the number and continuance of an army in time of peace.”\textsuperscript{152} Nonetheless, the clause was approved without modification.

Even at the very end of the process, when the final draft of the proposed Constitution was before the convention, the provi-

\textsuperscript{146} 3 RECORDS, supra note 115, at 420-21 (M. Farrand rev. ed. 1966).
\textsuperscript{147} 2 RECORDS, supra note 112, at 388.
\textsuperscript{148} Id.
\textsuperscript{149} Id. at 426-27.
\textsuperscript{150} Id. at 508.
\textsuperscript{151} Id. at 509.
\textsuperscript{152} Id.
sions concerning the military \textsuperscript{155} remained a source of concern for some delegates. George Mason, seconded this time by Edmund Randolph, tried once again to insert some language concerning the dangers of standing armies. Although saying he was "sensible that an absolute prohibition of standing armies in time of peace might be unsafe," he wished "to insert something pointing out and guarding against the danger of them." \textsuperscript{154} He moved to preface the clause concerning Congress's power over the militia with the words, "And that the liberties of the people may be better secured against the danger of standing armies in time of peace. . . ." \textsuperscript{155} James Madison spoke in favor of this motion: "[A]s armies in time of peace are allowed on all hands to be an evil, it is well to discountenance them by the Constitution, as far as will consist with the essential power of the Govt. on that head." \textsuperscript{156} His notes indicate, however, that several others opposed the motion. Gouvernor Morris stated that such language would set "a dishonorable mark of distinction on the military class of Citizens." \textsuperscript{157} The motion to add the language did not pass.

Martin, Gerry, Mason and Randolph all left the convention with their concerns about standing armies unallayed. Martin left

\begin{quote}
\textsuperscript{158} The relevant final provisions read:
\begin{itemize}
\item Art. I, Sect. 8
The Congress shall have Power . . .
\item To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
\item To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
\item To provide and maintain a Navy;
\item To make Rules for the Government and Regulation of the land and naval Forces;
\item To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
\item 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, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress . . . .
\item Art. II, Sect. 2
The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . .
\end{itemize}
\textit{Id.} at 655-56, 659.
\textsuperscript{154} 2 Records, supra note 112, at 616-17.
\textsuperscript{155} Id.
\textsuperscript{156} Id. at 617.
\textsuperscript{157} Id.
\end{quote}
Philadelphia early and became a leader of the anti-federalist opposition to ratification of the Constitution. In a key speech to the Maryland legislature in November, he identified the power to establish a national standing army as one critical defect in the plan:

By the eighth section of the first article, the Congress have also the power given them to raise and support armies, without any limitation as to numbers, and without any restriction in time of peace. Thus, Sir, this plan of government, instead of guarding against a standing army, that engine of arbitrary power, which has so often and so successfully been used for the subversion of freedom, has in its formation given it an express and constitutional sanction . . . .

. . . .

. . . If after having retained to the general government the great powers already granted, and among those, that of raising and keeping up regular troops without limitations, the power over the militia should be taken away from the States, and also given to the general government, it ought to be considered as the last coup de grace . . . .

Gerry, Mason and Randolph decided not to sign the proposed Constitution. Each mentioned the unrestrained power to raise standing armies as among their reasons for refusal. 159

G. The Ratification Debates

These concerns about a national military establishment became one important theme of the anti-federalist opposition to the Constitution. Because the anti-federalists were a diverse group, representing not a single political program or theory, but a whole host of sectional and individual points of view, it would be misleading to discuss their position as if it were a unitary one. Nonetheless, they shared a certain common ground. They represented "a somewhat inchoate, but compelling vision of politics that dif-

158. 3 RECORDS, supra note 115, at 207-09 (emphasis omitted).

159. See 2 RECORDS, supra note 112, at 633 (Gerry objects to power to "raise armies and money without limit"); id. at 563 (Randolph objects to "want of limitation to a standing army"); id. at 637, 640 (Mason objects to absence of declaration of rights, which should include, inter alia, provisions "against the danger of standing armies in time of peace").
fers critically from that of the Constitution."\(^{160}\) In this vision, anti-federalist fears about the dangers of a standing army and anti-federalist support for the state militia played a central role.

The anti-federalist vision, as various scholars have described it,\(^ {161}\) was localist, republican and committed to the maximum actual participation of the citizen in the governance of the community. Where federalists sought a larger, more powerful, more efficient, commercial nation, to be run by a national elite, anti-federalists believed in the virtues of local self-government, in the voice of the average citizen; a kind of town meeting view of politics in which all had their say and all retained their liberties. In the federalist view, a more powerful national military was a natural and necessary part of the next phase of American development.\(^ {162}\) The anti-federalists, in contrast, were more interested in creating the conditions for the citizens' pursuit of happiness at home than in making America an impressive player on the world stage.\(^ {163}\)

Distrust of a standing army and preference for a citizen militia were natural constituent parts of this anti-federalist vision.


