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Grassroots Voices: Local Action and National Military Policy

STEPHANIE A. LEVIN*

INTRODUCTION

BEFORE fighting began in the Persian Gulf, Congress engaged in a heated constitutional debate on the power to declare war. While the public watched on television, Senators and Representatives argued about whether they or the President had the final decision-making authority.¹

In the end, Congress agreed by a narrow margin to authorize the use of force.² Because Congress concurred with the President's policy, the constitutional theory that the executive branch alone could initiate hostilities was neither squarely tested nor decisively invalidated. Nonetheless, the importance of the congressional role in war-making, in eclipse at least since the days of Korea and Vietnam, was underscored.

But while attention was focused on the nation's capital, in cities and towns around the country another much-less-noticed constitutional drama was underway. This drama centered not on the proper balance between the congressional and presidential roles in war-making, but on that between the national government and the people. Unsatisfied with

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their role as just passive spectators of televised congressional debate, groups of citizens in numerous communities mounted local efforts to have a more direct voice in shaping military policy. The following sampling of newspaper headlines reveals this less familiar story: "Calif. City Backs War Resisters,"3 "Four Towns Seek Their Spot in International Affairs,"4 "Promoting a Forum to Speak Out on War,"5 "Council's Stand Against War."6

Scholars have focused a great deal of attention on constitutional issues in the formation of military policy at the national level, especially on the question of what the proper balance should be among the three branches of government.7 This Article addresses a less-explored but critical question — what is the constitutional role of local action?

We are so accustomed to thinking of military policy as exclusively a matter of federal concern that it is easy to forget that, in fact, as in all policy-making, there is a complex relationship between local interests and national decisions.8 The question is not whether local interests are


4. Joan Livingston, Four Towns Seek Their Spot in International Affairs, DAILY HAMPSHIRE GAZETTE, Jan. 5, 1991, at A9 (describing plans to debate Gulf war at annual town meetings in four Massachusetts towns).

5. Elizabeth Neufler, Promoting a Forum to Speak Out on War: Crisis in the Middle East, BOSTON GLOBE, Dec. 6, 1990, at A20 (describing nationwide effort to organize local town meetings on war).

6. Council's Stand Against War, DAILY HAMPSHIRE GAZETTE, Jan. 11, 1991, at A2 (On January 3, 1991 the Northampton City Council unanimously passed a resolution condemning the then-impending use of force to remove the Iraqi forces from Kuwait on the January 15th deadline imposed by President Bush.). See also Michael de Courcy Hinds, Antiwar Effort Buds Quickly, Nurtured by Activism of 60's, N.Y. TIMES, Jan. 11, 1991, at A1 (describing other local efforts around the country).


8. As former Speaker of the House Thomas ("Tip") O'Neill put it, "[a]ll politics is local," Larry Agran, Local Officials Should Speak Out on Foreign Policy, GOVERNING, Dec. 1987, at 74. Larry Agran, the former mayor of Irvine, California and a leader in the "municipal foreign policy"
represented, but how they are represented; whether they are filtered exclusively through national government officials, elected or appointed, or are expressed directly at the grassroots level.

One important form of grassroots action is popular protest. In the area of military policy there is a rich history of such protest, stretching from the individual conscientious objection of pre-Revolutionary Quakers and celebrated civil disobedients like William Lloyd Garrison and Henry David Thoreau to the mass anti-war demonstrations of World War I, the Vietnam War, and the nuclear freeze movement of the early 1980's. Popular protest plays a critical, if often overlooked, role in the shaping of official policy that eventually takes on the force of law.

My focus here is more specific. This article is directed not at grassroots action which takes place "out of doors," in the streets and unofficial gathering places of our communities, but only at those grassroots actions

movement as well as a candidate seeking the 1992 Democratic nomination for President, argues that "the distinctions between national and local politics have become obsolete in the nuclear age. By spending $300 billion each year for military purposes — roughly one-third of the funds in our national treasury — we have neglected the serious technical and social problems of American life." *Id.*


10. Garrison, a leader of the abolitionist movement, also espoused non-violent resistance to war. See CIVIL DISOBEDIENCE IN AMERICA: A DOCUMENTARY HISTORY 57-59 (David R. Weber ed., 1978); FANNY VILLARD, WILLIAM LLOYD GARRISON ON NON-RESISTANCE 22-28 (1924).

11. See HENRY DAVID THOREAU, CIVIL DISOBEDIENCE (1849).


which operate through the official channels of local government. The theme is the use of local power to affect military policy decisions. The issue is one not only of individual rights, but also of federalism. The key question is what role, if any, the Constitution permits for decentralized decision-making in the area of military policy.

Part I will demonstrate the surprising variety of local activity in this field, ranging from local referenda on specific issues of military policy, to community decisions to resist certain Defense Department projects on health or environmental grounds, to a vigorous nuclear free zone movement. Such activity has become more frequent and more self-aware in recent years, part of a broader “municipal foreign policy” movement which has grown in strength during the past decade. Action at the local level is often the most accessible means for citizens feeling otherwise shut out from participation in military policy decision-making to express themselves and be heard.

Recently, this grassroots movement has provoked a direct counter-response from the federal government, which views such local action as an unconstitutional invasion of federal prerogative. One of the first

14. The “municipal foreign policy” movement took shape and gained increased visibility in the early 1980’s. Two important organizations which worked together to foster this movement were the Local Elected Officials Project, begun by Larry Agran, the former mayor of Irvine, CA., and the Center for Innovative Diplomacy, also in Irvine, CA., which was founded by attorney Michael Shuman in 1982. At the December 1985 Convention of the National League of Cities, Mayor Tom Bradley of Los Angeles made municipal foreign policy a focus of his keynote address. See Michael H. Shuman, Dateline Main Street: Local Foreign Policies, 65 FOREIGN POL’Y, Winter 1986-87, at 154, 157.

The quarterly Bulletin of Municipal Foreign Policy was published until 1991 by the Center for Innovative Diplomacy to report on efforts at the local government level along a wide spectrum of international concerns. Reading any issue of this journal gives a good sense of the nature of activity at the state and local level. See also Symposium, State and Local Governments in International Affairs, INTERGOVERNMENTAL PERSP., Spring 1990 (Intergovernmental Perspectives is published quarterly by the U.S. Advisory Commission on Intergovernmental Relations).

15. The argument against local activity in the realm of foreign affairs has been forcefully articulated by Peter J. Spiro, formerly a special assistant to the legal adviser at the State Department. While still a student at the University of Virginia School of Law, Spiro authored a law review note arguing that local anti-apartheid divestment ordinances were illegal. Peter J. Spiro, Note, State and Local Anti-South Africa Action As An Intrusion Upon the Federal Power in Foreign Affairs, 72 VA. L. REV. 813 (1986). In a 1988 article critiquing municipal foreign policy more generally, Spiro recommended that the Reagan administration “launch [a] legal campaign against local foreign policies,” suggesting that it “need pursue only one or two such attacks [in the courts] in each of the major areas of local interference, preferably until a victory in the Supreme Court. Once one law fell, the rest would follow, and those cities and states that have acted will come to understand that they have acted illegitimately . . . .” Peter J. Spiro, Taking Foreign Policy Away From the Feds, WASH. Q., Winter 1988, at 191, 203. See also Will Swain, Feds on Offense?, BULL. MUN. FOREIGN POL’Y, Autumn 1989, at 22 (detailing the Bush administration’s “battle” with “renegade local govern-
legal prongs of that response was the Justice Department’s suit, in September of 1989, against the City of Oakland, California, to invalidate that city’s nuclear free zone ordinance. The district court decision favoring the United States in that case is currently on appeal to the Ninth Circuit. In Part II, I will assess the competing claims that either military policy is exclusively a matter of federal concern or that there is constitutional space for input from the state or local level. Part II concludes that while conventional wisdom and the trend of recent precedent favor increasingly centralized control over military matters, in fact the constitutional text and its history leave open an ambiguous and contested space for the interaction of local action and federal control. Part III urges that this space receive legal protection. As I will demonstrate, two important currents in contemporary legal thought — neo-republicanism and feminist jurisprudence — both underscore the importance of direct citizen voice and participation. Such participation serves at least two critical goals.

First, grassroots activity permits each citizen to express and affirm her own sense of self while making a larger commitment to the community and the nation. Individual citizens need not be silent and frequently cynical observers of national politics; they can be vocal participants.

Second, such decentralized action has creative and revitalizing effects upon national policy. War, and our now-permanent state of preparation for war, affect our daily lives and the lives of our communities at the most intimate levels. This Article argues that our constitutional values would be enriched by stimulating, rather than choking off, grassroots voices that speak to these concerns.

I. STORIES OF LOCAL OPPOSITION

It is impossible to assess the appropriate legal relationship between local action and national military policy without having a picture of the nature of that local action. The purpose of this section is to present such a picture which is not exhaustive, but is detailed enough to communicate a sense of its variety and scope.

ments in its first nine months, over three policy areas: nuclear-free zones, nuclear-war civil defense, and local anti-apartheid legislation).

A. Local Opposition to Federal Civil Defense Planning

On May 25, 1961, President Kennedy told a joint session of Congress that civil defense was a "major element of the national security program" and announced the administration's desire to triple the civil defense budget and transfer civil defense functions from the Office of Civil Defense Mobilization to the Department of Defense.\(^1\) This marked a significant intensification of a federal program that had been controversial since its opening days: the program to protect the civilian population from nuclear war by a system of air raid drills, fallout shelters and evacuation.\(^1\)

While the civil defense program demanded active participation at the grassroots level from both private citizens and state and local officials, it aroused considerable opposition from the very beginning. Critics contended that the idea that the population could be "protected" from nuclear war was a dangerous illusion. They argued that not only was it a waste of money, but also that such planning, by creating a sense of false security, actually increased the possibility of nuclear war and deflected attention from the urgency of arms control.\(^1\)

Individual activists who refused to participate in compulsory civil defense exercises were arrested and prosecuted for their protests.\(^2\) A number of local and state officials also decided, as a matter of local government policy, not to cooperate with the federal government's nuclear war civil defense agenda.\(^2\)

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\(^1\) ARTHUR I. WASKOW & STANLEY L. NEWMAN, AMERICA IN HIDING 13-14 (1962).

\(^2\) For a vivid description of the civil defense programs implemented at the beginning of the nuclear era, and their impact on popular culture, see ELAINE T. MAY, HOMEWARD BOUND: AMERICAN FAMILIES IN THE COLD WAR ERA 3, 103-07 (1988).

\(^3\) See COUNTERFEIT ARK: CRISIS RELOCATION FOR NUCLEAR WAR (Jennifer Leaning & Longley Keyes eds., 1984); Jonathan Mostow, An Issue for the People: Civil Defense in the Nuclear Age, 8 FLETCHER F. 205 (1984) (arguing that the Reagan administration's "city evacuation" concept of civil defense was "no more than an update of the bomb shelter mentality of the 1950's", and just as ineffective).


