

## ARTICLE

### STRICT SUBORDINATION: THE ORIGINS OF CIVIL CONTROL OF PRIVATE MILITARY POWER IN STATE CONSTITUTIONS

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#### ABSTRACT

*The resurgence of private militias claiming the protection of the Second Amendment raises a startling question: is the United States a country without a legal monopoly on the use of force? Perhaps not. The constitutions of forty-eight states contain strict subordination clauses that declare, in one way or another, that “in all cases the military should be under strict subordination to, and governed by, the civil power.” This strict subordination clause has attracted attention as part of efforts to regulate and prohibit private militias, but it has been largely neglected by legal scholarship. As a result, it remains unclear how well this anti-private militia reading of the clause is supported by legal history. This Article begins the necessary work of tracing the historical origins of civil–military “subordination” and its incorporation into the strict subordination clause. The history uncovered in this Article reveals the clause’s roots in English anxieties over the memory of an independent standing army, its connection to the concept of imperium in imperio in the colonists’ protests against British soldiers, and the unsuccessful push to include the clause in the Federal Constitution. Examining this history alongside the clause’s Founding Era meaning and the Founding Generation’s reaction to historical analogs to today’s private militias confirms strong historical support for the anti-private militia reading. Ultimately, the strict subordination clause is a “sleeping giant” in state constitutions.*

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*[A] state is a human community that (successfully) claims the monopoly of the legitimate use of physical force—*

Max Weber<sup>1</sup>

## INTRODUCTION

Ask any first-year political science student. By the classic definition, a state—that is to say, a country’s government—must possess a monopoly on the legitimate use of force.<sup>2</sup> Yet in recent years the United States has seen a proliferation of armed groups that answer to no one but themselves and who claim the protection of the Constitution’s Second Amendment.<sup>3</sup> The sight of

<sup>1</sup> Max Weber, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 78 (H.H. Gerth and C. Wright Mills eds., 1946).

<sup>2</sup> See, e.g., Hendrik Spruyt, *War, Trade, and State Formation*, in THE OXFORD HANDBOOK OF COMPARATIVE POLITICS 211, 211 (2007) (“In classic Weberian parlance, the state is that ‘compulsory political organization’ which controls a territorial area in which ‘the administrative staff successfully upholds the claim to the monopoly of the legitimate use of physical force in the enforcement of its order . . . .’” (quoting MAX WEBER, *ECONOMY AND SOCIETY* 54 (1978))).

<sup>3</sup> See, e.g., MARY B. MCCORD, BRENNAN CTR. FOR JUST., *DISPELLING THE MYTH OF THE SECOND AMENDMENT* 3 (June 29, 2021), <https://www.brennancenter.org/our-work/research->

men in tactical gear bearing assault rifles has become increasingly common in American politics. Often, they belong to self-described private militia groups.<sup>4</sup> These private militias have marched and paraded through American cities, patrolled the southern border, set up independent training camps, and appeared near public monuments and polling places.<sup>5</sup> This all raises the question: is the United States an exception to the classic rule? Is it a country with a government that lacks a legal monopoly on the use of force?<sup>6</sup>

Perhaps not. The constitutions of forty-eight states contain “strict subordination” clauses, which appear to prohibit private militias. To take one

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reports/dispelling-myth-second-amendment [<https://perma.cc/7C6J-QH75>] (“Private militia organizations sometimes suggest that the Second Amendment’s reference to ‘a well regulated Militia’ . . . authorizes their organizing, training, and functioning as military units.”).

<sup>4</sup> This Article uses the terms “private militia” or “private paramilitary” to broadly refer to any group of armed, non-state actors with a coherent, military-style organization. *See, e.g.*, ARMED CONFLICT LOCATION AND EVENT DATA PROJECT & MILITIAWATCH, *STANDING BY: RIGHT WING MILITIA GROUPS & THE U.S. ELECTION 5* (Oct. 21, 2020), <https://acleddata.com/2020/10/21/standing-by-militias-election/> [<https://perma.cc/C8GB-R4QU>] (discussing “[m]ilitia groups and other armed non-state actors”); *see also* Catrina Doxsee, *Examining Extremism: The Militia Movement*, CTR. FOR STRATEGIC & INT’L STUD. (Aug. 12, 2021), <https://www.csis.org/blogs/examining-extremism/examining-extremism-militia-movement> [<https://perma.cc/7Z29-KK2N>] (explaining origins and structure of private militias). *But see* Idean Salehyan, *Why We Shouldn’t Call Militias, ‘Militias’*, POL. VIOLENCE AT A GLANCE (Oct. 19, 2020), <https://politicalviolenceataglance.org/2020/10/19/why-we-shouldnt-call-militias-militias> [<https://perma.cc/8NLG-2RYF>] (arguing that armed groups not organized by the government should be referred to as “armed extremists”). While Professor Salehyan’s argument is persuasive with regard to a subset of groups, this Article considers the legality of private militias as such, that is to say armed groups that—but for the fact of being private—operate like a government’s armed forces.

<sup>5</sup> *See, e.g.*, Farah Peterson, *Our Constitution of Force*, 122 COLUM. L. REV. 1539, 1546–48 (2022). Private militias have done far more than this. *See* Mary B. McCord & Jacob Glick, *January 6th Report Exposes Ongoing, Converging Threat of Anti-Democracy Schemes and Paramilitary Violence*, JUST SEC. (Jan. 6, 2023), <https://www.justsecurity.org/84669/the-january-6th-report-exposes-the-ongoing-converging-threat-of-anti-democracy-schemes-and-paramilitary-violence> [<https://perma.cc/X25K-3J3E>]. To take just the most prominent example, members of private militias have been charged in the January 6, 2021 Capitol Insurrection, but—for the purpose of this Article’s investigation into the strict subordination clause—we are only concerned with the existence of private militias, not their acts, which may be unlawful on other grounds. *See, e.g.*, Press Release, U.S. Dep’t of Just., *Leader of Oath Keepers and 10 Other Individuals Indicted in Federal Court for Seditious Conspiracy and Other Offenses Related to U.S. Capitol Breach* (Jan. 13, 2022), <https://www.justice.gov/opa/pr/leader-oath-keepers-and-10-other-individuals-indicted-federal-court-seditious-conspiracy-and> [<https://perma.cc/DM7E-NHGX>].

<sup>6</sup> This Article addresses the question of legality, and it therefore leaves to others the related questions of whether the United States has—as a practical matter—lost its monopoly on the use of force. *See* Josephine Harmon, *U.S. Gun Culture as a Martial Culture Within a Weberian Framework: Disrupting the State’s Monopoly on Force*, 22 CULTURAL STUD. ↔ CRITICAL METHODOLOGIES 520, 520–22 (2022); Bradford R. McGuinn, *Grievance in Space and Time*, 8 FLETCHER SEC. REV. 14, 15 (2021).

important and representative example, the Virginia Constitution provides that “in all cases the military should be under strict subordination to, and governed by, the civil power.”<sup>7</sup> In a case brought in the wake of the Unite the Right rally in Charlottesville, a Virginia state court held that this language forbids “private armies or militia apart from the civil authorities and not subject to and regulated by the federal, state, or local authorities.”<sup>8</sup> If this ruling is correct, it represents a potent development toward the regulation of private militia groups. Indeed, the Biden administration’s *National Strategy for Countering Domestic Terrorism* identifies state strict subordination clauses as “prohibiting certain private militia activity.”<sup>9</sup>

But these pronouncements mask considerable uncertainty regarding the meaning and scope of the strict subordination clause.<sup>10</sup> Although the clause can be read as a broad prohibition on private militias, it is also susceptible to a narrower reading. For instance, the clause could simply mandate that, within the government, the military shall always be less powerful than the civil authority.<sup>11</sup> Under this reading, the clause is purely intra-governmental and represents an express commitment to civilian control of the military, but it does not forbid individuals from forming private military organizations. This uncertainty only deepens with the realization that the language of the strict subordination clause is old, with the clause having appeared in the very first state constitutions. What’s more, the clause has been largely neglected by legal scholarship, likely because of its status as a state constitutional provision.<sup>12</sup>

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<sup>7</sup> VA. CONST. art. I, § 13.

<sup>8</sup> *City of Charlottesville v. Pa. Light Foot Militia*, No. CL 17-560, 2018 WL 4698657, at \*7-\*8 (Va. Cir. Ct. July 7, 2018). It went on to hold that, while the provision did not create a private right, it created a cause of action that could be enforced by individual municipalities. *Id.*

<sup>9</sup> NAT’L SEC. COUNCIL, NATIONAL STRATEGY FOR COUNTERING DOMESTIC TERRORISM 25 (June 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/National-Strategy-for-Countering-Domestic-Terrorism.pdf> [<https://perma.cc/K8KE-9YBW>].

<sup>10</sup> *See, e.g.*, Advisory Opinion from Mark R. Herring, Att’y Gen., Commonwealth of Va., to Charniele L. Herring, Member, Va. House of Delegates 2 (Aug. 16, 2019), <https://www.oag.state.va.us/files/Opinions/2019/19-039-C-Herring-issued.pdf> [<https://perma.cc/M8NP-GRJX>] (asserting, without more, that the Virginia strict subordination clause “makes clear the Framers’ intent to preclude private militias” in the state).

<sup>11</sup> Under such a reading, the clause would be read as an answer to the age-old challenge of civil–military relations. *See* Peter D. Feaver, *The Civil-Military Problematique: Huntington, Janowitz, and the Question of Civilian Control*, 23 ARMED FORCES & SOC’Y. 149, 149 (1996) (“The civil–military challenge is to reconcile a military strong enough to do anything the civilians ask them to with a military subordinate enough to do only what civilians authorize them to do.”).

<sup>12</sup> *See, e.g.*, Maureen E. Brady, *Uses of Convention History in State Constitutional Law*, 2022 WIS. L. REV. 1169, 1170–71 (2022) (“[S]tate constitutional law has often suffered from lack of sustained attention.”).

This Article begins the necessary work of understanding the strict subordination clause by tracing the historical origins of the concept of civil–military “subordination” and its incorporation into a state constitutional provision.<sup>13</sup> This inquiry involves a series of interrelated questions. What did the strict subordination clause mean? Where did the clause come from? And how, given the clause’s ubiquity, did it fail to be included in the U.S. Constitution? While looking for answers to these questions, the Article also examines the support for an anti-private militia reading of the clause. Does the history of the strict subordination clause support an interpretation that prohibits the formation of paramilitary organizations by private individuals absent affirmative governmental consent and control?<sup>14</sup>

History reveals the language of civil–military subordination emerged from debates in eighteenth-century England over the propriety and necessity of keeping a regular standing army. Many commentators expressed profound anxiety about the separate and distinct nature of soldiers, who they saw as forming a body apart from the general populace. The idea of subordination was particularly associated with the New Model Army, which had grown into an independent political force during the English Civil War. The phrase “strictest subordination” appeared in the 1740s in connection with preserving close parliamentary control over the army. In the lead up to the American Revolution, Boston colonists used the principle of civil–military subordination and the fear of an “uncontrollable military power” to protest the presence of soldiers in the city. This complaint was then adopted and refined by delegates to the Continental Congress, eventually becoming embodied in early state strict subordination clauses. These clauses, in turn, became a basis for civilians to complain of depredations by the Continental Army. After the Revolution, states called for the addition of a strict subordination clause to the Federal Constitution. While the clause benefited from substantial support, other objectionable provisions kept it from being included in the eventual Second Amendment.

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<sup>13</sup> See Farah Peterson, *Expounding the Constitution*, 130 YALE L.J. 2, 12 n.21 (2020) (“[T]o understand a word [from the Founding Era] like ‘compact,’ it is not enough to understand its dictionary definition, or even its linguistic context. A scholar must also understand its intellectual history.”).

<sup>14</sup> Tracing the clause’s history will allow this Article to evaluate contemporary claims about its scope. See, e.g., First Amended Complaint for Injunctive and Declaratory Relief at 85–87, *City of Charlottesville v. Pa. Light Foot Militia*, No. CL 17000560-00 (Va. Cir. Ct. Charlottesville July 7, 2018) (“Defendants’ continued operation as military units, or as members and commanders thereof, independent of the civil power in Virginia will violate [the Virginia strict subordination clause].”). This Article does not investigate the historical support for parties bringing suit directly under the strict subordination clause, in other words whether the clause was understood to be self-executing. This is a complicated question that may well vary depending on state jurisprudence.

Altogether, the historical evidence shows a broad and capacious understanding of the clause that easily encompasses an anti-private militia reading. The validity of this reading can be seen in the Founding Era understanding of the clause's term "military," the Founding Era fears of *imperium in imperio* (government within government), and the historical aversion to independent military forces. This reading is also bolstered by looking to historical analogs to today's private militias—voluntary militia associations—which the founding generation thought unlawful unless appropriately tied to the civil government.

As the United States turns to confront domestic violent extremism, the federal government, states, and municipalities across the country have signaled a growing interest in more sharply regulating private militias. Thus, there is much riding on how courts interpret state strict subordination clauses. Given the importance of legal history in cases touching on firearms regulations, the clause's origin and Founding Era meaning have the potential to play a decisive role in any future litigation concerning its scope. As this Article shows, the strict subordination clause's history poses no barrier to states seeking to ban private militias.

Part I of this Article further frames the inquiry, including by surveying several interpretations of the strict subordination clause. Part II examines sources from English and Founding Era history to understand the meaning of the clause's key terms at the time of its first enactment. Part III describes the origins and intellectual history of the clause first in England, then in America. Part IV looks at where the clause was conspicuously omitted: two state constitutions and the U.S. Constitution. Part V re-centers the inquiry on private militias by considering some Founding Era analogs. Part VI distills the historical evidence presented in the prior four Parts into concrete arguments that the strict subordination clause prohibits private militias. A final Part concludes with some thoughts on the clause's potential breadth and implications for the government's monopoly on force.

## I. CONTESTABLE INTERPRETATIONS

The resurgence of private militias raises the importance of properly understanding the strict subordination clause. Before diving into history, this Part further frames this Article's inquiry. It provides a brief overview of the landscape of strict subordination clauses in the United States, describes divergent interpretations of the clause, and notes the critical role the clause's history will likely play in future litigation.

The prototypical strict subordination clause comes from the Virginia Declaration of Rights. Ratified in late spring of 1776, the thirteenth article provides:

That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense 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 subordination to, and governed by, the civil power.*<sup>15</sup>

Although George Mason drafted the Declaration, he did not originally include the strict subordination clause.<sup>16</sup> Instead, the clause first appeared in the committee draft and remained unchanged in the ratified version.<sup>17</sup> So the language's exact author remains unknown.<sup>18</sup>

Virginia's strict subordination clause spread quickly through the new states. In September of 1776, Pennsylvania and Delaware adopted near-identical versions.<sup>19</sup> Maryland followed suit in November, varying the formulation slightly so that its constitution declared: "That in all cases, and at all times, the military ought to be under strict subordination to and control of the civil power."<sup>20</sup> The momentum continued, and today, forty-eight states have adopted some version of the clause.<sup>21</sup> These include countless small variations, but many resemble a stripped-down version of the Virginia clause.

<sup>15</sup> VA. DECLARATION OF RIGHTS § 13 (June 12, 1776).

<sup>16</sup> See *The Virginia Declaration of Rights – First Draft*, GEORGE MASON'S GUNSTON HALL, <https://gunstonhall.org/learn/george-mason/virginia-declaration-of-rights/virginia-declaration-of-rights-first-draft/> [<https://perma.cc/YYW8-4KXP>].

<sup>17</sup> See *The Virginia Declaration of Rights – Committee Draft*, GEORGE MASON'S GUNSTON HALL, <https://gunstonhall.org/learn/george-mason/virginia-declaration-of-rights/the-virginia-declaration-of-rights-committee-draft/> [<https://perma.cc/38EG-W53C>]; *The Virginia Declaration of Rights – Ratified Version*, GEORGE MASON'S GUNSTON HALL, <https://gunstonhall.org/learn/george-mason/virginia-declaration-of-rights/the-virginia-declaration-of-rights-ratified-version/> [<https://perma.cc/LMU8-AKN6>].

<sup>18</sup> But see Dan Friedman, *Tracing the Lineage: Textual and Conceptual Similarities in the Revolutionary-Era State Declarations of Rights of Virginia, Maryland, and Delaware*, 33 RUTGERS L.J. 929, 972–73 (2002) ("Although the authorship of this article cannot be definitively determined, Professor [Robert] Rutland notes that the wording [of the draft of the thirteenth Article] of the Virginia Declaration of Rights is 'characteristically George Mason's.'" (citing 1 THE PAPERS OF GEORGE MASON, 1725-1792, at 286 (Rutland ed. 1970) (alterations omitted))).

<sup>19</sup> See PA. CONST. of 1776, art. XIII ("And that the military should be kept under strict subordination to, and governed by, the civil power."); DE. DECLARATION OF RIGHTS (Sept. 11, 1776) ("That in all cases and at all times the military ought to be under strict subordination to, and governed by the civil power.").

<sup>20</sup> MD CONST. of 1776, art. XXVII.

<sup>21</sup> See MCCORD, *supra* note 3, at 5 ("Following the Virginia model, 48 state constitutions contain a clause requiring the subordination of the military to civilian authorities."). For a comprehensive catalog of all state strict subordination clauses, see GEORGETOWN INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION, PROHIBITING PRIVATE ARMIES AT PUBLIC RALLIES 8 (3d ed. 2020) [hereinafter ICAP, PROHIBITING PRIVATE ARMIES].

For instance, Utah's constitution provides that "[t]he military shall be in strict subordination to the civil power."<sup>22</sup>

Despite the clause's longevity and geographic ubiquity, few scholars have examined its meaning. Spurred by recent events, state courts and attorneys general in at least three states have focused on the clause's connection to private militia organizations. All agree the clause prohibits private militias.<sup>23</sup> For example, a Tennessee Attorney General opinion, relying principally on the strict subordination clause, concludes that the state's constitution "prohibits a group of private citizens who are armed and trained for military service apart from the regular armed forces from organizing into local or regional militias."<sup>24</sup> A key proponent of this view, Professor Mary McCord, has advanced the reading that the strict subordination clause requires militias within a state to be "always . . . under civilian governmental control."<sup>25</sup>

In contrast to this recent agreement, Kentucky jurist Samuel Smith Nicholas expressed a different view of the clause in his 1842 pamphlet, *Martial Law*.<sup>26</sup> The pamphlet posits that state strict subordination clauses forbid the imposition of martial law by the government.<sup>27</sup> "Some [state constitutions] . . . have . . . gone so far as to say that *at all times and in all cases*, the military shall be in strict subordination to civil authority, or otherwise to speak, that *at no time and in no case*, shall the military assume superiority."<sup>28</sup> According to Nicholas, the clause prevents the assumption of full governmental authority by

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<sup>22</sup> UTAH CONST. art I, § 20.

<sup>23</sup> See *City of Charlottesville v. Pa. Light Foot Militia*, No. CL 17-560, 2018 WL 4698657, at \*7–\*8 (Va. Cir. Ct. 2018); *State v. N.M. Civil Guard*, No. D-202-CV-2020-04051, slip op. at 6 (N.M. D. Ct. Sept. 13, 2021) ("[T]he [strict subordination] clause prohibits a military from operating outside of the bounds of the New Mexico Military Code and other relevant authority."); Herring Advisory Opinion, *supra* note 10, at 2; Advisory Opinion No. 21-05 from Herbert H. Slatery III, Att'y Gen., State of Tenn., to Hon. Rusty Crowe, State Senator, State of Tenn. (May 6, 2021), <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2021/op21-05.pdf> [<https://perma.cc/TP53-M7WF>].

<sup>24</sup> See Slatery Advisory Opinion, *supra* note 23, at 1. ("The Constitution of Tennessee prohibits a group of private citizens who are armed and trained for military service apart from the regular armed forces from organizing into local or regional militias.").

<sup>25</sup> See MCCORD, *supra* note 3, at 3; see also *Confronting Violent White Supremacy (Part V): Examining the Rise of Militia Extremism: Hearing Before the Subcomm. on C.R. and C.L. of the H. Comm. on Oversight and Reform*, 117th Cong. 7-8 (2021) (statement of Mary B. McCord).

<sup>26</sup> See SAMUEL SMITH NICHOLAS, *MARTIAL LAW* 2 (1842). Nicholas was writing in response to the idea proposed by John Quincy Adams—then in his post-presidency return to Congress—that the federal government could use a wartime emergency to free the individuals enslaved in the American South. See John Fabian Witt, *A Lost Theory of American Emergency Constitutionalism*, 36 L. & HIST. REV. 551, 559–60 (2018).

<sup>27</sup> NICHOLAS, *supra* note 26, at 2.

<sup>28</sup> *Id.* at 14.



the military, thereby prohibiting martial law.<sup>29</sup> By this account, the clause operates primarily as a restraint on government, not necessarily on private parties.

Of course, there is no reason to understand the anti-private militia and anti-martial law readings of the strict subordination clause as mutually exclusive. One of the rare academic treatments of any strict subordination clause (specifically, Ohio's) suggests the clause contains two prohibitions.<sup>30</sup> First, it commands "that the military *shall not* be superior to the civil government," and second, it "prohibits the existence of an autonomous military force."<sup>31</sup> Examining the clause's history will help untangle these interpretations. As this Article will show, the historical evidence supports a broad and capacious understanding of the clause that both forbids military supremacy and prohibits private military bodies.

History may prove critical to properly deciding future court cases concerning the strict subordination clause's scope. Under *New York State Rifle & Pistol Association, Inc. v. Bruen*, the constitutionality of a given firearms regulation depends on whether a party can "demonstrate that the regulation is consistent with this Nation's historical tradition of firearms regulation."<sup>32</sup> An anti-private militia reading of the strict subordination clause does not turn the provision into a firearms regulation *per se*, but prohibiting private militias inevitably implicates some conduct involving firearms.<sup>33</sup> In *District of Columbia v. Heller*, the Supreme Court reaffirmed *Presser v. Illinois*'s holding that the Second Amendment does not forbid state prohibitions on "private

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<sup>29</sup> "They [the framers] intended carefully to preclude all idea that, in any possible case of presumable necessity, it would be allowable for the military to subvert the civil authority." *Id.*; see also Albert J. Lobb, *Civil Authority Versus Military*, 4 VA. L. REG. 897, 897, 899, 904 (1919) (discussing interpretation of subordination clauses as preventing states from declaring martial law). By martial law, this Article means the military's assumption of full control over a civilian populace. For a concise definition along these lines, see Joseph Nunn, *Martial Law in the United States: Its Meaning, Its History, and Why the President Can't Declare It*, BRENNAN CENTER FOR JUSTICE, n.8 (Aug. 20, 2020) (collecting sources).

<sup>30</sup> John Kulewicz, *The Relationship Between Military and Civil Power in Ohio*, 28 CLEV. ST. L. REV. 611, 611 (1979). The Ohio strict subordination clause declares that "the military shall be in strict subordination to the civil power." OHIO CONST. art. I, § 4.

<sup>31</sup> Kulewicz, *supra* note 30, at 612. Kulewicz did not define the term "autonomous military force," so it is ultimately unclear whether he would agree the clause prohibits private militias. See *id.* at 612–13. Though, some passages seemingly lend support to the anti-private militia reading. See *id.* at 613 ("The Strict Subordination clause preserves the monopoly that government necessarily must hold on the management of force in Ohio.").

<sup>32</sup> *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2126 (2022).

<sup>33</sup> See Brief of Amici Curiae Former National Security Officials in Support of Respondents, *Bruen*, 142 S. Ct. 2111 (2022) (No. 20-843) (explaining connection between private paramilitary groups and the gun regulation at issue in *Bruen*).

paramilitary organizations.”<sup>34</sup> While *Bruen* did not call this rule into question,<sup>35</sup> it nonetheless dramatically altered the constitutional landscape with regard to gun regulations.<sup>36</sup> And the Supreme Court cannot be assumed to leave intact long-settled precedent or state laws with their own considerable pedigrees.<sup>37</sup>

Anticipating a challenge, a robust consensus of scholarly literature has emerged showing the First and Second Amendments do not—individually or in combination—protect a right to engage in armed protests.<sup>38</sup> Many works also show that these same Amendments do not protect a right to form and join private militias.<sup>39</sup> That said, some have begun to argue an interpretation of the

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<sup>34</sup> *District of Columbia v. Heller*, 554 U.S. 570, 621 (2008) (“*Presser* said nothing about the Second Amendment’s meaning or scope, beyond the fact that it does not prevent the prohibition of private paramilitary organizations.”); *Presser v. Illinois*, 116 U.S. 252, 264–65 (1886).

<sup>35</sup> *See Bruen*, 142 S. Ct. at 2133 (reaffirming *Heller*’s conclusion that the “central component” of the Second Amendment is “individual self-defense”); *id.* at 2162 (Kavanaugh, J., concurring) (listing limitations on the Second Amendment right not disturbed by *Bruen*).

<sup>36</sup> *See id.* at 2126–27 (holding federal courts of appeals uniformly misread *Heller*); *id.* at 2174–75 (Breyer, J., dissenting) (observing the Court rejected the method of analysis adopted by all but the Eighth and Federal Circuits, which had not considered the question).

<sup>37</sup> *See id.* at 2122–23 (discussing provenance of hundred-year-old gun regulation invalidated in the case); *cf. Egbert v. Boule*, 142 S. Ct. 1793, 1818 (2022) (Sotomayor, J., dissenting) (“[A] restless and newly constituted Court sees fit to refashion the standard anew. . .”).

<sup>38</sup> *See* Joseph Blocher & Reva B. Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Under Heller*, 116 Nw. U. L. Rev. 139, 141–43 (2021) (showing historical tradition of regulating firearms to preserve public peace consistent with the Second Amendment); Michael C. Dorf, *When Two Rights Make a Wrong: Armed Assembly Under the First and Second Amendments*, 116 Nw. U. L. Rev. 111, 115–18 (2021) (arguing that Founding Era evidence does not support a right to “armed assembly” under the First and Second Amendments); Kendall Burchard, Essay, *Your ‘Little Friend’ Doesn’t Say ‘Hello’: Putting The First Amendment Before The Second In Public Protests*, 104 VA. L. REV. ONLINE 30 (2018) (arguing First and Second Amendments together do not protect a right to armed protest); Katlyn E. DeBoer, *Clash of the First and Second Amendments: Proposed Regulation of Armed Protests*, 45 HASTING CONST. L. Q. 333 (2018) (arguing that the First and Second Amendments do not prevent the prohibition of firearms at public protests); Luke Morgan, Note, *Leave Your Guns At Home: The Constitutionality Of A Prohibition On Carrying Firearms At Political Demonstrations*, 68 Duke L.J. 175, 186, 208 (2018) (arguing that carrying a gun to a public protest is not protected by the First or Second Amendments); Eric Tirschwell & Alla Lefkowitz, *Prohibiting Guns at Public Demonstrations: Debunking First and Second Amendment Myths after Charlottesville*, 65 UCLA L. REV. DISCOURSE 172, 186–88 (2018) (arguing First and Second Amendments do not together protect a right to armed assembly). *But see* Timothy Zick, *Arming Public Protests*, 104 IOWA L. REV. 223, 241–45 (2018) (determining protection for armed protests is a close question in the narrow context of gun rights protests).

<sup>39</sup> Blocher & Siegel, *supra* note 38, at 176 (“*Heller* reaffirmed the Court’s holding in *Presser v. Illinois* that the Second Amendment does not prevent the prohibition of private paramilitary organizations.”); Zick, *supra* note 38, at 254–57 (noting that state laws banning

Second Amendment envisioning a right of individuals to “assemble in force” for self-defense and for private law enforcement.<sup>40</sup> In these debates, the state’s traditional monopoly on the legitimate use of violence hangs in the balance.<sup>41</sup>

This Article takes up the slightly different and more neglected question of asking whether state strict subordination clauses affirmatively prohibit private militias beyond the control of the civil government. This question implicates the state’s monopoly on violence because a constitutional provision prohibiting independent armed groups actively reinforces that monopoly.<sup>42</sup> Recent Supreme Court precedent puts legal history front and center in this inquiry. Thus, this Article seeks to uncover the historical meaning, origins, and sweep of state strict subordination clauses.

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private militias likely do not conflict with the Second Amendment); Dorf, *supra* note 38, at 122 (“Crucially, no one in this debate argues that the term ‘militia’ as used in the Second Amendment referred to private armed groups.”); Tirschwell & Lefkowitz, *supra* note 38, at 177, 180–81 (describing state “anti-paramilitary law[s] that make[] it illegal for individuals to assemble to train with firearms” as a state gun regulation that is consistent with First and Second Amendments); Sean Tenaglia, Note, *Regulating Armed Private Militia Gatherings: A Constitutional State-Level Proposal to Promote Public Safety in a Post-Heller World*, 63 WM. & MARY L. REV. 679, 684 (2021) (arguing that state laws prohibiting private militias do not violate the Second Amendment); *see also* Monica Sue Barry, Note, *Stockpiling Weapons: Can Private Militias Receive Protection Under the First and Second Amendments*, 18 T. JEFFERSON L. REV. 61, 82–83, 91–93 (1996) (arguing private militia activity of stockpiling weapons is not protected by the First or Second Amendments); Chuck Dougherty, *The Minutemen, the National Guard and the Private Militia Movement: Will the Real Militia Please Stand Up*, 28 J. MARSHALL L. REV. 959, 984–85 (1995) (concluding that the Second Amendment does not protect private militias). *But see* Joelle E. Polesky, Comment, *The Rise of Private Militia: A First and Second Amendment Analysis of the Right to Organize and the Right to Train*, 144 U. PA. L. REV. 1593, 1612–20, 1631–33 (1996) (determining that state anti-private militia statutes that fully prohibit private military organizations violate the First Amendment, but not the Second).