\(^{161}\) See C. Kenyon, The Antifederalists (1985); Ratifying the Constitution (M. Gillespie & M. Lienesch eds. 1989); 1 The Complete Anti-Federalist 3-6 (H. Storing ed. 1981). Recent scholarship has attempted to redress the relative neglect of the anti-federalists in the past, emphasizing that understanding of anti-federalist thinking is crucial to a full understanding of the founding period. See Finkelman, Antifederalists: The Loyal Opposition and the American Constitution (Book Review), 70 Cornell L. Rev. 182, 183 (1984) ("Through Storing's volumes we see that, for our constitutional history, the arguments of the losers are just as important as those of the winners."); Onuf, supra note 72, at 368 ("[T]he idea that the founding properly embraces both the drafting of the Constitution and the debates over its adoption suggests that the Antifederalists played a much more positive role than is customarily allowed."); Symposium, Roads Not Taken: Undercurrents of Republican Thinking in Modern Constitutional Theory, 84 Nw. U. L. Rev. 1-249 (1989).

\(^{162}\) See Eubanks, New York: Federalism and the Political Economy of Union, in Ratifying the Constitution, supra note 161, at 303-04, 333 ("Having fought a successful revolution, they were now intent on building an empire.").

\(^{163}\) As one of the delegates put it in the opening days of the constitutional convention:

Our true situation appears to me to be this—a new extensive Country containing within itself the materials for forming a Government capable of extending to its citizens all the blessings of civil & religious liberty—capable of making them happy at home. This is the great end of Republican Establishments. We mistake the object of our government, if we hope or wish that it is to make us respectable abroad. Conquest or superiority among other powers is not or ought not ever to be the object of republican systems.

1 Records, supra note 113, at 402.
For all the same reasons articulated by the English anti-army opposition more than one hundred years earlier, the unrestrained national power to raise standing armies seemed inevitably dangerous to the anti-federalists. The very institution of a standing army was suspect: it trampled on liberty; it created potentially crushing national debt; it strengthened the executive at the expense of representative bodies; it centralized power instead of diffusing it. Unlike the militia, which embodied yeoman virtue, a standing army bred aristocracy and corruption.

Federalists accused anti-federalists of pandering to the popular dislike of the professional military without any genuine cause for alarm. They tried to dismiss the anti-federalist opposition to standing armies as mere rhetoric, claiming their opponents had no realistic grasp of national defense needs. Some contemporary scholars have expressed this same view. Although it may be true that anti-federalists played on the popular hatred of standing armies for its propaganda value, as no doubt the federalists also attempted to play on popular fears and emotions in their own campaign, this view does not do justice to the anti-federalist position.

The anti-federalists objected to the federalists' aggressive, empire-building approach to nationhood. They did not believe the federalists' claim that their only reason for wanting a standing army was to maintain a small number of troops for necessary guard duty at frontier garrisons or public arsenals. Instead, they believed that the federalist desire for a constitutionally unrestrained national troop-raising power was driven by a set of broader goals. When the federalist James Wilson stressed the need for troops in order to give the new nation an "appearance of

164. For a discussion of the reasons for the English opposition to standing armies, see supra notes 75-91 and accompanying text.
165. See, e.g., Essays of Brutus, in 2 The Complete Anti-Federalist 406 (H. Storing ed. 1981) [hereinafter 2 Anti-Federalist] (Brutus writes that federalists have "ridiculed the objection [to standing armies], as though it originated in the distempered brain of its opponents"); Essays by Cincinnatus, in 6 The Complete Anti-Federalist 16-17 (H. Storing ed. 1981) [hereinafter 6 Anti-Federalist] (Cincinnatus counters federalist James Wilson's charge that concern about standing army is mere "popular declamation"); Essays by a [Maryland] Farmer, in 5 The Complete Anti-Federalist 16 [hereinafter 5 Anti-Federalist] (Maryland Farmer refutes federalist claim that anti-federalist concern about standing army is just "a bugbear, an hobgoblin to frighten children").
166. See, e.g., C. Kenyon, supra note 161, at 8, 87 (noting anti-federalists' ideological fixation on "bête noire" of a standing army); L. Schwoerer, supra note 72, at 181, 189 (anti-army writers were "parochial" and "ill-informed about international affairs").
167. See, e.g., Essays of Brutus, supra note 165, at 415 (Brutus states that anti-
strength” and “dignity,” and when Alexander Hamilton wrote about sufficient military power to make the country “respectable” among European nations and not “despicable by its weakness,” the anti-federalists saw these words as signs of the larger federalist design.

An anti-federalist writing under the name of “Cincinnatus,” for example, pointed out that Wilson gave as one of the reasons for the necessity of a standing peacetime army the need to ensure that the country would be in a position to declare war on others. Calling this a “most warlike paragraph,” Cincinnatus wondered whether invasions of “Great-Britain, France, Spain, Portugal, or all together” are contemplated under the new Constitution. He warned his readers to understand “that one blessing of the constitution will be, the taxing [of] them to support fleets and armies to conquer other nations, against whom the ambition of their new rulers may declare war.” Referring to Wilson’s statement that a national military force is necessary for the “dignity and safety” of the nation, Cincinnatus ironically commented that safety can be assured by the militia, “[b]ut for the dignity of the country, that is for the ambition of its rulers, armies I confess are necessary; and not less in number than other ambitious rulers maintain.”