\(^5\) According to Carla Johnston, the co-founder of the Civil Defense Awareness network and a consultant on the arms race to government officials and citizen groups, by 1983 "some 100 communities in 22 states had rejected nuclear war evacuation planning. . . ." SAM TOTTEN & MARTHA W. TOTTEN, FACING THE DANGER: INTERVIEWS WITH 20 ANTI-NUCLEAR ACTIVISTS 134-40 (1984). For a typical example, see PHYSICIANS FOR SOCIAL RESPONSIBILITY/NY ORK CITY, ET AL., A NEW YORKER'S GUIDE TO CIVIL DEFENSE (1983) (explaining the June 1982 decision of the New York City Council to refuse all federal funds for civil defense preparations for nuclear war) (copy on file with the author).
Tension between the federal government’s commitment to civil defense planning and the resistance of some local governments has continued. During the Reagan administration, the Federal Emergency Management Agency (FEMA), which coordinates civil defense planning, intensified its activity and embarked on an elaborate scheme of “crisis relocation planning” in which 400 urban target areas were to team up with rural “host” regions to plan for population evacuation in the event of nuclear war.22 Many communities refused to participate, leading finally to abandonment of the program.23

FEMA has continued to pressure states and local communities to participate in nuclear war planning24 despite legislation passed by Congress in 1987 intended to prevent FEMA from withholding funds from any state that refused to participate in a “nuclear attack exercise.”25

B. Local Opposition to Military Research

The Department of Defense (DoD) carries out extensive research and development not only through its own employees and facilities, but also by massive funding of private contractors.26 In some cases, such research has produced adverse local reaction.

For example, city officials in Cambridge, Massachusetts, became involved when it was discovered that Arthur D. Little, Inc., a private research institute in that city, had constructed a special high-security laboratory for testing extremely toxic chemical warfare agents under contract with DoD. The Cambridge City Council created a scientific advisory board and held hearings on the proposed research. Ultimately,

the city Commissioner of Health and Hospitals issued a regulation prohibiting the "testing, storage, transportation and disposal" of the nerve gas agents under study, effectively terminating the research. Arthur D. Little sued the City, claiming, inter alia, that because the regulation conflicted with a DoD-authorized activity, it violated the Supremacy Clause, but the regulation was upheld by the Massachusetts Supreme Judicial Court.27

Similar efforts were undertaken more recently by students and citizens in the town of Amherst, Massachusetts, where the University of Massachusetts is located, in response to public disclosure that a research project concerning anthrax, a biological warfare agent, was being carried out at the University under a contract with the DoD's Biological Defense Research Program. In response to citizen requests, the Amherst Board of Health held hearings on the research, deciding that it posed no immediate public health threat, while Amherst Town Meeting members voted for a resolution urging the state's congressional delegates to sponsor legislation calling for stricter enforcement of the 1972 Biological Weapons Convention.28

C. Local Opposition to the Basing of Nuclear Weapons

Military plans to base nuclear weapons in certain communities have catalyzed local opposition. One such case, which involved action by a private anti-nuclear group rather than by local government, led to an important Supreme Court decision defining the scope of the military's responsibilities under the National Environmental Policy Act (NEPA).29

In other cases, military plans for nuclear weapons placement have provoked response from local government as well as from citizen opponents. In New York City, there has been a prolonged struggle among federal and local officials over a proposed Staten Island "homeport" where nuclear armed battleships were to be based. Opponents of the proposal collected enough signatures for a city referendum on the plan. Although then City-Clerk David Dinkins certified the signatures as

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29. Weinberger v. Catholic Action of Hawaii/Peace Educ. Project, 454 U.S. 139, 146 (1981) (although there is no "national security exception" to NEPA, the Navy does not have to release an environmental impact statement (EIS) concerning nuclear weapons placement, since decisions about where to place such weapons are classified). See generally Cary Ichter, Note, "Beyond Judicial Scrutiny": Military Compliance with NEPA, 18 GA. L. REV. 639 (1984).
valid, a court challenge to the constitutionality of the referendum prevented it from going forward.\textsuperscript{30} The state of Colorado has led prolonged litigation in opposition to the basing plans for MX missiles. While the lawsuit was originally dismissed on political question grounds, the Eighth Circuit Court of Appeals, sitting en banc, held that Colorado's claims were justiciable in federal court.\textsuperscript{31}

D. Local Opposition to Major Military Communications Projects

Military plans for elaborate electronic communications networks have also aroused considerable opposition from the communities affected. Two examples of such proposals which have elicited action from local governments are the Navy's Project ELF (extremely low frequency) and the Air Force's Project GWEN (ground wave emergency network).

The goal of ELF was to construct a communications system in northern Wisconsin and Minnesota which would have the capacity to reach deeply submerged nuclear submarines at sea. Details of the plan varied considerably over time, but essentially it involved a small number of surface transmitters with buried antenna cable dispersed over thousands of square miles.\textsuperscript{32} Because of public concern about the effect of continuous exposure of plants, animals, and human beings to the extremely low frequency electromagnetic radiation generated by the project, the governor of Wisconsin formed an ad hoc committee headed by Robert Bock, then the dean of the graduate school at the University of Wisconsin, to evaluate the Navy's environmental impact statements on the plan. This led ultimately to a lawsuit brought by the state of Wisconsin, joined as a plaintiff by the intervenor Marquette County, Michigan,

\textsuperscript{30} See Fossella v. Dinkins, 494 N.Y.S.2d 878, 880 (App. Div.), aff'd on state law grounds, 485 N.E.2d 1017 (N.Y. 1985). A coalition of environmentalists also challenged the proposed homeport, but that challenge was denied on the basis of Weinberger v. Catholic Action. See Hudson River Sloop Clearwater v. Dep't of Navy, 659 F. Supp. 674, 678-82 (E.D.N.Y. 1987). Despite ongoing opposition, the homeport project has continued to move slowly forward since the referendum was invalidated. Mayor Dinkins, who as city clerk had been the named defendant in the referendum lawsuit, fulfilled a campaign pledge to oppose further development of the base by writing to Secretary of Defense Cheney to request that no further work be done on it. Stephanie Storm, Dinkins Asks U.S. to Halt Development of S.L Naval Port, N.Y. Times, April 11, 1990, at B1.

\textsuperscript{31} Romer v. Carlucci, 847 F.2d 445, 450 (8th Cir. 1988) (en banc).

\textsuperscript{32} For example, one ELF proposal called Project Sanguine contemplated two above-ground transmitters and a 6300 square mile grid of buried antenna, while a later variant, Project Seafarer, called for five transmitters and 2400 miles of buried cable covering a 4000 square mile area. See Wisconsin v. Weinberger, 578 F. Supp. 1327, 1335 (W.D. Wis.), rev'd, 745 F.2d 412 (7th Cir. 1984).
which challenged the adequacy of the Navy's environmental studies.  

The Air Force's GWEN proposal is to build a network of ninety-six towers that will reach a height of twenty-five stories, each topped with a blinking strobe light, which will constitute a communications system for sending war messages to strategic forces during and after nuclear war.  

More than twenty communities which have been considered as sites for GWEN towers have voted, through their legislative bodies, to oppose the presence of the towers. Lane County, Oregon, one potential site, was a plaintiff in a lawsuit challenging the adequacy of the Air Force's environmental assessment of the proposed construction. Partly in response to this local opposition, in 1991 Congress enacted a moratorium on any further construction of GWEN towers, pending further study of their health effects.

E. Local Declarations of Nuclear Free Zones

The nuclear free zone (NFZ) movement is not just an American movement, but an international one. Over the last few decades, citizens in more than 160 American towns and cities and in more than 4000 municipalities around the world have voted to make their communities nuclear free zones.

33. Id.
34. See No GWEN Alliance of Lane County, Inc. v. Aldridge, 841 F.2d 946, 947-48 (9th Cir. 1988). See also Nancy Foster, Citizens Jam Nuclear Radio Network, BULL. OF THE ATOMIC SCIENTISTS, Nov. 1988, at 21.
35. See Local Activists Chop Away at Gwen Towers, BULL. OF MUN. FOREIGN POL'Y, Autumn 1989, at 44-45; Not in My Backyard, BULL. OF MUN. FOREIGN POL'Y, Autumn 1989, at 38. See also THE GWEN PROJECT, VOTES AGAINST GWEN TOWERS (informational pamphlet on file with author listing the 27 communities that had voted against Gwen towers as of July 1989).
36. See No GWEN Alliance of Lane County, Inc., 841 F.2d 946.
39. The first NFZ was declared in 1958 in Handa, Japan, and there are now local NFZs in Australia, Ireland, Germany, Spain, the United Kingdom and more than ten other countries, as well as in the United States. BENNETT, supra note 38, at 125. The dissolution of the Soviet Union has highlighted the question of whether the now independent republics, other than Russia, should be nuclear free. See Francis X. Clines, Apparatchik to Nationalist: Ukranian's Fancy Footwork, N.Y. TIMES, Aug. 30, 1991, at A1, A11. American communities which have passed NFZ legislation include Chicago, Hawaii County, and Madison, Wisconsin, as well as many other cities and towns.
Oakland, California's nuclear free zone ordinance, adopted by initiative in 1988, prompted a lawsuit by the United States to have the ordinance declared unconstitutional. A federal district court declared the ordinance invalid not only on the narrow ground that certain aspects of it are preempted by federal legislation, but on the broad basis that "[t]he exercise of war powers is the exclusive province of the federal government under the Constitution . . . [and] [s]tates and localities may not enact legislation that impedes or hinders the national defense, regardless of whether the defense activities are carried out directly by agencies of the federal government, or by private contractors. . . ." This decision is currently on appeal; if affirmed on the same grounds, it would have broad implications not only for the legality of nuclear free zones, but also for other local efforts to regulate defense-related research, facilities, and production.

F. Local Referenda on Military Policy

Citizens have made use of the initiative and referendum process at the state and local level to address a wide variety of military policy issues. During the Vietnam War, grassroots campaigns to put questions

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BENNETT, supra note 38, at 254-56. In addition to the communities cited by Bennett, the city of Oakland passed a NFZ ordinance in 1988.


43. See e.g., supra note 27 and accompanying text; supra note 31 and accompanying text. For a discussion of the legality of nuclear free zones prior to the Oakland case, see Patrick J. Borchers & Paul F. Dauer, Taming the New Breed of Nuclear Free Zone Ordinances: Statutory and Constitutional Infirmities in Local Procurement Ordinances Blacklisting the Producers of Nuclear Weapons Components, 40 HASTINGS L.J. 87 (1988); William N. Weaver, Jr. et al., The Legality of the Chicago Nuclear Weapon Free Zone Ordinance, 17 LOY. U. CHI. L.J. 553 (1986); Lori A. Martin, Comment, The Legality of Nuclear-Free Zone Ordinances, 55 U. CHI. L. REV. 965 (1988); Teresa A. Otruba, Comment, Local Nuclear-Free Zone Legislation: Force of Law or Expressions of Political Sentiment?, 22 U.S.F. L. REV. 561 (1988). For a discussion of the court's rationale, see infra notes 202-08 and accompanying text.

44. See, e.g., No Cruising in Maine, BULL. OF MUN. FOREIGN POL'Y, Winter 1989-90, at 15 (describing Maine referendum urging the Governor and state congressional delegation to work to end Navy cruise missile test flights over the state, based not upon the local health and safety concerns involved, but rather upon a grassroots effort at affecting the then-ongoing START negotiations); New Haven and Tacoma: "Yes" to Military Cuts, BULL. OF MUN. FOREIGN POL'Y, Winter 1989-90, at 17 (detailing New Haven and Tacoma, WA., referenda calling for reductions in Pentagon spending and a shift of funds to domestic programs). See also supra note 30 and accompanying text (describing proposed referendum on a Staten Island "homeport" in New York City).
related to the war on the local ballot multiplied. Such efforts met with mixed reception from the courts, some of which permitted such measures to go forward, while others found them outside the scope of legitimate local concern.