<sup>40</sup> *See, e.g.*, Robert Leider, *The State’s Monopoly of Force and the Right to Bear Arms*, 116 NW. U. L. REV. 35, 73 (2021). Professor Leider does not endorse all manner of private militias; he distinguishes between groups that assemble for collective self-defense, which he views as permissible, and groups that impermissibly do so to impose their will on others. *Id.* (“When private groups band together in an offensive manner, they are creating a de facto shadow government.”).

<sup>41</sup> Compare Leider, *supra* note 40, at 44, 49, with Darrell A.H. Miller & Jacob D. Charles, *Violence and Nondelegation*, 135 HARV. L. REV. FORUM 463, 464–65 (2022).

<sup>42</sup> *Cf.* Kulewicz, *supra* note 30, at 613. In addition to constitutional provisions, many states have enacted some statutory prohibitions or restrictions on private militias. *See* ICAP, PROHIBITING PRIVATE ARMIES, *supra* note 21, at 4–5. The validity of these statutes does not necessarily hinge on an interpretation of the strict subordination clause because they may be valid under state police powers. *See* *Berman v. Parker*, 348 U.S. 26, 31–32 (1954) (explaining state police powers). Yet the strict subordination clause’s longevity makes it a uniquely probative piece of evidence as to the validity of such restrictions. *See infra*, notes 405–06 and accompanying text.

## II. WHAT DID THE CLAUSE MEAN?

This Article's first task is to understand what the clause meant around the time of its inclusion in the Virginia Declaration of Rights. Although the clause's wording differs slightly from state to state, the various provisions share a common core. Each expresses the principle that the military must be lesser than the civil power. This formulation highlights the importance of understanding the three terms "military," "civil power," and "strict subordination." These terms make up the basic elements of the almost mathematical relationship expressed by the clause. Given the ubiquity and predominance of the strict subordination language, this Article mostly does not examine the additions and variations found in some states. It instead focuses on the core terms: military, civil power, and strict subordination.

### A. *Military or Military Power*

First, "military"—as it appears in the strict subordination clause—is almost certainly an adjective. Today, military is commonly used as a noun to describe the combined army, navy, and other professional armed forces of a nation.<sup>43</sup> However, at the time of the Founding, the use of military as an adjective was more common. Samuel Johnson's dictionary, regarded as one of the most influential dictionaries in the American colonies, included only the adjectival definitions in both its 1755 and 1773 editions.<sup>44</sup> Other dictionaries of the time are in accord.<sup>45</sup> When discussing military power and civil power together, it was common to just write "power" once, and the term "military

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<sup>43</sup> *E.g.*, *Military*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/military> (last visited Feb. 19, 2023) [<https://perma.cc/BTX4-DCT6>] (defining "military" as a noun synonymous with "armed forces"); *Armed Forces*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/armed%20forces> (last visited Feb. 19, 2023) [<https://perma.cc/BJ66-GBJM>] (defining "armed forces" as "the combined military, naval, and air forces of a nation"). For modern usage, see, e.g., Missy Ryan, *Coronavirus Challenges the Military's Way of Doing Things — Including Haircuts*, WASH. POST (Apr. 14, 2020), [https://www.washingtonpost.com/national-security/coronavirus-challenges-the-militarys-way-of-doing-things--including-haircuts/2020/04/14/cc673cfe-7e85-11ea-8de7-9fdff6d5d83e\\_story.html](https://www.washingtonpost.com/national-security/coronavirus-challenges-the-militarys-way-of-doing-things--including-haircuts/2020/04/14/cc673cfe-7e85-11ea-8de7-9fdff6d5d83e_story.html) [<https://perma.cc/UVT4-EJFF>].

<sup>44</sup> *See Military*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755); *Military*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1773) [hereinafter JOHNSON]; *see also* John Mikhail, *The Definition of "Emolument" in English Language and Legal Dictionaries, 1523-1806*, at 14 (June 30, 2017) (unpublished article) ("Samuel Johnson's *Dictionary of the English Language* was probably the most famous and important eighteenth century dictionary."); Gregory Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 Geo. Wash. L. Rev. 358, 359, 385 (2014).

<sup>45</sup> *Military*, NATHAN BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (21st ed. 1775) ("Belonging to soldiers or war, warlike"); *Military*, THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY (3d. ed. 1744) ("Military (A.) Something belonging to the art of war, or the state or condition of a soldier.").

power” appears frequently in combination with the word “civil” alone.<sup>46</sup> Thus, the best interpretation of the clause is to read “military” as modifying “power.” This has the advantage of maintaining a parallel structure within the clause, which can be read to require the subordination of the *military power* to the *civil power*.<sup>47</sup>

This raises the next question: what does “military power” mean? Dictionary definitions prove not particularly helpful,<sup>48</sup> but turning to usage suggests two meanings. On one hand, military could denote a power of

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<sup>46</sup> See, e.g., Letter from Thomas Jefferson to the Marquis de Lafayette (Mar. 19, 1781) (recommending that a particular ship “be kept under the *military Power* and clear of the *civil*” (emphasis added)); Letter from New York Committee of Safety to George Washington (Apr. 25, 1776), FOUNDERS ONLINE, [https://founders.archives.gov/?q=%22military%20power%22&s=1111311113&sa=&r=16&sr=\[https://perma.cc/2RGL-6YD5\]](https://founders.archives.gov/?q=%22military%20power%22&s=1111311113&sa=&r=16&sr=[https://perma.cc/2RGL-6YD5]) (“Convinced with You that there can be little Doubt that Things will go well under an harmonious co-operation of the *Civil* and *Military Powers*, permit us once more Sir to assure You of our most vigorous Exertions in seconding your Efforts in the common Cause.” (emphasis added)); Massachusetts Committee of Safety Resolution – The Arms Delivered by the Committee (June 28, 1776) (“And whereas the Committee apprehend that it is of vast importance that no *orders* are issued by the *military*, or obeyed by the civil powers, but only such as are *directed* by the *honourable Representative Body of the People, from whom all military and civil power originates*; and though this Committee are satisfied that General Ward has misunderstood said Resolve, and does not mean or intend to set up the *military* power above the *civil*”); see also Letter from Thomas Nelson, Jr., to Thomas Jefferson (Feb. 4, 1776), [https://founders.archives.gov/?q=%22the%20military%22&s=1111311111&sa=&r=178&sr=\[https://perma.cc/W6QH-XTKF\]](https://founders.archives.gov/?q=%22the%20military%22&s=1111311111&sa=&r=178&sr=[https://perma.cc/W6QH-XTKF]) (“[E]ntering another without permission of the *civil power* of that province, or without express orders of Congress. It was alleged that this was setting up the *Military* above the *Civil*.” (emphasis added)); 1 MONTESQUIEU, THE SPIRIT OF LAWS 193 (1748) (“They both preserve the *civil* and *military power*, and one is not destroyed by the other.” (emphasis added)). Compare Letter from Samuel Adams to James Warren (Oct. 20, 1778), in 11 LETTERS OF DELEGATES TO CONGRESS: OCT. 1, 1778 – JAN. 31, 1779, at 81 (“States in giving a just Preference to the *Military* above the *Civil Power*.” (emphasis added)), with *id.* at 82 (“[T]o suffer the *Civil* to stoop to the *Military Power*.” (emphasis added)).

<sup>47</sup> This is perhaps not terribly surprising as at least one Founding Era state constitution made this explicit. See MASS. CONST. of 1780, art. I, § 17 (“[T]he military power shall always be held in exact subordination to the civil authority, and be governed by it.”); see also FLA. CONST. art. I, § 7 (“The military power shall be subordinate to the civil.”); S.C. CONST. art. I, § 20 (“The military power of the State shall always be held in subordination to the civil authority and be governed by it.”).

<sup>48</sup> Johnson’s dictionary defines “military” as “(1) Engaged in the life of a soldier; soldierly. (2) Suited a soldier; pertaining to a soldier; warlike. (3) Effected by soldiers.” *Military*, JOHNSON, *supra* note 44. Although these repeated references to soldiers might appear to indicate the armed forces of a state, a “soldier,” in turn, was defined broadly. A “soldier,” per Johnson’s dictionary, is a “fighting man; a warrior.” *Soldier*, JOHNSON, *supra* note 44. Johnson included numerous definitions of “power,” such as “(1) Command; authority; dominion; influence . . . (8) Government; right of governing. (9) Sovereign; potentate.” *Power*, JOHNSON, *supra* note 44. Power alone could also mean “(12) Host; army; military force.” *Id.*

government and—in a manner similar to today’s understanding—it could also refer to a society’s fighting forces.<sup>49</sup>

In the lead-up to the Revolution, the Continental Congress’s open letter to the colonists complained that “an uncontrollable *military Power* is vested in Officers” of the Crown.<sup>50</sup> This language mirrors the Vesting Clauses in the Federal Constitution, where the document vests the legislative, executive, and judicial powers in separate branches of government.<sup>51</sup> One revolutionary committee in Maryland confirmed this similarity when it expressly declared that the military power should also be kept apart from the others. “Resolved, unanimously, That the Legislative, Judicative, Executive, and Military powers, ought to be separate . . . .”<sup>52</sup> Other sources describe the power in similar terms.<sup>53</sup>

A political-scientific definition of military power appears in Thomas Rutherforth’s 1756 *Institutes of Natural Law*, a volume known to the founders.<sup>54</sup> Rutherforth defined “military power” as “the power of acting with

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<sup>49</sup> This is similar to how “executive power” could mean both a “conceptual power” of government as well as “the political entity in which that conceptual power was vested,” such as the President. See Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1244 (2019).

<sup>50</sup> Memorial to the Inhabitants of the Colonies (Oct. 21, 1774), in 1 LETTERS OF DELEGATES TO CONGRESS: AUG. 1774 – AUG. 1775, at 214 (“By an Order of the King, the authority of the Commander in Chief, & under him, of the Brigadiers general, in time of Peace, is rendered supreme in all the civil Governments in America; and thus an *uncontrollable military Power* is vested in Officers not known to the Constitution of these Colonies.” (emphasis added)); Letter from William Ellery to Nicholas Cooke (Dec. 31, 1776), in 5 LETTERS OF DELEGATES TO CONGRESS: AUG. 16, 1776 – DEC. 31, 1776, at 711, (“Congress . . . delegated to and *invested* Genl. Washington with the *whole military Power* for a limited Time,” (emphasis added)); see also Letter from James Madison to Edmund Randolph (June 17, 1783), in 20 LETTERS OF DELEGATES TO CONGRESS: MAR. 12, 1783 – SEPT. 30, 1783, at 337 (“On looking into the articles of Confederation, the military power of Congress in time of peace, appears to be at least subject to be called in question.”).

<sup>51</sup> See U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States . . . .”); *id.* art. II, § 1 (“The executive Power shall be vested in a President of the United States of America.”); *id.* art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts . . . .”).

<sup>52</sup> JONATHAN WILSON ET AL., RESOLUTIONS OF THE COMMITTEE FOR THE LOWER DISTRICT OF FREDERICK COUNTY, IN MARYLAND (June 17, 1776), [https://perma.cc/9UAR-N8NG].

<sup>53</sup> “Every one of this gentleman’s reasons derive their force from this supposition, that the whole *legislative, executive, judicial and military powers* of this State are vested in one body of men.” 2 ADAMS FAMILY CORRESPONDENCE: JUNE 1776 – MAR. 1778, at 255–56 n.2 (L. H. Butterfield, Wendell D. Garrett & Marjorie Sprague eds., 1963) (emphasis added) (quoting Whitlocke, *Letter II to Ludlow*, PA. GAZETTE, June 4, 1777, at 3 (debating the new Pennsylvania constitution)).

<sup>54</sup> See Report on Books for Congress ([Jan. 23], 1783), FOUNDERS ONLINE, https://founders.archives.gov/?q=Rutherforth&s=1111311111&sa=&r=1&sr= [https://perma.cc/NX2V-ZX2R]; THE FEDERALIST NO. 84, at 517 n.\* (Alexander Hamilton) (Clinton Rossiter ed., 1961).

the common strength or [joint] force of the society to guard against such injuries, as threaten it from without.”<sup>55</sup> As defined by Rutherford, the military power naturally included “the military force,” his term for the instruments of that power. The military force was the “force of the society, as it is employed upon these [external] objects.”<sup>56</sup> This latter definition appears much closer to today’s definition of the term military.<sup>57</sup> Rutherford’s definitions might seem to suggest the military power and its instruments could only operate in the realm of foreign affairs, but he included an important exception. When civil officers faced domestic issues that their own power was insufficient to resolve, then they could “call in the assistance even of the military force.”<sup>58</sup>

Rutherford was particularly rigid in defining his separate terms. Much less rigidity appears in William Blackstone’s *Commentaries on the Laws of England*, where the celebrated author uses the terms “military force,” “military power,” and “military state” seemingly interchangeably.<sup>59</sup> In his *Commentaries*, Blackstone divided English society into separate orders or states: the clerical, the civil, the maritime, and the military. This military state

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<sup>55</sup> 2 THOMAS RUTHERFORTH, *INSTITUTES OF NATURAL LAW* 54 (1756) (“[T]he power of acting with the common strength or [joint] force of the society to guard against such injuries, as threaten it from without; to obtain amends for the damages arising from such injuries; or to inflict punishment upon the authors and abettors of them.”); see Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 309–10 (2021) (relying on Rutherford to ascertain Founding Era meaning); Philip Hamburger, *Delegating or Divesting?*, 155 NW. U. L. REV. ONLINE 88, 100 (2020) (agreeing with looking to the “unusually sophisticated” Rutherford to ascertain Founding Era meaning). Rutherford also categorized the military power as a sub-branch of the executive power, which he termed the “external executive power.” RUTHERFORTH, *supra*. As explained by Professor Mortenson, this particular aspect of Rutherford’s taxonomy was anomalous at that time. See Mortenson, *supra* note 49, at 1250–56.

<sup>56</sup> 2 RUTHERFORTH, *supra* note 55, at 54.

<sup>57</sup> See *id.* This is suggested by contemporary usage. See *Force*, JOHNSON, *supra* note 44 (defining “force” as “Armament; warlike preparation.”). Notably, the founding generation does not appear to have recognized a distinction based on the use of “force” or “forces,” at least based on Johnson’s choice of examples. See, e.g., *id.* (using “forces” to refer to soldiers in army: “O Thou! whose captain I account myself, Look on my forces with a gracious eye. [Put in their hands Thy bruising irons of wrath,] Shakes[pear]. Richard III.”).

<sup>58</sup> 2 RUTHERFORTH, *supra* note 55, at 66. According to Rutherford, “upon which occasion it is considered, not as the military force, or not as having in any respect a discretionary power, but as a part of the civil force acting under the direction of the civil magistrate.” *Id.* More properly for Rutherford, it could be said the civil magistrate “calls in the soldiery to his assistance; than that he calls in the military force.” *Id.*

<sup>59</sup> See generally 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*395–409. Compare *id.* at \*401 (“Nothing then . . . ought to be more guarded against in a free state, than making the military power . . . a body too distinct from the people. Like ours therefore, it should wholly be composed of natural subjects . . .”), with *id.* at \*395 (“The military state includes the whole of the soldiery; or, such persons as are peculiarly appointed among the rest of the people, for the safeguard and defence of the realm.”), and *id.* at \*396 (“[T]he military force of this kingdom was in the hands of the dukes or heretochs, . . . Their duty was to lead and regulate the English armies . . .”).

encompassed “the whole of the soldiery; or, such persons as are peculiarly appointed among the rest of the people, for the safeguard and defence of the realm.”<sup>60</sup> Depending on the relevant laws, this could mean anything from a militia comprised of ordinary inhabitants “chosen by lot” to a professional standing army.<sup>61</sup>

Seventeenth and eighteenth-century writers mirrored Rutherford and Blackstone’s usage, with some indicating that the military power included within it the military force,<sup>62</sup> while others used the two terms interchangeably.<sup>63</sup> In addition to describing a power of government,<sup>64</sup> writers also used military force or military power to refer to bodies of troops.<sup>65</sup> This included referring to the militia as a military force.<sup>66</sup> In *The Wealth of Nations*,

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<sup>60</sup> *Id.* at \*395.

<sup>61</sup> *Id.* at \*399–401.

<sup>62</sup> JOHN FREE, ENGLAND’S WARNING-PIECE 41 (1768) (“[A] power assumed at Will, independent of the Laws . . . is an arbitrary Power; and if it be supported and executed by military Force, it is also a military Power.” (emphasis in original omitted)); WILLIAM FALKNER, CHRISTIAN LOYALTY 393–94 (1679) (describing military power as the “highest command of the strength and Military force of a Nation.” (emphasis in original omitted)).

<sup>63</sup> 3 CALEB D’ANVERS, THE CRAFTSMAN 144 (1731) (“[F]or as absolute Government cannot subsist without military Force, so every Degree of military Force is, strictly speaking, absolute Government; and every Government . . . must be allowed to be so far arbitrary as it partakes of military Power . . .” (emphasis in original omitted)); PHILOMONOS, THE POWER OF THE CIVIL MAGISTRATE ASSERTED 41 (1752) (using terms interchangeably).

<sup>64</sup> See *supra* notes 62–63.

<sup>65</sup> See, e.g., *The Danger of our Present Situation*, in 15 THE GENTLEMAN’S MAGAZINE 432 (1745) (using “regular military power” to refer to a standing army (emphasis added)); Letter from Benjamin Franklin to [Joseph Smith?] (Apr. 12, 1770), FOUNDERS ONLINE, [https://founders.archives.gov/?q=%22military%20power%22&s=1111311111&sa=&r=5&sr=\[https://perma.cc/TL2R-XBE2\]](https://founders.archives.gov/?q=%22military%20power%22&s=1111311111&sa=&r=5&sr=[https://perma.cc/TL2R-XBE2]) (“I send you inclosed Govr Pownall’ . . . State of the Case of America as to the *Military Power* there.” (emphasis added)); Letter from William Pierce to St. George Tucker (Sept. 28, 1787), in 24 LETTERS OF DELEGATES TO CONGRESS: NOV. 6, 1786–FEB. 29, 1788, at 449 (“I am at a loss to know whether any government can have sufficient energy to effect its own ends without the aid of a *military power*.”); see also sources cited *infra* note 66.

<sup>66</sup> AN INQUIRY CONCERNING THE MILITARY FORCE PROPER FOR A FREE NATION OF EXTENSIVE DOMINION 79 (1784) (describing the militia as a “military force”); A MEMBER OF PARLIAMENT [JOHN SINCLAIR], CONSIDERATIONS ON MILITIAS AND STANDING ARMIES 1 (1782) (“All well governed states ought ever to be prepared to defend themselves, or to annoy their enemies. This cannot be effected without a military force. That force must either by perpetually in arms, or solely disciplined occasionally. The first is termed a standing army, the other a militia.”); 2 POLITICAL DISQUISITIONS 402 (1774) (“Lord *Lyttelton* thinks the militia (the only permanent military force, our ancestors knew) . . .”); ROGER ACHERLEY, THE BRITANNIC CONSTITUTION 508 (1727) (“*Debates about the Military Power, and particularly the Power over the Militia* . . .”); ENGLAND’S AND NORTH-BRITAIN’S HAPPINESS 11 (1709) (“It’s only [observed] at this time from those Instances, that they who had set up themselves by Enthusiastical Military Power, thought the militia a better security than their Army, when they have little or nothing to do.”); The Political Club of Danville, Kentucky, Debates over the Constitution, Feb. 23, 1788 – May 17, 1788, in 8 THE



Adam Smith described “two different species of military force,” the militia and the standing army.<sup>67</sup> “If the state has recourse to the first of those two expedients, its military force is said to consist of a militia.”<sup>68</sup>

In short, the term military as it appears in the strict subordination clause almost certainly referred to military power. In turn, military power carried a broad definition that meant a power of government, but also encompassed a society’s fighting forces. This included institutions such as the militia or a professional standing army.

### ***B. Civil Power***

At first glance, “civil power” might appear to simply mean the opposite of military power. In this sense, civil power means *civilian* power, the force and capacity of a society’s non-military institutions. In fact, this assumption is correct. “Civil” carried the meaning of being “not military.”<sup>69</sup>

The term was also used to refer to things pertaining to the larger political community.<sup>70</sup> For Rutherford, the civil power was simply “that [power] which governs a civil society.”<sup>71</sup> And he thought this power naturally arose from the organization of people into political communities.<sup>72</sup> It was an overarching category that encompassed both the legislative and executive powers.<sup>73</sup> Something close to this definition of civil power—as the authority of the whole political community—survived into the Founding Era. For example, in Federalist Essays Thirteen and Fifteen, Alexander Hamilton used “civil power” to mean the power of government.<sup>74</sup>

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DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: VIRGINIA, NO. 1, at 414 (John P. Kaminski et al. eds., 1988) (“[O]bserving his fears in calling in a Military force [i.e., the militia.]”).

<sup>67</sup> 2 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 213 (4th ed. 1785).

<sup>68</sup> *Id.* at 213.

<sup>69</sup> See *Civil*, JOHNSON, *supra* note 44 (“*adj.* . . . 7. Not military; as, the *civil* magistrate’s authority is obstructed by war.”).

<sup>70</sup> See *id.* (“1. Relating to the community; political.”); see also *Civil*, BAILEY, *supra* note 45 (“Civil . . . something that reflects the policy, publick good, or repose of the citizens, city or state.”); *Civil*, DYCHE & PARDON, *supra* note 45 (“Civil . . . belonging to the management, regulation and government of a city, state, or kingdom.”).

<sup>71</sup> 2 RUTHERFORTH, *supra* note 55, at 44.

<sup>72</sup> Rutherford defines and describes “civil society” as a “compleat assembly of men of free condition, who are united together for the purposes of maintaining their rights, and of advancing the common good.” *Id.* at 12.

<sup>73</sup> See *id.* at 43–44, 54.

<sup>74</sup> See THE FEDERALIST NO. 13 (Alexander Hamilton) (“[T]here is no rule by which we can measure the momentum of civil power necessary to the government of any given number of individuals”); THE FEDERALIST NO. 15 (Alexander Hamilton) (“It at all times betrayed an

However, when used in close proximity to military or military power, civil power denoted a separate sphere from the military. Hamilton again provides a helpful illustration. “[I]n the present unsettled state of government, the distinctions between the civil and military power, cannot be upheld with that exactness which every friend to society must wish.”<sup>75</sup> The writings and statements of others at the time are consistent with this usage.<sup>76</sup> During the Revolutionary War, correspondents frequently used civil power to refer to institutions and authorities other than the Continental Army. The term appears often in reference to state legislatures,<sup>77</sup> and the New York Committee of Safety described its work as an exercise of the civil power.<sup>78</sup> Civil power was also used to describe the operation of ordinary laws and legal processes.<sup>79</sup>

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ignorance of the true springs by which human conduct is actuated, and belied the original inducements to the establishment of *civil power*. Why has government been instituted at all? Because the passions of men will not conform to the dictates of reason and justice, without constraint.” (emphasis added)).

<sup>75</sup> Letter from Alexander Hamilton to William Livingston, Governor of New Jersey (Apr. 21, 1777) in 1 THE PAPERS OF ALEXANDER HAMILTON: 1768–1778, at 236 (Harold C. Syrett ed., 1961).

<sup>76</sup> See *supra* note 46 and accompanying text.

<sup>77</sup> See Letter from John Hancock to Certain Colonies (June 18, 1776), in 4 LETTERS OF DELEGATES TO CONGRESS: MAY 16, 1776–AUG. 15, 1776, at 264–65 (Paul H. Smith ed., 1979) (“This, it is apparent, can never be effectually done, but by adopting the enclosed Resolve; wherein it is recommended by Congress to your Colony, to empower the General at New York to call such Part of the Militia to his Assistance, as may be necessary to repel our Enemies. The great Advantages the American Cause will receive from the Civil Power thus lending its Aid to the Military, and acting in Conjunction with it, are too manifest to be mentioned. The whole Strength of a Colony may, by this Means, be drawn to a Point the instant the Situation of Affairs shall render it necessary.”); Letter from Benjamin Rush to Patrick Henry (July 16, 1776), in 4 LETTERS OF DELEGATES TO CONGRESS: MAY 16, 1776–AUG. 15, 1776, at 474 (Paul H. Smith ed., 1979) (“Have you not violated a fundamental principle of liberty in excluding the clergy from your Legislatures? I know their danger in a free government but I would rather see them excluded from civil power by custom than by law.”).

<sup>78</sup> Letter from the New York Committee of Safety to George Washington (Jan. 22, 1777), FOUNDERS ONLINE, [https://founders.archives.gov/?q=%22civil%20power%22&s=1111311111&sa=&r=30&sr=\[https://perma.cc/5ZET-5HAH\]](https://founders.archives.gov/?q=%22civil%20power%22&s=1111311111&sa=&r=30&sr=[https://perma.cc/5ZET-5HAH]) (“[T]he military Operations in this Quarter is cast upon us, and that we are compelled to turn our Attention to Matters out of the Line of the civil Power, and solely resting with your Excellency . . .”).

<sup>79</sup> The Petition to the House of Lords against the Massachusetts Government and Administration of Justice Bills (before May 11, 1774), in 21 THE PAPERS OF BENJAMIN FRANKLIN: JAN. 1, 1774, THROUGH MAR. 22, 1775, at 214 (William B. Wilcox ed., 1978) (“The bill that purports to secure a more impartial administration of justice empowers the governor to exempt soldiers from prosecution within the colony for murder, and therefore from control by the civil power”); Letter from William Livingston, Governor of New Jersey, to George Washington (Sept. 3, 1777) in 11 THE PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR SERIES 139 (Philander D. Chase & Edward G. Lengel eds., 2001) (“[I]f Collo. Barton should be turned over to the Civil power of this State (his having joined the Enemy last Winter, & having done infinite Mischief before his Departure) we should *hang* him.”); 8 THE

Thus, civil power as it appears in the strict subordination clause is best understood to mean the state's non-military governmental institutions. Although civil power could refer to the whole power of a political community, in the context of the clause it denoted particularly the non-military aspects of that power.

### C. *Strict Subordination*

This finally leads to "strict subordination." Contemporaneous dictionary definitions of the two words suggest an intuitive reading as a state of exacting or rigorous inferiority of one part to another.<sup>80</sup>

The term appears throughout eighteenth-century texts. It was used, for instance, to describe the idealized relationship between reason and emotion, with the latter being wholly under the control of the former.<sup>81</sup> In the military setting, strict subordination described the hierarchical relationship between soldier and commander.<sup>82</sup> One treatise describing Danish naval law noted that

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DOCUMENTARY HISTORY, *supra* note 66, at 414 ("[T]he Civil power by Posse Com[itatus] is sufficient . . ." (second alternation in original)); 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 384 (Jonathan Elliot ed., 2nd ed. 1876) (statement of James Madison) ("[W]hen the civil power was sufficient, this mode [calling forth the militia] would never be put in practice."); *see also infra* notes 147–155 (discussion between Gage and Bernard on use of civil power to quell tumults in Boston as opposed to using armed troops).

<sup>80</sup> *See Strict*, JOHNSON, *supra* note 44 (defining "strict" as "[e]xact," "[s]evere; rigorous; not mild; not indulgent," and "[c]onfined; not extensive," among others); *id.* at *Subordination* (defining subordination as "[t]he state of being inferior"); *Strict*, JOHN ASH, NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1775) ("Exact, accurate, rigorously nice, severe, rigorous, tense, rigid); *id.* at *Subordinate* ("Inferior, descending in a regular series.").

<sup>81</sup> *See* 2 JAMES FOSTER, DISCOURSES ON ALL THE PRINCIPAL BRANCHES OF NATURAL RELIGION AND SOCIAL VIRTUE 397 (1752) ("[M]ay we be strict in all the offices of self government, and restrain our affections and appetites within due bounds, that they may all remain in a state of *strict subordination* to the eternal law or reason and the holy gospel." (emphasis added)); *see also* DR. BROWN, A DISSERTATION ON THE RISE, UNION, AND POWER THE PROGRESSION, SEPARATION, AND CORRUPTIONS OF POETRY AND MUSIC 228 (1763) ("And as we possess a nobler System of Religion, Polity, and Morals, than they could ever boast; so the Application of the Sister Arts to these, under a *strict Subordination* to Truth, might seem to promise the noblest Consequences of the Education of Youth." (emphasis added)); EDWARD SEARCH, FREEWILL FOREKNOWLEDGE, AND FATE, A FRAGMENT 146–47 (1763) ("For as military discipline consists of the *strict subordination* of the soldiers to the officers, and the officers to the generals, so the little state of man is never so well disciplined as when the moral senses have the entire command of our motions, but lie themselves under controul of sober consideration and sounds judgement." (emphasis added)).