Similarly, a “Son of Liberty” listed “[a] standing army, that bane to freedom” as the first in a series of “curses” that the new Constitution would bring about. He suggested that, under the new Constitution, militia-members will be dragged from state to state, under federal control, to quell slave revolts or “subdue their fellow citizens.” Moreover, he stated, the country will be “perpetually involved in the wars of Europe, to gratify the ambitious views of their ambitious rulers, by which the country will be continually drained of its men and money.”

federalist opposition to military establishments not triggered by plans merely to raise small numbers of troops for guard duty).

171. Id. at 16-17.
172. Id. at 17.
173. Id.
174. Objections by a Son of Liberty, in 6 Anti-Federalist, supra note 165, at 34 (emphasis in original).
175. Id. at 35 (emphasis in original).
176. Id.
A "New Hampshire Farmer," again invoking the dangers of standing armies in time of peace, argued that war should be defensive only: "War is justifiable on no other principle than self-defence, it is at best a curse to any people... it ought ever to be avoided if possible; nothing but self-defence can justify it."\(^{177}\) He went on to argue that the militia would be sufficient for defensive purposes alone, suggesting that the federalist desire for standing armies was linked to a more aggressive national policy.\(^{178}\)

John DeWitt, of Massachusetts, saw no need for standing armies unless the country was invaded.\(^{179}\) A "Columbian Patriot," believed to be Mercy Otis Warren, foresaw that the country's new military power would not be for genuine national defense, but to "maintain... the splendour of the most useless part of the community."\(^{180}\) In their view of history, inherited from Trenchard, Sidney, Molesworth, and the other English opposition writers, armies did not keep nations free; rather, citizens maintained their liberty in republics defended by militias.\(^{181}\) They believed that liberty would be lost with the drive toward empire and the rise of standing armies.\(^{182}\)

In these arguments against standing armies, there was no sharp line between the kinds of concerns that today we would label political and those that we would call civil libertarian, i.e., between those focused on collective liberty and those focused on individual rights.\(^{183}\) The anti-federalists naturally linked these categories, since they believed that the purpose of a properly


\(^{178}\) See id. at 207 ("Organize your militia, arm them well, and under Providence they will be a sufficient security.").

\(^{179}\) Essays of John DeWitt, in 4 Anti-Federalist, supra note 177, at 39.

\(^{180}\) Observations on the New Constitution, and on the Federal and State Conventions by a Columbian Patriot, in 4 Anti-Federalist, supra note 177, at 277.


\(^{182}\) See Essays of Brutus, supra note 165, at 413; Essays of John DeWitt, supra note 177 at 37; Essays by a [Maryland] Farmer, supra note 165, at 22-25.

\(^{183}\) See, e.g., The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents [hereinafter Pennsylvania Address], in 3 Anti-Federalist, supra note 181, at 164. In the address, the anti-federalist delegates to the Pennsylvania ratifying convention wrote that a standing army and the federal control of the militia would lead to "the destruction of all liberty, both public and private; whether of a personal, civil or religious nature." Id. at 164 (emphasis added). This report combines discussion of both the political effects of a centralized military and the impact on individuals. See Michelman, La...
structured society was to sustain individual liberty, while the purpose of individual liberty was to be able to participate fully and freely in community life.

The anti-federalists worried about the direct impact on the individual of a shift from a decentralized militia system to a centralized national military, as well as about its destructive political effects on society as a whole. They objected, for example, to the prospect of individuals being sent out of state to forcibly subdue rebellions which in conscience they might not support.184 They were disturbed by the absence of any protection for conscientious objectors, concerned that individuals would be forced to serve in a national army despite their religious beliefs.185 They feared the subjection of members of the standing army and of a nationally-controlled militia to military regimes of law and discipline.186 In the military, martial law, which they despised, replaced the common law; the court-martial replaced the jury trial; and rigid hierarchy and discipline replaced equality and respect among men. The political dangers of institutionalizing reliance on military establishments were mirrored by the harm to individual citizens.

At its core, the anti-federalists viewed the federalist insistence on strengthened national military power as a sign that government by coercion was to be substituted for government by respect. The federalists, as they saw it, had a bellicose view of the world and their fellow citizens: they believed that one must anticipate frequent wars with other nations and be prepared, on the domestic front, to crush rebellion and anarchy by force. Decrying this as the triumph of force over reason and affection,187 the anti-federalists rejected this world view. They hoped for an America that would live at peace with other nations, and for a government at home that would command obedience by respect rather than

184. See The Letters of Centinel, in 2 Anti-Federalist, supra note 165, at 159; Objections by a Son of Liberty, supra note 174, at 35; Pennsylvania Address, supra note 183, at 164.

185. See Address of the Albany Antifederal Committee, in 6 Anti-Federalist, supra note 165, at 122, 123; Essays of an Old Whig, in 3 Anti-Federalist, supra note 181, at 36; Letters of Centinel, supra note 184, at 159; Pennsylvania Address, supra note 183, at 164.