A central component of the nuclear freeze campaign of the early 1980's was the effort to pass resolutions at the local level urging the government to halt nuclear weapons testing, production, and deployment. In what one commentator has called "the biggest referendum on a single issue in the history of the United States," more than 900 communities ultimately voted on such measures.

G. The Value of Local Action

Military policy decisions make themselves felt at the local level in a variety of ways: by the impact of projects or facilities on local health, safety, or the environment; by the deployment of financial and human resources in certain directions while diverting them from other beneficial purposes; and by the unquantifiable but nonetheless real extent to which they contribute to or detract from a genuine state of peace and security in the community. Ultimately, military policy decisions in the most literal sense are matters of life and death, whether of "individual" deaths in "conventional" wars, or of mass death in a nuclear holocaust.

Private citizens can and do express their views about such policies through a number of channels: by voting for national candidates, lobbying, joining citizen organizations, and protesting. In addition, they turn to local government. This is natural because, as so many political commentators have recognized since de Tocqueville's famous observations more than a century ago, the strength of American democracy lies in its local roots. Writer Elinor Langer acknowledged the grass roots tradition when she testified before the Portland, Oregon, City Council on a proposed nuclear free zone ordinance: "We must act on the local level..."
because that is where the hope of the American republic always has been and always will be.\textsuperscript{50}

Acting through local government can strengthen citizen participation in at least five important ways. First, perhaps most pragmatically, it provides financial resources. Instead of having to dig into their own pockets to finance investigations of defense policy, information gathering, lobbying, publicity, or litigation, concerned citizens can marshall the collective resources of their community to further goals upon which a local majority has agreed. This can help correct the imbalance between wealthy private or corporate lobbying groups which may favor one policy option and less-affluent citizens who might otherwise lack the wherewithal to investigate or promote policy alternatives.

Second, local government involvement fosters knowledge. The capacity of local legislative or administrative bodies to develop a body of information about relevant military policies by holding hearings, creating advisory boards, and gaining access to official information from national sources often will exceed that of private individuals or groups.

Third, working through local government is likely to increase publicity and outreach. A broader range of citizens, especially among those least likely to be aware of or included by private citizen efforts, may be reached by public action at the local level. In most states, there are open meeting laws and "sunshine" statutes which require public notice of, and access to, all official activities.\textsuperscript{51} Local governmental affairs are reported in the local media. Citizens from diverse backgrounds and with divergent viewpoints are more likely to learn about and attend local government hearings on military policy issues rather than those held by private organizations. Unlike many private events at which speakers preach to the converted, public meetings under the auspices of local government could be genuine opportunities for interaction, disagreement, and the exchange of views.

Fourth, when citizens act through local government, the stability of citizen participation can be increased. Spontaneous protests, ad hoc opposition groups, and poorly-funded organizations and coalitions — while all important contributors to policy formation — are inherently evanescent and transitory. Making use of the mechanisms of local government creates the potential for steadier, more sustained action.

Finally, citizen participation gains greater legitimacy when it is

\textsuperscript{50} Elinor Langer, The "Moment Before", \textit{The Nation}, Aug. 1985, at 76.

\textsuperscript{51} Osborne M. Reynolds Jr., \textit{Handbook of Local Government Law} 189 (1982).
channeled through the institutions of local government. Local officials speak for their constituency; local referenda or ordinances represent the authoritative voice of the whole community. When a mayor speaks or a city council passes a resolution, it has a different impact from a mass demonstration or even an opinion poll showing majority views. The media, people in other communities, and policy-makers in Washington often take more careful notice. At least prima facie, such local government action has the force of law.

Many would say that such action is not lawful precisely because local government has no legitimate constitutional role to play in the foreign affairs or national security field. This is the key question addressed in the next section of this Article: what are the arguments for and against the constitutionality of such a role?

II. THE CONSTITUTIONALITY OF LOCAL ACTION

In his recent article The Role of States and Cities in Foreign Relations, Professor Richard Bilder, acknowledging his reliance on the seminal work of Professor Louis Henkin of Columbia University,52 observes that

the federal government is the sole representative of the United States in its dealings with foreign nations, that it is entrusted with full and exclusive responsibility and control over our nation's foreign relations and that the authority of state and local governments to act in this area is very limited.53

The customary view is that what holds true for the field of foreign relations is equally if not more true for the sub-field of national defense: that the federal government has a virtual monopoly of constitutional power.

Support for this view can be found in the text of the Constitution, the history of its drafting, subsequent patterns of national practice, and the relevant case law. But the record is not completely one-sided. While the case for exclusive federal control is strong, there are aspects of the constitutional text and history which point in the opposite direction. Among these are some of the Constitution's most-neglected provisions. While this Section will articulate the basis for the customary view that the federal government has a monopoly of control over military policy, it

52. See, e.g., Louis Henkin, Foreign Affairs and the Constitution, at 5 (1972): "Federalism . . . rarely raises its head in foreign relations since for these purposes the United States is virtually a unitary state."

will consider the evidence for this other, less-familiar picture of the constitutional division of power.

A. The Constitutional Text

To understand the constitutional framework created to control the country's military powers, the logical place to begin is with the text. The language of the Constitution makes clear that one of the key functions intended for the new national government was military: to "provide for the common defense."\(^{54}\)

To fulfill this goal, the drafters empowered Congress "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; [t]o raise and support Armies . . . ; [t]o provide and maintain a Navy; . . . [t]o provide for calling forth the Militia . . . ; [t]o provide for organizing, arming, and disciplining, the Militia. . . ."\(^{55}\) The President was designated the "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States. . . ."\(^{56}\) Moreover, the Constitution not only confers military powers on the federal government, but also expressly forbids certain military functions to the states: "[n]o State shall . . . grant Letters of Marque and Reprisal," nor "without the Consent of Congress . . . keep Troops, or Ships of War in time of Peace. . . or engage in War, unless actually invaded. . . ."\(^{57}\)

At the same time that the textual language creates these federal government powers, it also reveals a concern for setting limits on them. For example, Congress is empowered to raise and support armies, but only with the proviso, attached to no other congressional power, that "no Appropriation of Money to that Use shall be for a longer Term than two Years."\(^{58}\) Congress is given authority to call forth the militia, but only for certain specified purposes: "to execute the Laws of the Union, suppress Insurrections and repel Invasions."\(^{59}\) The congressional power to organize, arm, and discipline the militia is similarly circumscribed. The text provides that Congress may govern only such part of the militia as is "employed in the Service of the United States;" only that part, presumably, which meets the requirements set out in the preceding "call forth"

\(^{54}\) U.S. CONST. pmbl.; art. I, § 8, cl. 1.  
\(^{55}\) Id. at art. I, § 8, cl. 11-16.  
\(^{56}\) Id. at art. II, § 2, cl. 1.  
\(^{57}\) Id. at art. I, § 10.  
\(^{58}\) Id. at art. I, § 8, cl. 12.  
\(^{59}\) Id. at art. I, § 8, cl. 15.
clause. Otherwise, the authority of the states over their own militias is explicitly affirmed: the text "reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."60

The president's power over the militias of the several states is also confined only to those occasions when they are "called into the actual Service of the United States."61 Furthermore, the Second62 and the Third63 Amendments expressly place limitations on the national government's plenary powers in the military field.

These textual limitations suggest that the framers and the general population may have had more reservations about the military role of the federal government, and a greater determination to guarantee the residual authority of the states and the people in this area, than is conventionally supposed. The historical context within which the words of the Constitution were generated provides support for this hypothesis. A look at that history reveals not a single-minded determination to create an exclusive national monopoly in the field of national defense, but a more complicated and ambivalent desire to share power among the federal government, the states, and the people.

B. The Historical Context

The question of how to structure the military powers of the new government engendered considerable controversy both at the constitutional convention and during the ratification period. While all agreed that the power to decide on war and peace was appropriately a national power, there was considerably less consensus about permitting the national government an unfettered ability to raise armies.64 Many were opposed to the idea that the entire capacity for and control over national defense should be transferred from the hands of the people and the states,

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60. Id. at art. I, § 8, cl. 16.
61. Id. at art. II, § 2, cl. 1.
62. "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed." Id. at amend. II.
63. "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." Id. at amend. III.
64. The evidence for the historical conclusions presented here is also discussed in my article, Stephanie A. Levin, The Deference That Is Due: Rethinking the Jurisprudence of Judicial Deference to the Military, 35 VILL. L. REV. 1009, 1023-55 (1990). On the desire to place limits on the federal government's power to raise troops, see especially id. at 1033, 1035-38, 1041-43, 1045-55. The four delegates to the constitutional convention who refused to sign the Constitution, Luther Martin, Elbridge Gerry, George Mason, and Edmund Randolph, all cited the scope of the federal government's power to raise armies as among their reasons for opposition. Id. at 1042-43.
as embodied in the state militias, into the hands of the national
government.

These concerns were consistent with certain ideological currents of
the revolutionary period which were derived from English republican
thinking. Just as their English ancestors had engaged in prolonged
struggles to limit the military prerogatives of the crown, many Ameri-
cans of the founding generation thought it critical to limit the scope of
the central government's power over the military.

As a practical matter, these concerns manifested themselves at the
constitutional convention in two ways. First, proposals were made to
place direct limits on the national government's powers to raise troops.
This strategy had little success, as motions to incorporate explicit limita-
tions on this power into the Constitution were defeated. As a substi-
tute, the delegates adopted the temporal limitation on congressional
appropriations "to raise and support armies," borrowing this idea from
the British system, where Parliamentary appropriations for military ex-
penditures were confined to one year. The goal of the British limit had been
to prevent the creation of a permanent army and to tether the Crown by
ensuring frequent Parliamentary review of military expenditures. Similarly, the American restriction was intended to prevent the growth of a
national standing army and to curb executive branch power in favor of
Congress.

While one goal of this appropriations limit was to restrain the mili-
tary expansion of the federal government, it left ultimate control in the
hands of Congress; it did not directly confine the power of the federal
government vis-a-vis the states or the people. That balance was ad-
dressed more directly in the debate over the militia clauses. The issue
was how to structure the relationship between the already-existing decen-
tralized military institutions of the states, the state militias, and the new
military powers of the national government. This was a controversial
question.

65. For a fuller description of this ideology and its origins in English republican thought of the
seventeenth and eighteenth centuries, see id. at 1023-55 and sources cited therein.

See generally Levin, supra note 64, at 1035-43.

67. See Francis L. Coolidge, Jr. & Joel David Sharrow, Note, The War Making Powers: The
Intentions of the Framers in the Light of Parliamentary History, 50 B.U. L. Rev. 5, 7 (Spec. Issue
1970).