<sup>82</sup> *See* MONTESQUIEU, THE SPIRIT OF NATIONS 174 (1753) ("The military Commands are in the Hands of the chief Nobility, and yet throughout the whole Body of Officers an Equality is kept up, which, however it may seem hid in a *strict Subordination*, never fails to shew itself on those delicate Occasions where Honour is at Stake." (emphasis added)); FRANCIS STOUGHTON

it was good the law precisely delineated the duties of officers because “the *strict subordination* established by the law might otherwise have rendered entirely arbitrary the authority of superiors.”<sup>83</sup> And, strict subordination was also used to describe or prescribe the ideal state of civil–military relations.<sup>84</sup>

Just as some states differed slightly in their formulations—with Massachusetts using “exact subordination”—many treatises did as well. Exact subordination appeared in the same contexts as strict subordination without any obvious difference in meaning.<sup>85</sup> “Perfect subordination” represents

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SULLIVAN, AN HISTORICAL TREATISE ON THE FEUDAL LAW, AND THE CONSTITUTION AND LAWS OF ENGLAND (1772) (stating that jury trials for soldiers “would have effectually destroyed that *strict subordination*, which is the soul of military enterprises.” (emphasis added)); *see also* Letter from George Washington to the Pennsylvania Committee of Safety (Mar. 28, 1777), FOUNDERS ONLINE, <https://founders.archives.gov/?q=strict%20subordination&s=1111311111&r=6> [https://perma.cc/8BNR-APHQ] (“From the dissensions that have lately prevailed in that Corps, discipline has been much relaxed, and it will require strict Care and Attention to both Officers and Men to bring them back to a proper Sense of *Subordination* and duty.” (emphasis added)).

<sup>83</sup> URBAIN ROGER, THE PRESENT STATE OF DENMARK 140 (1762) (emphasis added). *The Present State of Denmark* appears, in part, a response to Robert Viscount Moleworth’s *Account of Denmark*, a tract known in the colonies. *See id.* at i (“Different from any ACCOUNT hitherto published in the English Language.”); *see also* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 39 (1967) (explaining importance of Denmark).

<sup>84</sup> *See* LORD CHANCELLOR’S SPEECH, in 17 A COLLECTION OF THE PARLIAMENTARY DEBATES IN ENGLAND 379 (1743) (“The army, my Lords is, in time of peace, then best regulated when it is kept under *the strictest subordination* to the civil power, that power which it is instituted to protect and to preserve.” (emphasis added)); 7 DAVID HUME, THE HISTORY OF ENGLAND FROM THE INVASION OF JULIUS CAESAR TO THE REVOLUTION IN 1688, at 26 (1763) (“That no maxim of policy was more undisputed, that the necessity of preserving an inseparable connexion between the civil and military powers, and of retaining the latter in *strict subordination* to the former” (emphasis added)); *see also* JEAN LOUIS DE LOLME, THE CONSTITUTION OF ENGLAND 383–84 (1775) (praising “the *astonishing subjection* in which the military [of England] is kept to the civil power.” (emphasis added)).

<sup>85</sup> *See* GABRIEL BONNOT DE MABLY, OBSERVATIONS ON THE ROMANS: WRITTEN ORIGINALLY IN FRENCH 136–37 (1751) (“The Romans, says Sallust, more frequently punished excess of valour than cowardice, and to this rigid discipline, rather than skill of the consuls, the commonwealth owed its victories for a long time. If some particular advantages were thereby lost, that great one of the most *exact subordination* in the armies was gained, which was more valuable for the calamities escaped by its means, than for any good effects produced by it.” (emphasis added)); 2 DAVID FORDYCE, DIALOGUES CONCERNING EDUCATION 106 (1768) (“Thus, when the principal figure, or what holds the first rank in any composition, or when the drapery is set to any particular key or pitch, with regards to mode, colour, or riches of habit, all the inferior parts must be adjusted according to the same key and in an *exact subordination* to what is principal.” (emphasis added)); 1 JAMES STEUART, AN INQUIRY INTO THE PRINCIPLES OF POLITICAL OECONOMY 2 (1767) (“He is no ways master to break the laws of his oeconomy, although in every respect he may keep each individual within the house, in the most *exact subordination* to his commands.” (emphasis added)).

another popular variation carrying again the same meaning.<sup>86</sup> For instance, a pseudonymous feminist writer, Sophia, used the term to call attention to the inherent hypocrisy of patriarchal society. “Were we to see the *Men* every where, and at all times, masters of themselves, and their animal appetites in a *perfect subordination* to their rational faculties; we should have some colour to think that nature designed them for masters to us.”<sup>87</sup>

Strict subordination thus denoted a scheme of absolute inferiority of one part to another. For one to be strictly, exactly, or perfectly subordinate to another was to be under their “entirely arbitrary” control.

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Putting these three terms together suggests how the founding generation would have understood the strict subordination clause. The clause required that the military power—a term encompassing both a power of government and specific military institutions—remain in a state of rigid or exacting inferiority to a state’s civil power, that is to say the state’s non-military institutions.

Some Founding Era state constitutions took the additional step of adding that the military must also be “governed by” or under the “control of” the civil power.<sup>88</sup> These additions present a small puzzle because Founding Era definitions and usages of “strict subordination” indicate an element of control, not just inferiority. Are these additions surplusage? Probably not. These constitutions make explicit a feature of strict subordination that would otherwise have to be implied from the clause. Take for instance the Virginia constitution. The “strict subordination” portion mandates that the “military” must be inferior to the “civil power,” thus unambiguously indicating that the military may not exercise control over the civil power. The “governed by” portion clarifies that a complementary inference is also true: the civil power

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<sup>86</sup> See 1 MONTESQUIEU, *THE SPIRIT OF THE LAWS* (2d. ed. 1752) (“Nothing gives a greater force to the laws than a *perfect subordination* between the citizens and the magistrate.” (emphasis added)); 5 NOËL-ANTOINE PLUCHE, *NATURE DISPLAY’D: BEING DISCOURSES ON SUCH PARTICULARS OF NATURAL HISTORY* 86 (4th ed. 1763) (“It is this *perfect Subordination* of Imagination to Reason, that renders Eloquence energetic and prevailing; that gives Poetry its Fire and Pictures; that conveys Variety and Unaffectedness into Conversations, and never fails to render all our Arts and Talents equally pleasing and successful.” (emphasis added)).

<sup>87</sup> SOPHIA, *WOMAN NOT INFERIOR TO MAN* 2–3 (1739) (emphasis added to “perfect subordination”).

<sup>88</sup> Today, this “governed by” language appears in six state constitutions: Massachusetts, New Hampshire, North Carolina, South Carolina, Vermont, and Virginia. ICAP, *PROHIBITING PRIVATE ARMIES*, *supra* note 21, at 50, 62, 70, 82, 88, 89. Language declaring the military should remain under the “control of” the civil power appears in the Maryland Constitution. *Id.* at 49.

must exercise control over the military. States constitutions that omit “governed by” or “control of” language from their strict subordination clauses can likely be interpreted the same as Virginia’s, even if some additional interpretive work is required.<sup>89</sup>

### III. WHERE DOES THE CLAUSE COME FROM?

Equipped with some sense of what the strict subordination clause meant, we can now inquire into the origins and understanding of the ideas animating the clause. The story begins in Section III.A with the English Civil War, when an independent army, not controlled by either Parliament or the Crown, held the balance of political power. This was a defining moment in English politics that cast its shadow over debates following the Glorious Revolution about keeping a standing army in the country.

As seen in Section III.B, colonists protesting the presence of British soldiers appropriated the vocabulary of these debates. With the colonies moving toward revolution, the introduction of an independent and uncontrollable military power into the colonies became a key complaint of the Continental Congress. Once the principle of strict subordination became enshrined in a growing number of state constitutions, civilians would come to accuse the Continental Army of failing to heed its terms.

Although this Part does not exhaustively detail the adoption of the strict subordination clause into each state constitution, it charts the development of the concept of civil–military subordination to show the predominant ideas that would have influenced the clause’s understanding at the time of adoption.

#### A. *The English Precedent*

##### 1. The New Model Army

The King and Parliament were at war. Various disputes over who properly held supreme authority had spilled into open conflict. One of the precipitating causes had been Parliament’s attempt to assert decisive control

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<sup>89</sup> Gregory E. Maggs, *A Guide and Index for Finding Evidence of Original Meaning of the U.S. Constitution in Early State Constitutions and Declarations of Rights*, 98 N.C. L. REV. 779, 815 (2020) (discussing instances where the Supreme Court has interpreted different formulations in state constitutions to have the same meaning). *But see also* Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2169 (2019) (“Prolixity, often including lots of repetition and surplusage, was the norm in early modern legal drafting.”).

over the militia in 1641.<sup>90</sup> Early on, Parliament faced difficulties in its fight against the King. Its forces operated largely under the personal command of Parliament's own members. This aristocratic fighting force caused divisions and confusion. It also saddled Parliament with halfhearted and ineffective commanders.<sup>91</sup>

Beset with difficulties, proponents of a more vigorous war effort devised a strategy to jettison their aristocratic dead weight.<sup>92</sup> They proposed an ordinance "for the discharging of the Members of both Houses from all offices, both military and civil," or the Self-Denying Ordinance.<sup>93</sup> This measure dismissed all commanders who were also members of Parliament.<sup>94</sup> The ordinance's passage in April of 1645 and the ensuing departure of aristocratic officers marked the creation of the New Model Army.<sup>95</sup>

The New Model Army went on to win the war against the King; however, it became its own independent force in English politics, with its own demands. In 1648, the Army not only refused to disband at Parliament's orders, but it also removed members of Parliament perceived as hostile to its interests in an event known to history as Pride's Purge.<sup>96</sup> After the King's execution, Oliver Cromwell, backed by the New Model Army, repeatedly dissolved successive Parliaments over the following years.<sup>97</sup> Criticism of the Army abounded. The Levelers, a radical egalitarian group that emerged from the Army's ranks, protested the lack of popular control in terms that anticipated

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<sup>90</sup> See LOIS G. SCHWOERER, NO STANDING ARMIES! THE ANTIARMY IDEOLOGY IN SEVENTEENTH-CENTURY ENGLAND 33–34 (1974); William S. Fields & David T. Hardy, *The Third Amendment and the Issue of the Maintenance of Standing Armies: A Legal History* 35 AM. J. L. HIST. 393, 403 (1991). A 1641 ordinance sought to grant Parliament the "power to assemble and call together all and singular His Majesty's subjects" and muster them into the militia. *The Militia Ordinance*, in THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION, 1625–1660, at 245–47 (Samuel Rawson Gardiner ed., 1906).

<sup>91</sup> See MICHAEL BRADDICK, GOD'S FURY, ENGLAND'S FIRE: A NEW HISTORY OF THE ENGLISH CIVIL WARS 350–52 (2009); IAN GENTLES, THE NEW MODEL ARMY: AGENT OF REVOLUTION 4–6 (2022) ("[Parliament's] aristocratic leaders, the earls of Essex and Manchester, [who] seemed plagued with doubts about the justice of their cause, were looking for a compromise peace . . .").

<sup>92</sup> See MALCOLM WANKLYN, PARLIAMENT'S GENERALS 55–59 (2019).

<sup>93</sup> *The Self-Denying Ordinance*, in THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION, 1625–1660, at 287–88 (Samuel Rawson Gardiner ed., 1906).

<sup>94</sup> The Ordinance "demanded the resignation of members of both Houses from all military or civil offices held since 1640," but "individuals might be reappointed later, as Cromwell was." DIANE PURKIS, THE ENGLISH CIVIL WAR 421 (2006).

<sup>95</sup> See SCHWOERER, *supra* note 90, at 52. ("The effect of the Self-Denying Ordinance by which the army was established was to create a nonaristocratic officer corps, . . ."); WANKLYN, *supra* note 92, at 59.

<sup>96</sup> SCHWOERER, *supra* note 90 at 53, 57.

<sup>97</sup> *Id.* at 51–53; see also BRADDICK, *supra* note 91, at 353 ("It was to be the New Model Army which carried through a coup in 1648 leading directly to the trial and execution of the King.").

the eventual strict subordination clause.<sup>98</sup> As Professor Lois Schwoerer notes, conservative voices from Parliament and the landed gentry joined the Levelers in criticizing the Army.<sup>99</sup>

With this background, it is easy to see how the Self-Denying Ordinance could come to occupy an important place in English thinking on civil–military relations.<sup>100</sup> Looking back from the mid-Eighteenth Century, David Hume discusses Parliament’s debate and passage of the Ordinance in his *History of England*. He records the speech of Lord Bulstrode Whitlocke, who argued that the change would mean that respectable military men would be replaced by “mere adventurers.” According to Hume, Whitlocke also stated that “no maxim of policy was more undisputed, than the necessity of preserving an *inseparable connexion* between the civil and military powers, and of retaining the latter in *strict subordination* to the former.”<sup>101</sup>

There is every reason to think this language is Hume’s and not Whitlocke’s.<sup>102</sup> The rest of Hume’s telling of the speech anticipates subsequent developments with the accuracy of hindsight. Nonetheless, it shows the significance of the Self-Denying Ordinance for the founding generation, as Hume’s account was widely read and would have been an influential lens through which they understood the English Civil War.<sup>103</sup>

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<sup>98</sup> In their 1647 *Agreement of the People*, the Levelers argued that the power of Parliament was “inferior only to theirs who choose them,” that is the people, and extended “without the consent or concurrence of any other person or persons, . . . to the making war and peace.” *The Agreement of the People, as presented to the Council of the Army*, in *THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION, 1625–1660*, at 333–35 (Samuel Rawson Gardiner ed., 1906).

<sup>99</sup> See SCHWOERER, *supra* note 90, at 54–55; see also, e.g., *THE PEACEABLE MILITIA: OR THE CAUSE AND CURE OF THE LATE AND PRESENT WARRE* 16 (Aug. 16, 1648). (“That in what Nation foever, any Trustees or Governours have gained such an arbitrary and unlimited power over the *Militia* . . . they have kept up standing Armies in the bowels of those Kingdomes, to force obedience to their wills in all those things whatsoever . . .”).

<sup>100</sup> See, e.g., Fields & Hardy, *supra* note 90, at 404 (“The end result of the war was a military dictatorship which furthered the popular aversion to the army.”).

<sup>101</sup> 5 DAVID HUME, *THE HISTORY OF ENGLAND FROM JULIUS CAESAR TO THE REVOLUTION IN 1688*, at 448 (1763) (emphasis added).

<sup>102</sup> For instance, Hume’s language differs from the more contemporaneous sources on which he relied. Compare *id.*, with John Rushworth, *Historical Collections: The New Model Army*, in 6 *HISTORICAL COLLECTIONS OF PRIVATE PASSAGES OF STATE: 1645–47*, at 1–23 (1722), [<https://perma.cc/HK6Y-X2QM>], and BULSTRODE WHITLOCKE, *MEMORIALS OF THE ENGLISH AFFAIR* 114–15 (1688).

<sup>103</sup> *The History of England* appears, for instance, in Thomas Jefferson’s library collection.

See THOMAS JEFFERSON’S LIBRARY: A CATALOG WITH THE ENTRIES IN HIS OWN ORDER 27–30 (James Gilreath & Douglas L. Wilson eds., 1989),

[http://catdir.loc.gov/catdir/toc/becites/main/jefferson/88607928\\_ch3.html](http://catdir.loc.gov/catdir/toc/becites/main/jefferson/88607928_ch3.html)

[<https://perma.cc/LA64-L52F>]; see also BAILYN, *supra* note 83, at 28 n.8.



Hume's description of Whitlocke's speech is particularly interesting because—instead of calling for the separation of military and civil power—he emphasizes the need for their “inseparable *connexion*.” Of course, members of Parliament were actively participating in the conflict as battlefield commanders. According to Whitlocke's own recollection of his speech, members of Parliament should have remained in the army because they shared the same interests as the rest of Parliament, making them less likely to break Parliament's trust.<sup>104</sup> This reasoning evokes the conundrum of keeping those with access to the means of violence responsive to the authority of a non-military institution.<sup>105</sup> For Whitlocke and later Hume, this authority was maintained by members exercising direct command over parliamentary troops. The Self-Denying Ordinance severed this connection, and resulted in the New Model Army, unmoored from the restraint of Parliament.

By Hume's account, the English Civil War was the paradigmatic breakdown between military and civil power. The New Model Army, although initially raised by Parliament, would go on to control and dissolve subsequent Parliaments. For the founding generation, this would have represented the failure of strict subordination.

## 2. The Glorious Revolution and English Bill of Rights

While the experience of the English Civil War illustrated the paradigmatic need for the strict subordination clause, its eventual language was developed in the late seventeenth and early eighteenth centuries. This period of intense writing had a profound effect on the founders' thinking.

After the English Civil War, conflict between the Crown and Parliament would erupt again in the Glorious Revolution. Grievances and concerns over a standing army again came to the fore, but this time the King was accused of raising such a military force.<sup>106</sup> The outcome was the Declaration of Rights of 1689, which enshrined parliamentary supremacy over any British armies.<sup>107</sup> It declared that “the raising or keeping a standing army

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<sup>104</sup> See WHITLOCKE, *supra* note 102, at 115. Whitlocke also recalls drawing on classical allusions to the Greek and Roman practice of Senators serving simultaneously in military offices. *Id.*

<sup>105</sup> See, e.g., Peter D. Feaver, *Civil–Military Relations*, 2 ANN. REV. POL. SCI. 211, 214–15 (1999) (“The civil-military problematique is a simple paradox: The very institution created to protect the polity is given sufficient power to become a threat to the polity.”).

<sup>106</sup> For a brief description of the Glorious Revolution, as relevant to constitutional scholarship, see Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 310, 379–85 (1998).

<sup>107</sup> See SCHWOERER, *supra* note 90, at 154.

within the kingdom in time of peace, unless it be with consent of Parliament, is against law.”<sup>108</sup>

On the immediate heels of the Glorious Revolution, a regiment of soldiers revolted against the new joint monarchs, William and Mary.<sup>109</sup> In response, Parliament speedily passed the first Mutiny Act. The Act granted the Crown the power to punish mutiny, sedition, and desertion by court martial, thus giving a statutory basis to military law and permitting its operation in the armed forces.<sup>110</sup> Importantly, the Mutiny Act included the following proviso: “That nothing in this Act . . . shall extend or be construed to Exempt any Officer or Soldier whatsoever from the Ordinary Processe of Law . . . .”<sup>111</sup> Thus, while soldiers could be subject to court martial, they were not exempt from ordinary civilian laws. As Professor Schwoerer notes, “the soldier was to remain a citizen.”<sup>112</sup>

The Act contained a six-month sunset, and Parliament would come to renew the Act on a yearly basis. This periodic reauthorization also gave Parliament functional control over the standing army, and by the nineteenth century, the passage of the first Mutiny Act would be recognized as the turning point that permitted gradual acceptance and maintenance of a standing army in Great Britain.<sup>113</sup> According to one later commentator, it was this statute that showed a professional army could be made “submissive to the civil power.”<sup>114</sup>

<sup>108</sup> ENGLISH BILL OF RIGHTS OF 1689, [https://avalon.law.yale.edu/17th\\_century/england.asp](https://avalon.law.yale.edu/17th_century/england.asp) [HTTPS://PERMA.CC/VR99-SQVH].

<sup>109</sup> SCHWOERER, *supra* note 90, at 151–52; *see also* FRANCIS LIEBER & G. NORMAN LIEBER, TO SAVE THE COUNTRY: A LOST TREATISE ON MARTIAL LAW 75–76 n.†, 109 (Will Smiley & John Fabian Witt Eds., 2019) (briefly discussing origins of Mutiny Acts).

<sup>110</sup> *See* 1 CHARLES CLODE, THE ADMINISTRATION OF JUSTICE UNDER MILITARY AND MARTIAL LAW 143 (1872), [<https://perma.cc/9XW5-77YW>] (“[I]t conceded exceptional powers to the Crown for the punishment of *soldiers* . . . , [but] it restrained the Crown in . . . declaring Martial Law against the *civil community* . . . .”). The statute refers to “martial law,” but at this time, martial law and military law were not separate concepts. *See* George M. Dennison, *Martial Law: The Development of a Theory of Emergency Powers, 1776-1861*, 18 AM. J. L. HIST. 52, 52–53 (1974). As explained by Jurist Matthew Hale, martial law arose out of “the necessity of government, order, and discipline in an army” and was in “in truth . . . not a law.” MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 26–27 (1713) (Charles M. Gray Ed. 1971).

<sup>111</sup> Mutiny Act, 1 W. & M. c. 5 (1689).

<sup>112</sup> SCHWOERER, *supra* note 90, at 152 (quoting 4 MARK A. THOMSON, A CONSTITUTIONAL HISTORY OF ENGLAND 292–93 (1938)); CLODE, *supra* note 110, at 143–44.

<sup>113</sup> LIEBER & LIEBER, *supra* note 109, at 109, 122 (“By slow degrees, familiarity reconciled the public mind to the names, once so odious, of standing army and court-martial.” (quoting 3 THOMAS BABINGTON MACAULAY, HISTORY OF ENGLAND 42–47 (1861)); SCHWOERER, *supra* note 90, at 152 (“Clode regards the Mutiny Act as the ‘great divide’ in the history of martial law.” (quoting CLODE *supra* note 110, at 9)).

<sup>114</sup> LIEBER & LIEBER, *supra* note 109, at 122 (“It was proved by experience that, in a well-constituted society, professional soldiers may be terrible to a foreign enemy, and yet

Yet this acceptance was far in the future, and public contestation over standing armies erupted in the late 1690s as the public grappled with the presence of William and Mary's victorious troops.<sup>115</sup>

John Trenchard, a country Whig, initiated a fierce battle of competing pamphlets with *An Argument, Shewing That a Standing Army Is Inconsistent with a Free Government*.<sup>116</sup> A year later, he published *A Short History of Standing Armies in England* in response to William's initial refusal to reduce the army to the limits set by parliamentary vote.<sup>117</sup> *A Short History* was immensely popular and rapidly went through several printings.<sup>118</sup> In it, Trenchard caustically described the machinations of the New Model Army after Cromwell's death. He recounted the Army's rejection of political proposals because "they would not settle the Military Sword independent of the Civil."<sup>119</sup> Thus, according to Trenchard, one of the evils of the New Model Army consisted of its insistence on existing as a freestanding military force, unconstrained by civil authority.

The next year, an anonymous pamphlet would further refine Trenchard's point. The author of *Some Farther Considerations about a Standing Army* argued that standing armies harmed English civil law by causing the proliferation of military law. "Except the Martial [i.e., military] Law be fully Subordinate to the Civil, it proves troublesome and mischievous," this author opined.<sup>120</sup> According to the pamphlet, such subordination was impossible so long as a standing army existed. "Tis usual with the Sword to Rage and Devour; [and] . . . to strive for Superiority."<sup>121</sup>

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submissive to the civil power." (quoting 3 THOMAS BABINGTON MACAULAY, HISTORY OF ENGLAND 42–47 (1861)).

<sup>115</sup> In particular, William had repositioned the army to face foreign threats. See David Womersley, *John Trenchard and the Opposition to Standing Armies*, ONLINE LIBRARY OF LIBERTY (Sept. 2016), <https://oll.libertyfund.org/page/liberty-matters-david-womersley-john-trenchard-opposition-to-standing-armies> [<https://perma.cc/4AZ4-3X8L>].

<sup>116</sup> See SCHWOERER, *supra* note 90, at 163. According to Bernard Bailyn's seminal treatment of the American Revolution's ideological foundations, the writings of this country party formed a major inspiration for the American founders. BAILYN, *supra* note 83, at 35–36 ("[T]hese libertarian tracts, emerging first in the form of denunciation of standing armies in the reign of William III, left an indelible imprint on the 'country' mind everywhere in the English-speaking world."); see also SCHWOERER, *supra* note 90, at 155–56. For a review of the limits of Bailyn's (and his students') description of the influence of the country Whigs, see Peterson, *supra* note 5, at 1564–72, 1565 n. 126.

<sup>117</sup> See SCHWOERER, *supra* note 90, at 167, 175.

<sup>118</sup> *Id.* at 169.

<sup>119</sup> JOHN TRENCHARD, A SHORT HISTORY OF STANDING ARMIES IN ENGLAND 9–10 (1698), [<https://perma.cc/H4HT-RZBS>].

<sup>120</sup> SOME FARTHER CONSIDERATIONS ABOUT A STANDING ARMY 1 (1699), [<https://perma.cc/LAN8-8PT5>].

<sup>121</sup> *Id.*

Language that closely mirrors the strict subordination clause began to emerge in histories of England that followed the antiarmy pamphlets. The 1706 *Complete History of England*, discussing the restoration of King Charles II and the disbanding of the New Model Army, described one royal officer's commitment "to make the Military Power as it ought to be, subordinate to the Civil."<sup>122</sup> Similarly, Laurence Echard's 1718 history covered the same episode in almost identical terms. "For he plausibly stood up 'for the Privileges of Parliaments, and for that regular and necessary way of bringing the Military Power in Subjection to the Civil Authority.'"<sup>123</sup>

The antiarmy argument developed in the pamphlet wars of the late seventeenth century would grow into an enduring trope in English politics.<sup>124</sup> Despite the country's tacit acceptance of a permanent, professional force,<sup>125</sup> the annual reauthorization of the Mutiny Act provided fresh occasion for opponents of the military establishment to decry the dangers of standing armies.<sup>126</sup> The next Section turns to one such debate.

### 3. The Army Debates

In December 1740, England had just entered into war with Spain. In Parliament, the opposition switched from attacking standing armies on principle to attacking the government's method of raising an army.<sup>127</sup> Leading the opposition on this point was the Duke of Argyll, who had initially sought

<sup>122</sup> 3 WHITE KENNET, A COMPLETE HISTORY OF ENGLAND 216 (1706), [https://perma.cc/QW8X-3LBX]. This was George Monck, who played a pivotal role in the restoration. *Id.*; see also 2 THE HISTORY OF ENGLAND. FAITHFULLY EXTRACTED FROM AUTHENTICK RECORDS 225 (1715), [https://perma.cc/4HHQ-T3ZR] (stating that Monck "call'd all his Officers together, and told them, *That the Army in England had broke up the Parliament, for not humoring them in their Extravagancies, and that he was resolv'd to make the Military Power subordinate to the Civil.*").

<sup>123</sup> 3 LAURENCE ECHARD, THE HISTORY OF ENGLAND 858 (1718); see also *id.* ("[H]e drew out his Forces at *Edinburgh*, and gave a them an Account 'of this Resolutions to adhere to the Civil Power, and making the Military subordinate to it.'").

<sup>124</sup> See SCHWOERER, *supra* note 90, at 191–92 ("Some men repeated with monotonous regularity the identical arguments which Trenchard and his friends had advanced."); LIEBER & LIEBER, *supra* note 109, at 123 ("The debate which recurred every spring on the Mutiny Bill came to be regarded merely as an occasion on which hopeful young orators fresh from Christchurch were to deliver maiden speeches, . . . . At length these declamations became too ridiculous to be repeated." (quoting 4 MACAULAY, HISTORY OF ENGLAND 42–46)).

<sup>125</sup> See SCHWOERER, *supra* note 90, at 188.

<sup>126</sup> Don Higginbotham, Review, *In Defiance of the Law: The Standing-Army Controversy, the Two Constitutions, and the Coming of the American Revolution by John Phillip Reid*, 27 AM. J. L. HIST. 307, 309 (1983).

<sup>127</sup> 11 SAMUEL JOHNSON, THE WORKS OF SAMUEL JOHNSON: DEBATES IN PARLIAMENT 72–74 (Thomas Kaminski, Benjamin Beard Hoover & O. M. Barack, Jr. eds., 2011), [https://perma.cc/C8DG-LS62]. The government had wanted to increase the army's size by adding new regiments under new officers instead of adding soldiers to existing regiments, but the opposition charged that this produced political patronage. *Id.*

to command the military forces himself, but whose efforts had been rebuffed by the King.<sup>128</sup> Bitter, he introduced a resolution in the House of Lords condemning the government's proposed increase in new regiments.<sup>129</sup>

Argyll opened debate on the resolution by decrying the supposed influence of political officers over the army, which he thought was degrading proper military discipline.<sup>130</sup> He waxed eloquent on the virtues of martial order and promotion by merit. According to one account of the speech, Argyll intoned, "There must be the very strictest military subordination, on which must be founded the strictest discipline. . . . And all [new officers] must be preferred for their military merit."<sup>131</sup> However, he thought, this strict discipline had been subverted by the political whims of civil officers. According to Argyll, the army's generals were "without power, and without command," "only phantoms of authority," and "restrained by an arbitrary Minister."<sup>132</sup> As a result, the political influence of the court and ministry over the army had to be opposed at every turn.<sup>133</sup>

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<sup>128</sup> *Id.* at 73.

<sup>129</sup> *Id.* at 87; *see also* 25 J. HOUSE LORDS 545, 552 (Dec. 1740), [<https://perma.cc/4DP3-DTXX>] ("It was proposed, 'To resolve, That augmenting the Army by raising Regiments, as it is the most unnecessary and most expensive Method of Augmentation, is also the most dangerous to the Liberties of Britain.'").