186. See Essays of Brutus, supra note 165, at 407; Essays by the Impartial Examiner, in 5 Anti-Federalist, supra note 165, at 172, 181; Letters of Centinel, supra note 184, at 159.

187. See Essays of Brutus, supra note 165, at 370-71; Essays of John DeWitt, supra note 179, at 39-40; Letters of Cato, in 2 Anti-Federalist, supra note 165, at 111; Observations Leading to a Fair Examination of the System of Government Proposed by the Late Convention, in 2 Anti-Federalist, supra note 165, at 231-34.
by fear. They chided the federalists for having given up on these aspirations. As expressed by the anti-federalist John DeWitt:

If the people are not in general disposed to execute the powers of government, it is time to suspect there is something wrong in that government, and rather than employ a standing army, they had better have another; for, in my humble opinion, it is yet much too early to set it down for a fact, that mankind cannot be governed, but by force. 188

The popular appeal of these arguments can be gauged by the considerable effort which the authors of the Federalist Papers devoted to responding to this anti-federalist critique. "Publius," the pseudonymous author of the influential essays, directed much attention to proving the need for a stronger national military, both to deal with military threat from abroad 189 and to stave off dissen

sion and deal with "domestic factions and convulsions" at home. 190 Yet while the two principal authors of these essays, Hamilton and Madison, shared the conclusion that the national military power authorized by the new Constitution was both necessary and desirable, their respective contributions on this subject differ considerably in tone.

Hamilton, who would make support of a sizable national army a central theme of his political career, 191 premised his position on the bellicose view of human nature disputed by the anti-federalists. In The Federalist No. 34, Hamilton expressed his belief that "the fiery and destructive passions of war reign in the human breast with much more powerful sway than the mild and beneficent sentiments of peace." 192 Thus, he reasoned, the government must have military powers "without limitation." 193 Reading Hamilton's lengthy defense of the military provisions of the Constitution, 194 one can sense his eagerness to dispense with the foolish objections of those who are, in the words of his colleague John

189. See, e.g., The Federalist Nos. 3-4 (J. Jay), 41 (J. Madison).
191. For the story of Hamilton's role in the creation of the national military establishment, see generally R. Kohn, supra note 91; F. McDonald, Alexander Hamilton (1979).
193. Id. at 214.
194. See The Federalist Nos. 6, 8, 11, 22-26, 28-30, 34, and 69 (A. Hamilton).
Jay, "seduced by a too great fondness for peace." 195 Despite Hamilton's own impatience with the anti-army position, however, he obviously recognized its popular strength, and strove to reassure his readers. He claimed that even though the proposed Constitution contained no explicit limitations on the power to raise troops, no large army would be created. The militia would remain the "natural defence for a free country." 196 Yet, even as he tried to be reassuring, his true opinions surfaced. He warned against being "duplicates" of the suggestion that a militia could defend the country, 197 or taken in by "the novel and absurd experiment in politics, of tying up the hands of government from offensive war." 198 His polemical contributions, despite their attempts to reassure, actually appear to support the anti-federalist view that the federalists wanted a sizable standing army for potential military adventure abroad and repression of dissent at home.

Madison, on the other hand, appeared to agree with the anti-federalists that there were serious dangers connected with standing armies. Indeed, he identified these dangers as a reason for supporting the military provisions of the Constitution. He claimed that the anti-federalists had gotten it wrong, that stronger national unity would actually decrease the likelihood of the existence of standing armies. Stronger national unity, he argued, would "exhibit[] a more forbidding posture to foreign ambition" and prevent the possibility of military strife between the states. 199 Although Madison, like Hamilton, recognized the military ambitions of other nations, he seemed to share the anti-federalist commitment to a more pacific course for the United States. Agreeing that liberty is destroyed by "military establishments," he concluded:

A standing force therefore, is a dangerous, at the same time that it may be a necessary, provision. On the smallest scale it has its inconveniences. On an extensive scale its consequences may be fatal. On any scale, it is an object of laudable circumspection and precaution. A wise nation will combine all these considerations; and whilst it does not rashly preclude itself from any resource which may become essential to its safety, will exert all its

prudence in diminishing both the necessity and the danger of resorting to one which may be inauspicious to its liberties.\textsuperscript{200}

Madison’s conclusion attests to the fact that the ideological consensus about the dangers of a standing army was still widely shared in the 1780s. But Hamilton’s words reveal a glimpse of the breakdown of that consensus. This breakdown led the anti-federalists to seek protection against the growth of a national standing army, making it a central part of their demand for a bill of rights.

H. The Standing Army Controversy and the Bill of Rights

The most enduring product of the anti-federalist critique of the proposed constitution was the eventual adoption of the Bill of Rights. Prominent among the original proposals made for such a bill were clauses intended to set limits on the national power to raise and maintain a standing army. The first examples of such clauses were found in the report written by the minority, or anti-federalist, delegates to the Pennsylvania ratifying convention.\textsuperscript{201} Although the convention majority rejected these proposals, the minority report was printed in pamphlet and newspaper form and had a strong influence on later participants in the ratification debates. The report lucidly articulated the various anti-federalist objections to standing armies and to federal control of the militia.\textsuperscript{202} It also proposed two amendments that spoke directly to

\textsuperscript{200} Id.