68. See 2 The Records of the Federal Convention of 1787, supra note 66, at 330, 508-09
and The Federalist Nos. 26, 29 (Alexander Hamilton), Nos. 41, 46 (James Madison).
See also Levin, supra note 64, at 1036-37, 1041.
Some of the Constitution's drafters, including Alexander Hamilton, thought of the militias as unreliable and outmoded, and wanted to scrap them and replace them with a more efficient, professional, central army which would enable the United States to play a more forceful role in European affairs.69 Others, led by Elbridge Gerry and Luther Martin, felt strongly that protection of the militia system was crucial both to their less-imperial vision of America and to the preservation of liberty.70

In the end, the final document embodied an ambiguous and perhaps deliberately vague compromise between these positions.71 The inclusion of the militia clauses testifies to the fact that the framers of the Constitution assumed that the state militias would continue to exist.72 Although some at the convention had pressed to bring these completely under federal control, the final form of the militia clauses explicitly re-affirmed state control over their staffing and training, and placed substantive limits on the federal government's authority to call up or command them. What was contemplated was not an absolute federal monopoly in the area of national defense, but a coexistence between central power and decentralized military institutions. As we shall see in Section E, this relationship has evolved over time in unanticipated ways. But for now, it is important to recognize that this duality was incorporated into the original constitutional structure.

Despite the acknowledgement implicit in the militia clauses that some degree of decentralized authority would exist, the anti-federalists complained that the proposed constitution allowed too much unrestrained military power to the central government. They felt that the federalists' approach was both overly bellicose and dangerous to popular

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69. Hamilton's views are expressed in his contributions to The Federalist Papers, especially numbers 11, 23-29, and 34. See also Richard H. Kohn, Eagle and Sword: The Federalists and the Creation of the Military Establishment in America, 1783-1802 (1975); Forrest McDonald, Alexander Hamilton (1979).

70. On the conflict between an imperial and a republican vision for the new nation, see Cecil L. Eubanks, New York: Federalism and the Political Economy of Union, in Ratifying the Constitution 300 (Michael Allen Gillespie & Michael Lienesch eds., 1989), and Carol H. Rose, The Ancient Constitution vs. the Federalist Empire: Anti-Federalism from the Attack on "Monarchism" to Modern Localism, 84 NW. U. L. REV. 74, 89-93 (1989). See also Levin, supra note 64, at 1042-49.

71. In Perpich v. Department of Defense, 110 S. Ct. 2418, 2422 (1990), the Supreme Court described the relevant constitutional text as a "compromise" between these two conflicting themes about military policy. For further discussion of the Perpich case, see infra Section E. See also Stephen Dycus et al., National Security Law 436 (1990) (describing the militia clause as a "compromise between states' rights and nationalist delegates to the 1787 convention"); Alan Hirsch, The Militia Clauses of the Constitution and the National Guard, 56 U. Cin. L. REV. 919, 924-25 (1988) (same).

72. See, e.g., The Federalist No. 29 (Alexander Hamilton), No. 41 (James Madison).
freedom.  

Desire to limit the national government's military powers was a significant force behind proposals for key portions of the Bill of Rights.

One of the amendments proposed most often by the state ratifying conventions would have limited the federal government's troop-raising powers. Although Madison omitted this proposal from the draft Bill of Rights which he submitted to Congress in 1789, nonetheless one-fifth of the first ten amendments address the military powers of the new government (if you exclude the general Amendments IX and X, the correct fraction is even higher than one-fifth). While again, as with the militia clauses, the subsequent history of these provisions must also be taken into account, our contemporary failure to recognize the importance accorded to these concerns during the original ratification period distorts our perception of the Constitution.

C. Historical Conclusions

What overall conclusions can be drawn from this textual and historical survey? Three key points emerge from the discussion so far. First, as I've already suggested, a careful reading of the Constitution and the original Bill of Rights reveals that the founding generation desired to place limits on the central government's military powers as well as to legitimate them. Second, one important avenue for accomplishing this was through federalism, which assured a continuing existence for the state militias and a decentralized control over them. Finally, it is impor-

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73. The words of anti-federalist Mercy Otis Warren, writing under the pseudonym "A Columbian Patriot," are typical:

Though it has been said . . . that a Standing-Army is necessary for the dignity and safety of America, yet freedom revolts at the idea. . . . Standing armies have been the nursery of vice and the bane of liberty from the Roman legions, to the establishment of the artful Ximenes. . . . By the edicts of authority vested in the sovereign power by the proposed constitution, the militia of the country, the bulwark of defence, and the security of national liberty is no longer under the controul [sic] of civil authority; but at the rescript of the Monarch, or the aristocracy.


75. The amendments originally proposed by the states are described in 4 THE ROOTS OF THE BILL OF RIGHTS 734-35, 761, 842-43, 915-16, 918, 968-69 (Bernard Schwartz ed., 1980). A chart comparing the frequency of proposed troop-limitation amendments with other proposals such as for free speech, due process, etc. is found at 5 id. at 1167.

76. 5 id. at 1026-28. See, Levin, supra note 64, at 1051-55.

77. See infra text accompanying notes 101-24 (Section F).
tant to remember that to understand the specific mechanisms incorporated in the Constitution — whether the appropriations cut-off or the militia clauses or the ban against the quartering of troops — one must read them in the context of the overall political philosophy which prompted them. It is not the precise details of these arrangements which are most significant to us, it is their meaning. Part III returns more explicitly to this point.

First, it is essential to consider two arguments which may undercut the contemporary importance of these textual and historical considerations. One, closely associated with the opinion of Justice Sutherland in United States v. Curtiss-Wright Export Corp., is the claim that the military powers of the United States government do not in fact derive from the Constitution, but rather from extra-constitutional sources. If this were so, close study of the constitutional arrangements would be less meaningful because they would not define the entire universe of the government's possible powers. This argument is addressed in Section D, below.

A second argument is that the original constitutional arrangements concerning the military are of minimal contemporary significance because they are premised on historical realities which are now obsolete. Since the citizen militia and the quartering of troops disappeared long ago with the musket and the bayonet, so the argument goes, eighteenth century concerns about them are no longer relevant. This argument, certainly having some apparent force in a nuclear age, is addressed in Sections E and F. The continuing significance, if any, of the militia clauses and the Second and Third Amendments is considered in these sections.

D. Are the Government's Military Powers Extra-Constitutional?—The Argument of Curtiss-Wright

Scholars agree that Curtiss-Wright is a key case in the shaping of contemporary ideas of government power in the field of foreign affairs and national security. The case involved a challenge by a corporate arms dealer to the validity of a criminal prosecution against it for selling machine guns to Bolivia in violation of a presidential proclamation prohibiting such sales. The corporation claimed that this proclamation represented an unconstitutional delegation of legislative power to the President, and was therefore invalid.79

78. 299 U.S. 304 (1936). See infra text accompanying notes 79-87 (Section D).
The Supreme Court upheld the conviction, but it is not the result in the case which is critical here, rather it is Justice Sutherland's rationale. Writing for the Court, he suggested that it was irrelevant whether, under ordinary circumstances, this would have amounted to an unconstitutional delegation of legislative power. Instead, noting that this case concerned government action in the field of "foreign or external affairs" rather than "domestic or internal" ones, he expressed the view that ordinary constitutional constraints did not apply.80

Justice Sutherland's opinion articulated a constitutional theory which sharply separated the "external" powers of government from the "internal." The former, Justice Sutherland stated, "did not depend upon the affirmative grants of the Constitution."81 Justice Sutherland recognized that the federal government's domestic powers had been transferred to it from the people and the states by the ratification of the Constitution, but in his view the foreign affairs powers had a different source. They had passed directly at independence from Great Britain to the corporate government of the United States as an inherent attribute of "sovereignty," independent of any action by the people.82 According to this theory, the powers enumerated in the Constitution were at best suggestive; they were neither source for, nor limit on, the central government's authority over war, peace, and diplomacy.

Justice Sutherland's theory has been the object of much debate and criticism,83 however, Professor Henkin, while noting that it goes far beyond what was necessary to decide the case, concludes that it "remains authoritative doctrine."84 Since Justice Sutherland's opinion upheld the validity of a discretionary presidential action, it is often seen as an important moment in the enlargement of presidential power vis-a-vis the Congress.85 No doubt this is true. More important are its implications for the overall power of the federal government vis-a-vis the states and the

80. Id. at 315, 318-22.
81. Id. at 318.
82. Id. at 317.
85. Professor Koh, for example, has pointed out that what he calls the "Curtiss-Wright vision . . . tips the scales dramatically in favor of executive power." Harold H. Koh, Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair, 97 Yale L.J. 1255, 1306 (1988).
people. If the government's military powers, unlike its domestic ones, were not transferred to it by the states and the people, then considerations of federalism are indeed irrelevant. If the source of those powers was not the Constitution, but an ill-defined national "sovereignty" which passed directly to the United States government from Great Britain, then in this regard the role of "we the people" was entirely bypassed.

Sutherland's theory in effect splits our national government into two: a domestic government bound by familiar doctrines of constitutional limitation, including federalism, and a foreign affairs or military government bound by none. Jarring though such a picture may be, there is certainly both historical and case law support for it. Yet even those who would endorse such a theory, arguing that foreign affairs and military powers by their nature are less easily confined within clear limits than domestic ones, must be aware of the questions which it leaves unanswered. If the Constitution is not the limiting factor, what is? Did the revolutionary generation really just re-create a new government which, at least as regards its behavior in foreign affairs, was an exact duplicate of the old?

The enormous body of discussion, debate, and writing about foreign and military affairs which poured forth at the constitutional convention, in the federalist papers, in the campaigns of the anti-federalists, and in the proposals for the Bill of Rights, make it impossible to believe that this was the case. The founding generation believed it was creating a government innovative not only in its domestic aspects, but also in the way in which it was to behave in the larger world. The constitutional terms governing foreign and military affairs were meant to be determinative of government powers in those areas just as other clauses were meant to

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86. As Professor Henkin has pointed out, one logical deduction from the Sutherland theory is that federal foreign affairs powers are subject to no constitutional limitations, including those in the Bill of Rights. Yet he finds "no support whatever" for the view that Curtiss-Wright goes that far, and concludes that the "safeguards for individual rights" found in the first ten amendments bind the government even in this area. Henkin, supra note 83, at 253. Despite Professor Henkin's conclusion that the Bill of Rights does limit government action in the foreign affairs and military fields, it often seems to be the case that it operates more weakly there than in other areas. Consider, for example, the weight that national security interests receive when they are balanced against individual rights, or the unusual degree of judicial deference that is shown to the government when civil rights claims are made against the military. See, e.g., Department of the Navy v. Egan, 484 U.S. 518 (1988); United States v. Stanley, 483 U.S. 669 (1987); Haig v. Agee, 453 U.S. 280 (1981); Korematsu v. United States, 323 U.S. 214 (1944). See generally, Levin, supra note 64, at 1013-22.

87. Professor Koh, for example, points out that while the Warren Court appeared to disavow the Sutherland approach in favor of what he calls the Youngstown vision of a more constitutionally-limited national security power, more recent Supreme Court case law has moved back in the direction of Curtiss-Wright. See Koh, supra note 83, at 134-40.
define government powers in the realm of domestic affairs. Whether one concludes that the former should be construed with the same degree of strictness as the latter, or, following Curtiss-Wright, with a greater degree of fluidity, the constitutional references cannot simply be ignored. The constitutional arrangements indicate the nature of the new enterprise which the founding generation believed it had launched. The next question to be answered is how changing times have affected that vision.

E. The Contemporary Significance of the Militia Clauses

In the recent case of Perpich v. Department of Defense, the Supreme Court acknowledged that the original constitutional scheme represented a compromise between two conflicting positions about military policy, but then proceeded to undo that compromise in favor of completely centralized control. The specific question at issue was whether the federal government could order members of a state national guard unit overseas for training without the consent of the state governor. The Court concluded that it could. The broader question was whether the decentralized authority implicit in the militia clauses was to have any continuing vitality. After Perpich, this is doubtful.