<sup>130</sup> 11 JOHNSON, *supra* note 127, at 75–82. The records of debates of Parliament are subject to question regarding their accuracy. For instance, Samuel Johnson had to invent portions of speeches where notes failed him. *See* Thomas Kaminski, *Three Contexts for Reading Johnson's Parliamentary Debates*, in SAMUEL JOHNSON: NEW CONTEXTS FOR A NEW CENTURY 200 (Howard Weinbrot ed., 2014); *see also* Mary Ransome, *The Reliability of Contemporary Reporting of the Debates of the House of Commons, 1727–1741*, 19 HIST. RESEARCH 67 (examining accuracy of Torbuck's debates). However, the historical evidence suggests the gap between what was recorded and what was said is fairly small. *See* Kaminski, *supra*, at 196–200. In any event, for the purposes of a retrospective look at influences on the founding generation, it matters less what MPs actually said and more what the public understood them to have said. And, for the most part, the quoted language that follows appears generally well-backed up by various sources.

<sup>131</sup> 11 JOHNSON, *supra* note 127, at 76 n.4. There is a good reason to think this may be an accurate account of the language. *See id.* at 74 (report of French ambassador agreeing closely with quoted language); *see also* Kaminski, *supra* note 130, at 200 n.11 (pointing to confirmation of Johnson's language by the French ambassador as evidence of reliability).

<sup>132</sup> 11 JOHNSON, *supra* note 127, at 82 ("By raising new regiments, my Lords, we shall only gratify the Minister with the distribution of new commissions, and the establishment of new dependents; we shall enlarge the influence of the Court, and increase the charge of the nation, which is already loaded with too many taxes to support any unnecessary expence.").

<sup>133</sup> *Id.* at 84. ("[I]t ought to be our care to hinder the increase of the influence of the Court, and to obstruct all measures that may extend the authority of the Ministry, . . .").

Rising in response to Argyll, Philip York, the First Earl of Hardwicke and Lord Chancellor, defended the government.<sup>134</sup> In his speech, Hardwicke concentrated less on the particularities of the proposed resolution and instead focused on Argyll's exaltation of military virtue as a way of conjuring the familiar specter of the standing army.<sup>135</sup> He argued that the distinct nature of soldiers, being subject to military law and set apart from society, rendered them dangerous and made them "ready to subvert the constitution" and "to oppress the civil magistrates for whom they had lost their reverence."<sup>136</sup> The Duke's resolution, he argued, would bring these dangers to pass by loosening the bonds of civilian control.<sup>137</sup> In closing, Hardwicke returned to the anti-standing army principle and offered his own distillation of that principle: "The army, my Lords, is, in time of peace, then best regulated when it is kept under *the strictest subordination* to the civil power, that power which it is instituted to protect and to preserve."<sup>138</sup>

The House of Lords rejected the opposition's motion,<sup>139</sup> but more importantly Hardwicke's speech received notable attention. Samuel Johnson's telling of the debate was published and circulated in magazine form.<sup>140</sup> Portions of Hardwicke's arguments were also reprinted in an anonymous 1749

<sup>134</sup> See PHILIP C. YORKE, *THE LIFE AND CORRESPONDENCE OF PHILIP YORK, EARL OF HARDWICKE, LORD HIGH CHANCELLOR OF GREAT BRITAIN 1797–99* (1913), [https://perma.cc/MWJ4-Q9QZ]. Hardwicke's contributions to other standing army debates have received some attention in legal scholarship. See Higginbotham, *supra* note 127, at 309 (discussing Hardwicke's skepticism of standing armies); Earl F. Martin, *America's Anti-Standing Army Tradition and the Separate Community Doctrine*, 76 MISS. L.J. 135, 145 n. 43 (2006) (same).

<sup>135</sup> 19 A COLLECTION OF THE PARLIAMENTARY DEBATES IN ENGLAND 377 (1743) [hereinafter "PARLIAMENTARY DEBATES"], [https://perma.cc/J5RJ-8F82] ("Whether a standing army, in time of peace, is made necessary by the change of conduct in foreign courts it is now useless to inquire; but it will be easily granted by your Lordships, that no motive but necessity, necessity absolute and inevitable ought to influence us to support a standing body of regular forces, which have always been accounted dangerous, and found destructive to a free people.").

<sup>136</sup> PARLIAMENTARY DEBATES, *supra* note 136, at 378.

<sup>137</sup> *Id.* ("And how soon, my Lords, might such outrages be expected from any army formed after the mode of the noble Duke . . . ?").

<sup>138</sup> *Id.* at 379 (emphasis added). Hardwicke had taken his own notes on Argyll's speech and it is possible that this precise turn of phrase was a deliberate reference to Argyll's earlier use of "strict military subordination." 11 JOHNSON, *supra* note 127, at 74. Most sources are in agreement concerning the accuracy of the language. See 11 JOHNSON, *supra* note 127, at 104; see also *id.* at 104 n.6 ("According to the French report [on the speech], 'Il [i.e., Hardwicke] s'étendit longuement et avec beaucoup d'éloquence sur les raisons qui devoient toujours faire subordonner l'autorité militaire à l'autorité politique'").

The irony is, of course, that Hardwicke invoked the English aversion to standing armies to defend an *increase* in troops. Argyll's emphasis on political influence over the armed forces allowed Hardwicke to turn the standing army argument on its head, by defending the proposed expansion as in keeping with the tradition of Parliamentary and Ministerial control.

<sup>139</sup> See 25 J. HOUSE LORDS, 545, 552 (Dec. 1740), [https://perma.cc/4DP3-DTXC]

<sup>140</sup> *Debates in the Senate of Lilliput*, in 11 THE GENTLEMAN'S MAGAZINE 630 (1741), [https://perma.cc/HH33-FA2R].

pamphlet.<sup>141</sup> It referred to “standing Forces” as a “military power” that had to be properly governed by law, and it warned that “Soldiers . . . ought to be kept under the strictest Subordination to the Civil Power, otherwise they will be inclined to consider themselves a Body distinct and independent from the rest of the Community.”<sup>142</sup>

Hardwicke’s use of “strictest subordination” generally conforms to the discussion of terminology in Part II above. Hardwicke was responding to Argyll’s vigorous attack on political influence over military offices, and as a result, he had to defend the court’s position in the strongest terms. Retreating to the principle of civilian control and to the specter of runaway standing armies was thus a safe maneuver for Hardwicke. To properly counter Argyll, Hardwicke categorically rejected any independent military authority.

With ample publication and repetition, Hardwicke’s speech may have influenced the American founders directly.<sup>143</sup> At a minimum, it was emblematic of the emerging language at the time—which included Hume’s *History of England*—to describe civil–military relations. Notably, for Hardwicke as for Hume, the distinct danger of a failure of strict subordination was the separation of soldiers from the civil institutions meant to ultimately govern them. As expressed by Blackstone, “Nothing then . . . ought to be more guarded against in a free state, than making the military power, when such a one is necessary to be kept on foot, a body too distinct from the people.”<sup>144</sup>

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<sup>141</sup> See OBSERVATIONS ON THE LAST SESSION OF P—RLM—NT 21 (1749), [https://perma.cc/LJ9H-X8BX]. Compare *id.* at 22–23 (warning, as in Hardwicke’s speech, that soldiers will “subvert the Constitution from which they receive no Advantages; to oppress the Civil Magistrates for whom they have lost all Reverence”), with PARLIAMENTARY DEBATES, *supra* note 136, at 378 (“[Soldiers will] subvert the constitution from which they received little advantage, and to oppress the civil magistrates for whom they have lost their reverence.”).

<sup>142</sup> *Id.* at 22 (“If at any Time it be found necessary to keep up a large Body of standing Forces in a Time of Peace, it ought to be the Duty of the Minister, to adapt the Laws by which this Military Power is to be governed, in such a Manner to our national Constitution, that no detriment may arise therefrom; and that our civil Rights may be protected, and not liable to be oppressed, by the Army. The Soldiers, therefore, ought to be kept under the strictest Subordination to the Civil Power, otherwise they will be inclined to consider themselves a Body distinct and independent from the rest of the Community.”). The same pamphlet would also opine that “we are [] in Danger from the Want of the Army being under due and legal Subordination to the Civil Authority.” *Id.* at 27.

<sup>143</sup> After all, founders such as John Dickinson paid close attention to parliamentary debates, including those involving standing armies. See Trevor Colburn, *A Pennsylvanian Farmer at the Court of King George: John Dickinson’s London Letters, 1745–1756*, 86 PA. MAG. 417, 445 (1962); BAILYN *supra* note 83, at 90–91.

<sup>144</sup> 1 BLACKSTONE, *supra* note 59, at \*401.

## ***B. The Revolution***

Although English history explains how the framers articulated their grievances related to civil–military control, the presence of the strict subordination clause in early state constitutions follows from specific incidents on the path to revolution. The Seven Years’ War left a problem for what was by then the British Empire: how to secure the new lands they had obtained from France and Native peoples? Their solution was to leave ten regular army garrisons in the colonies.<sup>145</sup> Providing for this troop presence across the sea required Great Britain to explore new revenue measures whose names are the mainstays of any American history course: the Stamp Act, the Sugar Act, and the Townshend Acts. Opposition to these measures would quickly lead to civil disturbances along with denunciations of military power.

### **1. The Occupation of Boston**

In the fall of 1768, two regiments of British regulars disembarked into the city of Boston. Tensions had been rising over the various revenue measures imposed on the colonies. Protests, led by Samuel Adams, had resulted in riots against royal customs officials and the sacking of several houses and at least one boat.<sup>146</sup>

That summer, Massachusetts’s royal governor, Francis Bernard, had written to Thomas Gage, commander in chief of British forces in North America, complaining of his inability to quell riots and tumults in the city.<sup>147</sup> Correspondence between Bernard and Gage aligns with this Article’s discussion of the meaning of the strict subordination clause and shows them

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<sup>145</sup> See WOODY HOLTON, *LIBERTY IS SWEET* 53–55 (2021); Fields & Hardy, *supra* 90, at 415–16 (describing the growth of the British standing army at the end of the Seven Years War, which was highly suspicious to the colonists).

<sup>146</sup> Letter from Francis Bernard, Governor of Massachusetts, to the Earl of Hillsborough, Sec’y of State for the Colonies (June 11, 1768), in 4 *THE PAPERS OF FRANCIS BERNARD: GOVERNOR OF COLONIAL MASSACHUSETTS, 1760–69*, at 185, 185–86 (Colin Nicholson ed., 2015) (“After this they went to a Wharf where lay a pleasure Boat belonging to Mr. Harrison [a customs officer], built by himself in a particular and elegant manner. This they took out of the water, and Carried it into the Common, & burnt it.”); Letter from Thomas Gage, Commander in Chief of British Forces in North America, to Francis Bernard, Governor of Massachusetts (June 24, 1768), in 4 *THE PAPERS OF FRANCIS BERNARD: GOVERNOR OF COLONIAL MASSACHUSETTS, 1760–69*, at 219 (Colin Nicholson ed., 2015) (“I have received a Letter from the Commissioners of the Customs to acquaint me, that the Collector, Comptroller, and other officers had been beat and abused in the Execution of their Duty, . . .”); BENJAMIN L. CARP, *DEFIANCE OF THE PATRIOTS* 38–39 (2010).

<sup>147</sup> See, e.g., Letter from Francis Bernard, Governor of Massachusetts, to Thomas Gage, Commander in Chief of British Forces in North America (July 2, 1768), in 4 *THE PAPERS OF FRANCIS BERNARD: GOVERNOR OF COLONIAL MASSACHUSETTS, 1760–69*, at 235 (Colin Nicholson ed., 2015) (“All real power is in the hands of the people of the lowest class; Civil Authority can do nothing but what they will allow.”).



repeatedly using “civil power” to refer to the colony’s ordinary apparatus of civilian government—an apparatus, Bernard repeatedly lamented, that was unable to deal with the rioters.<sup>148</sup>

Discussing the need to bring troops to Boston, Bernard and Gage displayed a keen awareness of the restrictions of English law. Both agreed that professional soldiers could not be used to respond to disorder in the city unless the civil power was outmatched and requested assistance.<sup>149</sup> In July, Gage wrote to Bernard signaling he had troops ready, but he made clear the decision to call for their assistance belonged to Bernard.<sup>150</sup> “It is needless for me to acquaint you,” Gage wrote, “that it is contrary to the Laws and Constitution, for Troops to move to quell Tumults and Riots, unless Military Aid is required for those Purposes by the Civil Power.”<sup>151</sup> He continued, “even then, the Troops cannot act by their own Authority, but are under the Command of the Civil Power, and must act solely in obedience thereto.”<sup>152</sup> There is every reason to think that Gage offers a fair summary of the English legal prohibitions that had developed over the preceding century.<sup>153</sup> Regular soldiers could be brought to bear consistent with the English constitution, but they had to remain under the control of the civil authorities. Bernard concurred, but he noted the presence of troops in Boston would “prevent tumults [and] riots” as well as “enable the Civil power to punish those who create them.”<sup>154</sup> He then

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<sup>148</sup> Letter from Thomas Gage, Commander in Chief of British Forces in North America, to Francis Bernard, Governor of Massachusetts (June 24, 1768), in 4 THE PAPERS OF FRANCIS BERNARD: GOVERNOR OF COLONIAL MASSACHUSETTS, 1760–69, at 219 (Colin Nicholson ed., 2015) (“Nor do I think it proper to order any of His Majesty’s Forces to march for the sole purpose of quelling a Riot; unless required thereto, by the Civil Power.”); Letter from the Earl of Hillsborough, Sec’y of State for the Colonies, to Francis Bernard, Governor of Massachusetts (June 11, 1768), in 4 THE PAPERS OF FRANCIS BERNARD: GOVERNOR OF COLONIAL MASSACHUSETTS, 1760–69, at 181, 182 (Colin Nicholson ed., 2015) (“[T]he Authority of Civil Power is too weak to enforce Obedience to the Laws....”); see also *supra* note 147.

<sup>149</sup> See, e.g., Letter from Thomas Gage, Commander in Chief of British Forces in North America, to Francis Bernard, Governor of Massachusetts (July 11, 1768), in 4 THE PAPERS OF FRANCIS BERNARD: GOVERNOR OF COLONIAL MASSACHUSETTS, 1760–69, at 253 (Colin Nicholson ed., 2015).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> For a review of this particular history involving the use of military troops in civil disorders, see David E. Engdahl, *Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 IOWA L. REV. 1 (1971).

<sup>154</sup> Letter from Francis Bernard, Governor of Massachusetts, to Thomas Gage, Commander in Chief of British Forces in North America (July 18, 1768), in 4 THE PAPERS OF FRANCIS BERNARD: GOVERNOR OF COLONIAL MASSACHUSETTS, 1760–69, at 257, 257 (Colin Nicholson ed., 2015) (“I quite agree with you that it is contrary to Law for troops to move to quell tumults & riots unless required by the civil power.”).

suggested that soldiers could be innocuously stationed in the city as part of the regular garrisoning process.<sup>155</sup>

In the end, several regiments were ordered to Boston.<sup>156</sup> The presence of soldiers in the city only exacerbated tensions with its inhabitants.<sup>157</sup> The *Journal of the Times*, a collection of widely published “journal” accounts of the military occupation, catalogued various depredations by soldiers on the civilian population.<sup>158</sup> The *Journal* complained of “repeated offenses and violences committed by soldiery, against the peace,” which “in open defiance and contempt of the civil magistrate and the law, have escaped punishment, in the courts of justice.”<sup>159</sup> Colonists also demanded to know why the soldiers had “been quartered in the Body of [the] Town,” as opposed to local barracks outside of the city.<sup>160</sup> John Adams called the arrangement an “Excess of military Power.”<sup>161</sup>

As soon as the Massachusetts General Court assembled in the late spring of 1769, the House of Representatives’ first order of business was to seek the troops’ removal from Boston. A House committee promptly drafted a note to the governor.<sup>162</sup> “The Experience of Ages, is sufficient to convince, that the Military Power is ever dangerous, and subversive of a *free* Constitution.”

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<sup>155</sup> *Id.* at 257–58.

<sup>156</sup> Letter from Thomas Gage, Commander in Chief of British Forces in North America, to Francis Bernard, Governor of Massachusetts (Aug. 31, 1768), in 4 THE PAPERS OF FRANCIS BERNARD: GOVERNOR OF COLONIAL MASSACHUSETTS, 1760–69, at 290–91 (Colin Nicholson ed., 2015); Letter from the Earl of Hillsborough, Sec’y of State for the Colonies, to Francis Bernard, Governor of Massachusetts (July 30, 1768), in 4 THE PAPERS OF FRANCIS BERNARD: GOVERNOR OF COLONIAL MASSACHUSETTS, 1760–69, at 271, 271–74 (Colin Nicholson ed., 2015) (informing Bernard of order to send two additional regiments to Boston).

<sup>157</sup> RICHARD ARCHER, AS IF AN ENEMY’S COUNTRY: THE BRITISH OCCUPATION OF BOSTON AND THE ORIGINS OF REVOLUTION 123–43 (2010) (describing the British occupation of Boston and the frictions caused by the daily presence of soldiers).

<sup>158</sup> See generally OLIVER MORTON DICKERSON, BOSTON UNDER MILITARY RULE 1768–1769 AS REVEALED IN A JOURNAL OF THE TIMES (1936), [<https://perma.cc/Z382-D6NP>]. However, there is good reason to think many of these accounts were exaggerated, if not outright fabrications. See HOLTON, *supra* note 145, at 103.

<sup>159</sup> DICKERSON, *supra* note 158, at 98.

<sup>160</sup> Letter from John Adams to the Honorable James Otis and Thomas Cushing Esqrs, Mr. Samuel Adams and John Hancock Esqr. (May 8, 1769), in 1 THE PAPERS OF JOHN ADAMS, SEPT. 1755–OCT. 1773 (Robert J. Taylor, Mary-Jo Kline, & Gregg L. Lint eds., 1977); CARP, *supra* note 146, at 194.

<sup>161</sup> Letter from John Adams to the Honorable James Otis and Thomas Cushing Esqrs, Mr. Samuel Adams and John Hancock Esqr. (May 8, 1769), in 1 THE PAPERS OF JOHN ADAMS, SEPT. 1755–OCT. 1773 (Robert J. Taylor, Mary-Jo Kline, & Gregg L. Lint eds., 1977).

<sup>162</sup> H.R. Journal, 1769–1770 Gen. Ct., 1st Sess. 5–6 (Mass. 1769), as reprinted in 45 MASS. HIST. SOC’Y, JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS, 1768–1769, at 117–18 (1976) [hereinafter HOUSE JOURNAL], [<https://perma.cc/KL2C-89JA>].

The letter called particular attention to the English Civil War, and it requested that the governor order the troops out of the city.<sup>163</sup>

The House received a short reply from the governor: "I Have no Authority over his Majesty's Ships in this Port, or his Troops in this Town; nor can I give any Orders for the Removal of the same."<sup>164</sup>

This only further provoked the House of Representatives, and it created a new committee to draft a response, which included Samuel Adams and James Otis.<sup>165</sup> Working for almost two weeks, the committee, and then the whole House, prepared, debated, and amended a new message to Governor Bernard. With the message finally ready on June 13, the House ordered the drafting committee to deliver it.<sup>166</sup>

The House opened its response by telling the governor it was "sorry" to hear he did not have the authority to remove the troops.<sup>167</sup> According to the House, this conclusion was wrong. The message reasoned that the "King . . . is the supreme executive Power through all the Parts of the British Empire," and that within Massachusetts, Governor Bernard was "the King's Lieutenant, Captain-General, and Commander in Chief."<sup>168</sup> "From hence," the House continued, "we think it indubitably follows, that all Officers, civil and military, within this Colony, are subject to the Order, Direction and Controul of your Excellency."<sup>169</sup> In short, the governor, as the highest civil officer in the colony, should have authority over any soldiers in Boston.

If the governor did not possess the authority to remove the troops as he claimed, then this had disturbing implications, as the House next laid out. For one thing, this position made unclear whether the inhabitants of Boston were "subject to an absolute Power, civil or military."<sup>170</sup> More concerning still, it threatened to create divided sovereignty and to expose the colony to an *uncontrollable* military power. As the House complained, "the Doctrine your Excellency has been pleased to advance, in your Answer to the Message of the House, involves us in that State which is called by the Learned, *Imperium in*

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<sup>163</sup> *Id.* ("The History of our own Nation affords Instances of Parliaments which have been lead into mean and destructive Compliances, even to surrendering their Share in the supreme Legislative, through the Awe of Standing Armies.").

<sup>164</sup> *Id.* at 8.

<sup>165</sup> *Id.* at 12.

<sup>166</sup> *See id.* at 12–18.

<sup>167</sup> *Id.* at 18.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 19.

*Imperio*; or at least establishes a military Power here, uncontrollable by any Civil Authority in the Province.”<sup>171</sup>

The concept of *imperium in imperio*, often translated as “government within government” or “dominion within a dominion,”<sup>172</sup> was a recurring bugbear in English political thought.<sup>173</sup> The notion of sovereignty that arose out of the English Civil War held that, according to Blackstone, in every political community there must exist “a supreme, irresistible, absolute, uncontrolled authority, in which . . . the rights of sovereignty, reside.”<sup>174</sup> In short, every government must possess some ultimate source of authority to which no other entity was superior.<sup>175</sup> A source of authority separate from the recognized sovereign was thus a contradiction in terms and was to be avoided at all costs.<sup>176</sup> The fear of *imperium in imperio* extended not just to competing governments, but also to anyone who was thought to be subject to divided loyalties. Catholics, for example, were singled out for opprobrium on the basis of perceived loyalty to the Pope.<sup>177</sup> Such unchecked divisions, the thinking went, led directly “to the worst Anarchy and Confusion, civil Discord, War and Bloodshed.”<sup>178</sup>

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<sup>171</sup> *Id.*

<sup>172</sup> See Alison LaCroix, *Rhetoric and Reality in Early American Legal History: A Reply to Gordon Wood*, 78 U. CHI. L. REV. 733, 733–35 (2011); Alison L. LaCroix, *The New Wheel in the Federal Machine: From Sovereignty to Jurisdiction in the Early Republic*, 2007 SUP. CT. REV. 345, 349 (2007) [hereinafter LaCroix, *New Wheel*].

<sup>173</sup> LaCroix, *New Wheel*, *supra* note 172, at 349 n.13 (describing *imperium in imperio* as “a powerful rhetorical device invoked repeatedly throughout eighteenth-century Anglo-American debates”).

<sup>174</sup> 1 BLACKSTONE, *supra* note 59, at \*49; see BAILYN, *supra* note 83, at 198–99, 201 (“[T]here must reside somewhere in every political unit a single, undivided, final power, higher in legal authority than any other power, subject to no law, a law unto itself.”).

<sup>175</sup> This idea of sovereignty was closely associated with the writings of Jean Bodin and Thomas Hobbes. See BAILYN, *supra* note 83, at 199 (explaining that Hobbes, drawing from Bodin, distilled sovereignty into its “essential quality . . . the capacity to compel obedience.”).

<sup>176</sup> Frequently called a “solecism,” the term *imperium in imperio* is thought to have originated with Country Whig Lord Bolingbroke, who used it to criticize Walpole’s ministry. See Daniel J. Hulsebosch, *Imperia in Imperio: The Multiple Constitutions of Empire in New York, 1750–1777*, 16 L. & HIST. REV. 319, 340 n. 58 (1998).

<sup>177</sup> THE VOTES AND PROCEEDINGS OF THE FREEHOLDERS AND OTHER INHABITANTS OF THE TOWN OF BOSTON, IN TOWN MEETING ASSEMBLED, ACCORDING TO LAW 4 (1772) [hereinafter THE VOTES AND PROCEEDINGS], [<https://perma.cc/F6NJ-RH77>] (“The Roman Catholicks or Papists are excluded, by Reason of such Doctrines as . . . their recognizing the Pope in so absolute a Manner, in Subversion of Government, by introducing as far as possible into the States, under whose Protection they enjoy Life, Liberty and Property, that Solecism in Politicks, *Imperium in Imperio* . . .”); accord 4 WILLIAM BLACKSTONE, COMMENTARIES \*114 (“This then is the original meaning of the offence, which we call *praemunire*; viz. introducing a foreign power into this land, and creating *imperium in imperio*, by paying that obedience to papal process, which constitutionally belonged to the king alone.”).

<sup>178</sup> THE VOTES AND PROCEEDINGS, *supra* note 177, at 4.

The lawyer James Otis, one of the message's drafters, had earlier advanced an argument concerning the limitations of Parliament that had been attacked as a form of *imperium in imperio*.<sup>179</sup> Conservative writers looked with scorn and suspicion on any suggestion that colonial assemblies had independent prerogatives that Parliament was bound to respect.<sup>180</sup> At that time, Otis had responded to these denunciations by admitting that Parliament held absolute control over the colonies. "[T]o preserve their dependency on, and subordination to, the mother state, and to prevent *imperium in imperio* . . . the mother state justly asserts the right and authority to bind her colonies . . . ." <sup>181</sup> Although Otis thought Parliament could be restrained in other ways, preventing *imperium in imperio* required conceding the proper subordination of the colonies to Great Britain.<sup>182</sup>

The appeal to *imperium in imperio* in the message to Bernard was thus a clever turn because it flipped the pro-Parliament argument on its head. If Bernard truly could not control the soldiers and was thus not the ultimate authority in Massachusetts, then divided sovereignty had already come to pass. The argument also linked subordination and *imperium in imperio*, as subordination avoided the danger of competing sovereigns.<sup>183</sup>

Notably, the House included almost as a fallback argument that Bernard's position established, at a minimum, an uncontrollable military power in the colony. So, even if the regiments stationed in the city did not precisely amount to a separate sovereign, the presence of armed soldiers who could not be directed by the civil governor was still improper. The message ended forcefully by concluding that the governor's refusal to take responsibility produced an uncontrollable, absolute power without any check and with "the Sword constantly in its Hand." Such a power, the House asserted, would "exercise a rigorous severity whenever it pleases."<sup>184</sup>

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<sup>179</sup> See BAILYN, *supra* note 83, at 206 ("[Otis's] view of the self-defining restrictions of Parliament's power amounted to claiming for the colonies 'an independent, uncontrollable, provincial legislative.'").

<sup>180</sup> See Hulsebosch, *supra* note 176, at 340 n. 58 (1998); BAILYN, *supra* note 83, at 206.

<sup>181</sup> JAMES OTIS, A VINDICATION OF THE BRITISH COLONIES (1765), *reprinted in* COLLECTED POLITICAL WRITINGS OF JAMES OTIS 183, 193–94 (Richard Samuelson ed., 2015).

<sup>182</sup> Otis adopted the unsatisfying argument that Parliament, though supreme, was restrained by what was right and just. See BAILYN, *supra* note 83, at 205–07.

<sup>183</sup> See also 4 BLACKSTONE, *supra* note 177, at \*104 ("The most stable foundation of legal and rational government is a due subordination of rank . . .").

<sup>184</sup> H.R. Journal, *supra* note 162, at 19 ("We think we can infer from your Excellency's Declaration, that this military Force is uncontrollable by any Authority in the Province: It is then a Power without any Check here, and therefore it is so far absolute.—An absolute Power which has the Sword constantly in its Hand, may exercise a rigorous severity whenever it pleases.").

The governor responded the next day. He flatly reiterated that he did not have command over the soldiers. But, he continued, if the House of Representatives was so alarmed by troops in Boston, then the only solution was to move the assembly to a place where the presence of armed forces could not bother them.<sup>185</sup> As a result, he ordered the General Court removed to Harvard college.<sup>186</sup> To the public, the *Journal of the Times* complained of the governor's claim of having "*no authority over the military.*"<sup>187</sup> It further charged that Bernard, head of the "*civil department,*" had willingly made the House "give way to the *military*" by "adjourning the [General Court] to Cambridge."<sup>188</sup>

The House's fears of unchecked military power would come to be realized in the Boston Massacre. British soldiers fired into a crowd, killing Crispus Attucks and four others.<sup>189</sup> For a generation raised on the suspicion of standing armies, Boston and all that transpired there neatly encapsulated all the dangers of the military power rising above its civil counterpart. The civil governor had abdicated his rightful power to dismiss soldiers from the city, and those soldiers then preyed on the city's innocent inhabitants. Deference to the military power had resulted in the colonial assembly being removed from its ordinary place of business instead of troops being removed from the town. More galling still, the governor's justification for inaction flew in the face of

<sup>185</sup> H.R. Journal, *supra* note 162, at 20.

<sup>186</sup> H.R. Journal, *supra* note 162, at 120–21. In an exasperated letter to Gage, Bernard explained his decision to remove the General Court. "The Assembly has hitherto done no Business: they insisted upon the Troops being removed out of the Town of Boston Before they entered upon Business. I have therefore removed the Assembly to Cambridge[:] it is now said that they will do no Business till the Troops are removed out of the Province; if that is the Case, Nothing will be done." Letter from Francis Bernard, Governor of Massachusetts, to Thomas Gage, Commander in Chief of British Forces in North America (June 19, 1769), in 5 THE PAPERS OF FRANCIS BERNARD: GOVERNOR OF COLONIAL MASSACHUSETTS, 1760–69, at 288, 289 (Colin Nicholson ed., 2015). Part of the business not being done was the matter of Bernard's pay, which at the time was still granted by the colonial legislature. *See* Letter from Francis Bernard, Governor of Massachusetts, to Earl of Hillsborough, Sec'y of State for the Colonies (July 1, 1769), in 5 THE PAPERS OF FRANCIS BERNARD: GOVERNOR OF COLONIAL MASSACHUSETTS, 1760–69, at 295, 295–99 (Colin Nicholson ed., 2015) (complaining of the House "having entered into their 5th week without having done any thing towards the support of Government," including Bernard's salary); *see also* Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 YALE L.J. 1652, 1680–81 (2021) (discussing ministry's eventual decision to pay the governor's salary directly to deny the legislature this leverage).