\textsuperscript{201} For a readable general history of the Pennsylvania ratifying convention, see Graham, \textit{Pennsylvania Representation and the Meaning of Republicanism}, in \textit{Ratifying the Constitution}, supra note 162, at 52.

\textsuperscript{202} See \textit{Pennsylvania Address}, supra note 183, at 163-65. The Pennsylvania Minority’s Address covers the entire range of anti-federalist objections to the military provisions of the proposed Constitution. Claiming that the framers must have “been sensible that no dependence could be placed on the people for their support: but on the contrary, that the government must be executed by force,” the report castigates the provisions for “a permanent STANDING ARMY” and for “strict discipline and government” of the militia. It identifies many reasons why these provisions are dangerous: first, that a standing army may “overturn the public liberties” and permit “[a]n ambitious man” to seize “absolute power;” second, that “personal liberty” of individual militia members may be destroyed as they are subjected to fines, corporal punishment, and even the death sentence under martial law; third, that there is no protection for conscientious objectors; fourth, that the militia of one state may be marched to other states “to quell an insurrection occasioned by the most galling oppression . . . [and thus] be made the instruments of crushing the last efforts of expiring liberty;” and finally, that a government executed by force and a host of troops and officers will be “a very expensive and burthensome” one. \textit{Id.}
these concerns.

The first of these amendments, in language tracking that of the Pennsylvania state constitution, recognized the right of the people to bear arms and provided that "standing armies in the time of peace . . . ought not to be kept up." 203 The second insured that control over the militia would remain with the individual states. 204

Similarly proposals for amendments to the Constitution were made by a minority group at the Maryland convention and by the majority delegates of New Hampshire, New York, North Carolina, Rhode Island and Virginia. 205 Generally, these amendments contained language disapproving of standing armies and requiring

203. Id. at 151. The full text of this amendment stated the following:

7. That the people have a right to bear arms for the defence of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up: and that the military shall be kept under strict subordination to and be governed by the civil powers.

Id.

204. Id. at 152. The text of this amendment stated the following:

11. That the power of organizing, arming and disciplining the militia (the manner of disciplining the militia to be prescribed by Congress) remain with the individual states, and that Congress shall not have authority to call or march any of the militia out of their own state, without the consent of such state, and for such length of time only as such state shall agree.

Id.

205. The Maryland minority proposed amendments protecting against standing armies in peacetime by requiring a two-thirds vote of Congress to raise them, limiting federal control of the militia, and protecting individual rights of conscientious objectors and soldiers. Maryland Ratifying Convention, 1788, reprinted in 4 THE ROOTS OF THE BILL OF RIGHTS 734-35 (B. Schwartz ed. 1980) [hereinafter 4 Roots]. New Hampshire proposed amendments requiring a three-fourths vote of Congress to keep up a standing army in time of peace, and preventing quartering of soldiers in private homes without the owner's consent. New Hampshire Proposed Amendments, 1788, reprinted in 4 Roots, supra, at 761. Virginia proposed amendments recognizing the right to bear arms and the importance of the militia, and requiring a two-thirds vote of Congress to raise standing armies in peacetime, prohibiting the quartering of soldiers, and limiting enlistments to four years. Virginia Ratifying Convention, 1788, reprinted in 4 Roots, supra, at 842-43. New York adopted a declaration of rights which recognized the importance of the militia and the dangers of standing armies in peacetime and recommended amendments requiring a two-thirds vote to raise standing armies in peacetime, a two-thirds vote to declare war, and a six-week limit on how long the militia could be required to serve out of state. New York Proposed Amendments, 1788, reprinted in 4 Roots, supra, at 915-16, 918. North Carolina recommended both a declaration of rights and a set of amendments containing the same relevant language as that of Virginia. North Carolina Convention Debates, reprinted in 4 Roots, supra, at 968-69.
two-thirds or three-quarters votes by Congress before they could be raised. When such an amendment was proposed in the Virginia ratifying convention, Madison spoke in opposition to the requirement for a two-thirds vote:

I most devoutly wish that there may never be an occasion for having a single regiment. There can be no harm in declaring that standing armies, in time of peace, are dangerous to liberty, and ought to be avoided . . . . But when we come to say that the national security shall depend, not on a majority of the people of America, but that it may be frustrated by less than one third of the people of America, I ask if this be a safe or proper mode . . . .

Despite Madison's opposition, this proposal was endorsed by the convention.

Since it was Madison who sifted through all of the proposed amendments recommended by the state conventions in order to produce a set of proposed amendments to introduce to the first Congress on June 8, 1789, it is perhaps not surprising that this set did not include the provision requiring a super-majority vote to raise standing armies in peacetime, even though five states had suggested it. More striking is that the list of proposed amend-

206. Virginia Ratifying Convention, 1788, supra note 205, at 825.

207. Thomas Jefferson was also in favor of including protections against standing armies in a bill of rights. He wrote a letter to David Humphreys in 1789, endorsing the addition of such a bill to the Constitution:

There are instruments so dangerous to the rights of the nation, and which place them so totally at the mercy of their governors, that those governors, whether legislative or executive, should be restrained from keeping such instruments on foot but in well-defined cases. Such an instrument is a standing army.