There is a long history of objections by state governors to specific missions ordered by the federal government for their militia forces. Such objections began during the War of 1812 and continued through the Civil War, the war in Vietnam, and the controversy over proposed training missions in central America in the 1980's which ultimately led to the Perpich decision. The governors’ objections have been based on

89. See supra note 71.
91. Hirsch, supra note 71, at 944.
93. Beginning in 1985, the governors of several states either withheld consent for their state militia units to train in Central America (California, Maine, and Ohio), or announced they would refuse if asked (Arizona, Massachusetts, Vermont, and Washington), or imposed conditions on such service (Kansas, New Mexico, and New York). Twenty-six state legislatures debated the issue. See, Note, supra note 90, at 613-14. In response to this controversy, Congress enacted the Montgomery Amendment, National Defense Authorization Act of 1987, Pub. L. No. 99-661, § 522, 100 Stat. 3871 (codified at 10 U.S.C. § 672(f) (1988)), which prohibited governors from withholding consent “because of any objection to the location, purpose, type, or schedule of such active duty.”
the claim that the Constitution limits congressional authority to call up the militia to three circumstances only ("to execute the laws of the union, suppress insurrections and repel invasions"), and that if none of these circumstances is present, state control over the militia is constitutionally guaranteed. Since none of these circumstances applied to Central America in the 1980's, the governors argued, a non-consensual training mission there was constitutionally impermissible.

The Supreme Court disagreed, explaining that what appeared to be the militia referred to in the Constitution really was something different. Beginning in 1903, the so-called state National Guards had been established as the twentieth century equivalent of the militia. These militias were gradually federalized, culminating with Congress's decision, on the eve of the First World War, to make each of them into two simultaneous entities: a "militia entity," fulfilling the functions of, and operating under the constraints of, the militia clauses; and a "regular army entity," existing pursuant to Congress's power to raise and support armies. From that time on, the Court explained, each member who joined the National Guard engaged in a "dual enlistment" into both the state militia and the United States military.

When the President ordered members of the National Guard to duty in Central America, he was not, the Court suggested, ordering the militia (which arguably would have been constitutionally forbidden). Rather, he was acting under his power as commander-in-chief of the regular army. Since the brief for Governor Perpich did not contest the validity of the dual enlistment system, it provided no basis for attacking this conclusion, and the validity of the Montgomery Amendment logically followed. However, it is less clear that the decision is consistent with the original constitutional balance.

In response to the governor's claim that the effect of the decision would be to undo that balance, the Court reasoned backward, starting from the conclusory position that the Constitution "commit[s] matters of foreign policy and military affairs to the exclusive control of the National Government." The problem with this conclusion, as the Court itself

94.  Perpich, 110 S. Ct. at 2426.
95.  Id. at 2429. To demonstrate this exclusivity of control, the Court relied on Tarble's Case, 80
noticed, was that it would appear to rule out the very existence of the state militias. Yet there they are, enshrined in the Constitution and reaffirmed in the Bill of Rights. To explain this, the Court appears to have adopted a strictly permissive interpretation of the militia clauses, viewing them as allowing the states to maintain and control their militias only to the extent that the federal government had not, by exerting its plenary power to raise armies, squeezed them out. By this logic, the militia clauses would not in any way be a counterbalance to federal military power, but were merely a transitory concession to the states.

This makes Perpich broadly consistent with Curtiss-Wright in its conclusion that the Constitution provides no real check on the expansiveness of the federal government’s military powers. Curtiss-Wright interpreted the terms of the Constitution as not limiting those powers because they are not definitive. Perpich held that the constitutional terms are not limiting because the Court interpreted them as describing only a transitory state of affairs, a balance which will tip entirely in the direction of federal power as the regular army supplants the militia. Perpich, continuing the trend of earlier cases, reached a high-water mark for central-

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96. "Were it not for the Militia Clauses, it might be possible to argue on like grounds that the constitutional allocation of powers precluded the formation of organized state militia." Perpich, 110 S. Ct. at 2429.

97. "A well-regulated militia, being necessary to the security of a free State . . ." U.S. CONST. amend. II.

98. The Perpich opinion does not really make clear how the Court would reconcile the militia clauses with the federal government’s plenary power over military affairs. In a footnote, the Court quotes from the opinion in the Selective Draft Law Cases, 245 U.S. 366, 383 (1918), to the effect that the militia clauses guarantee power over the militia to the states only "to the extent that such control was not taken away . . . by Congress . . . [only] unless and until by the exertion of the military power of Congress that area had been circumscribed or totally disappeared." 110 S. Ct. 2418, 2430, note 29. But then the Court carefully avoids indicating whether or not it continues to approve of the quoted language, expressly noting that it need not reach that point to decide the Perpich case. Id.

99. This view is consistent with the World War I opinions in the Selective Draft Law Cases, 245 U.S. 366 (1918) and Cox v. Wood, 247 U.S. 3 (1918), to the effect that the militia clauses create no limit nor qualification on the national government’s troop-raising power.

100. Indeed, the Court in Perpich quotes the relevant lines of Curtiss-Wright: "The powers to declare and wage war, to conclude peace, to make treaties . . . if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality." 110 S. Ct. at 2429 n. 28 (quoting United States v. Curtiss-Wright Export Co., 299 U.S. 304, 318 (1936)).
ized power. Before considering the implications of this development in Section III, it remains only to be seen if the Bill of Rights has exerted any meaningful pressure in the opposite direction.

F. The Contemporary Significance of the Second and Third Amendments

Professor Sanford Levinson titled his recent article on the Second Amendment *The Embarrassing Second Amendment.*" One can hardly imagine what adjective he would have used to describe the Third. While there has been a small outpouring of recent scholarship on the Second Amendment (to be discussed below), these two amendments nonetheless remain the neglected stepchildren of the Bill of Rights. Whatever significance they may have had in the late 1700's, they appear to have become almost the dead letters of contemporary civil liberties.

The main preoccupation of current Second Amendment scholarship has been the debate between the so-called "collective" and "individual" right positions. The first view, favored until recently by mainstream scholars, is that the Amendment is better interpreted as a protection only against the federal government's interference with the states' rights to maintain their militias, and not as a guarantee of the individual's right to be armed. The latter position, once the province of the NRA and other anti-gun control advocates, now appears to be gaining scholarly respectability; it holds that the Amendment does protect an individual right to keep weapons. While resolution of this argument is beyond the purposes of this Article, I find the "either-or" dichotomy to be both unnecessary and misleading. The meaning of the Amendment combines individual and collective rights in a manner which fits comfortably with its language: the (individual) right of persons not to be disarmed is protected so that the (collective) right of a free people to rely for security on


102. Professor Levinson does at least mention the Third Amendment, noting that "[o]ne will find extraordinarily little discussion about another one of the initial Bill of Rights, the Third Amendment." But he finds this lack of attention justified because the Third Amendment, unlike the Second, is "of no current importance whatsoever." *Id.* at 640-41. As discussed below, this Article questions that conclusion. See infra notes 114-22 and accompanying text.


its own militia will be preserved.105

One reason why so much energy has been expended on the debate between the collective and the individual theories of the Second Amendment is that the main practical question which has been asked about it is whether it prohibits various federal or state gun control proposals.106 But, as Professor Elaine Scarry has written, "the Second Amendment is a very great amendment and coming to know it through criminals and the endlessly disputed claims of gun clubs seems the equivalent of coming to know the First Amendment only through pornography."107 She proposes a deeper view of the Amendment which focuses on its origins as a "way of dispersing military power across the entire population . . . a distribution of authorization over our nation's arms." She sees the Amendment as speaking to something more profound than just whether citizens can buy machine guns: "Like voting, like reapportionment, like taxation, what is at stake in the right to bear arms is a just distribution of political power."108 This view, of course, is consistent with seeing the Amendment as a limitation on the military powers of the federal government.

At the moment, support for this view in the case law is at best sketchy and undeveloped. It is not that the few Supreme Court cases which have addressed the Second Amendment are inconsistent with this position. Indeed, in the only case which actually discussed the Amendment at any length, the Court emphasized that it originated in the eighteenth century's strong distrust of "standing armies" and sought to "assure the continuation and render possible the effectiveness" of a de-

105. For an analysis which also rejects an "either-or" approach on the grounds that "neither . . . school of thought is correct insofar as it claims to entirely explain the second amendment, and both are correct, insofar as they purport to offer partial explanations," see David T. Hardy, The Second Amendment and the Historiography of the Bill of Rights, 4 J.L. & Pol. 1 (1987).


108. Id. at 1268-69 (emphasis omitted). My use of the quotation is not meant to suggest that an individual right to be armed has nothing to do with "a just distribution of political power"; some would argue that protection of that individual right is essential to ensuring that the distribution of power remains just. See, e.g., Levinson, supra note 101, at 656-57. But whether or not this is true, my point is to agree with Professor Scarry that the Second Amendment is not only about individual gun control, but speaks to broader issues in the social control of violence, including control over the military violence of the state.
centralized non-professional militia. But no case of which I am aware has actually relied on the Second Amendment as a basis for protecting a grassroots participatory role in decision-making about military policy. This is not to say that Professor Scarry's vision of the Amendment's decentralizing potential is not compelling. Linked to other sources of authority, the Second Amendment may well have promise as a possible counterweight to the trend of cases like Curtiss-Wright or Perpich. But at the moment that promise is inchoate and must await future development.

As for the Third Amendment, the paucity of both commentary and case law about it make the field of Second Amendment scholarship seem crowded by comparison. There is hardly any law review literature about it, the treatise writers say next to nothing, and only the oddest bits of case law seem to address it. One might at first easily agree with Professor Levinson's assessment that it is "of no current importance

109. United States v. Miller, 307 U.S. 174, 178 (1939). The question at issue in Miller was whether the Second Amendment prevented the federal government from requiring the registration of sawed-off shotguns; the Court held that it did not. The other Supreme Court cases which have alluded to the Second Amendment, each very briefly, are: Lewis v. United States, 445 U.S. 55, 65 n.8 (1980) (citing Miller for proposition that federal prohibition of guns to felons does not violate Second Amendment); Miller v. Texas, 153 U.S. 535, 538 (1894) (Second Amendment applies only against the federal government, not against the states); Presser v. Illinois, 116 U.S. 252, 265 (1886) (same); United States v. Cruikshank, 92 U.S. 542, 553 (1875) (Second Amendment does not apply to invasion of rights by private individuals, only to invasions by federal government). For an interesting discussion of Presser and Cruikshank, see Cottrol & Diamond, supra note 104, at 347-50. As they point out, the Second Amendment has had, like so much else in American law, a tangled and at times quite ugly relationship with racism. See also Scott v. Sanford, 60 U.S. (19 How.) 393, 416-17 (1856) (African-Americans must not be citizens because, inter alia, if they were, the laws disarming them would be unconstitutional).


111. In his treatise on constitutional law, Professor Tribe refers to the Third Amendment only in passing. Tribe, supra note 103, at 775, 1309 (noting that along with the First, Fourth, and Fifth, the Third Amendment gives off "penumbras" or "shadows" from which the non-textual, constitutional right to privacy emanates).