<sup>187</sup> DICKERSON, *supra* note 158, at 109. This use of military alone was likely still a reference to "military power" as that term was used in the preceding line. *See id.* ("They [the House of Representatives] protested against the grievance of the military power placed so near them . . .").

<sup>188</sup> *Id.* at 110.

<sup>189</sup> *See* Farah Peterson, *Black Lives and the Boston Massacre*, AM. SCHOLAR (Dec. 3, 2018), <https://theamericanscholar.org/black-lives-and-the-boston-massacre/> [https://perma.cc/9Q56-9JJG].

well-known restrictions of English law, as the correspondence between Bernard and Gage demonstrates. All of this had culminated with bodies in the streets of Boston.

## 2. The Continental Congress

As relations with its troublesome colony worsened, Great Britain instituted a set of new punitive measures, the Coercive or Intolerable Acts, against Boston. Among these was an act allowing soldiers to be tried for capital offenses outside of Massachusetts courts.<sup>190</sup> Parliament also passed a new Quartering Act, reaffirming the power of the commander in chief of British forces, and other officers, to requisition buildings for billeting soldiers.<sup>191</sup> Finally, Thomas Gage was appointed the new governor of Massachusetts—though he would retain his post as commander in chief—and was given more ships to pacify the city.<sup>192</sup>

Troubled by events in Boston, the American colonies elected delegates to attend the First Continental Congress in 1774.<sup>193</sup> Thomas Jefferson, then a lawyer and Virginia assemblymember, wrote instructions to Virginia's delegates to prepare a remonstrance to the King listing the colonies' grievances. As the final two grievances, the instructions first accused the King of sending "large bodies of armed forces, not made up of the people here," among the colonists. It then concluded: "instead of subjecting the military to the civil power, his majesty has expressly made the civil subordinate to the military."<sup>194</sup>

<sup>190</sup> See CARP, *supra* note 146, at 194 ("If a civil or military official was put on trial in Massachusetts for a capital offense (such as murder) the governor had the power to transfer the trial to another colony, or to London."); see also HOLTON, *supra* note 145, at 137.

<sup>191</sup> The Quartering Act, 14 Geo. 3 c. 54. Contrary to popular belief, the act provided for quartering in "uninhabited houses, out-houses, barns, or other buildings," but not occupied, private dwellings. *Id.*; see also Denver Brunsmann, 54 EIGHTEENTH-CENTURY STUD. 724, 725 (2021) (reviewing JOHN GILBERT MCCURDY, *QUARTERS* (2019)).

<sup>192</sup> CARP, *supra* note 146, at 195; THOMAS GAGE'S COMMISSION AS GOVERNOR OF THE PROVINCE OF THE MASSACHUSETTS BAY (Apr. 7, 1774), in 2 PUBLICATIONS OF THE COLONIAL SOCIETY OF MASSACHUSETTS: MASSACHUSETTS ROYAL COMMISSIONS, 1681–1774, at 174–83, [https://perma.cc/SFQ5-7REK].

<sup>193</sup> Bowie, *supra* note 186, at 1685–94 (describing influence of Boston on the course of the First Continental Congress).

<sup>194</sup> Draft of Instructions to the Virginia Delegates in the Continental Congress (July 1774), FOUNDERS ONLINE, <https://founders.archives.gov/?q=%22civil%20power%22&s=1111311111&sa=&r=15&sr=#TSJN-01-01-0090-fn-0038-ptr> [https://perma.cc/62GU-J8CW]. Jefferson's instructions were printed as a pamphlet and thus attained wider circulation than just Virginia's delegates. See *id.*; THOMAS JEFFERSON, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA (1774), [https://perma.cc/72B7-H6ET].

At the Continental Congress, Virginia delegate Richard Henry Lee introduced a resolution that accused the Crown of turning Boston, “that once free city, into a military garrison.”<sup>195</sup> The resolution further charged that it was “inconsistent with the honour and safety of a free people to live within the control, and exposed to the injuries of a military force, not under the government of the civil power.”

A few weeks later, the Congress debated and adopted an open letter, drafted principally by Lee, designed to convince the colonists of their cause.<sup>196</sup> As with Jefferson’s instructions, the letter listed grievances against the King and Parliament. Among these, it included: “the authority of the Commander in chief, and under him, of the Brigadiers general, in time of peace, is rendered supreme in all the civil governments, in America.”<sup>197</sup> “[T]hus,” the letter continued, “an uncontrollable military power is vested in officers not known to the constitution of these colonies.”<sup>198</sup> Here, the memorial tracks closely with the Massachusetts House of Representatives’ complaint from a few years earlier. It specifically identified the placement of the commander in chief, Thomas Gage, above the civil authority. Like the House’s message to Governor Bernard, the Continental Congress focused on how the elevation of the military power above its civil counterpart resulted in a power present in the colony beyond the reach of the regular institutions of government.

As so often happens in politics, the Continental Congress’s position on civil–military relations was vulnerable to charges of inconsistency. Writing the next year, Samuel Seabury accused the Congress and state provincial congresses of seeking to take control of state militias.<sup>199</sup> This should alarm the colonists, Seabury argued: “I cannot conceive a worse state of thralldom, than a military power in any government, unchecked, and uncontrollable by the civil power.”<sup>200</sup> Thus, from Seabury’s perspective, the Continental Congress—a

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<sup>195</sup> 1 JOURNALS OF THE CONTINENTAL CONGRESS 59 (Worthington Chauncey Ford et al. eds., 1904–1937), available at [https://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field\(DOCID+@lit\(jc00128\)\)](https://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(jc00128))): [<https://perma.cc/9NDN-FW38>] (Sat. Oct. 8, 1774).

<sup>196</sup> *Id.* at 90.

<sup>197</sup> *Id.* at 96.

<sup>198</sup> *Id.*

<sup>199</sup> AN ALARM TO THE LEGISLATURE OF THE PROVINCE OF NEW-YORK 10 (Jan. 17, 1775), [<https://perma.cc/5B2D-XXH4>]. The Continental Congress had adopted a set of Resolutions from Suffolk County, Massachusetts, which called for individuals to undertake military training to resist the British if necessary. 1 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 195, at 31–35. However, the resolution in question sought to assert control over the militia as a preexisting legal institution. *See id.* at 35 (“[W]e, therefore . . . advise, as it has been recommended to take away all commissions from the officers of the militia, that *those who now hold commissions*, or such other persons, *be elected in each town* as officers in the militia . . .” (emphasis added)).

<sup>200</sup> AN ALARM, *supra* note 199.



body outside of the formal legal architecture of Great Britain and the colonies—was the source of uncontrollable military power.<sup>201</sup>

But to the revolutionary side, the Continental Congress and other assemblies that had sprung up in response to British policies were the civil power.<sup>202</sup> As Jefferson explained, properly constituted legislatures “alone possess and may exercise” their sovereign powers.<sup>203</sup> However, the dissolution of such legislatures meant “the power revert[ed] to the people” who could then form their own assemblies.<sup>204</sup> This reasoning leads to the conclusion that the Continental Congress, as a representative assembly, was not an uncontrollable military power. Although perhaps a sufficient response to the observation that Congress was an extralegal body, such arguments were also hypocritical in a slaveholding society. The founders would have to tie themselves in knots to explain why their justifications for revolution did not extend to the colonies’ enslaved Black population.<sup>205</sup> And after the Revolutionary War, Samuel Adams, who had advocated an expansive right of the people to assemble, stressed that the right was satisfied so long as legislatures were open and functioning.<sup>206</sup>

However strained their reasoning, the revolutionaries firmly adhered to their logic of civil–military relations. Nowhere was this more apparent than in the relationship between the Continental Congress and the Continental Army. In 1775, the Congress formally adopted the regiments besieging Boston and voted to raise an army.<sup>207</sup> They then elected George Washington commander in chief and granted him a commission as general. The commission allowed Washington wide discretion, but nonetheless made explicit that his authority

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<sup>201</sup> See *id.* at 4–5 (“A Committee, chosen in a tumultuous, illegal manner, usurped the most authority over the province. They entered into contracts, compacts, combinations, treaties of alliance, with the other colonies, without any power from the legislature of the province. They agreed with the other Colonies to send Delegates to meet in convention at Philadelphia, to determine upon the rights and liberties of the good people of this province, unsupported by any Law.”).

<sup>202</sup> See, e.g., *Letter of the New York Delegates*, in 1 JOURNAL OF THE PROVINCIAL CONGRESS 379 (1842) (referring to Congress as the civil power).

<sup>203</sup> Draft of Instructions, *supra* note 194.

<sup>204</sup> *Id.*; see also Bowie, *supra* note 186, at 1695–98.

<sup>205</sup> See generally BAILYN, *supra* note 83, at 232–46. Commentators were keenly aware of the hypocrisy of a revolution built on liberty, but which denied enslaved Black persons their freedom. See, e.g., *id.* at 239 (“How can we ‘reconcile the exercise of Slavery with our professions freedom . . .’” (quoting RICHARD WELLS, A FEW POLITICAL REFLECTIONS 79–80, 81, 82, 83 (1774))).

<sup>206</sup> See Bowie, *supra* note 186, at 1710.

<sup>207</sup> 2 JOURNALS OF THE CONTINENTAL CONGRESS 90–91 (Worthington Chauncey Ford et al. eds., 1904–1937) (June 15, 1775).

was subservient to that of Congress.<sup>208</sup> The Congress's intimate involvement in management of the war further confirmed its supremacy over its military apparatus.<sup>209</sup> For instance, Congress granted and approved the commissions of minor officers besides Washington. In a letter to Dorothy Quincy, John Hancock, the Congress's President, shared the news of Washington's generalship and noted, "I am greatly hurried, have Five hundred Commissions to Sign for the Officers of our Army."<sup>210</sup> In short, the founders committed themselves, at least at the outset, to a war run by a legislative body.

As events progressed, Virginia drafted its Declaration of Rights in 1776 that supplied the paradigmatic language of strict subordination. It declared "that in all cases the military should be under strict subordination to, and governed by, the civil power." Not two weeks later, Thomas Jefferson relied on the Virginia Declaration of Rights and Virginia Constitution as he drafted the Declaration of Independence.<sup>211</sup> Among the grievances leveled against the King, Jefferson included the following. "He has affected to render the Military independent of and superior to the Civil power."<sup>212</sup>

### 3. State Constitutions

As described above, the strict subordination clause spread throughout the newly independent states. Instead of exhaustively chronicling the adoption of the strict subordination clause in each state, it suffices here to provide a general overview of the clause's movement from state to state, best represented in the table below. Closely examining each state's Founding Era adoption of the strict subordination clause may prove a fruitful course of future research.<sup>213</sup>

In the early days of the Revolutionary War, back and forth correspondence over the legal status of the former colonies led the Continental Congress to encourage the soon-to-be states to organize new forms of

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<sup>208</sup> See *id.* at 96 ("And you are . . . to observe and follow such orders and directions, from time to time, as you shall receive from this, or a future Congress of these United Colonies, or committee of Congress. This commission to continue in force, until revoked by this, or a future Congress.").

<sup>209</sup> See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 772–80 (2008).

<sup>210</sup> Letter from John Hancock to Dorothy Quincy (June 21, 1775), in 1 LETTERS OF DELEGATES TO CONGRESS: AUG. 1774 – AUG. 1775, at 472 [<https://perma.cc/97Q2-8AY2>].

<sup>211</sup> See, e.g., Randy Barnett, *Lochner Was Not Crazy—It Was Good*, 16 GEO. J. L. & PUB. POL'Y 437, 440 (2018).

<sup>212</sup> THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776).

<sup>213</sup> At the same time, any such effort is likely to run headlong into the many difficulties surrounding the records of state constitutional conventions. See Brady, *supra* note 12, at 1170–80 (detailing reliability issues with state constitutional convention records).

government.<sup>214</sup> In this hurried atmosphere, State constitutional conventions consciously copied provisions from one another.<sup>215</sup> The following table captures the time of adoption of the strict subordination clause in the first fifteen states.

*Table 1. —Spread of the Strict Subordination Clause in the Founding Era.*<sup>216</sup>

State	Date	SSC	Wording
Virginia	June 12, 1776	Yes	Art. XIII. [T]hat, in all cases, the military should be under strict subordination to, and governed by, the civil power.
New Jersey	July 2, 1776	No	
Delaware	Sept. 11, 1776	Yes	Sec. 20. That in all cases and at all times the military ought to be under strict subordination to, and governed by the civil power.
Pennsylvania	Sept. 28, 1776	Yes	Art. XIII. And that the military should be kept under strict subordination to, and governed by, the civil power.
Maryland	Nov. 11, 1776	Yes	Art. XXVII. That in all cases, and at all times, the military ought to be under strict subordination to and control of the civil power.
North Carolina	Dec. 18, 1776	Yes	Art. XVII. [T]hat the military should be kept under strict subordination to, and governed by, the civil power.
Georgia	Feb. 5, 1777	No	
New York	Apr. 20, 1777	No	
Vermont	July 8, 1777	Yes	Art. XV. [T]hat the military should be kept under strict

<sup>214</sup> See Nikolas Bowie, *Why the Constitution Was Written Down*, 71 STAN. L. REV. 1397, 1492–98 (2019); see also Maggs, *supra* note 89, at 786.

<sup>215</sup> See, e.g., Friedman, *supra* note 18, at 940–48.

<sup>216</sup> For a 50-state table of strict subordination clauses in today's state constitutions, see ICAP, PROHIBITING PRIVATE ARMIES, *supra* note 21.

			subordination to, and governed by, the civil power.
South Carolina	Mar. 19, 1778	Yes	Art. XLII. That the military be subordinate to the civil power of the State.
Massachusetts	June 15, 1780	Yes	Art. XVII. [T]he military power shall always be held in an exact subordination to the civil authority and be governed by it.
New Hampshire	June 2, 1784	Yes	Art. 26. In all cases, and at all times, the military ought to be under strict subordination to, and governed by, the civil power.
Kentucky	June 1, 1792	Yes	Article XII. § 24. [T]he military shall, in all cases and at all times, be in strict subordination to the civil power.

The table is necessarily incomplete because Rhode Island and Connecticut kept their colonial charters throughout the Founding Era.<sup>217</sup> However, these states eventually adopted strict subordination clauses,<sup>218</sup> as did New Jersey by the time of its 1844 constitution.<sup>219</sup> This leaves New York and Georgia as the outliers that never adopted the clause, to be further discussed in Part IV.

As should be readily apparent, the strict subordination clause was popular. Of the six states that ratified constitutions in 1776, five adopted versions of the clause. These clauses are all highly similar and all employ the three terms analyzed above in Part II. The year 1777 saw only the constitution of Vermont, which would not join the Union until 1791, incorporate a strict subordination clause. From 1778 onwards, states adopting a strict subordination clause began to vary the clause to a greater extent. For instance, Massachusetts used “exact” instead of “strict,” and South Carolina omitted the

<sup>217</sup> Maggs, *supra* note 89, at 786.

<sup>218</sup> R.I. CONST. art. I, § 18 (“The military shall be held in strict subordination to the civil authority.”); CONN. CONST. art. I, § 16 (“The military shall, in all cases, and at all times, be in strict subordination to the civil power.”).

<sup>219</sup> N.J. CONST. of 1844, art. I, § 12 (“The military shall be in strict subordination to the civil power.”).

adjective entirely. Massachusetts also referred explicitly to the “military power” and used “civil authority.”<sup>220</sup>

The table displays a particular trend: the movement away from “should” and “ought” to “shall” as the verb in the clause. Today, most state constitutions use “shall,”<sup>221</sup> which is usually understood to be mandatory.<sup>222</sup> Should and ought, by contrast, are less common drafting terms. The Founding Era definition of “should” could be read to suggest a purely precatory declaration,<sup>223</sup> but, as Johnson’s 1773 dictionary admits, the verb’s “significance is not easily fixed.”<sup>224</sup> Indeed, Johnson’s first example demonstrates that “should” could indicate a mandatory duty depending on context.<sup>225</sup> For its part, “ought” was defined as “[t]o be obliged by duty.”<sup>226</sup> Thus all three verbs were capable of imposing strict subordination as a command, not just a recommendation. Moreover, the language of the early clauses—which frequently stated they applied “in all cases and at all times”—shows a context that favors a mandatory reading.<sup>227</sup>

Overall, the clause’s rapid adoption by the states confirms that the founding generation thought it a vital component in a state’s governing document. Given the centrality of the proper distribution of civil–military power to the grievances leading up to the Revolution, this should come as no surprise. It is possible that the clause could vary linguistically and grammatically because, however phrased, it evoked the intellectual history of military power that the states had inherited from Great Britain.<sup>228</sup> The clause

<sup>220</sup> “Authority” meant “legal power” or even just “power.” See *Authority*, JOHNSON, *supra* note 44.

<sup>221</sup> See ICAP, PROHIBITING PRIVATE ARMIES, *supra* note 21.

<sup>222</sup> See, e.g., Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909, 923 n.51 (2016).

<sup>223</sup> This remains true today. “Mere precatory provisions, by contrast, typically use the word ‘should’ to signify that they are not mandatory, . . .” *California v. Texas*, 141 S. Ct. 2104, 2137 (2021) (Alito, J., dissenting).

<sup>224</sup> *Should*, JOHNSON, *supra* note 44 (“[A] kind of auxiliary verb used in the conjunctive mood, of which the significance is not easily fixed.”).

<sup>225</sup> *Id.* (“I SHOULD go. It is my business or duty to go.”). Relatedly, the Supreme Court has long understood that the more permissive “may” can carry a mandatory command. See *Mason v. Fearson*, 50 U.S. (9. How.) 248, 259 (1850) (“Where a statute directs the doing of a thing for the sake of justice or the public good, the word ‘may’ is the same as the word ‘shall’ . . . .”); *United States v. Thoman*, 156 U.S. 353, 359 (1895). If “may” can be mandatory in the appropriate context, then surely the same is true for “should” and “ought.”

<sup>226</sup> *Ought*, JOHNSON, *supra* note 44.

<sup>227</sup> See, e.g., DEL. CONST. of 1776, art. 20. Additionally, without affirmative evidence of different meanings between the clauses, this appears to be the sort of grammatical difference that may be properly disregarded. See *Minnesota v. Carter*, 525 U.S. 83, 92–93 (1998) (Scalia, J., concurring) (discussing differences between Fourth Amendment and state analogs that use “their . . . houses” versus “his houses” and concluding “no indication anyone believed” the difference had interpretive consequences); see also Maggs, *supra* note 89, at 816.

<sup>228</sup> See Peterson, *supra* note 13.

did not lose its salience with independence; rather, as the next Section shows, civilians repurposed it to oppose new exercises of military power.

#### 4. The Continental Army

With the principle of strict subordination enshrined in a growing number of state constitutions during the Revolutionary War, civilians used the clause's language to complain of military depredations and abuses by none other than the Continental Army. Over the course of the war, the Continental Army had begun to resemble the sort of standing army that had prompted such anxiety from American colonists. The Continental Congress acquiesced to Washington's request to enlist soldiers for the duration of the war, not a term of months or years.<sup>229</sup> And, in the course of fleeing Philadelphia, the Congress granted Washington "full power to order and direct all things relative . . . to the operations of war."<sup>230</sup>

Despite his increased powers, Washington still faced persistent difficulties keeping his army clothed and fed. Chronic deficiencies in supplying the army led a convention of New England states to propose a measure allowing the commander in chief to enact forced requisitions from the states.<sup>231</sup> In the words of Abigail Adams, the resolution meant to "vest General Washington with the power of marching his Army into the state that refuses supplies and exacting it by Martial Law."<sup>232</sup> Another correspondent decried this proposal as "vest[ing] the Military with Civil Powers of an Extraordinary kind."<sup>233</sup> While the Continental Congress declined to adopt this resolution, the

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<sup>229</sup> See 5 JOURNALS OF THE CONTINENTAL CONGRESS 762 (Worthington Chauncey Ford et al. eds., 1904–1937), available at [https://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field\(DOCID+@lit\(jc00586\)\)](https://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(jc00586))): [<https://perma.cc/43TS-UTAW>] (Mon. Sept. 16, 1776) (moving to duration-of-war enlistment); Letter from George Washington to John Hancock (Sept. 2, 1776), FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/03-06-02-0162> [<https://perma.cc/PW8K-W682>] (requesting a permanent standing army); see also HOLTON, *supra* note 145, at 262 (discussing creation of permanent standing army).

<sup>230</sup> 6 JOURNALS OF THE CONTINENTAL CONGRESS 1027 (Worthington Chauncey Ford et al. eds., 1904–1937), available at [https://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field\(DOCID+@lit\(jc00655\)\)](https://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(jc00655))): [<https://perma.cc/D6CC-Q3VS>] (Thurs. Dec. 12, 1776).

<sup>231</sup> See Letter from William Bradford to Thomas Jefferson, enclosing proceedings of the Hartford Convention (Nov. 22, 1780), FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/01-04-02-0166> [<https://perma.cc/YWV2-YT59>].

<sup>232</sup> Letter from Abigail Adams to John Adams (Nov. 13, 1780), FOUNDERS ONLINE, <https://founders.archives.gov/documents/Adams/04-04-02-0011-0001> [<https://perma.cc/55R7-VLJT>].

<sup>233</sup> Letter from James Warren to Samuel Adams (Dec. 4, 1780), in 2 WARREN–ADAMS LETTERS 151–52 (1925), [<https://perma.cc/K6K2-RG4T>].

army's need for provisions did not abate and its efforts to fill that need routinely sparked civilian animosity.<sup>234</sup>

Such confrontation emerged in the Army's Western Department, which George Washington had entrusted to Colonel Daniel Brodhead in the spring of 1779.<sup>235</sup> From the strategically located Fort Pitt, Brodhead's principal activity in the war involved campaigns against the Iroquois Confederacy.<sup>236</sup> When quartered at the fort, he also fought with Pittsburgh's local civilian population over access to scarce provisions. One February, Brodhead ordered his men to seize a "considerable quantity of Salt meat," kept in the homes of several town families.<sup>237</sup> Brodhead had at least two members of the offending families arrested.<sup>238</sup>

This and other offenses ignited the righteous anger of Pittsburgh's inhabitants, who composed a memorial of grievances that eventually reached Washington. "In many cases he [Brodhead] has actually exercised this authority taking away the property, confining the Persons of the Citizens, and ordering them to be tryed by a Court Martial." These instances of military compulsion, they claimed, represented impermissible "Encroachments of Military power." "We know well that the laws and Constitutions of our Country have fixed a procise boundary to the Military power," the memorial

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<sup>234</sup> See, e.g., William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 790 (1995) ("The Revolutionary Army seized private goods without compensation.").

<sup>235</sup> Letter from George Washington to Colonel Daniel Brodhead, FOUNDERS ONLINE (March 5, 1779), <https://founders.archives.gov/documents/Washington/03-19-02-0380> [<https://perma.cc/88N2-QMDB>].

<sup>236</sup> See Hannah Brandebura, *Fort Pitt During the Revolutionary War: General Brodhead's Expedition*, SEN. JOHN HEINZ HISTORY CENTER (Aug. 9, 2018), <https://www.heinzhistorycenter.org/blog/fort-pitt-museum-fort-pitt-during-the-revolutionary-war-general-brodheads-expedition/> [<https://perma.cc/GLR2-YQFY>]; see generally LOUISA PHELPS KELLOGG, FRONTIER RETREAT ON THE UPPER OHIO, 1779-1781 (1917), <https://archive.org/details/frontierretreat00kell/page/16/mode/2up> [<https://perma.cc/W46L-WPPX>].

<sup>237</sup> Instructions from Daniel Broadhead to Lt. G. Peterson (Feb. 9, 1781), in INSTRUCTIONS TO OFFICERS ON DIFFERENT COMMANDS AND AT DIFFERENT POSTS, 1779-1781, at 166, <https://digital.library.pitt.edu/islandora/object/pitt%3A31735061278507/transcript> [<https://perma.cc/2YU6-YEZT>] (digital transcription).

<sup>238</sup> *Id.* at 167; see also Instructions from Daniel Brodhead to Capt. Sam Brady (Sept. 21, 1780), in INSTRUCTIONS TO OFFICERS ON DIFFERENT COMMANDS AND AT DIFFERENT POSTS, *supra* note 237, at 144-45 ("In the meantime we can have no objection to the using of necessary Compulsion rather than the Troops should suffer' - I sincerely lament the necessity of this mode of supplying the Troops under my Command, & wish it could be avoided, but I hope the virtuous Inhabitants will judge rightly of the measure & cheerfully submit . . .").

continued, “It is limited to those who are enlisted for the Service and under the Articles of War; it Cannot extend in the least degree to a Citizen.”<sup>239</sup>

That same year, George Mason drafted a similar petition to the leaders of the Virginia General Assembly, complaining of seizures and forced requisitioning by the Continental Army in anticipation of the siege of Yorktown. “Warrants have been issued . . . for seizing the Horses, Cattle, Provisions, & other Effects of the free Citizens of this Commonwealth . . . .” Such seizures had “been executed by military Sergeants, & common Soldiers; who have insulted & abused the Inhabitants.” According to Mason, these seizures violated the thirteenth article of the Virginia Declaration of Rights. Contrary to the state’s strict subordination clause, “Horses & other Effects have been frequently taken from the Inhabitants by Military-Officers, and Soldiers, without authority from, or application to the Civil Magistrate.”<sup>240</sup>

For Mason and the fifty-seven other signatories, the strict subordination clause operated as a real check on the exercise of coercive force. The petition and its equivalent from Pittsburgh show that restraining the military power meant prohibiting soldiers from requisitioning goods directly from civilians. According to the Pittsburgh memorial, it also meant forbidding the trial by court martial of persons outside of the armed forces. For the country’s beleaguered civilians then, the clause was not an empty promise but a source of concrete rights.

#### IV. WHY DOES IT NOT APPEAR IN THE U.S. CONSTITUTION?

Given its centrality to the American Revolution, strict subordination is unsurprisingly the law throughout the United States, subject to three significant exceptions: the constitutions of Georgia, New York, and the United States.<sup>241</sup>

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<sup>239</sup> Letter from Samuel Huntington to George Washington (June 6, 1781), FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/99-01-02-05975> [https://perma.cc/8FFM-7V7H]. Pennsylvania had adopted its constitution some four years earlier, *see* PA. CONST. of 1776, so it is reasonable to infer that the “procise boundary” described by the Pittsburgh memorial included the strict subordination clause.

<sup>240</sup> A Petition and Remonstrance from the Freeholders of Prince William County (Dec. 10, 1781), CONSOURCE, <https://www.consource.org/document/a-petition-and-remonstrance-from-the-freeholders-of-prince-william-county-1781-12-10/> [https://perma.cc/2XXF-P6PV] (“That altho’ the thirteenth Article of the Bill of Rights expressly declares ‘that in all Cases, the Military shou’d be under strict Subordination to, and governed by the Civil Power’ Yet Horses & other Effects . . .”).

<sup>241</sup> For the most part, U.S. territorial constitutions also include strict subordination clauses. *See* CONST. OF PUERTO RICO, art. II, § 13. (“The military authority shall always be subordinate to civil authority.”); CONST. OF AMERICAN SAMOA, art. V, § 8 (“The military authority shall always be subordinate to the civil authority in time of peace.”). Two additional exceptions include the District of Columbia Charter and the Constitution of the Northern Mariana Islands.



Looking briefly at Georgia but mainly at New York in Section IV.A suggests what the founding generation understood to be permitted in the absence of the clause. Section IV.B turns to the clause's omission from the Federal Constitution and the unsuccessful efforts to have it included. Commentaries on the problems facing the colonies during the Critical Period and debates during the Constitution's ratification shed further light on the meaning of the clause.

### *A. New York and Georgia: Missing Strict Subordination Clauses*

Of the states that did not include strict subordination clauses in their Founding Era constitutions, only two have not adopted one since. Both constitutions went into effect close in time in the late winter and early spring of 1777.

The Georgia constitution, begun at the state's convention in 1776 and finally adopted on February 5 of the next year,<sup>242</sup> omitted a strict subordination clause. However, it incorporated several other clauses that paint a picture of civil governmental control similar to other states. The constitution specified that the governor's command extended to "all the militia, and other military . . . forces" of the state,<sup>243</sup> and it notably included a provision prohibiting the military intimidation of voters, even if inadvertent.<sup>244</sup> So even in the absence of strict subordination from the constitution, the Georgia Constitution nonetheless enshrined a robust version of civil control of the military.<sup>245</sup>

In New York, the absence of the strict subordination clause from the state's constitution presents some mystery. When New York finally ratified the Federal Constitution, it recommended adding a strict subordination clause. And, a key advocate of this proposal was the prominent antifederalist and New Yorker Melancton Smith, who participated in the New York Provincial

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See CONST. OF NORTHERN MARIANA ISLANDS; District of Columbia Home Rule Act, Pub. L. No. 93-198, 84 Stat. 774 (1973). The more recent nature of these governing documents makes the reasons for these omissions different in kind than Founding Era omissions.