209. It should be noted that the number of state conventions suggesting an amendment requiring a super-majority vote to raise armies was greater than: 1) the number seeking amendments guaranteeing the rights to assemble, to due process or against cruel and unusual punishment (four); 2) the number seeking guarantees of freedom of speech or rights of criminal procedure (three); and 3) the number seeking to bar double jeopardy (two). See 5 ROOTS, supra note 207, at 1167 (table showing which Bill of Rights guarantees contained in state amendments); Kates, Handgun Prohibition and the Original Meaning of the Second Amendment, 82 MICH. L. REV. 204, 222 (1983).
ments did not include any explicit reference at all to the concern about standing armies. Two of the suggested amendments, however, did arise from the standing army controversy: 1) "The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person" and 2) protection against the quartering of soldiers in private homes in time of peace.210

When the first, or "well regulated militia" amendment,211 came up for discussion in the House of Representatives, a motion was made to add language disapproving of standing armies in time of peace and requiring a two-thirds majority of Congress to raise them. But the motion was defeated.212 Later, when the same amendment was under consideration in the Senate, a motion was made yet again to incorporate language disapproving of, and placing a limitation on, the raising of standing armies in peacetime. This motion was also defeated by a narrow vote of nine to six.213

Thus, despite repeated efforts to include clauses in the Bill of Rights explicitly reflecting the widespread opposition to standing armies, such efforts failed. The imprint of that opposition was left, however, certainly but much more obscurely, in the second and third amendments.214

210. See House of Representatives Debates (May-June, 1789), supra note 208, at 1026-27.
211. Before being presented to Congress, this proposed amendment was altered in committee to read: "A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms." House of Representatives Debates (July-Aug., 1789), reprinted in 5 Roots, supra note 207, at 1107.
212. Id. at 1109-10.
213. See Senate Journal (Aug.-Sept., 1789), reprinted in 5 Roots, supra note 207, at 1149. Before the final version of the Bill of Rights left the Senate to be ratified by the states, there was one last attempt to add this anti-standing army language and limitation. Once again it did not succeed. Id. at 1152.
214. Recently, there has been renewed interest in these "neglected" amendments and their meaning, especially the second amendment. See, e.g., Levinson, supra note 86, at 640-42. For differing perspectives on the historiography of the second amendment, see generally Cress, An Armed Community: The Origins and Meaning of the Right to Bear Arms, 71 J. Am. Hist. 22 (1984); Hardy, supra note 83. Although there is considerable debate about the exact nature of these amendments, both historically and as they might be applied today, there is a general consensus that the fear of standing armies lay behind them. One author has noted:

Although there is undoubtedly room for argument based on the frequently conflicting sources of history, it is not unreasonable to believe
If the Constitution had included language expressly disapproving of standing peacetime armies, or a clause requiring that Congress vote by a two-thirds or three-quarters majority to raise one, we would have had a different constitutional jurisprudence and perhaps even different a national history. Yet although the concerns raised during the anti-standing army debate were incorporated obliquely rather than explicitly into the constitutional text, they still reflected a widespread and powerful point of view, one apparently shared by Madison and other federalists, as well as by the anti-federalists. This viewpoint, all too often entirely forgotten by contemporary interpreters, has the power to illuminate our contemporary ways of thinking about the relationship between military institutions and civil liberties. It reminds us that military institutions by their nature are inhospitable to civil liberties, and that in order to maximize liberty in society, the role of military institutions must be kept to a minimum and closely confined. As the next section will develop, the insights gleaned from this eighteenth century debate suggest that we would profit by rethinking the nature of the dilemma that confronted the Supreme Court in the Stanley cases.

IV. RETHINKING THE DEFERENCE THAT IS DUE

Viewing the Stanley cases through the lens of late eighteenth century history makes the anti-federalists seem eerily prescient. Although the federalists ridiculed anti-federalist fears that the proposed Constitution would permit the growth of a large standing peacetime army, such a military establishment has in fact developed. As the anti-federalists warned, this military establishment seriously drains the national economy and increases the power of the executive branch at the expense of the legislative branch.215

More directly to the point for the purposes of this Article, the existence of this large permanent military establishment brings many citizens under the regime of military rules and regulations. This expansive military influence is evident not only during periods of declared war and periods of fighting short of a fully-declared war, but during peacetime as well. These rules and

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215. For a discussion of the anti-federalists' fears of a standing army, see supra notes 167-88 and accompanying text.
regulations allow considerably less room for the exercise of individual civil rights and liberties than those governing civilian life. As the majority in the *Stanley* cases continually emphasized, and as the dissenters were forced to acknowledge, life in a military setting is naturally less free than civilian life.

This incompatibility between military institutions and individual liberty repeatedly confronted the Supreme Court in the *Stanley* cases. The majority’s response, as described above, was consistently to favor military institutions by assenting to whatever curtailment of liberty the military believed to be required. The dissent, on the other hand, hoped to somehow sidestep the conflict by adjusting military institutions to fit the Bill of Rights. But neither approach takes seriously enough the troubling reality of the dilemma itself.