112. See, e.g., Engblom v. Carey, 572 F. Supp. 44, 49 (S.D.N.Y. 1983) (prison guards' assertion that the quartering of National Guard troops in their staff housing during their strike violated their Third Amendment rights held to state a triable claim, but ultimately dismissed on remand based on defendants' qualified immunity), on remand from 677 F.2d 957, 959 (2d Cir. 1982), aff'd by 724 F.2d 28 (2d Cir. 1983); Jones v. United States Secretary of Defense, 346 F. Supp. 97, 100 (D. Minn. 1972) (government's order requiring members of Army Reserve to march in a parade at national convention of veteran's organization which they did not support held not to violate Third Amendment); United States v. Valenzuela, 95 F. Supp. 363, 366 (S.D. Cal. 1951) (government's post-war rent control legislation held not to violate Third Amendment).
whatsoever."¹¹³

There are, however, two cases which suggest that there might be some contemporary vitality for the Third Amendment as a limitation on the military powers of the federal government. The first is the famous Steel Seizure case,¹¹⁴ which invalidated President Truman's Korean War seizure of the nation's steel mills. Justice Black's opinion for the Court struck down the President's action on the grounds that it was unauthorized by Congress, rejecting the claim that it could be justified by the President's powers as commander-in-chief of the military. Justice Jackson, concurring in the judgment, noted that the Third Amendment set this nation apart from many others by placing limits on the government's power to commandeer private resources for the military. Even in wartime, it required Congress to authorize such seizures; in peacetime, it required the owner's consent.¹¹⁵

Such consent was lacking in a recent case in which the United States military occupied a large Honduran ranch owned by an American citizen in order to set up a military training center in Central America.¹¹⁶ The Department of Defense took over large portions of the ranch, without any eminent domain proceedings, built a permanent tent camp, artillery range, and other buildings, and moved over one thousand soldiers into residence. The owner, Temistocles Ramírez de Arellano, sued for injunctive and declaratory relief. The district court dismissed the case on political question grounds;¹¹⁷ a panel of the Court of Appeals disagreed with this holding but dismissed on the grounds that injunctive relief was inappropriate as a matter of equitable discretion;¹¹⁸ and finally, on rehearing en banc, the full bench of the District of Columbia Circuit held that "[c]harges that United States officials are unconstitutionally housing over 1000 soldiers on a United States citizen's private ranch and running military forays throughout the pastures cannot conscionably be dismissed by this court at the stage of a bare complaint."¹¹⁹ The Court then

¹¹³. See supra note 102.
¹¹⁵. Id. at 644 (Jackson, J., concurring).
¹¹⁶. Ramírez de Arellano v. Weinberger, 788 F.2d 762 (D.C. Cir. 1986) [hereinafter de Arellano I].
¹¹⁷. Ramírez de Arellano v. Weinberger, 568 F. Supp. 1236 (D.D.C. 1983) [de Arellano I], aff'd, 724 F.2d 143 (D.C. Cir. 1983) [de Arellano II], reh'g, 745 F.2d 1500 (D.C. Cir. 1984) [de Arellano III], cert. granted and judgment vacated by, 471 U.S. 1113 (1985) [de Arellano IV], on remand, 788 F.2d 762 (D.C. Cir. 1986) [de Arellano V].
¹¹⁸. de Arellano II, 724 F.2d at 153.
¹¹⁹. de Arellano III, 745 F.2d at 1543.
cited, in a footnote, to the Third Amendment.\textsuperscript{120}

These cases are at best suggestive of the notion that the Third Amendment is not entirely archaic, since neither actually rested its holding on it. But they demonstrate that the underlying concern about the federal government's appropriation of private resources for military purposes is not completely obsolete. Perhaps not surprisingly, it turns out to be a writer rather than a judge who has posed one of the most thought-provoking images of a continuing meaning for the Third Amendment. Testifying before the Portland, Oregon City Council in favor of a proposed nuclear free zone ordinance, Elinor Langer said: "The early colonists did not have to quarter soldiers in their houses\textsuperscript{121} — remember the Bill of Rights? — and we do not have to quarter nuclear weapons, or the parts for nuclear weapons, in our cities."\textsuperscript{122} Like the Second Amendment, the Third, despite its apparent obsolescence, may yet have a new life.

But for now, the only fair reading of existing precedent must acknowledge that the Second and Third Amendments, whatever their original intentions, have failed to play any meaningful role in constraining the military power of the central government. Although for the ratifiers of the Constitution — who were after all its ultimate authors\textsuperscript{123} — these amendments, singly and in combination, were a crucial part of the overall package of civil liberties which they wanted to protect from government invasion, their descendants have not so far made much use of them. Perhaps this is because they were tied to a specific military technology which has now been superseded, the technology of the musket and the citizen-soldier being replaced by that of the missile and the defense industry engineer.\textsuperscript{124}

\textsuperscript{120} "The spirit of the Nation's historic commitment to protecting private citizens' rights against military excesses is embodied in the Third Amendment's express prohibition against the quartering of soldiers in private homes." \textit{Id.} at 1543 n.186.

\textsuperscript{121} Ms. Langer should be forgiven a writer's poetic inaccuracy; in truth, the early colonists did have to quarter British soldiers in their homes and it was precisely in reaction to this experience that the post-Revolutionary proponents of the Bill of Rights were determined to include an amendment prohibiting that practice. Obviously, at the time of the passage of the Bill of Rights the early Americans were no longer in fact "colonists" subject to the rule of the British crown.

\textsuperscript{122} Langer, \textit{supra} note 50, at 78.

\textsuperscript{123} "Once we remember that it was popular ratification that transformed a mere proposal into binding law, we cannot but choose as our supreme legal text the edition that was in fact offered to and endorsed by the People . . . ." Akhil Reed Amar, \textit{Our Forgotten Constitution: A Bicentennial Comment}, 97 Yale L.J. 281, 286 (1987) (citations omitted).

\textsuperscript{124} But see Levinson, \textit{supra} note 101, at 656 ("[I]t is hard for me to see how one can argue that circumstances have so changed as to make mass disarmament constitutionally unproblematic.") (footnote omitted).
Still, we did not eliminate the First Amendment because of the invention of radio and television, or the Fourth because of the discovery of how to wiretap a phone. Surely changing times require changing understandings, which is why an interpretive approach limited to the letter of the original Constitution is so unsatisfying. Our goal should be to penetrate the spirit of that document and give it contemporary life. If the desire to ensure decentralized control over the nation’s military powers was so powerful in the militia age, is this any less true in the age of the atom bomb? In the final section of this Article, I will make the case for why the value of decentralization remains compelling.

III. THE IMPORTANCE OF LOCAL ACTION

As a school child in the late 1950's, I often participated in air raid drills meant to prepare us for nuclear attack. A siren sounded and we were marched from our classrooms into the halls, where we crouched face down on the floor by the cement block walls, carefully instructed to stay away from windows in case of flying glass. Until they rang the all-clear, we were to remain there silent, hands clasped over the backs of our necks to shield us from the atomic blast.

This image of mute passivity conveys what Robert Jay Lifton, the renowned psychiatrist and anti-nuclear activist, has called “nuclear numbing,” the process by which people shield themselves from true awareness of the dangers posed by nuclear weapons. In Lifton’s words, nuclear numbing causes people to push away their doubts and fears, “leaving everything to leaders and experts.” When “fear and a sense of threat break through prior numbing; these uncomfortable (potentially shattering) feelings in turn raise the personal question of whether one should take some form of action to counter the danger; that question becomes an additional source of conflict, associated as it is with


126. INDEFENSIBLE WEAPONS, supra note 125, passim.

127. Lifton himself suggests that the air-raid drill is illustrative of the “absurdity of the mind” engendered by nuclear numbing, describing a picture of “the seven-year-old school girl, following her teacher’s advice in the midst of a nuclear air-raid drill . . . and holding a sheet of paper over her head to protect herself from fallout.” Id. at 5.

128. Id. at 10.
feelings of helplessness and doubts about efficacy. . . "

In the summer of 1985 in Portland, Oregon, a grassroots campaign was underway to have the city declare itself a nuclear free zone. The Mayor and City Council were unsure of how to proceed, troubled by whether they had jurisdiction, worried if such an ordinance would be constitutional, wondering whether it would make sense. Before any councillor had yet officially introduced a proposed ordinance, the writer Elinor Langer testified in favor of one before the City Council. Her description of her struggles with just the kinds of conflicts Dr. Lifton wrote about merits quoting at some length:

As someone whose work involves the habit of introspection, I can report that between my longstanding "right opinions" on the subject of nuclear war and my appearance here today — my first such public appearance — my mind presented me with many arguments against testifying, including (a) my preoccupation with other matters; (b) my lack of expertise; (c) the largely symbolic nature of the issue, at least in relation to national defense if not in relation to the city; and (d) the futility of action. I hope I may be forgiven a writer's presumption if I say I wonder whether the reasoning of members of the City Council, which has led to the absence of an actual ordinance today, is not much the same: namely, there are other issues before us; it is not really our jurisdiction; it is too limited in its national impact to take any risks for locally; and ultimately, we are lost anyway.

The problem with this reasoning is, of course, its circularity. If we act, we may die; but if we don't act, we will surely die. . .

... It is our place to act, it is all of our places to act, because there is no force other than public opinion that is capable of bringing about change. The Federal government not only cannot lead, it can barely follow. . .

Every instance of progress in arms control that has been made since 1945 has been made in response to just such public pressure as declaring Portland a nuclear-free zone would represent.130

By now it is almost platitudinous to complain about the political apathy of American citizens, their dismal percentage of voting, their disinterest, their cynicism. Yet when concern moves them to become active on the local level in connection with issues of war and peace,131 one of the first obstacles they are likely to confront is the claim that this is not within the legitimate sphere of local concern. If we read our Constitution as shutting out such local action, as relegating these issues exclusively to the jurisdiction of the federal government, are we not

129. Id.
130. Langer, supra note 50, at 77-78.
131. See supra Section I (for examples of such local activism).
contributing to the very apathy which we decry? Our search should be for ways to revitalize, not to squelch, such grassroots action.

Part II concluded that the original constitutional design contemplated such grassroots participation. But while the structure of the Constitution and the intentions behind key portions of the Bill of Rights represented a desire to strike a balance between centralized and decentralized control over military power, the subsequent interpretive history has moved strongly in the direction of exclusively centralized control. This Section makes the argument for redressing that imbalance.

As I will demonstrate below, at least two important themes in recent jurisprudence — neo-republicanism and feminism — underscore the importance of fostering a more vocal and participatory citizenry. Such participation is as necessary and appropriate in regard to issues of national security and national defense policy as in other policy areas. These themes will be discussed in Sections A and B. Finally, Section C concludes that the goals of voice and participation can be furthered by nurturing local activity. Such activity rests on a revised conception of federalism, a conception which focuses not on “states’ rights,” but on maximizing opportunities for people to participate in government, to speak and be heard.

A. Neo-republicanism and the Importance of Participation

As perhaps is too often the case with intellectual vogues, a good idea is first promulgated, then attacked, and then begins to sink beneath the weight of citations and counter-citations. So it appears to be with republicanism. By now, the law review literature on it is so extensive that it would be foolish to attempt to cite it all, and the criticisms and qualifications which have been made of it are so complex that it sometimes seems difficult to know exactly what remains.