<sup>242</sup> Maggs, *supra* note 89, at 788.

<sup>243</sup> GA. CONST. of 1777, art. XXI ("[A]ll commissions, civil and military, shall be issued by the governor, under his hand and the great seal of the State."); *id.*, art. XXXIII ("The governor for the time being shall be captains general and commander-in-chief over all the militia, and other military and naval forces belonging to this State.").

<sup>244</sup> *Id.* art. X. ("[N]or shall any military officer, or soldier, appear at any election in a military character, to the intent that all elections may be free and open.").

<sup>245</sup> In fact, Georgia's 1877 Constitution included the following provision: "The civil authority shall be superior to the military . . ." GA. CONST. of 1877, art. I, § 1, ¶ XIX. This provision persists today. See GA. CONST. art. I, § II, ¶ VI. So while the Georgia Constitution does not follow the language of most strict subordination clauses, it may ultimately include much the same restrictions.

Congress.<sup>246</sup> The clause's absence may be partly explained by the New York constitution not including a bill of rights at all. That said, there is reason to suspect the specific exclusion of a provision resembling the strict subordination clause.

At the time of the constitution's enactment in the spring of 1777, New York had been the central theater of operations in the Revolutionary War. Rightly expecting the British would invade New York, Washington opened communications with a secret committee of the New York Provincial Congress to address the threat from the state's "intestine enemies."<sup>247</sup> In short order, the committee reported on schemes in Connecticut and Long Island to assist royal forces. According to committee member Gouverneur Morris, "several persons who were strangers have been observed taking notice of and fixing on proper places for landing on the south side of Long island."<sup>248</sup> After considering the threat, the committee issued a report naming suspected loyalists and calling for their arrest.<sup>249</sup>

Apprehended loyalists were to be brought before another body of the provincial congress: the committee to detect and defeat conspiracies. This committee would inquire into the culpability of suspects and have them confined if found guilty.<sup>250</sup> It was also granted sweeping powers to order suspected loyalists not named in the initial report "to be summoned or apprehended as they may think proper."<sup>251</sup> The report recommended against using the militia to carry out these arrests, and it instead authorized the committee to request the assistance of Continental troops.<sup>252</sup> The document specified that Washington was to "give order that the said detachments, while so employed, be under the direction of the said committee."<sup>253</sup> Washington instructed his soldiers to comply with this plan, which he described to General Israel Putnam. "[T]o carry the Scheme into Execution, they will be obliged to have recourse to the Military power for assistance. If this should be the case, you are hereby required, during my absence to afford [them] every aid . . . ."<sup>254</sup>

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<sup>246</sup> See 23 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: NEW YORK 2200–01, 2326–27 (John Kaminski et al. eds., 2009); 1 JOURNAL OF THE PROVINCIAL CONGRESS 9 (1842). Though Smith was not with the Provincial Congress when it adopted the New York Constitution. *Id.* at 892.

<sup>247</sup> 1 JOURNAL OF THE PROVINCIAL CONGRESS 450 (1842); HOLTON, *supra* note 145, at 222.

<sup>248</sup> 1 JOURNAL OF THE PROVINCIAL CONGRESS 453 (1842).

<sup>249</sup> *Id.* at 476 ("That the following persons . . . be arrested and brought before a committee of this Congress . . .").

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 476–77.

<sup>252</sup> *Id.* at 478.

<sup>253</sup> *Id.* at 477.

<sup>254</sup> Orders to Maj. Gen. Israel Putnam (May 21, 1776), FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/03-04-02-0294>

On paper, these plans dictated that any Continental soldiers would be under the committee's direction, thus preserving the principle of strict subordination. However, a one-way relationship between civil and military authority was not always preserved in practice. For example, in the process of securing New York City, Washington requested that the New York Committee of Safety issue a resolution banning communications between New Yorkers and British ships.<sup>255</sup> In his own words, this would be an instance of "Civil Authority Co-operat[ing] with the Military to carry [the measure] into Execution."<sup>256</sup> The very next day, the Committee of Safety granted the request.<sup>257</sup>

True to expectations, General Howe's advance troops arrived in New York harbor on the second of July, with the rest of the British army following a few days later.<sup>258</sup> Thus, the fear of an invading army and of internal enemies would have gripped the New York Provincial Congress just as it authorized the drafting of a constitution that August.<sup>259</sup> By the time of the constitution's adoption in April of 1777, the threats had not ceased. New York City had fallen to the British, who planned to cut off New England from the other colonies by establishing control over the Hudson Valley.<sup>260</sup> The colonists knew of and feared this plan.<sup>261</sup> With British forces on all sides, the New York constitution arrived at the time when the members of the Provincial Congress would have been affected by a profound siege mentality.<sup>262</sup>

In this environment, with the Provincial Congress dispatching committees to arrest inhabitants and to quell insurrections with the help of

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[<https://perma.cc/3EG6-EY39>]; *see also* 2 JOURNAL OF THE PROVINCIAL CONGRESS 119 (1842), [<https://perma.cc/4BAJ-MTCJ>].

<sup>255</sup> Letter from George Washington to the New York Committee of Safety (Apr. 17, 1776), FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/03-04-02-0061> [<https://perma.cc/6WLZ-CTY2>].

<sup>256</sup> *Id.*; *see also* Letter from George Washington to John Augustin Washington (Apr. 29, 1776), FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/03-04-02-0139> [<https://perma.cc/863M-4XPU>] ("I have prevaild upon the Comee of safety to forbid every kind of Intercourse between the Inhabitants of this Colony and the Enemy; this I was resolved upon effecting; but thought it best to bring it about through that Channel, as I can now pursue my own measures in support of their resolves.").

<sup>257</sup> Letter from the New York Committee of Safety to George Washington (Apr. 18, 1776), FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/03-04-02-0065> [<https://perma.cc/4XM2-RQBM>].

<sup>258</sup> HOLTON, *supra* note 145, at 255.

<sup>259</sup> 1 JOURNAL OF THE PROVINCIAL CONGRESS 552 (1842).

<sup>260</sup> HOLTON, *supra* note 145, at 303.

<sup>261</sup> *Id.* at 304.

<sup>262</sup> *Id.* at 303.

soldiers,<sup>263</sup> the omission of a strict subordination clause is unsurprising. Indeed, the newly-constituted legislature quickly moved to reauthorize the committee to detect and defeat conspiracies, with effectively the same powers as before.<sup>264</sup> A strict subordination clause would have afforded loyalists additional means of contesting these procedures.<sup>265</sup>

While short on provisions restraining the state's use of military force, the constitution contained other provisions consistent with preventing any independent military organization from exerting influence over the citizens of the state. For instance, the constitution opened with the declaration that "no authority shall . . . be exercised over the people or members of this State but such as shall be derived from and granted by them."<sup>266</sup> And, almost ten years after adopting a constitution, New York passed a statutory bill of rights that declared "no citizen . . . shall be *constrained to arm himself*, or to go out of this state, or to find soldiers or men of arms either horsemen or footmen, if it be not by assent and grant of the people of this state, by their representatives in senate and assembly."<sup>267</sup> Taken together, these provisions show a set of protections against the exercise of armed force by entities whose authority was not traceable to the state legislature.<sup>268</sup>

The thrust of New York's experience is hard to miss. In the throes of war, the colony took extraordinary internal security measures while also declining to adopt a strict subordination clause. The co-dependence between New York's civil authorities and the Continental Army suggests a tacit

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<sup>263</sup> See, e.g., 1 JOURNAL OF THE PROVINCIAL CONGRESS 638 (1842) (authorizing committee "to call out such detachments of . . . troops in the different counties, as they may, from time to time, deem necessary for suppressing insurrections; to apprehend, secure, or remove such persons whom they shall judge dangerous to the safety of the State . . .").

<sup>264</sup> An Act Appointing Commissioners for Detecting and Defeating Conspiracies and Declaring Their Powers (Feb. 5, 1778), in 1 LAWS OF THE STATE OF NEW YORK 8–10 (1886), [https://perma.cc/ZB6U-4ZC7].

<sup>265</sup> This has been offered as a reason for New York not adopting a bill of rights at all. See Robert Emery, *New York's Statutory Bill of Rights: A Constitutional Coelacanth* 19 Touro L. REV. 363, 367 (2003) ("In the face of Loyalist threats to the existence of the new government, the Convention refrained, however, from adding to the constitution any further assertions of fundamental rights that would hinder efforts to suppress counter-revolutionary activity.").

<sup>266</sup> N.Y. CONST. of 1777, art 1.

<sup>267</sup> N.Y. BILL OF RIGHTS of 1787, https://history.nycourts.gov/wp-content/uploads/2019/01/Publications\_NY-Bill-Rights-compressed.pdf [https://perma.cc/T65L-72ZR]; see *Constrain*, JOHNSON, *supra* note 44 ("To Constrain . . . to compel; to force to some action."); see also Maggs, *supra* note 89, at 797.

<sup>268</sup> This trend is perhaps unsurprising given the fear of internal enemies gripping the new state. Moreover, the New York government had, since before the Revolution, been dealing with riots and tumults, including a low-grade backcountry war across the Hudson River (to be discussed in more depth in Part V.B). See *An Act for preventing tumultuous and riotous Assemblies in the Places therein mentioned, and for the more speedy and effectual punishing the Rioters* (Mar. 9, 1774), in ETHAN ALLEN, A BRIEF NARRATIVE OF THE PROCEEDINGS OF THE GOVERNMENT OF NEW-YORK 24–36 (Sept. 23, 1774), [https://perma.cc/VR7A-8LUQ].

realization that this relationship could run afoul of the clause. Suspected loyalists—like the inhabitants of Pittsburgh—could have used the clause to protest the use of soldiers to arrest civilians. At the same time, New York civil authorities evidenced a desire to follow at least the principle of strict subordination. And New York’s constitutional provisions and statutory bill of rights preserved legislative control over any armed groups in the state.

### ***B. The Federal Constitution***

For a document thought to enshrine civilian control over the military,<sup>269</sup> the Federal Constitution curiously omits a strict subordination clause. As this Section recounts, this was not for lack of trying. The unsuccessful push to include the clause in the Constitution provides further evidence of the clause’s meaning. Beginning with the Critical Period, this Section shows the founders grappling with problems of internal disorder and violence. In this context, we see allusions to Cromwell, factions, and the absence of proper subordination. During the ratification debates, states and antifederalists faulted the Constitution for not including a strict subordination clause, and one antifederalist explanation—Federal Farmer’s—proves particularly helpful in understanding the clause’s scope. Finally, proposals to include the clause in the eventual Second Amendment reveal how strict subordination nearly became “the supreme Law of the Land.”<sup>270</sup>

#### **1. Critical Period**

Between the end of the Revolutionary War and the Constitutional Convention, tumults, riots, and mutinies affected the several states. After military victory at Yorktown, but before the formal peace between Great Britain and its former colonies, paying the troops in the Continental Army became an urgent problem. In 1783, several Pennsylvania regiments abandoned their posts and marched on Philadelphia, the meeting place of the Continental Congress.<sup>271</sup> The soldiers had all but given up on receiving their back pay from Congress, so they were likely trying to pressure the Pennsylvania executive council.<sup>272</sup> Nonetheless, the presence of almost four hundred armed men in the city distressed members of Congress.

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<sup>269</sup> See, e.g., Samuel P. Huntington, *Civilian Control and the Constitution*, 50 AM. POL. SCI. REV. 676, 676 (1956) (alluding to this assumption).

<sup>270</sup> U.S. CONST. art. VI, cl. 2.

<sup>271</sup> JACK N. RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS* 334–35 (2019); *Chasing Congress Away*, U.S. HOUSE OF REPRESENTATIVES: HISTORY, ART & ARCHIVES (June 1, 2015), <https://history.house.gov/Blog/2015/June/6-1-Chasing-Congress/> [https://perma.cc/97BW-NQHP].

<sup>272</sup> See Kenneth R. Bowling, *New Light on the Philadelphia Mutiny of 1783: Federal-State Confrontation at the Close of the War for Independence*, 101 PA. MAG. HIST. & BIOGRAPHY 419, 426–28 (1977).

The Congress therefore promptly appointed a committee, headed by Alexander Hamilton, to induce the president of Pennsylvania to take responsive action. The committee's report complained of "the disorderly and menacing appearance of a body of armed soldiers surrounding the place where Congress were assembled."<sup>273</sup> It further requested that Pennsylvania take "vigorous measures . . . to put a stop to the further progress of the evil, and to compel submission on the part of the offenders" and "effectual measures for supporting the public authority."<sup>274</sup>

Despite the Congress's pleas, the Pennsylvania executive council refused to order out the militia to deal with the soldiers, so Congress embarrassingly fled to Princeton.<sup>275</sup> The 1783 Philadelphia mutiny memorably pushed Congress out of Philadelphia, but it was by no means the only such incident. Describing the response to an earlier mutiny in 1781, James Thatcher wrote "General [Robert] Howe harangued them, representing the heinousness of the crime of mutiny, and the absolute necessity of military subordination."<sup>276</sup>

Though plenty of agrarian and debtor revolts had occurred before and alongside the American Revolution, post-war conditions only intensified the issues. As diagnosed by one observer, "[m]any thousands of our inhabitants had been employed in the various departments of the army and the navy . . . returned [to civilian life] . . . destitute of property and the means of acquiring it."<sup>277</sup> According to this line of reasoning, these conditions led former soldiers "to despise their country, dispossessed them of patriotic sentiments, and fitted them to sow the seeds of civil discord."<sup>278</sup>

The proliferation of ex-soldiers in the states would also have looked particularly alarming to those of the founding generation familiar with English law. In his description of offenses against the "good order" of the commonwealth, Blackstone included "idle soldiers and mariners wandering about the realm, or persons pretending so to be, and abusing the name of that

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<sup>273</sup> 24 JOURNALS OF THE CONTINENTAL CONGRESS 416 (Gaillard Hunt ed., 1922), *available at* [https://memory.loc.gov/cgi-bin/query/D?hlaw:1:/temp/~ammem\\_iPOX::\[https://perma.cc/TSS4-9YK8\]](https://memory.loc.gov/cgi-bin/query/D?hlaw:1:/temp/~ammem_iPOX::[https://perma.cc/TSS4-9YK8]) (Tues. July 1, 1783).

<sup>274</sup> *Id.* at 416–17.

<sup>275</sup> See RAKOVE, *supra* note 271, at 335; *see also* Bowling, *supra* note 272, at 435.

<sup>276</sup> JAMES THATCHER, A MILITARY JOURNAL DURING THE AMERICAN REVOLUTIONARY WAR, FROM 1775 TO 1783, at 245 (2d ed. 1827), [<https://perma.cc/8GH2-VAH3>]. He continued on, stating that Howe "add[ed] that the mutineers must be brought to an unconditional submission." *Id.*

<sup>277</sup> David Daggett, Oration Delivered in New Haven (excerpts) (July 4, 1787), in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION, PUBLIC AND PRIVATE, NO. 1, at 160–63 (John P. Kaminski et al. eds., 1981).

<sup>278</sup> *Id.* at 161.

honourable profession.”<sup>279</sup> This prohibition derived from an Elizabethan-era statute that had criminalized the idle wandering of persons “under the Name of Soldiers and Mariners.”<sup>280</sup> The law had called out the “wicked behaviors” of such persons who “continually assemble themselves weaponed in the High ways and elsewhere in Troupes, to the great terror and astonishment of her Majesty’s true subjects.”<sup>281</sup>

Confirming these fears, further tumults and insurrections erupted in the states. Most famously, debtor protests in western Massachusetts that began with closing down county courthouses cascaded into an armed revolt led by Daniel Shays.<sup>282</sup> One commentator described Shays as a lesser version of Cromwell, but worried about what should happen if the real deal came along.<sup>283</sup> Throughout the Critical Period and during Ratification, repeated allusions to Cromwell and the New Model Army evoked the danger of an unbridled military force.<sup>284</sup> For several writers, Cromwell and the New Model Army symbolized the particular threat of an armed force that lay outside the regular

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<sup>279</sup> 4 BLACKSTONE, *supra* note 177, at \*164–65; *see also* 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 85 (describing the same).

<sup>280</sup> 39 Eliz. c.17. in 4 STATUTES OF THE REALM 915.

<sup>281</sup> *Id.* This offense has previously been analyzed as a subset of vagrancy law. *See* Markus Dirk Dubber, *The Power to Govern Men and Things: Patriarchal Origins of the Police Power in American Law*, 52 BUFF. L. REV. 1277, 1287, 1292 (2004). As the Supreme Court has indicated, vagrancy laws modeled on their early English predecessors fail modern constitution scrutiny, most notably on vagueness grounds. *See* *Papachristou v. City of Jacksonville*, 405 U.S. 156, 161–62 (1972). And they give free reign to racial discrimination, *see id.* at 159, 168, so we should be cautious in looking back to these old laws.

<sup>282</sup> For a concise summary of the rebellion, *see* Bowie, *supra* note 186, at 1708–13.

<sup>283</sup> “A Shays, an ignoble contemptible Shays, without abilities, without influence has for a while, prostrated our government, in the three western counties of Massachusetts. And what if a greater than Shays, a CROMWELL or a CEASAR should arise;—where are our bulwarks against the attack?” Dagget, *supra* note 277, at 162.

<sup>284</sup> *See, e.g.,* Independent Gazetteer, *microformed on* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: PENNSYLVANIA 1602 (Merrill Jenson et al. eds., 1976) (“Oliver Cromwell headed an army which pretended to fight for liberty, and by that army became a bloody tyrant . . .”).

constitutional order.<sup>285</sup> As one federalist writer suggested, the New Model Army had grown into the army of a dreaded “faction.”<sup>286</sup>

Critical Period newspapers contrasted the evils and disruptions of a society riven by factions with a state characterized by proper peace and “subordination.”<sup>287</sup> As used in these cases, the term subordination described an ideal state of proper order and hierarchy, desired particularly by the elites in

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<sup>285</sup> See Brutus X, N.Y. J. (Jan. 24, 1788), *reprinted in* 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION, PUBLIC AND PRIVATE, No. 3 462 (John Kaminski et al. eds., 1984) (contrasting Cromwell’s army with that of Julius Caesar, who—the author pointedly noted—“was appointed to the command, by the constitutional authority of that commonwealth”); Maecenas, STATE GAZETTE OF SOUTH CAROLINA (Dec. 6, 1787), *reprinted in* 27 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: SOUTH CAROLINA 51, 53 (John Kaminski et al. eds., 2016) (“[The parliament] raised a numerous army, and appointed Cromwell their General—after the murder of their Sovereign, this man, by the force of arms, took the government into his own hands . . .”); see also Massachusetts Convention Debate, Speech of Rev. Thatcher (Feb. 4, 1788), *reprinted in* 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: MASSACHUSETTS 1419 (John Kaminski et al. eds., 2000) (“Have we not reason to fear new commotions in this Commonwealth? . . . And in such scenes of hostile contention, will not some [Sulla] drench the land in blood, or some Cromwell or Caesar lay our liberties prostrate at his feet?”); Peregrine, WINCHESTER VA. GAZETTE (Apr. 2, 1788), *reprinted in* 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: VIRGINIA 639, 641 (John Kaminski et al. eds., 1990) (“Now the truth is, that Cromwell . . . obtained a high rank and great influence in the army, which during the civil war had been opposed to Charles the first, . . .”). At the same time, they did not fail to realize that this had been Parliament’s army that had turned against it. See Brutus VIII, N.Y. J. (Jan. 10, 1788), *reprinted in* 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: NEW YORK 593, 596 (John Kaminski et al. eds., 2004).

<sup>286</sup> Maecenas, STATE GAZETTE OF SOUTH CAROLINA (Dec. 6, 1787), *reprinted in* 27 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: SOUTH CAROLINA 51, 53 (John Kaminski et al. eds., 2016) (“[The people of England’s] ambition was inflamed by the success of one of their most daring members—(Cromwell) as the spirit of faction was suppressed only by a succeeding faction, the people amazed at so many revolutions, sought every where for a Democracy, without being able to find it, at length, after a series of tumultuary motions and shocks, they were obliged to have recourse to the very government which they had so odiously proscribed.” (citing 3 MONTESQUIEU, THE SPIRIT OF THE LAWS 29 (Thomas Nugent trans., 5th ed. 1773))).

<sup>287</sup> Compare The Politician: Evils of the Different Forms of Government, THE SALEM MERCURY, Nov. 4, 1786, at 1 (“In Democratical Governments . . . all things are at the disposal of an ignorant and giddy multitude . . . all subordination is subverted; and the most insolent and vicious of the people must be caressed, bribed, and intoxicated . . .”), with *id.* (“If in despotick governments power cannot be attained but by servility and adulation, in democratical it can never be acquired but by the equally pernicious vices of turbulence and faction . . .”). *Reasons why Great Britain Must Prosper*, INDEPENDENT JOURNAL (New York), July 9, 1785, at 3 (“We have public prints so devoted to public tranquility, that not one of them will support the countenance and views of a faction,—order and good government, and rationale subordination are the grand object of them all.”).



the colonies.<sup>288</sup> This was not necessarily about civil–military relations. Such was the fear of internal disruptions among some segments of society that some pointed to “the power of a standing army” as one way “to preserve union and subordination in society.”<sup>289</sup>

The perception that the colonies were spinning out of control convinced the eventual constitutional framers to meet in Philadelphia. The danger of insurrection was at the forefront of many delegates’ minds.<sup>290</sup> In James Madison’s words—describing the failures of government under the Articles of Confederation—“[i]f the minority happen to include all such as possess the skill and habits of military life, . . . one third only may conquer the remaining two thirds.”<sup>291</sup> The Constitution that emerged was thus an answer to these perceived problems.

## 2. Ratification

Fittingly for a Constitution designed to end bottom-up uprisings, the unveiling of the Convention’s work prompted fears of top-down oppression from the federal government.<sup>292</sup>

A repeated complaint was the Constitution’s omission of a bill of rights, which led state ratifying conventions to propose their own amendments. At least five states proposed strict subordination clauses.<sup>293</sup> Most of these were

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<sup>288</sup> See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787* 411 (1998). (“Most commentators were concerned with what they described as the breakdown in governmental authority, the tendency of the people to ignore the government and defy the laws by their claims that ‘a subordination to the laws, is always the cant word to enslave the people.’” (quoting *To Senex*, STATE GAZETTE OF SOUTH CAROLINA, June 13, 1785., at 2)).

<sup>289</sup> *Sketches of American Policy*, STATE GAZETTE OF SOUTH CAROLINA, Dec. 29, 1785, at 2. This call to a return to proper subordination was a fairly explicit effort to stave off agrarian revolution. As one South Carolina writer stated, the “principles of the Gracchi were undoubtedly right, but they urged them too far,” resulting in “bloodshed.” *Id.* The Gracchi were a pair of brothers, living during the waning years of the Roman Republic, whose efforts at land redistribution resulted in their untimely demise. See generally MIKE DUNCAN, *THE STORM BEFORE THE STORM* (2018).

<sup>290</sup> For a further, brief description of the sense of crisis leading up to the Constitutional Convention, see Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269, 1279–82 (2020).

<sup>291</sup> JAMES MADISON, *VICES OF THE POLITICAL SYSTEM OF THE UNITED STATES* (April 1787), FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/01-09-02-0187#JSMN-01-09-02-0187-fn-0006-ptr> [<https://perma.cc/PW7D-N8TU>].

<sup>292</sup> See RICHARD H. KOHN, *EAGLE AND SWORD* 74–75, 81 (1975).

<sup>293</sup> The Pennsylvania Convention: Convention Debates, P.M. (Dec. 12, 1787), in 2 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: PENNSYLVANIA* 598 (Merrill Jensen et al. eds., 1976); The Virginia Convention: Draft Structural Amendments to the Constitution, ante-27 June (June 26, 1788), in 10 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: VIRGINIA*, No. 3, at 1550, 1553 (John Kaminski et al.

identical to the strict subordination clauses appearing in state constitutions and declarations of rights.<sup>294</sup> Rhode Island's proposed amendment, however, placed the strict subordination element in a prefatory clause: "as at all times the military should be under strict subordination to the civil power, that therefore no standing army, or regular [troops] shall be raised, or kept up in time of peace."<sup>295</sup> Rhode Island's proposed amendment illustrates that the prohibition on standing armies in peacetime followed naturally from the strict subordination principle.<sup>296</sup>

Public commentaries from antifederalists likewise called for the inclusion of a strict subordination clause in the new Constitution.<sup>297</sup> One of the most thoughtful and methodical critiques of the new Federal Constitution came from the antifederalist writer operating under the pseudonym Federal Farmer, who may have been the New Yorker Melancton Smith.<sup>298</sup> In one letter, he devoted particular attention to the various military powers entrusted to the federal government, and he lamented the absence of sufficient checks and balances on that power, particularly the absence of a strict subordination clause.

He opened this discussion with a description of terms. "The military forces of a free country may be considered under three general descriptions—

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eds., 1993); New York Declaration of Rights, Form of Ratification, and Recommendaory Amendments to the Constitution (July 26, 1788), in 23 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: NEW YORK, No. 5, at 2326, 2327 (John Kaminski et al., eds., 2009); Rhode Island Form of Ratification and Amendments (May 29, 1790), in 26 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RHODE ISLAND, No. 3, at 996, 1001–02 (John Kaminski et al. eds., 2013); North Carolina Convention Amendments (Aug. 1, 1788), in 30 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: NORTH CAROLINA COMMENTARIES ON THE CONSTITUTION PUBLIC AND PRIVATE 455 (Kaminski et al. eds., 2019).

<sup>294</sup> See, e.g., North Carolina Convention Amendments, *supra* note 293, at 455 ("[T]hat in all cases, the military should be under strict subordination to, and governed by the civil power.").

<sup>295</sup> Rhode Island Form of Ratification and Amendments, *supra* note 293, at 1001–02.

<sup>296</sup> Though—certainly from an originalist-textualist perspective at least—this should not be taken as the precise meaning of the clause. See *District of Columbia v. Heller*, 554 U.S. 570, 578 (2008) ("But apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause.").

<sup>297</sup> See Brutus II, N.Y. J. (Nov. 1, 1787), reprinted in 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION PUBLIC AND PRIVATE, No. 1, at 524, 527–28 (John Kaminski et al. eds., 1981); Luther Martin, *Genuine Information* (Apr. 12, 1788), reprinted in 17 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION PUBLIC AND PRIVATE, No. 5, at 83, 89 (John Kaminski et al. eds., 1995).

<sup>298</sup> See Joseph Kent McGaughy, *The Authorship of "The Letters from the Federal Farmer"*, *Revisited* 70 N.Y. HIST. 153, 170 (1989); Robert H. Webking, *Melancton Smith and the Letters from the Federal Farmer*, 44 WILLIAM & MARY Q. 510, 510–11 (1987).

1. The militia. 2. the navy and 3. the regular troops.”<sup>299</sup> “A militia,” he continued, “when properly formed, are in fact the people themselves,” and the institution included, “according to the past and general [usage] of the states, all men capable of bearing arms.”<sup>300</sup>

This terminological exposition is important. There is every reason to think Federal Farmer accurately describes the common Founding Era understanding of the militia. According to Blackstone, the tradition of the militia being made up of a general swath of the population was as old as the institution itself.<sup>301</sup> The colonies had enacted militia laws enrolling all men of a certain age; although, these often specifically excluded Black and Native American men.<sup>302</sup> And, when the new federal government got around to establishing and defining the national militia, it directed that “each and every free able-bodied white male citizen,” between the ages of eighteen and forty-five, be counted in the militia rolls.<sup>303</sup> So Federal Farmer was correct to say that “general [usage]”—at least by the exclusionary standards of his own time—established that the militia comprised “all men capable of bearing arms.”<sup>304</sup>

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<sup>299</sup> Federal Farmer, *Letter to the Republican*, XVIII (Jan. 25, 1788), in 17 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION PUBLIC AND PRIVATE, No. 5, at 360, 362 (John Kaminski et al. eds., 1995).

<sup>300</sup> *Id.*

<sup>301</sup> 1 BLACKSTONE, *supra* note 59, at \*396, \*397 (“It seems universally agreed by all historians, that king Alfred first settled a national militia in this kingdom, and by his prudent discipline made all the subjects of his dominion soldiers.”); *see also* Selective Draft Law Cases, 245 U.S. 366, 378–79 (1918) (“In England it is certain that before the Norman Conquest the duty of the great militant body of the citizens was recognized and enforceable.”); S.T. Ansell, *Legal and Historical Aspects of the Militia*, 26 YALE L.J. 471, 471 (1917) (“History and law . . . show beyond question that, as such, the militia from its obscure origin in Saxon times has been composed of all subjects and citizens capable of bearing arms, regardless of age or parental authority.”); Fields & Hardy, *supra* note 90, at 400–401 (describing development of militia encompassing all freemen in England). For yet further sources, *see Heller*, 554 U.S. at 595–96.