The intractable nature of the conflict between the norms of military institutions and the values of civilian life was exactly what worried the participants in the eighteenth century “standing army” debate. To them, the problem was plain. Since professional military institutions by their very nature were inconsistent with civil liberties, it was dangerous to permit such institutions to grow. The answer, then, had to be structural. Only by carefully confining the existence of these institutions during peacetime could society hope to remain fully free.

Finding an appropriate level of deference for judicial review of claims against the military requires consideration of this broader, structural, perspective. What is the appropriate place for military institutions in a peacetime society? There can be no truly thoughtful resolution of the dilemma posed by the *Stanley* cases without considering this question.

**A. The Military as a “Separate Community”**

While members of the founding generation disagreed on many issues about the military, they did agree that professional military institutions significantly differed from the institutions of civilian society. These differences were a major source of their distrust of military institutions. They were also among their reasons for preferring a citizen militia to a professional army.

The founding generation was well aware that the military establishment, and the military camp, operated by different rules.

216. For example, recall Samuel Adams’s comment that “the maxims and rules of the army are essentially different from the genius of a free people, and the laws of a free government.” See S. Adams, supra note 95, at 264–65.
and under different principles than those of the civilian society they cherished. Although attempts were made, even under the pressure of fighting the Revolutionary War, to devise more relaxed and more "American" approaches to military discipline than the harsh European ones, it was generally understood that conditions in the military could never incorporate the liberty and self-governance of civilian life. In turn, the nature of daily military life would shape a certain type of men with a certain type of interests, not necessarily congruent with those of civilians. To rely on a militia was preferable since men would retain their connections to civilian life and continue to practice the habits of free citizens.

In this respect, the majority position in the *Stanley* cases seems to be on target about something which, however unpleasant, has long been recognized to be correct. As Justice Rehnquist writes, "the military is, by necessity, a specialized society separate from civilian society," and discipline, hierarchy, uniformity, and obedience are its hallmarks. Free speech, due process, and equal treatment are not the norms of basic training.

This is not to say that there need be total disregard for society's general commitment to free speech, free association, freedom of religion, and equal protection in order to maintain necessary military discipline and preparedness. Attempts can and should be made to incorporate those values as much as possible into the daily routines of military life. But it must be recognized that other aspects of the military mission are necessarily in conflict with those values, and this will especially be true in a time of genuine military crisis or attack. Judicial deference to the judgment of military officials about where to draw these lines is not surprising, because no judge wants to risk being the one who promulgated a rule which disabled the military forces from maintaining and mounting an effective defense.

Indeed, even the dissenters in the *Stanley* cases agree that under many circumstances the scope of freedom afforded members of the military under the Bill of Rights must be narrower than that accorded to civilians. Justice Blackmun, Brennan, Marshall and O'Connor all state this explicitly, and even Justice

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219. For the Justices' statements indicating their recognition that curtailed rights for those in the military may be appropriate, see *supra* notes 27 (Black-
Douglas recognized that "[t]he power to draft an army includes, of course, the power to curtail considerably the 'liberty' of the people who make it up." The idea that freedom in the military must inevitably be more restricted than freedom in civilian life seems central to our most basic understanding of the nature of military institutions. Thus, although attempts to incorporate more libertarian values into the conduct of military life should be applauded, one must recognize that this process can only go so far.

As a result, the proper structural balance between military institutions and civilian society becomes critical. The problem is not that military institutions, by their nature "different from the genius of a free people," are unfree. When properly confined and limited—in Madison's words, when they remain "an object of laudable circumspection and precaution"—military forces may be a necessary, if unhappy, element of national life in times of crisis. Under such crisis, liberty inevitably suffers; though this may be cause for regret, it need not be fatal if a corrective return to the values of civilian life follows quickly once the crisis is past.

The problem arises when military institutions grow and become a permanent and dominant feature of national peacetime life. The "standing army in time of peace" feared by eighteenth century Americans finds its contemporary analogue in the "national security state" created after World War II. Those in the anti-standing army tradition believed that a society pervaded by the needs of military institutions would inevitably begin to lose both the individual liberties of citizens directly subject to those institutions and broader social liberty as well.

The deference of the majority in the Stanley cases to the claimed needs of military discipline and effectiveness might be appropriate if they were confronting challenges to a temporary army in the field like the Continental Army, which even those in the eighteenth century reluctantly understood might be necessary to meet a passing crisis of national defense. But the Court failed to take notice that it was dealing with an entirely different kind of animal. The military being challenged in the Stanley cases is not one mustered in an emergency to meet urgent defense needs but...
ing a congressionally declared war. Instead, the institution being challenged is one which has become permanent, enormous, and entrenched: an interlocking set of military establishments that reach pervasively into every corner of national life. It is inappropriate to judge this "standing army" and a temporary army with the same yardstick of military necessity. In the face of this existing military institution, the unthinking deference of the majority is misplaced.