132. See supra Section II, parts D-E.


134. Joyce Appleby commented some years ago that “[r]epublicanism slipped into the scholarly lexicon in the late 1960’s and has since become the most protean concept for those working on the culture of antebellum America.” Appleby, supra note 133, at 461.
One source of confusion has been the tendency of the "republican revival" to conflate two meanings of the term which Joyce Appleby has described as its two scholarly "careers."\(^{135}\) The first is the use of the term republicanism to refer to an actual set of ideas held at a certain time in history by certain politically conscious thinkers, namely those ideas held by the American revolutionary generation, derived from English republican political thought of the seventeenth and eighteenth centuries. The second is the use of the word to refer more generally to a certain political orientation, or ideology, that its proponents believe continues to have contemporary value. This orientation, which I will call "neo-republicanism," is often put forward as a counterweight to the tenets of classical "liberalism."\(^{136}\)

One key feature distinguishing "liberalism" from "neo-republicanism" is the value each places on political participation. For "liberalism," participation is at best a secondary value and at worst a nuisance. Since the goal of government is to secure private happiness, one participates only as much as is minimally necessary to ensure that this is the case. Given that participation is viewed primarily as instrumental, it makes sense to leave politics for the most part to professionals and experts. Every few years, one can rely on the vote as a tool for throwing out one's representatives if they are not serving one's needs.\(^{137}\)

For "neo-republicanism," on the other hand, political participation is primary — an activity which is essential both to individual satisfaction and to the health of the state.\(^{138}\) Hannah Arendt is a leading example of a political philosopher who has championed this tradition of participatory politics, which she calls "public happiness."\(^{139}\) She describes

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\(^{135}\) Appleby, supra note 133, at 462. See also Richard H. Fallon, Jr., What is Republicanism, and is it worth reviving?, 102 HARV. L. REV. 1695 (1989) (describing the "two wellsprings" of the republican revival as historical and ideological).

\(^{136}\) I use the quotation marks to signal that these terms refer to archetypes of "neo-republicanism" and "liberalism," rather than to any realistic or nuanced description of a particular variation of those types which actually existed at anytime either in theory or in history. My goal is to contrast two sets of assumptions about the practice of politics, not to capture the often mixed reality of how they play out in the actual world.

\(^{137}\) See Paul Brest, Constitutional Citizenship, 34 CLEV. ST. L. REV. 175, 185-88 (1985) (describing a "consumer conception" of democracy which is equivalent to this paradigm of "liberalism").

\(^{138}\) See, e.g., HANNAH ARENDT, ON REVOLUTION 119-20, 221 (1965) (the most important aspect of republican political freedom is the right "to be a participator in government"); C. Edwin Baker, Republican Liberalism: Liberal Rights and Republican Politics, 41 FLA. L. REV. 491, 513-14 (1989); Frank Michelman, Law's Republic, 97 YALE L.J. 1493, 1503, 1531 (1988); Cass R. Sunstein, Beyond the Republican Revival, 97 YALE L.J. 1539, 1555 (1988).

\(^{139}\) See ARENDT, supra note 138, at 123.
the ambiguity inherent in the American founding period, when it was uncertain whether "the new government was to constitute a realm of its own for the 'public happiness' of its citizens, or whether it had been devised solely to serve and ensure their pursuit of private happiness more effectively than had the old regime." She contends that despite considerable ambivalence about this throughout American history, "the revolutionary notions of public happiness and political freedom have never altogether vanished . . . they have become part and parcel of the very structure of the political body of the republic." It is from the persistence of such notions that neo-republicanism draws its force.

It is unnecessary to repeat here the case ably made by other neo-republicans in support of the value of citizen participation. In this time of widespread political apathy and cynicism, the case for increased citizen involvement seems particularly strong. For present purposes, what is important is to connect the general argument in favor of political participation to a more specific argument about the importance of participation in decision-making about the exercise of state violence — that is, to the argument favoring decentralized control over military power. Just such an argument was a central component of classical republican ideology.

It is probably a misunderstanding of this aspect of the participatory theory of republicanism that has resulted in the frequent criticism that republicanism is "militaristic." Several critics of neo-republicanism have made this charge to cast doubt on its value, while even neo-republican proponents have sought to distance themselves from it. But a more careful consideration of the meaning of the "armed citizen" for republicans reveals that the charge of militarism is an oversimplification.

Pocock explains the relationship between the Machiavellian "exaltation of the civic militia" and his "Aristotelian theory of citizenship." The point is not to foster militarism but to restrain it — to prevent the dangers that stem from a professional caste of soldiers whose entire dedication is to the arts of war and not to the civic community. As Pocock explains:

A man who should devote the whole of his energies to the arte della lana [commerce] and none to participation in public affairs would appear in

140. Id. at 130.
141. Id. at 135.
143. See, e.g., Frank Michelman, supra note 138, at 1495; Sunstein, supra note 138, at 1539-40.
classical theory as less than a citizen and a source of weakness to his fel-
lows; but a man who should devote the whole of his energies to the arte
della guerra — Machiavelli sometimes uses phrases like “make war his arte” — is an infinitely greater danger. The banausic tradesman is pursuing
a limited good to the neglect of the common good, and that is bad; . . . but
the banausic soldier is far more likely to do this, and to do it in a far more
antisocial way, because his arte is to exercise the means of coercion and
destruction.\textsuperscript{144}

In republican thought, the arming of the citizen-soldier is not inten-
tended to militarize society, but to \textit{prevent} the growth of military institu-
tions detached from daily civilian life. The linkage of the citizen and the
soldier is intended not to glorify the career of the soldier, but to prevent
it from being a career — as Pocock explains, the “central point is that it
must on no account become a separately organized profession to which
men look for the whole of their living. A soldier who is nothing but a
soldier is a menace to all other social activities. . . .”\textsuperscript{145} As Pocock later
reminds us, this distrust of the professional warrior and attachment to
the citizen militia were vital features of the thinking of many members of
the founding generation in America — as the famous episode of the Society
of the Cincinnati illustrates.\textsuperscript{146} The deep public fear that this society
of former military officers would become an oligarchy that would seize
the reins of government power resonated with republican concern about
the dangers of professional armies. Pocock points out that the guarantee
demanded by the ratifiers of the Constitution of their right to constitute
themselves a “well regulated militia” is founded in the classical republic-

\textit{The armed citizenry so important to republican ideology simultane-
ously served several goals. While the notion of its value as an ultimate
bulwark against government tyranny is familiar to us, and has received
increased scholarly attention of late,\textsuperscript{148} the equally important goal of
avoiding the growth of professional military institutions is less familiar

\textsuperscript{144} J.G.A. POCOCK, \textit{The Machiavellian Moment: Florentine Political Thought
and the Atlantic Republican Tradition} 200 (1975).
\textsuperscript{145} \textit{Id.} at 199.
\textsuperscript{146} The Society of the Cincinnati was a semi-secret organization of former Continental Army
officers which many feared was plotting an aristocratic coup. \textit{See} Kohn, \textit{supra} note 69, at 52-53.
\textsuperscript{147} Pocock, \textit{supra} note 144, at 528.
\textsuperscript{148} \textit{See} Kates, \textit{supra} note 104, at 232-33; Levinson, \textit{supra} note 101, at 648.
and has been less well understood. Similarly, there is another important purpose which has received insufficient attention — that of assuring widespread citizen consent to the nation's use of armed force.

The anti-federalists' commitment to this was one reason for their objections to the military arrangements of the proposed constitution. Many believed that the unrestrained power of the federal government to raise a professional army would permit the country's "rulers" to engage in an end run around the militia and become involved in aggressive European wars which would serve only their interests, not that of the majority.\textsuperscript{149} Anti-federalists also complained that federal control over the militia would lead to militia members being dragged out of state against their will to put down slave revolts or "subdue their fellow citizens" even when they believed the causes for upheaval were just.\textsuperscript{150} Reliance instead on a decentralized militia for military force would in effect demand a plebiscite of citizens each time armed force was invoked; in the most literal sense, people would "vote with their feet" — or in this case, their bodies.

Professor Scarry has pointed out this aspect of the meaning of an armed citizenry.\textsuperscript{151} She discusses a view of the social contract in which, contrary to our usual understanding, war demands that "the processes of consent have to be more explicit than under ordinary peacetime conditions."\textsuperscript{152} Kant, for example, said that:

\begin{quote}
[e]very nation must be so organized internally that not the head of the nation — for whom, properly speaking, war has no cost, (since he puts the expense off on others, namely the people) — but rather the people who pay for it have the decisive voice as to whether or not there should be war.\textsuperscript{153}
\end{quote}

\textsuperscript{149} See, e.g., Essays of Brutus, in \textit{2 THE COMPLETE ANTI-FEDERALIST} 401 (Herbert J. Storing ed., 1981); Letter from Cincinnatus to James Wilson, New York Journal (Nov. 22, 1787), in \textit{6 id.} at 16-17; Objections by a Son of Liberty, in \textit{6 id.} at 35; Essays by a Farmer, in \textit{4 id.} at 207. Mercy Otis Warren, writing as the "Columbian Patriot," expressed the general sentiment when she foresaw the new national military power being used not for genuine national defense, but to "maintain . . . the splendour of the most useless part of the community." \textit{Observations on the New Constitution, and on the Federal and State Conventions by a Columbian Patriot, in 4 id.} at 277. See generally Levin, supra note 64, at 1045-51. \textit{See also} Pocock, supra note 144, at 528-31.

\textsuperscript{150} \textit{See} Objections by a Son of Liberty, in \textit{6 THE COMPLETE ANTI-FEDERALIST, supra note 149}, at 35; \textit{The Letters of Centinel, in 2 id.} at 159-60; \textit{The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents, in 3 id.} at 164-65. See generally, Levin, \textit{supra} note 64, at 1046-49.

\textsuperscript{151} Scarry, \textit{supra} note 107, at 1266-69.


\textsuperscript{153} Scarry, \textit{supra} note 107, at 1257 (quoting Immanuel Kant, \textit{On the Proverb That May be True in Theory but is of no Practical Use, reprinted in PERPETUAL PEACE AND OTHER ESSAYS ON POLITICS: HISTORY AND MORALS} (Ted Humphrey trans., 1983)).
This view is congruent with a republican understanding of social control over military force, a view which Scarry, like Professor Pocock, finds inherent in the Second Amendment.

The eighteenth century mechanisms for assuring this diffusion of consent over military power were the reliance for national security on the militia, the continuing decentralization of control over that militia, the guarantee of an armed citizenry, and the power of the individual property holder to resist the military demands of the central government.154 But as the negligible role of these provisions in subsequent legal doctrine suggests,155 none of these mechanisms are the most effective candidates for ensuring increased citizen participation or consent today.

For one thing, even in its heyday, the militia corresponded to a conception of citizenship which we would now find intolerably narrow: male,156 mostly white,157 and property-based.158 Moreover, the frequently-made argument that re-vitalizing such mechanisms has little value in an age of nuclear warheads and underground missile silos has considerable force.159 What is necessary, as I suggested earlier, is to penetrate the specifics of these arrangements to reach an understanding of their meaning; and then to see if that meaning can be given contemporary life.