<sup>302</sup> *See generally* Benjamin Quarles, *The Colonial Militia and Negro Manpower*, 45 MISS. VALLEY HIST. REV. 643 (1959) (describing landscape of racially exclusionary militia laws). Racist exclusions in the definition of the militia were unfortunately nothing new as King Henry II’s 1181 assize of arms had, for instance, imposed special exclusions on Jewish persons. *See 1181, Assize of Arms*, JOE HILLABY & CAROLINE HILLABY, DICTIONARY OF MEDIEVAL ANGLO-JEWISH HISTORY, in THE PALGRAVE DICTIONARY OF MEDIEVAL ANGLO-JEWISH HISTORY (Palgrave Macmillan 2013), [<https://perma.cc/BK55-CRTK>].

<sup>303</sup> Act of May 8, 1792, ch. 33, 1 Stat. 271, 271 (1792) (repealed 1903). As Professor Carol Anderson describes, the limitation to “white” citizens was motivated in part by the white legislators’ fear of the recent Haitian revolution. *See* CAROL ANDERSON, THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA 47–52 (2021).

<sup>304</sup> Letters from Federal Farmer to the Republican, Letter XVIII, *supra* note 299, at 362. *See, e.g.,* GEORGE WASHINGTON, WASHINGTON’S SENTIMENTS ON A PEACE ESTABLISHMENT (May 1, 1783), FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/99-01-02-11202> [<https://perma.cc/3ERT-PURF>] (“[T]he Citizens of America (with a few legal and official exceptions) from 18 to 50 Years of Age should be borne on the Militia Rolls . . .”).

According to Federal Farmer, the “whole” of the military force described above “ought ever to be, and understood to be, in strict subordination to the civil authority.”<sup>305</sup> The author opined that “[s]tipulations in the constitution to this effect, are perhaps, too general to be of much service.” Nonetheless, he thought such clauses should be included “to impress on the minds of the people and soldiery, that the military ought ever to be subject to the civil authority.”<sup>306</sup>

For Federal Farmer then, the military forces that had to be kept under strict subordination to the civil power naturally included all men capable of bearing arms. As previewed in Part II, the term “military forces” was either contained within or interchangeable with the term “military” or “military power” as used in state strict subordination clauses.<sup>307</sup> Thus, when Federal Farmer describes the subordination of a general militia to the civil authority, all evidence points to this being the same relationship dictated by the strict subordination clause.

Federal Farmer’s admiration for a militia made up of the general populace stood in contrast to his distaste for “select corps of militia,” which he thought dangerous to liberty. He described such corps as “distinct bodies of military men” that lacked “permanent interests and attachments in the community.”<sup>308</sup> Echoing Blackstone on idle soldiers, Federal Farmer warned against “plac[ing] the sword . . . in the hands of men destitute of property, of principle, or of attachment to the society and government.”<sup>309</sup> The solution, he thought, was a “general uniform plan,” prescribed by the federal government, that nonetheless left it to the states to “form and train the militia, appoint their officers and *solely* manage them.”<sup>310</sup>

Thematically, Federal Farmer’s critique mixes the fear of faction-based violence that pervaded the states prior to the Constitutional Convention with the apprehension of centralized power (particularly military power) after the framers unveiled the Constitution. He thus emphasized the need to keep both “the regular troops” and “the militia”—composed of “the people themselves”—under “strict subordination to the civil authority.”<sup>311</sup>

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<sup>305</sup> Letters from Federal Farmer to the Republican, Letter XVIII, *supra* note 299.

<sup>306</sup> *See id.*

<sup>307</sup> *See supra* notes 55–57 and accompanying text. As noted there, the terms “force” and “forces” were understood to be interchangeable.

<sup>308</sup> Letters from Federal Farmer to the Republican, Letter XVIII, *supra* note 299, at 362.

<sup>309</sup> *Id.* at 363.

<sup>310</sup> *Id.* at 362–63 (emphasis added). The Constitution, of course, struck a slightly different balance. *See* U.S. CONST. art I, § 8, cl. 16.

<sup>311</sup> Letters from Federal Farmer to the Republican, Letter XVIII, *supra* note 299, at 362.

### 3. Amendments

This brings us to the final mystery of this Part: how could a salutary provision like the strict subordination clause fail to be included in the Federal Constitution?

With pressure from the states and antifederalists, adding a declaration of rights to the Federal Constitution became inevitable.<sup>312</sup> When Madison introduced his proposed amendments in Congress on June 8, 1789, he did not include a strict subordination clause, despite several states' requests for the provision.<sup>313</sup> Instead, Madison opted for language making the militia the centerpiece of security for the new nation. "The right of the people to keep and bear arms shall not be infringed; a well armed and a well regulated militia being the best security of a free country: . . . ."<sup>314</sup>

In large part, this wording followed from the proposals of the same states that had sought strict subordination clauses.<sup>315</sup> Taking Virginia's proposal for instance, Madison's amendment mirrors the first line, "[t]hat the people have a right to keep and bear arms: 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."<sup>316</sup> However, Madison dropped the subsequent language that "standing armies in time of peace are dangerous to liberty" and should be avoided on that basis.<sup>317</sup> This omission likely reflects Madison's recognition that the Federal Government required a freer hand to raise regular forces than suggested in the state proposals.<sup>318</sup> In trimming these proposals, Madison also left out a strict subordination clause.

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<sup>312</sup> See, e.g., Letter from George Mason to John Lamb (June 9, 1788), CONSOURCE, <https://www.consource.org/document/george-mason-to-john-lamb-1788-6-9/> [<https://perma.cc/G8AG-4YRS>] (describing need for amendments to the Federal Constitution).

<sup>313</sup> See 1 ANNALS OF CONG. 451 (1789) (Joseph Gales ed., 1790).

<sup>314</sup> See *id.* ("[B]ut no person religiously scrupulous of bearing arms shall be compelled to render military service in person.").

<sup>315</sup> See, e.g., New York Declaration of Rights, Form of Ratification, and Recommendaory Amendments to the Constitution (Jul. 26, 1788), in 23 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: NEW YORK 2326, 2327 (John Kaminski et al. eds., 2009) ("That the People have a right to keep and bear Arms; that a well regulated Militia, including a body of the people *capable of bearing Arms*, is the proper, natural and safe defence of a free State . . . .").

<sup>316</sup> See The Virginia Convention (Jun. 27, 1788), in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: VIRGINIA, NO. 3 1550, 1553 (John Kaminski et al. eds., 1993).

<sup>317</sup> See *id.*

<sup>318</sup> See, e.g., Convention of Virginia (1788), in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 309 (Jonathan Elliot ed., 1836) [hereinafter ELLIOT'S DEBATES] ("I am no friend to naval or land armaments in time of peace; but if they be necessary, the calamity must be submitted to."); *id.* at 413 (statement

Madison's proposed amendment quickly met denunciation from Elbridge Gerry, a founder and Massachusetts congressman.<sup>319</sup> At the Constitutional Convention, Gerry had raised the sinister possibility of the federal government loosening its "myrmidons" on the states.<sup>320</sup> He now attacked the amendment on the basis that calling the militia the "best" security "admitted an idea that a standing army was a secondary one."<sup>321</sup> Even this implication was too much for Gerry. "What, sir, is the use of a militia?" he asked rhetorically, "It is to prevent the establishment of a standing army, the bane of liberty."<sup>322</sup>

In this vein, a representative from South Carolina, Aedanus Burke, proposed to append the following language to the amendment to clarify the position of a standing army under the Constitution.

A standing army of regular troops in times of peace is dangerous to public liberty, and such shall not be raised or kept up in time of peace but from necessity, and for the security of the people, nor then without the consent of two-thirds of the members present of both Houses; and *in all cases the military shall be subordinate to the civil authority*.<sup>323</sup>

Unfortunately for Burke, his proposal ran into the objection that it came out of procedural order.<sup>324</sup> And another member criticized the two-thirds requirement to raise an army.<sup>325</sup> Burke's proposal was thus promptly defeated.<sup>326</sup>

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of James Madison) ("Where is the impropriety of saying that we shall have an army, if necessary?").

<sup>319</sup> See *Gerry, Elbridge*, U.S. HOUSE OF REPRESENTATIVES: HISTORY, ART & ARCHIVES (June 6, 2022),

<https://history.house.gov/People/Detail/13737?ret=True> [https://perma.cc/S64F-KN69].

<sup>320</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 314, 317 (Madison's notes, Aug. 17, 1788) (Max Farrand ed., 1911) ("Mr. Gerry was agst. letting loose the myrmidons of the U. States on a State without its own consent.").

<sup>321</sup> See 1 ANNALS OF CONG. 780 (1789) (Joseph Gales ed., 1790).

<sup>322</sup> *Id.* at 778.

<sup>323</sup> *Id.* at 780 (emphasis added).

<sup>324</sup> See *id.* (statement of Rep. Vining).

<sup>325</sup> *Id.* Representative Thomas Hartley "hoped the people of America would always be satisfied with having a majority to govern. He never wished to see two-thirds or three-fourths required, because it might put it in the power of a small minority to govern the whole Union." *Id.* For his part, Madison had already spoken at length against this same provision at the Virginia ratification convention. See *Convention of Virginia (1788)*, in 3 ELLIOT'S DEBATES, *supra* note 318, at 620–21.

<sup>326</sup> 1 ANNALS OF CONG. 781 (1789) (Joseph Gales ed., 1790).

The Senate also considered adding a strict subordination provision to the Second Amendment. The proposed clause declared “that in all cases the military should be under strict subordination to, and governed by, the civil power.”<sup>327</sup> But just like in the House, this Senate proposal would also have required two thirds of both houses to raise a standing army in peacetime, and it prohibited the enlistment of soldiers “for any longer term than the continuance of the war.”<sup>328</sup> By a six to nine vote, the Senate likewise declined to adopt the additional language.<sup>329</sup>

Both the House and the Senate considered strict subordination clauses accompanied by stringent constraints on Congress’s ability to raise a standing army, so drawing inferences from the clause’s rejection is difficult, if not impossible. Many were no doubt influenced by Washington’s view that keeping some regular troops in peacetime was “indispensably necessary.”<sup>330</sup> And even a general provision like the strict subordination clause could have opened the door to specific constraints on the federal government’s ability to wield military force.<sup>331</sup>

The twice-proposed strict subordination clause did not make it into the Constitution, but the Bill of Rights incorporated specific provisions associated with debates surrounding civil–military subordination. The Second Amendment retains the declaration that a “well regulated Militia” is “necessary to the security of a free State,”<sup>332</sup> the Third Amendment only permits the wartime quartering of soldiers “in a manner to be prescribed by law,”<sup>333</sup> and the Fifth Amendment extends grand jury protections to members of the militia, except “when in actual service in time of War or public danger.”<sup>334</sup> In addition, structural provisions in the Constitution echo the subordination of the military power to its civil counterpart. The Constitution entrusts to Congress the

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<sup>327</sup> S. JOURNAL, 1st Cong., 1st Sess. 71 (1789).

<sup>328</sup> *Id.* In full, it read, “[t]hat standing armies, in time of peace, being dangerous to liberty, should be avoided, as far as the circumstances and protection of the community will admit; and that in all cases the military should be under strict subordination to, and governed by, the civil power; that no standing army or regular troops shall be raised in time of peace, without the consent of two-thirds of the members present in both Houses; and that no soldier shall be enlisted for any longer term than the continuance of the war.” *Id.*

<sup>329</sup> *Id.*

<sup>330</sup> See GEORGE WASHINGTON, WASHINGTON’S SENTIMENTS ON A PEACE ESTABLISHMENT (May 1, 1783), FOUNDERS ONLINE, <https://founders.archives.gov/documents/Washington/99-01-02-11202> [<https://perma.cc/3ERT-PURF>]

<sup>331</sup> See Peterson, *supra* note 13, at 20–23. As Professor Farah Peterson has convincingly shown, Eighteenth-century lawyers would have expected such a general provision to permit a broad, purpose-oriented construction.

<sup>332</sup> U.S. CONST. amend. II.

<sup>333</sup> U.S. CONST. amend. III; see also 1 ANNALS OF CONG. 451 (1789) (Joseph Gales ed., 1790) (introduction of Third Amendment).

<sup>334</sup> U.S. CONST. amend. V. The Fifth Amendment does not afford the same protection to “cases arising in the land or naval forces.” *Id.*

decision to declare war as well as the powers to organize and call forth the militia.<sup>335</sup> It makes the President—an elected official—the commander in chief.<sup>336</sup> It forbids the states from keeping peacetime standing armies,<sup>337</sup> and it requires periodic congressional reauthorization of army funding.<sup>338</sup>

These specific constitutional provisions offer clues as to the contents of the broader strict subordination clause.<sup>339</sup> They provide further indication that the clause—described as very “general” by Federal Farmer—represented a capacious and multi-layered prohibition on military supremacy. This could range from forbidding standing armies in peacetime to requiring Congressional authorization for quartering soldiers. Further research is required on the implications of the Constitution omitting a strict subordination clause, but the chief effect appears to be that the Constitution lacks an express catch-all provision forbidding independent military power.

## V. PRIVATE MILITIA PRECEDENTS?

The preceding Parts focused on the historical evolution and interpretation of the language contained in state strict subordination clauses. As we have seen, the concept of strict subordination of military to civil power was frequently discussed in relation to the armed forces of the state. However, this Article opened with a focus on private militias, which have thus far only been indirectly implicated by discussions of strict subordination. This Part thus separately and squarely considers Founding Era evidence concerning the legality of private militias.

In doing so, it preempts an argument that state constitutions must be read to allow private militias. Professor Martin Lederman has described a form of reasoning—adopted at times by the Supreme Court and judges on other courts—that the Constitution preserves the practices of the Continental Congress and Continental Army in fighting the Revolutionary War.<sup>340</sup> The key presumption is “that the Constitution was designed to afford the government ‘the power of carrying on war as it had been carried on during the

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<sup>335</sup> U.S. CONST. art. I, § 8, cl. 11, 15–16.

<sup>336</sup> *Id.* art. II, §§ 1–2.

<sup>337</sup> *Id.* art. I, § 10, cl. 3.

<sup>338</sup> *Id.* § 8, cl. 12.

<sup>339</sup> Notably, the Federal Constitution has been interpreted to implicitly contain the strict subordination principle. *See* Authority of a President to Send Militia into a Foreign Country, 29 Op. Att’y Gen. 322, 325 (1912) (“Under our Constitution, as it has been uniformly construed from the first, the military is subordinate to the civil power and subservient to the civil power . . .”).

<sup>340</sup> *See* Martin S. Lederman, *Of Spies, Saboteurs, and Enemy Accomplices: History’s Lessons for the Constitutionality of Wartime Military Tribunals*, 105 GEO. L.J. 1529, 1538 (2017).



Revolution.”<sup>341</sup> Logically, this presumption grows even stronger when considering state constitutions enacted during the war. Surely these constitutions should not be read to prohibit the practices of the war the states were then fighting.

This suggests a straightforward syllogism regarding private militias and strict subordination clauses: the revolutionary generation employed private militias to fight the war, state strict subordination provisions must read as consistent with this practice, therefore they do not prohibit private militias. This reasoning resonates with the persistent revolutionary image of the citizen soldier rising up semi-autonomously to fight the British. One thinks of the paradigmatic “minuteman” reaching for his rifle above the fireplace.<sup>342</sup>

But this argument and its associated imagery are more illusory than real. Although the militia—as discussed above—traditionally drew from all the male inhabitants in a region, it was thoroughly a creature of the government. “Ultimate responsibility for the militia was a function of the Crown. In England it was exercised for the Crown by the county lords lieutenant; in America, by the governor.”<sup>343</sup> When colonies joined the movement for independence, often their provincial congress or committee of safety—civil institutions by the founders’ reckoning—asserted control over the pre-existing institution of the militia.<sup>344</sup> As Professor McCord has observed, the notion that private militias have some special constitutional protection is based primarily in “mythology,” not history.<sup>345</sup>

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<sup>341</sup> *Id.* (quoting *Miller v. United States*, 78 U.S. 268, 312 (1871)); *see also id.* at 1543 (“[T]here is also a storied tradition of looking to Washington’s actions as Commander in Chief during the war as a model the Framers presumably did not intend to jettison when it came time to craft the Constitution shortly after that successful military campaign.”).

<sup>342</sup> *See* Nathan R. Kozuskanich, *Pennsylvania, the Militia, and the Second Amendment*, 133 PA. MAG. HIST. & BIOGRAPHY 119, 119 (2009) (alluding to same myth).

<sup>343</sup> ROBERT K. WRIGHT, JR., *THE CONTINENTAL ARMY* 7 (1983), [<https://perma.cc/78SK-NZ9T>]. Of course, realizing that the founding generation expected militia organizations to be closely controlled and regulated by the state should not obscure the role the militia often played in service to the state. For instance, as Professor Carol Anderson has observed, state militias excelled at the terrible function of suppressing slave insurrections. ANDERSON, *supra* note 303, at 34; *see also* SALLY HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* 19–34 (2001) (describing development of slave patrols mandated by the legislature in South Carolina, Virginia, and North Carolina).

<sup>344</sup> *See, e.g.*, JOURNALS OF EACH PROVINCIAL CONGRESS OF MASSACHUSETTS, 32–33 (William Lincoln ed., 1837), [<https://perma.cc/7HK9-L4VU>] (October 26, 1774) (“Resolved that . . . a committee of safety . . . shall have power . . . to alarm, muster and cause to be assembled . . . so many of the militia of this province, as they shall judge necessary . . .”).

<sup>345</sup> *See* MCCORD, *supra* note 3, at 4 (“The mythology that the U.S. Constitution protects armed private militias is so widespread that it is sometimes repeated by law enforcement officers themselves.”).

As this Part shows, organizations of private individuals exercising military force did exist before and during the Founding; however, the Founding Era response to these organizations suggests they were unlawful and would almost certainly have violated the strict subordination clause. This Part does not review all such Founding Era groups. Instead, it investigates two cases that, at first glance, would seem to present strong support for a private militia precedent, but that upon closer inspection point in the opposite direction. These two exceptions that prove the rule are Pennsylvania's voluntary militia associations and the New Hampshire Grants' Green Mountain Boys.

### A. *Pennsylvania: Militia Associations*

Pennsylvania presents the best test case for assessing the existence of a private militia precedent. When the American Revolution erupted and the news of Lexington and Concord reached the colony, colonists joined and formed private militia associations.<sup>346</sup> Such associations had existed for some time due to the colony's refusal to create a regular military force. Quakers, who held firmly to pacifist ideals, had long controlled the government of colonial Pennsylvania, meaning it had never formally organized a militia.<sup>347</sup>

None other than Benjamin Franklin established the precedent for Pennsylvania's private militia associations.<sup>348</sup> In 1747, in the midst of King George's War, Pennsylvania colonists grew anxious over the threat of "French and Spanish privateers prowling the Delaware Bay."<sup>349</sup> Yet the General Assembly took no measures for the colony's defense.<sup>350</sup> In a pamphlet entitled *Plain Truth*, Franklin used biblical imagery to paint a stark picture of the menace bearing down on the colony, and he drew attention to the colony's peculiar lack of a government-provided armed force. "There is no British Colony excepting this, but has made some Kind of Provision for its Defence."<sup>351</sup> As a solution, Franklin called on the colony's "middling People, the Farmers, Shopkeepers and Tradesmen of this City and Country" to take matters into their own hands. "All we want" he reported, "is Order, Discipline, and a few Cannon."<sup>352</sup>

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<sup>346</sup> See MERRIL JENSEN, *THE FOUNDING OF A NATION* 595, 596–97 (1968).

<sup>347</sup> Edwin B. Bronner, *The Quakers and Non-Violence in Pennsylvania*, 35 PA. HIST. J. MID. ATLANTIC STUD. 1–5 (1968).

<sup>348</sup> Kozuskanich, *supra* note 342, at 127.

<sup>349</sup> Jessica Choppin Roney, *Ready to act in defiance of Government: Colonial Philadelphia Voluntary Culture and the Defense Association of 1747–1748*, 8 EARLY AM. STUD. 358, 360–62 (2010).

<sup>350</sup> *Id.* at 359–60.

<sup>351</sup> BENJAMIN FRANKLIN, *PLAIN TRUTH*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Franklin/01-03-02-0091#BNFN-01-03-02-0091-fn-0026-ptr> [https://perma.cc/XXC5-NPRJ].

<sup>352</sup> *Id.*

Franklin ended *Plain Truth* by promising a plan for “a Form of an Association,” if the “Hints” in his paper were well-received. They were. By Franklin’s own recollection, Pennsylvanians eagerly read and discussed the pamphlet, quickly requiring a second printing.<sup>353</sup> Soon, Franklin was presenting his plan for the Association to a meeting of tradesmen.<sup>354</sup>

The Form of Association, much like a constitution or a contract, consisted of several articles accompanied by explanatory remarks that established the governance of a military organization. A preamble reiterated that “the Assemblies of this Province . . . have not done, nor are likely to do any Thing for our Defence.”<sup>355</sup> Therefore, the plan committed its members “for [their] mutual Defence and Security,” to “form [them]selves into an Association.” The first article required every associator to obtain “a good Firelock, Cartouch Box, and at least twelve Charges of Powder and Ball” and as many as possible to obtain “a good Sword, Cutlass or Hanger.” Next, it anticipated forming the associators into companies.<sup>356</sup>

The third and fourth articles called for the companies to elect their own officers as soon as they met. But they also mandated that officers’ names “be presented to the Governor for the Time being, or in his Absence to the President and Council of this Province, in order to obtain Commissions accordingly.”<sup>357</sup> These officers could only exercise the powers of their station after they received their commissions, and they could only serve for one year. As noted in the explanatory remarks, “[t]he Application to the Governor . . . for Commissions, preserves the Prerogative, at the same time that these frequent Elections secure the Liberty of the People.”<sup>358</sup>

The fifth article set the times for training and disciplining of the companies (four per year). It also provided that the Association would assemble if “called together on some Emergency by the Governor, or, in his Absence, the President and Council.” As explained in the remarks, the associators agreed to heed the governor’s call in the event of an emergency, which it specifically described as “an actual Invasion by our Enemies.” The sixth article provided for the election of a General Military Council to “frame

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<sup>353</sup> *Plain Truth*, reprinted in 3 THE PAPERS OF BENJAMIN FRANKLIN 180 (Leonard W. Labaree ed., 1961).

<sup>354</sup> Roney, *supra* note 349, at 362.

<sup>355</sup> *Form of Association*, reprinted in 3 THE PAPERS OF BENJAMIN FRANKLIN 205 (Leonard W. Labaree ed., 1961), [<https://perma.cc/7TAJ-EGC4>]. “[T]his Colony is in a naked, defenceless State, without Fortifications or Militia of any Sort . . . .” *Id.* “That the Assemblies of this Province, by reason of their religious Principles, have not done, nor are likely to do any Thing for our Defence . . . .” *Id.*

<sup>356</sup> *Id.*

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

such Regulations as shall be requisite for the better ordering [the Association's] military Affairs." The Council's regulations would have the force of law among associators, but—as prohibited by the seventh article—it could not levy taxes or fines on members.<sup>359</sup>

The final article reiterated that the Form of Association was binding on its members, "unless the King's Majesty shall order otherwise." It also specified the conditions under which the Association could be dissolved. The remarks clarified that this final article, "as well as several of the others, expresses a dutiful Regard to the Government we are under."<sup>360</sup>

Pennsylvanians enthusiastically joined the Association. Estimates place the number of associators who signed up in the early days between 1,000 and 1,200 men.<sup>361</sup> The Association began organizing itself according to Franklin's plan, including by electing officers and drilling in companies.<sup>362</sup> But almost as soon as it appeared, King George's War ended, and the Association faded away by 1749.<sup>363</sup> As described by Professor Jessica Roney, the Association was an "extralegal militia" that operated "with no legal basis, with no original grant of power from any branch of government, and with no explicit oversight by any governmental" body.<sup>364</sup>

If Roney's characterization is correct, and there is every reason to believe it is, then the 1747 Association and successor associations that fought in the Revolutionary War would seemingly present a strong precedent for a private militia tradition. The problem with this interpretation is that it ignores the conspicuous ways Franklin tied the Association to the colony's existing civil government. Most prominently, officers still had to apply to the governor for their commissions, a requirement that companies scrupulously observed in practice.<sup>365</sup> The document also committed associators to heed the governor's call to muster in an emergency and to obey any dictate from the Crown contrary to its own internal laws. These efforts to anchor the Association in existing civil authority suggest Franklin understood the endeavor rested on shaky legal foundations.

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<sup>359</sup> *Id.*

<sup>360</sup> *Id.*

<sup>361</sup> Roney, *supra* note 349, at 362.

<sup>362</sup> *Id.* at 375–78, 385; *Plain Truth*, *supra* note 353, at 180.

<sup>363</sup> Roney, *supra* note 349, at 385.

<sup>364</sup> *Id.* at 358. According to Roney, the militia association drew on prior voluntary civic organizations, including the library and firefighting companies. *See id.* at 363–66.

<sup>365</sup> *See, e.g., Notes on the Association, reprinted in 3 THE PAPERS OF BENJAMIN FRANKLIN* 308 (Leonard W. Labaree ed., 1961). The governor did not refuse any commissions. Roney, *supra* note 349, at 374–75; *see also id.* at 375 n.26 (detailing how, for a period of time, due to the governor's stepping down, commissions were issued as a matter of course by the president of the council).

This raises a second issue with taking the Association as precedent for private military organizations. The Association would almost certainly have been unlawful under Founding Era state constitutions if it was not already in 1747. The Association came only seven years after Hardwicke and Argyle's debate on the necessity of preserving the strict subordination of the armed forces to the government.<sup>366</sup> And it preceded by almost thirty years the enactment of Pennsylvania's strict subordination clause. Roney notes the pamphlets criticizing the Association did not attack it on a legal basis.<sup>367</sup> Though, as she continues, "[s]urely the lack of serious debate about the Association's right to exist was in part attributable to its answering an immediate need."<sup>368</sup>

Moreover, the Association's legality *was* aggressively attacked in private correspondence between the colony's proprietor, Thomas Penn, and the secretary of the colonial council, Richard Peters. Penn described the Association as a "military commonwealth," conjuring the specter of *imperium in imperio*, and he thought its creation amounted to a "little less than Treason."<sup>369</sup> He pointed particularly to the General Military Council as usurping "the King's power of ordering the Militia, which you know our Kings are very jealous of."<sup>370</sup> The Association and its council, he opined, gave "the power of the Militia, or calling the People together for their defence, from the King to themselves, and . . . I fear [this] will be esteemed greatly Criminal."<sup>371</sup>

Peters initially tried to defend the Association by drawing a direct line between colony's civil authority and the organization. According to him, the Association's practice of electing its own officers "was look'd upon by the Council only in the nature of a recommendation, the tenor of their Commissions being to receive their Orders from the Governor for the time being according to the rules of war."<sup>372</sup> It was thus highly significant that the Association's officers still received their commissions from the governor. No doubt influenced by his superior, Peters eventually came around to Penn's view of the Association as an "illegal combination."<sup>373</sup>

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<sup>366</sup> See *supra* Part III.A.3.

<sup>367</sup> Roney, *supra* note 349, at 380.

<sup>368</sup> *Id.* at 381.

<sup>369</sup> *Introduction to FRANKLIN, PLAIN TRUTH*, *supra* note 351 (quoting letter from Thomas Penn to Richard Peters (March 30, 1748)).

<sup>370</sup> *Id.* According to Sir Matthew Hale, in the King "alone is the Power of the Militia in this Kingdome." *Reflections by the Lrd. Cheife Justice Hale on Mr. Hobbes His Dialogue of the Lawe*, in 5 WILLIAM S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 508 (1924).

<sup>371</sup> *Introduction to FRANKLIN, PLAIN TRUTH*, *supra* note 351 (quoting letter from Thomas Penn to the Council and its President (Mar. 30, 1748)).

<sup>372</sup> *Id.* (quoting letters from Richard Peters to Thomas Penn (Mar. 25, June 13, 1748)).

<sup>373</sup> *Id.*

When peace came and the Association “dwindled away” without becoming an American version of the New Model Army, Penn suddenly had nicer things to say about it. Nonetheless, he stressed the importance of keeping the Association under proper legal control. Penn wrote to Peters that he was “pleased to find that the Association has had so good an Effect,” but noted “that the persons associated have Commissions in the Common Form, and do not act *but by Authority from the president and Council*.”<sup>374</sup> Looking to the future, Penn hoped that “before another War something more regular may be done” to provide for the colony’s defense.<sup>375</sup>

“[S]omething more regular” was attempted in 1755, when the colony again felt itself under external threat. Benjamin Franklin, who was a member of the colonial assembly, proposed a bill drawing on his Form of Association.<sup>376</sup> As eventually passed, the colony’s new Militia Act acknowledged the burgeoning tradition of voluntary associations, but also the tradition’s extra-legality. “[W]hereas the voluntary Assembling of great Bodies of armed Men . . . on any occasional Alarm . . . as of late hath happened, *without Call or Authority from the Government*.”<sup>377</sup> It continued on to declare the unreasonableness “that any should, through a *Want of legal Powers*, be in the least restrained” from taking steps toward safeguarding the public security.<sup>378</sup>

The key operative section of the Militia Act made it “lawful for the Freemen of this Province to form themselves into Companies, as heretofore they have used in Time of War *without Law*.”<sup>379</sup> Plainly, the Act authorized the formation of the previously extra-legal—and very likely unlawful—militia associations. The law reinstated much of Franklin’s 1747 Form of Association with only slight modifications. For instance, companies still elected their own officers, who received their commissions from the governor. However, if the governor refused to grant a commission to a particular person, then the associators could elect two different replacements, one of whom the governor was obligated to endow with a commission. The Militia Act thus imposed tighter limits on the governor’s control over officer selection than the Form of Association. But instead of the maligned General Military Council, the Act empowered the governor to issue articles of war to govern the militia, provided he obtain the “Advice and Consent” of a majority of the officers and that any such articles not be “repugnant.”<sup>380</sup> Finally, the Act replicated a key feature of

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<sup>374</sup> *Id.* (quoting letter from Thomas Penn to Richard Peters (Aug. 31, 1748)).