B. Containing the "Separate Community"

Judicial deference to the military in the face of constitutional claims for greater liberty, equity, and due process is just one facet of contemporary judicial accommodation to the need for national security. The political question doctrine,223 doctrines of tort immunity such as the Feres doctrine224 and the government contractor defense,225 judicial refusal to allow state governors to question National Guard deployment,226 and a potpourri of judicial decisions in the field of foreign affairs227 are all evidence of a widespread judicial reluctance to scrutinize policies and practices declared to be necessary for national defense. Nor is the judiciary by any means alone in this process of accommodation. Despite certain legislative counterthrusts in the opposite direction,228


225. See Boyle v. United Technologies Corp., 487 U.S. 500 (1988) (federal government contractors may be immunized from liability under state tort law for design defects in military equipment).


227. For a discussion of these cases, see Koh, supra note 74, at 1305-17.

228. For example, Congress passed the War Powers Resolution in the aftermath of the Vietnam War in order to strengthen its role in decision-making concerning deployment of American military forces. See Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541-1548 (1988)). The impact of the Resolution on actual practice to date in the cases of Grenada, the Persian Gulf, Libya, and Panama has been minimal, at best. In 1982, Congress
without the complicity of both the legislative and the executive branches, military institutions and military needs could never have come to define the national political agenda to such an extensive degree.

Reversing this course of events—containing the "separate community"—will be a complex and difficult undertaking involving a wide spectrum of steps. The dramatic changes created by the ending of the Cold War era and the shift of attention to the Persian Gulf require that we re-define the meaning of national security and rethink our military priorities. If this country moves in the direction of a prolonged military presence in a new and faraway part of the world, with an extensive military machine involving thousands of women and men, it is quite likely that the judiciary will again have to confront questions of the clash between military practices and constitutional norms. Individual soldiers far from home in an environment with very different norms and customs may find their freedom of action sharply limited. If they choose to challenge military restrictions on their freedom, the courts will again find themselves on the horns of a dilemma where saying "yes" to the military imperils valued civil liberties, but saying "yes" to civil liberties seems to conflict with the requirements of the military mission.

passed the Boland Amendment to prevent military intervention in Nicaragua. See Department of Defense Appropriation Act, 1985, Pub. L. No. 97-377, § 793, 96 Stat. 1865 (1982). Despite the covert efforts to circumvent this Amendment which have been revealed by the Iran-Contra hearings and trials, it appears that in this instance Congress was somewhat more successful in achieving its goal.

229. Scholars have recognized that in the face of the enormous expansion of the armed forces, constitutional and legal controls over the military no longer seem to be working. See, e.g., Yarmolinsky, Civilian Control: New Perspectives for New Problems, 49 Ind. L.J. 654, 655 (1974) ("The fact is that the apparatus of civilian control that was developed to implement the original concept of the founding fathers has proved wholly inadequate to control an establishment several orders of magnitude larger and more complex."). As a result, several writers have recently begun suggesting ways to develop stronger legal mechanisms to contain the pervasiveness of American military institutions. See Goldstein, The Failure of Constitutional Controls over War Powers in the Nuclear Age: The Argument for a Constitutional Amendment, 40 Stan. L. Rev. 1543, 1587 (1988) (recommending constitutional amendment requiring Congress to "supervise and oversee military planning, capabilities, and readiness" and creating private right of action permitting citizens to enforce in court congressional failure "to provide adequate oversight"); Koh, supra note 74, at 1320-38 (suggesting legislative, administrative, and judicial changes to increase constraint over executive power in area of national security); Scales, Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron? 12 Harv. Women's L.J. 25 (1989) (urging feminist, direct action approaches to transformation of law and militarism).

230. The outbreak of war in the Persian Gulf since the completion of this Article has shifted the American military for some undetermined time from a peacetime to a wartime status. In wartime, concerns about the civil liberties of
The founding generation faced this same dilemma. Because many of them believed that extensive standing armies were inherently incompatible with full liberty, they sought to avoid any possibility that the new Constitution might permit their unfettered growth. They thought that to maintain the proper balance between civil liberties and military necessity, the very existence of professional military institutions in peacetime should be severely confined. In Madison's words, the nation should "exert all its prudence" to diminish the possibility that resort to such a "dangerous" expedient would be necessary.\textsuperscript{291}

Judicial understanding of and attention to, this historical tradition would permit a more perceptive contemporary analysis of individual constitutional claims against the military. Recognizing that these cases arise in the context of an expansion of peacetime military institutions totally unanticipated by the Constitution will encourage judges not only to address the proper scope of civil liberties within the military, but also to question the proper scope of the institutions themselves. Without such questioning, uncritical judicial deference to the excessive aggrandizement of military institutions will threaten the liberties of individuals and of society alike.

\textsuperscript{291} See The Federalist No. 41, at 271 (J. Madison) (J. Cooke ed. 1961).

our military forces may temporarily be overshadowed by more immediate concerns for their lives and safety. With the end of the war, however, a vast military establishment will remain. To prepare for that time, national debate must be focused on the concern raised by this Article about the incompatibility between such an extensive military and civil libertarian values.