<sup>375</sup> *Id.* (quoting the same).

<sup>376</sup> *The Militia Act* (Nov. 25, 1755), reprinted in 6 THE PAPERS OF BENJAMIN FRANKLIN 266 (Leonard W. Labaree ed., 1961).

<sup>377</sup> *Id.* (emphasis added).

<sup>378</sup> *Id.* (emphasis added).

<sup>379</sup> *Id.* (emphasis added).

<sup>380</sup> *Id.*

the English Mutiny Act by providing that ordinary civilian law would continue to apply to associators except when they were in actual service.<sup>381</sup>

The Militia Act proved short lived. Back in Great Britain, the Board of Trade reviewed the Act and found it “improper and inadequate” to the colony’s defense.<sup>382</sup> It drew particular attention to the Act’s voluntary structure and the election of officers.<sup>383</sup> It noted, “no Provision is made for that due subordination without which all Bodies of People associated for Military purposes would be absolutely useless.”<sup>384</sup> The Board catalogued other “defective [and] mischievous Provisions,” but the Act notably permitted too much independence in the militia structure. On the Board’s recommendation, the Crown ordered the Militia Act repealed.<sup>385</sup>

When the Revolution came to Pennsylvania, inhabitants drew on this tradition of voluntary associations as they formed militia companies to resist the British.<sup>386</sup> In Philadelphia, thousands signed up for a militia association with members agreeing to “associate for the purpose of learning the Military Exercise, and for defending our property and lives.”<sup>387</sup> After some tepid gestures of support, the Pennsylvania Provincial Assembly recognized these associations and imposed a nominal tax on those who would not join.<sup>388</sup> So, in contrast to colonial-era associations, the Revolutionary associations were quickly adopted by the civil authority.

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<sup>381</sup> *Id.* (“That no Enlistment or Enrollment of any Person, in any of the Companies or Regiments to be formed and raised as aforesaid, shall protect such Person in any Suit or civil Action brought against him by his Creditors or others, except during his being in actual Service in Field or Garrison; nor from a Prosecution for any Offence committed against the Laws of this Province.”). The Pennsylvania General Assembly later passed its own munity act that declared “Numbers of armed Men assembled together, without any clear and express Law for their Government, may become dangerous to the King’s Peace, ruinous to each other, and of little Service to the Publick.” *Mutiny Act* (Apr. 15, 1756), *reprinted in* 6 THE PAPERS OF BENJAMIN FRANKLIN 433–37 (Leonard W. Labaree ed., 1961).

<sup>382</sup> Letter from Dunk Hallifax et al. to Privy Council for Plantation Affairs, *reprinted in* 7 MINUTES OF THE PROVINCIAL COUNCIL OF PENNSYLVANIA, FROM THE ORGANIZATION TO THE TERMINATION OF THE PROPRIETARY GOVERNMENT 274 (Theo. Penn & Co. 1851), [<https://perma.cc/3FLQ-T7U6>]. Ironically, the main object of the Board’s discontent appears to have been Quaker pacifism, which the Act was a deliberate attempt to circumvent. *See id.* at 275.

<sup>383</sup> *Id.*

<sup>384</sup> *Id.*

<sup>385</sup> *The Militia Act*, *supra* note 376; *see also* Kozuskanich, *supra* note 342, at 132 n.50.

<sup>386</sup> JENSEN, *supra* note 346, at 595 (describing appearance of independent militia associations throughout the colony).

<sup>387</sup> *Id.* at 596–97 (citing Philadelphia Association (Apr. 26, 1775), *in* 2 AMERICAN ARCHIVES: FOURTH SERIES 400 (Peter Force ed., 1839), [<https://perma.cc/3FLQ-T7U6>]).

<sup>388</sup> *See* 8 PENNSYLVANIA ARCHIVES: EIGHTH SERIES 7351–52 (Charles F. Hoban ed., 1935), [<https://perma.cc/T7RS-2T5Y>]; *see also* Kozuskanich, *supra* note 342, at 134; Arthur J. Alexander, *Pennsylvania’s Revolutionary Militia* 69 PA. MAG. HIST. & BIOGRAPHY 15, 15–16 (1945).

### ***B. New Hampshire Grants: Green Mountain Boys***

Another potential candidate for a private militia precedent comes from the New Hampshire Grants: the disputed land between New York and New Hampshire (what is today Vermont). In the years prior to the Revolution, Ethan Allen led a group called the Green Mountain Boys that engaged in quasi-insurrectionary violence against the agents of absentee landlords from New York.<sup>389</sup> There are palpable parallels between the Green Mountain Boys and today's private militias. Allen instructed his men to be properly armed, and they waged an intimidation campaign to push anyone with a New York land commission out from the Grants. Their actions were also patently unlawful. Allen and several of his cousins were wanted fugitives from New York, which placed a £150 bounty on his head.<sup>390</sup> New York even enacted a new riot act aimed specifically at suppressing the disruptions in the Grants.<sup>391</sup>

So, if the Revolutionary War had been fought through the sort of privately mustered and commanded forces that would lend some constitutional imprimatur to today's private militias, then surely Ethan Allen's Green Mountain Boys would be the ideal candidate for such a precedent. Yet the Green Mountain Boys' experience in the Revolutionary War tells precisely the opposite story.

Allen and the Green Mountain Boys indeed fought for the Revolution; however, their actions were in the service to and ultimately under the direction of state assemblies and the Continental Congress. When war broke out, both Massachusetts and Connecticut sought to capture the critical Fort Ticonderoga from the British. Connecticut's governor hired the Green Mountain Boys for the job.<sup>392</sup> Massachusetts issued a formal commission to Benedict Arnold to do the same. Running into each other in a backwoods tavern, Allen and Arnold argued strenuously over who carried the more legitimate authority to take the fort.<sup>393</sup> Allen had with him around a hundred and forty men whereas Arnold had none, but Arnold had a formal commission.<sup>394</sup> In the end, they captured

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<sup>389</sup> See generally CHRISTOPHER S. WREN, *THOSE TURBULENT SONS OF FREEDOM* at 1–16 (2018); see also March Bushnell, *Then Again: Disputing land claims gave rise to Vermont republic*, VTDIGGER (Oct. 27, 2019) <https://vtdigger.org/2019/10/27/then-again-disputing-land-claims-gave-rise-to-vermont-republic/> [https://perma.cc/R3X6-V7WF].

<sup>390</sup> See WREN, *supra* note 389 at 9, 11–12.

<sup>391</sup> *An Act for preventing tumultuous and riotous Assemblies in the Places therein mentioned, and for the more speedy and effectual punishing the Rioters* (Mar. 9, 1774), reprinted in *LAWS OF THE COLONY OF NEW YORK: PASSED IN THE YEARS 1774 AND 1775*, at 38 (James B. Lyon 1888), [https://perma.cc/YS34-XAWU].

<sup>392</sup> See WREN, *supra* note 389, at 21–22.

<sup>393</sup> *Id.* at 22–25.

<sup>394</sup> *Id.* at 23; 3 *COLLECTIONS OF THE BERKSHIRE HISTORICAL AND SCIENTIFIC SOCIETY* 387 (Sun Printing Co. 1899), [https://perma.cc/G6AS-ZD2H]. The assembled forces also included



the Fort jointly—famously without firing a shot—but the argument continued with Arnold claiming command of the whole expedition.<sup>395</sup>

Accompanying Allen's forces was the Committee of War for the Expedition, men from Connecticut who represented the interests of the expedition's financiers.<sup>396</sup> Arnold's challenge to Allen's leadership, and thus to Connecticut's control over the expedition, prompted them to formalize Allen's authority in a written commission and orders.<sup>397</sup> The commission drew a direct line between Connecticut's authority and Allen's actions. "Whereas agreeable to the Power and Authority to us given by the Colony of Connecticut, we have appointed you to take the command of a party of men and reduce and take possession of the garrison of Ticonderoga."<sup>398</sup> The commission directed Allen to keep Ticonderoga until he received "further orders from the Colony of Connecticut or from the Continental Congress."<sup>399</sup>

After taking Ticonderoga, Allen traveled to Philadelphia, where he petitioned the Continental Congress to formally muster the Green Mountain Boys into the Continental Army. Upon receiving Allen and his petition, the Congress passed a resolution granting Allen's request and, importantly, granting back pay to those who had helped capture the fort.<sup>400</sup> Thus, the previously insurrectionist band became fully clothed with the legitimacy of the Continental Army.

Although the Green Mountain Boys had been brought into the official fold, Allen himself would not be at their head. He was passed over for command and would then spend much of the war a prisoner of the British. Allen was captured after abandoning his post as a Continental Army recruiter and mounting an impromptu effort to seize Montreal with some Canadians he hired for the occasion.<sup>401</sup> George Washington wrote of the affair: "Colonel Allen's Misfortune will I hope teach a Lesson of Prudence & Subordination to others."<sup>402</sup>

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roughly seventy volunteers from Massachusetts, though they were not under Arnold's command. *Id.* at 389; WREN, *supra* note 389, at 23.

<sup>395</sup> COLLECTIONS, *supra* note 394, at 389.

<sup>396</sup> *Id.* at 386.

<sup>397</sup> WREN, *supra* note 389, at 27.

<sup>398</sup> COLLECTIONS, *supra* note 394, at 389.

<sup>399</sup> *Id.*

<sup>400</sup> 2 JOURNALS OF THE CONTINENTAL CONGRESS 104–06 (June 23, 1775), [<https://perma.cc/85MM-J544>]; WRIGHT, *supra* note 343, at 42 ("They were formed into a regiment with the same company structure and terms of enlistment that the New Yorkers had, but they were commanded by a lieutenant colonel rather than a colonel.").

<sup>401</sup> WREN, *supra* note 389, at 39–42.

<sup>402</sup> Letter from George Washington to Major General Philip Schuyler (Oct. 26, 1775), FOUNDERS ONLINE,

Washington's choice of words to describe Allen's misadventure as a lack of "Subordination" is revelatory. For Washington, there was no place for irregular forces and their independent adventurism in the Continental Army.

## VI. AN ANTI-PRIVATE MILITIA CLAUSE IN STATE CONSTITUTIONS

Telling the story of forgotten or overlooked constitutional provisions is a valuable exercise in its own right.<sup>403</sup> However, the history of the strict subordination clause has concrete applications to present-day problems. It lends considerable historical support to litigation efforts to use the strict subordination clause to restrict private militias.<sup>404</sup> To show why, this Part distills the previously related history into concrete arguments.

As a threshold matter, the strict subordination clause—whatever its meaning—does not conflict with the Second Amendment. As shown above, state strict subordination clauses generally predated the passage of the Second Amendment. In at least four early state constitutions, strict subordination clauses co-existed with an explicit right to bear arms.<sup>405</sup> Both the House and Senate considered adding a strict subordination provision to the Second Amendment, and though both declined to do so, there is no evidence that this was because the two provisions were understood to be logically incompatible.<sup>406</sup> So, the Second Amendment did not repeal state strict subordination clauses *sub silentio*. Whatever the strict subordination clause meant, it was understood to coexist with the Second Amendment.

Altogether, the evidence from the strict subordination clause's history strongly supports the anti-private militia reading. This evidence can be divided into support for five arguments: (1) the founding generation understood

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<https://founders.archives.gov/?q=Ethan%20Allen%20Author%3A%22Washington%2C%20George%22&s=1111311121&r=2&sr=#GEWN-03-02-02-0220-fn-0001-ptr> [https://perma.cc/3PDQ-KGHY].

<sup>403</sup> See, e.g., Bowie, *supra* note 186, at 1722–25.

<sup>404</sup> The history also further supports state enactment of anti-private paramilitary laws. See, e.g., Va. Code Ann. § 18.2-433.2.

<sup>405</sup> See PA. CONST. of 1776, art. XIII ("That the people have a right to bear arms for the defence of themselves and the state; . . . And that the military should be kept under strict subordination to, and governed by the civil power."); N.C. CONST. of 1776, art. XVII ("That the People have a right to bear Arms for the Defense of the State. . . . and that the military should be kept under strict subordination to, and governed by the civil Power."); VT. CONST. of 1777, art. XV ("That the People have a Right to bear Arms, for the Defence of themselves and the State . . . and that the military should be kept under strict Subordination to, and governed by the civil Power."); MA. CONST. of 1780, art. XVII ("The people have a right to keep and bear arms for the common defence . . . and the military power shall always be held in exact subordination to the civil authority, and be governed by it.").

<sup>406</sup> See *supra* Part IV.B.3.

“military” to include the unorganized militia—which was comprised of all people capable of bearing arms—meaning all such people must also remain subordinate to the civil power; (2) subordination solved the problem of *imperium in imperio*, logically precluding independent or “uncontrollable” military forces; (3) military power meant a power of government, which cannot be assumed by private parties; (4) strict subordination appeared paradigmatically in reference to the New Model Army; and finally (5) Founding Era private militia associations almost certainly violated strict subordination clauses.

Turning to the first argument, the strict subordination clause declares that “the military [power]” shall be subordinate to the civil power. As described in Part II, the founding generation understood military power to refer to a society’s particular fighting forces or, to use Blackstone’s definition, “such persons as are *peculiarly appointed* among the rest of the people, for the safeguard and defense of the realm.”<sup>407</sup> In the Founding Era United States this included the militia. As cogently described by Federal Farmer, the militia “are in fact the people themselves” and the institution traditionally included “all men capable of bearing arms.”<sup>408</sup> The Supreme Court has acknowledged that this definition is well-supported by Founding Era sources.<sup>409</sup> So, it would have been commonly understood that the term “military” encompassed all people capable of bearing arms. By the terms of the clause, this body of people—just like the regular army or select militia—had to remain in strict subordination to the civil power.

This conclusion receives further support from the realization that U.S. law has consistently recognized a broad definition of the militia. Blackstone describes the creation of a “national militia” as making “all the subjects of [the] dominion soldiers.”<sup>410</sup> The Second Congress adopted a version of this conception of the militia in the 1792 Militia Act.<sup>411</sup> Today, federal and state laws continue to count broad swaths of the population as part of the militia. The Virginia Code, for instance, defines the “militia” as “all able-bodied

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<sup>407</sup> 1 BLACKSTONE, *supra* note 59, at \*395 (emphasis added). As noted in Part II, Blackstone appears to have meant the same thing whether using military state or military power.

<sup>408</sup> Letters from Federal Farmer to the Republican, Letter XVIII, *supra* note 299.

<sup>409</sup> See *Heller v. District of Columbia*, 554 U.S. 570, 596 (2008).

<sup>410</sup> 1 Blackstone, *supra* note 59, at \*397.

<sup>411</sup> Act of May 8, 1792, Ch. 33, 1 Stat. 271, 271 (1792) (repealed 1903); see also William L. Shaw, *The Interrelationship of the United States Army and the National Guard*, 31 MIL. L. REV. 39, 44 (1966) (explaining the unorganized militia is made up of all able-bodied citizens and resident aliens who may be needed in an emergency). This law and other militia statutes included race and gender-based exclusions. As one federal court of appeals has observed, a history-based method of analysis may require interaction with repugnant precedent. See *Range v. Attorney General*, 53 F.4th 262, 276 n.18 (3d Cir. 2022), *petition for hearing en banc granted*, 56 F.4th 992 (Jan. 6, 2023) (No. 21-2835). Indeed, the existence of such precedent suggests a reason for caution in using history as a rigid test of constitutionality.

residents of the Commonwealth” in a certain age range who are or intend to become citizens.<sup>412</sup> These laws confirm that federal and state governments have not relinquished their traditional control over the body of people capable of bearing arms. The understanding that this body must remain subordinate to the civil power should ultimately be intuitive. If the state can call up the people and form them into militia companies, then surely the state can also prohibit the people from forming militia companies on their own.<sup>413</sup>

A second argument is that the strict subordination clause was understood to solve a problem of *imperium in imperio*, thereby prohibiting any uncontrollable or independent military bodies. *Imperium in imperio* was an enduring concern in English and colonial political thought, which the colonists deployed to criticize British military policy in North America and particularly in Boston. They complained of the governor’s professed inability to dismiss the soldiers from the town. As described in the Continental Congress’s open letter, this resulted in “an uncontrollable military power” being “vested in officers not known to the constitution of these colonies.”<sup>414</sup> Just a few months earlier Jefferson had summarized this state of affairs as making “the civil subordinate to the military.”<sup>415</sup>

Thus, the strict subordination clause forbids the existence of an uncontrollable military power or a military *imperium in imperio* by mandating precisely the opposite relationship to the one described by Jefferson. “Uncontrollable military power” undoubtedly encompasses private militias. After all, the Continental Congress complained of power that lay outside of the colonies’ constitutional order: power “vested in officers *not known* to the constitution of these colonies.”<sup>416</sup> Thomas Penn described the closest analog to today’s private militias—Franklin’s militia Association—as a “military

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<sup>412</sup> VA. CODE ANN. § 44-1. Federal law defines the “unorganized militia” as “all able-bodied males at least 17 years of age and . . . under 45 years” who are or intend to become citizens. 10 U.S.C. § 246.

<sup>413</sup> This is why the Federal Constitution perhaps contains a dormant strict subordination clause: because it gives Congress the power “[t]o provide for calling forth the Militia” and “[t]o provide for organizing, arming, and disciplining, the Militia.” U.S. CONST. art. I, § 8, cl. 15–16; see MCCORD, *supra* note 3, at 3 (making this argument); see also *Heller*, 554 U.S. at 596 (“From that pool, Congress has *plenary power* to organize the units that will make up an effective fighting force.” (emphasis added)).

<sup>414</sup> 1 JOURNALS OF THE CONTINENTAL CONGRESS 96 (Worthington Chauncey Ford et al. eds., 1904–1937), available at [https://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field\(DOCID+@lit\(jc00138\)\)](https://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(jc00138))): [<https://perma.cc/V2XH-3PWC>] (Fri. Oct. 21, 1774).

<sup>415</sup> *Draft of Instructions to the Virginia Delegates in the Continental Congress* (July 1774), FOUNDERS ONLINE, <https://founders.archives.gov/?q=%22civil%20power%22&s=1111311111&sa=&r=15&sr=#TSJN-01-01-0090-fn-0038-ptr> [<https://perma.cc/4VDW-4U5E>].

<sup>416</sup> 1 JOURNALS OF THE CONTINENTAL CONGRESS (Fri. Oct. 21, 1774), *supra* note 195.

commonwealth” treasonously beyond the Crown’s authority.<sup>417</sup> And Samuel Seabury used the terms “unchecked and uncontrollable” “military power” to criticize the Continental Congress and provincial congresses, entities he thought unlawful.<sup>418</sup> This all indicates that Founding Era readers of the clause would have understood it to apply to any independent or uncontrollable military bodies.

Third, understanding “military” to refer to a power of government means that strict subordination clauses forbid private actors from exercising that power independent of the civil authority. Whatever one thinks of the non-delegation doctrine—the idea that legislatures cannot give the legislative power to other entities—private militias represent a different sort of delegation problem.<sup>419</sup> They are, at base, private parties that are assuming for themselves the state’s military power. In the non-delegation context, at least one Justice has noted the continued validity of a rule that Congress cannot delegate legislative power to a private entity.<sup>420</sup> If this principle is correct, it suggests *a fortiori* that private parties may not independently assume a power that state constitutions explicitly subordinate to civil authority.<sup>421</sup> While the Federal Constitution merely declares that legislative powers “shall be vested” in Congress,<sup>422</sup> state strict subordination clauses declare that the military power must be held in a position of inferiority to its civil counterpart. This strongly suggests that private parties may not assume the “military power” without the consent and control of civil authorities. To interpret these clauses otherwise would be to violate the principle expressed in the Declaration of Independence by tolerating a military power “independent of . . . the Civil power.”<sup>423</sup>

Fourth, the ideas animating the strict subordination of military to civil power appear paradigmatically in the context of the New Model Army. As shown in Part III, the language of strict subordination emerged in the context of fear and criticism of standing armies in England. Writers used the term to

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<sup>417</sup> *Introduction to* FRANKLIN, PLAIN TRUTH, *supra* note 351 (quoting Letter from Thomas Penn to Richard Peters (March 30, 1748)).

<sup>418</sup> *See supra* note 199 and accompanying text. Additionally, the danger of *imperium in imperio* was thought to extend to private citizens whose loyalties lay with some other entity than the duly-constituted sovereign *See supra* note 176 and accompanying text.

<sup>419</sup> *See* Charles & Miller, *supra* note 41, at 468–70, 472 (discussing delegation problem with private individuals exercising control over the means of violence).

<sup>420</sup> *Dept. of Transportation v. Ass’n of Am. R.R.*, 575 U.S. 43, 60–61 (2015) (Alito, J., concurring) (“Congress cannot delegate regulatory authority to a private entity.” (internal quotation marks omitted)).

<sup>421</sup> As noted by Jefferson, properly constituted legislatures “*alone* possess and may exercise” their sovereign powers. *See supra* note 203 and accompanying text. If this principle forbids legislatures from giving power away, then it surely prohibits entities from taking that power from the legislature.

<sup>422</sup> U.S. CONST. art. I, § 1.

<sup>423</sup> THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776).

describe the proper relationship between Parliament and the armed forces in response to the experience of an army growing so independent it became the predominant political power in the country. The English experience also shows a marked fear of soldiers becoming a separate state that had lost its “reverence” for civil institutions.<sup>424</sup> The phrase “strictest subordination” appeared in perhaps its earliest iteration in response to a proposal to weaken Parliament’s control over the army. In turn, the American founding generation knew of Cromwell and the New Model Army, even if reduced to the level of caricature. For many during the Founding, the term “strict subordination” in the civil–military context would have evoked the danger of an independent military force. The common understanding of the clause would plainly have extended to any military company purporting to be its own independent organization.

Fifth and finally, while analogs to today’s private militias existed at the time of the founding, they almost certainly violated the strict subordination clause. Considering Pennsylvania’s voluntary militia associations, Benjamin Franklin took pains to fit the Association into the architecture of the colony’s civil government. Association officers had to receive their commissions from the governor,<sup>425</sup> the Form of Association put the militia forces at the disposal of the governor and the Assembly, and royal authority could override the Association’s rules. Despite these efforts, the Association was still thought “greatly criminal,” a “little less than Treason,” and an “illegal combination.”<sup>426</sup> Further, Pennsylvania’s attempt at adopting a militia law in 1755 tacitly, but plainly, conceded the 1747 Association’s extra-legality. The law observed that such associating had occurred “without . . . Authority from the Government” and “without law.”<sup>427</sup> Until the Militia Act, associators had been in “Want of legal Powers” to band together for voluntary defense.<sup>428</sup>

These developments preceded the eventual inclusion of the strict subordination clause in Pennsylvania’s constitution. However, if Pennsylvania proprietor Thomas Penn was right to call the Association and its Military Council a “military commonwealth,” then such private militia activity seems plainly implicated by the strict subordination clause. Admittedly, it is unclear whether the governor’s nominal control over the Association through the granting of commissions would be sufficient civil control to satisfy the terms

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<sup>424</sup> See *supra* note 136 and accompanying text; *supra* notes 277–80 and accompanying text.

<sup>425</sup> For further discussion of the importance of commissions, see Kent, Leib & Shugerman, *supra* note 89, at 2163–64.

<sup>426</sup> *Introduction to FRANKLIN, PLAIN TRUTH*, *supra* note 351 (quoting Letter from Thomas Penn to Richard Peters (March 30, 1748)).

<sup>427</sup> *The Milia Act* (Nov. 25, 1755), *supra* note 376.

<sup>428</sup> *Id.*

of the clause. But the Board of Trade's rejection of the 1755 Act for a failure to show "due subordination" suggests the answer is no.<sup>429</sup>

Even more obviously unlawful than the voluntary militia associations, the Green Mountain Boys similarly reveal an absence of a private militia precedent. Bickering between Allan and Arnold forced the Connecticut committee to protect its interests by issuing Allen a formal commission and orders. Thereafter, the Green Mountain Boys were mustered into the Continental Army, stripping them of any private status. Only Allen kept acting as if he still commanded a private force, which landed him in British custody and earned him the dismissive ire of George Washington.

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Together, these five arguments from history confirm that today's private militias fall under the ambit of the strict subordination clause. This conclusion naturally complements the argument from plain text that the clause reaches all instances of the "military" whether organized by the government or by private persons.<sup>430</sup> As that argument goes, whenever people band together and assume the forms and stylings of military organizations they become the "military" for the purpose of the clause.<sup>431</sup> Whatever the route, the result is the same. If private persons form militia organizations, then these organizations must be under strict subordination to the civil power or else they are unlawful. And as explained above, "strict subordination" meant a state of absolute, almost arbitrary, control according to common Founding Era understanding. This leaves no room for independent military entities acting on their own inclinations and initiatives.

## CONCLUSION

The strict subordination clause originated in England from profound anxiety over the separate and distinct status of soldiers. Driven by the memory of the New Model Army, many deemed keeping the army in "strictest subordination" to civil institutions, particularly Parliament, a vital necessity.

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<sup>429</sup> See Letter from Dunk Hallifax et al. to Privy Council for Plantation Affairs, *supra* note 382. To the extent the Board was using "due subordination" in the sense of military discipline, the result is the same. The Board's complaint was that Pennsylvania's proposed militia structure permitted too much independence.

<sup>430</sup> See Plaintiffs' Brief in Opposition to Defendants' Demurrers, at 5–6, City of Charlottesville v. Pennsylvania Light Foot Militia, No. 17000560-00 (Va. Circ. Ct. 2018), <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2018/05/Plaintiffs-Opposition-to-Demurrers-Final.pdf> [<https://perma.cc/DZ3H-QLS2>].

<sup>431</sup> See *id.* ("[T]he Clause's manifest purpose [is] to ensure that all persons who engage in the coordinated use of force—or who project a willingness to do so—are answerable to elected officials, rather than free to coerce compliance with extralegal demands.").

Colonists in Boston, who had adopted the English fear of standing armies, also appropriated the language of civil–military subordination to complain of the soldiers stationed there and the governor’s supposed lack of authority over them. This grievance was taken up and refined by delegates to the Continental Congress who complained of an uncontrollable military power in the colonies. Against this backdrop, the fledgling states began adopting strict subordination clauses.

This history reveals the clause to be a broad and capacious guarantee against military supremacy in the states. Yet this Article has barely scratched the surface of the clause’s meaning. Much like the Federal Constitution’s Guarantee Clause, it is a “sleeping giant” in state constitutions.<sup>432</sup> Though Federal Farmer thought the clause “perhaps” too general to be of practical utility, George Mason evidently disagreed because he used it to contest military seizures. Likewise, the beleaguered inhabitants of Pittsburgh sought relief from the depredations of the Continental Army by invoking the constitutional limitations on the military power. These petitions and claims point to specific prohibitions contained within the clause that offer promising avenues for future research.

For instance, there is much to recommend the anti-martial law reading of the strict subordination clause. The history shows the founding generation understood the clause to prohibit the use of court martial proceedings against civilians, the unchecked seizure of civilian goods by the military, and the use of soldiers as civilian law enforcement officers unless tightly controlled and directed by a civil authority. New York—which empowered a legislative committee with sweeping powers to investigate and arrest civilians using Continental Army soldiers—tellingly did not adopt a strict subordination clause. In addition, the clause’s noticeable absence from the Federal Constitution may bear implications for federal civil–military relations, which have reemerged as an important topic of discussion.<sup>433</sup>

Despite the strict subordination clause’s breadth, an anti-private militia reading finds strong support in the clause’s history. For example, the founding generation understood the adjective “military,” as it appears in state constitutions, to definitionally include all persons capable of bearing arms. Therefore, all such persons had to be kept in strict subordination to the civil power. The clause was also integral to allaying Founding Era concerns of military *imperium in imperio*, which logically precludes independent military organizations. And the Founding Era discourse surrounding analogs to today’s private militias shows they violated the strict subordination clause.

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<sup>432</sup> See CONG. GLOBE, 40th Cong., 1st Sess. 614 (1867) (statement of Sen. Charles Sumner).

<sup>433</sup> See, e.g., Kori Schake, *The Line Held: Civil-Military Relations in the Trump Administration*, 15 STRATEGIC STUD. Q. 38, 38–40 (2021).



To return to the opening question, strict subordination clauses constitutionally protect a state's monopoly on the use of force. While such a monopoly may be desirable from a standpoint of abstract political theory, it should not escape notice that the history discussed above repeatedly resurfaces the use of state violence in service of empire, conquest, and slavery. This uncomfortable legacy serves as a vital reminder that subordinating the use of military force to the civil state, though important, is no substitute for ensuring that such force does not hinder principles of freedom, democracy, and justice.