It would be foolish, and dangerous, to argue for a contemporary

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154. These mechanisms were incorporated, respectively, in the arrangements of the militia clauses and in the Second and Third Amendments. The decision to choose the full Congress, rather than the executive branch or the Senate, as the locus of control over military power also demonstrates this desire to disperse, rather than concentrate, consent over the use of military force, although in a different fashion. The most dramatic proposal for incorporating a requirement of intensified consent in regard to military force into the Constitution — the proposal to include an amendment requiring a super-majority vote of Congress to raise troops — never made it into the final Bill of Rights, as discussed above. See supra note 76 and accompanying text. But while some might argue that the rejection of this proposal signified rejection of the entire idea of such consent, my claim is that the multiplicity of ways in which the demand for widespread consent to military force repeatedly surfaced demonstrates how crucial an area of eighteenth century concern this was.

155. See supra Section II, parts D-F.


157. See Cottrell & Diamond, supra note 104; see also Scott v. Sandford, 60 U.S. (19 How.) 393, 416-17 (1856).

158. This was true of the Third Amendment as well — it gave rights only to propertyd citizens. For an interesting discussion of whether the protected class included only those with full fee simple ownership interests, or covered a broader range of property “rights,” see Engblom v. Carey, 677 F.2d 957, 961-64 (2d Cir. 1982).

159. But as Perpich v. Department of Defense, 110 S. Ct. 2418 (1990) and Ramírez de Arellano v. Weinberger, 724 F.2d 143 (D.C. Cir. 1983) suggest, these mechanisms are far from completely archaic. See discussion supra notes 90-93, 116-22 and accompanying text. See also Levinson, supra note 124.
diffusion of power based on widespread possession of armaments and locally-controlled militia forces drilling in our city streets.\textsuperscript{160} Decentralized possession of the actual instrumentalities of military violence is neither feasible nor desirable under contemporary conditions. However, this makes it all the more important to find other, less physical, means to assure decentralized control over these instrumentalities. The broad diffusion of political conversation, what Paul Brest has called "discursive participation,"\textsuperscript{161} is such a mechanism.

What I am suggesting is a shift from a mode of decentralization which rests on countering power with power\textsuperscript{162} to a mode which seeks to foster broad participatory conversation. Such a shift would reflect certain important themes in feminist thinking. These ideas of feminist theory contribute to our understanding of the importance of such conversation and to our knowledge of how to foster it.

B. Feminism and the Importance of Voice

One of the core preoccupations of feminist thinking has been the notion of voice. Since so many women, at least until recently, have shared the experience of feeling unheard,\textsuperscript{163} especially by those with power, interest in recognizing and encouraging the development of each person's voice has always been a key feminist value.

The collaborative authors of \textit{Women's Ways of Knowing: The Development of Self, Voice, and Mind} set out to learn more about the processes by which "ordinary women find their voice and use it to gain control.


\textsuperscript{161} \textit{See} Brest, supra note 137, at 194; Paul Brest, \textit{Further Beyond the Republican Revival: Toward Radical Republicanism}, 97 \textit{Yale L.J.} 1623, 1624 (1988).

\textsuperscript{162} By "power with power" I mean the power of the armed central government with the dispersed but collective power of the armed citizenry, organized as the "well regulated militia."

\textsuperscript{163} \textit{See} MARY F. BELENKY ET AL., \textit{WOMEN'S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE, AND MIND} 5 (1986) ("In everyday and professional life, as well as in the classroom, women often feel unheard even when they believe they have something important to say.").
Based on in-depth interviews with over one hundred women of different ages and classes, they developed a series of what they call "epistemological positions" which they abstracted from the reflections of the women that they interviewed. While it is not claimed that these positions represent any straight-line sequence of development, they can be placed in an order that moves toward increasing complexity of thought and sureness of articulation; that is, toward an increasingly developed voice. "Silence," the first position, is described as one in which "women experience themselves as mindless and voiceless and subject to the whims of external authority." The remaining categories are "received knowledge," "subjective knowledge," "procedural knowledge," and "constructed knowledge."

The "constructed knowers," who have combined "objective knowledge" with the passion and creativity of their own concerns, appear to be the most successful at acting in the world in ways which are simultaneously satisfying and productive. It is they who have found their own voice. While the main goal of the book is descriptive, in its final chapters the authors begin to explore the conditions, primarily in the family and in the schools, that best promote development of this orientation. A subsequent project currently in progress by Mary Field Belenky, one of the book's co-authors, and her collaborators focuses more directly on this latter concern: how to discover the keys to the "empowerment process — of moving the silenced into voice.”

This question must be central to any serious effort to foster widespread political participation of the kind envisioned by republican theory. While general discussion of this complex but crucial topic is beyond the scope of this paper, it is significant to note that the arena of military policy is one in which the general population is particularly silenced. In-

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164. Id. at 4.
165. Id. at 15.
166. "[A] perspective from which women conceive of themselves as capable of receiving, even reproducing, knowledge from the all-knowing external authorities but not capable of creating knowledge on their own." Id.
167. "[A] perspective from which truth and knowledge are conceived of as personal, private, and subjectively known or intuited." Id.
168. "[W]omen are invested in learning and applying objective procedures for obtaining and communicating knowledge." Id.
169. "[A] position in which women view all knowledge as contextual, experience themselves as creators of knowledge, and value both subjective and objective strategies for knowing." Id.
deed, if we consider the process of "nuclear numbing" described earlier, or the sense of disempowerment most individuals feel in connection with complex decisions about national security and defense policy, we can see an intriguing parallel between the types of knowing described in *Women's Ways of Knowing* and people's feelings about the possibility of playing a more participatory role. Many will feel limited to the stances of "silence" ("voiceless and subject to the whims of external authority") or, at best, "received knowledge" ("capable of receiving, even reproducing, knowledge from the all-knowing external authorities but not capable of creating knowledge on their own"). Some, operating from the orientation of "subjective knowledge" ("truth and knowledge are conceived of as personal, private, and subjectively known or intuited") may feel opposed to official policy, but believe they have no sufficient basis on which to justify their position and no way to express their opposition except through private complaining and cynical withdrawal. Only those who are first able to develop "procedural knowledge" (learning "objective procedures for obtaining and communicating knowledge") and then to integrate this knowledge with their own values and concerns to shape a personal form of "constructed knowledge" (experiencing themselves as "creators of knowledge") will be able to envision playing a meaningful role as citizens in the shaping of public policy about the military.

Carol Cohn, a feminist psychologist, has written about the particular difficulties involved in developing a voice with which citizens can engage in critical thinking about that core of our military policy known as "strategic doctrine" — the theory of nuclear weaponry. Driven by a compelling desire to learn how those who develop this theory could "think this way," Cohn spent a year at a special institute studying strategic theory. In her article "Sex and Death in the Rational World of Defense Intellectuals," she describes her discovery that the very language used by strategic theorists prevents both certain questions from being raised and also excludes the uninitiated from participation.

In the world of "technostrategic language," which is a pseudo-scientific jargon composed of abstractions, acronyms, and euphemisms, speakers of ordinary English — no matter how well-informed — are treated as "ignorant, simpleminded, or both." At the same time, if one speaks in the technostrategic language in order to demonstrate legitimacy and gain

172. *Id.* at 708.
respect, it becomes impossible to express certain ideas. Cohn uses the example of the concept "peace," explaining that it is not a part of this discourse. As close as one can come is "strategic stability," a term that refers to a balance of numbers and types of weapon systems—not the political, social, economic, and psychological conditions implied by the word "peace." Not only is there no word signifying peace in this discourse, but the word "peace" itself cannot be used. To speak it is immediately to brand oneself as a soft-headed activist instead of an expert. . . . 173

When such ingrown and exclusionary forms of discourse come to dominate policy making, this is fertile ground for a dangerous divorce between the concerns of experts and the concerns of ordinary citizens. 174

Originally, the feminist commitment to the importance of fostering voice was a response to the traditional silencing of female voices, but it has been extended to recognize the need to increase our capacity to hear from others who have been excluded. 175 In the arena of military policy, women's voices historically have been almost entirely shut out, but this is in a process of transition. 176 However, even if women and others now excluded from the domains of technostrategic policy formation were admitted, so that those domains became more fully representative of the population, this would not heal the split between expert and citizen.

The political scientist Jean Bethke Elshtain points out that while

173. Id.
174. Several writers have pointed out that the distinction between the technical language of experts and the ordinary vocabulary of laypersons reflects a distinction between speakers who take the standpoint of "users" or "deployers" of military weapons, and those who take the standpoint of "victims." See id. at 706-07 & 706 n.39.
175. See, e.g., Belenky et al., supra note 170, at 1-2, 4, 18 (describing their intention "to understand how the silenced can be empowered to gain a voice and claim the powers of mind; how the excluded can be supported to move from the margins to the center"). See also Mari J. Matsuda, Looking to the Bottom: CLS and Reparations, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Martha Minow, Words and the Door to the Land of Change: Law, Language, and Family Violence, 43 VAND. L. REV. 1665, 1688 (1990); Martha Minow, The Supreme Court, 1986 Term - Foreword: Justice Engendered, 101 HARV. L. REV. 10, 86-88 (1987).
176. The active involvement of women in the Persian Gulf War has given renewed impetus to the controversial claim that women should participate in the military on exactly the same terms as men. Congress, and the country, have been reconsidering the role of women in the military, including the traditional exclusion of women from combat. See Jon Nordheimer, Women's Role in Combat: The War Resumes, N.Y. TIMES, May 26, 1991, at A1; Barbara Kantrowitz, The Right to Fight, NEWSWEEK, Aug. 5, 1991, at 22. Regardless of what specific steps are taken in the immediate future, it seems almost certain that women will play a significantly larger role in the nation's military institutions, and therefore in the formation of its military policy, than they have in the past. For a discussion of this process and its implications, see Stephanie Levin, Women and Violence: Reflections on Ending the Combat Exclusion, 26 NEW ENG. L. REV. (forthcoming spring 1992).
more equal representation of women in the "nuclear priesthood" of strategic theorists means that "[w]omen, too, would speak in the voice of the knowing insiders," the language would remain "dissociated: that is, its linguistic use of euphemisms . . . removes it from what it claims to be talking about." Most important for present purposes, the language would also remain exclusionary, "not available to most citizens, whether male or female, for the ordinary tasks of everyday civic life."

Some opponents of this kind of technostategic talk have sought to counter it with a psychological or apocalyptic language for talking about modern warfare and military strategy, an approach which centers on acknowledging despair and doom. But while this approach may be valuable as a way of breaking through "nuclear numbing" or other forms of apathy and disempowerment, Elshtain urges that there be a search for another way which "promotes civic identity and connection." She warns, however, that talk of enhanced citizen voice and participation must go beyond the level of abstract platitude. It is here that a renewed decentralism — understood not as a panacea, nor as a substitute for either private action or national politics, but as another locus for meaningful citizen involvement — has its place.

Dean Paul Brest, in a friendly critique of neo-republican theorists, shares Elshtain's view that the commitment to enhanced citizenship must go beyond the level of abstraction. He chides neo-republican legal scholars for their obsession with the courts, their unfortunate willingness to treat "the judiciary as the 'trace of the People's absent self-government.'" Rejecting this court-centered approach, he urges instead a search for "programs of genuine participatory democracy in the

177. This term is actually used as a self-description by strategic theorists; as Cohn notes in her article, "[p]erhaps most astonishing of all is the fact that the creators of strategic doctrine actually refer to members of their community as 'the nuclear priesthood.'" Cohn, supra note 171, at 702.


179. Id.


181. ELSHTAIN, supra note 178, at 247.

182. Id. at 249. "A revitalized civic discourse must be neither abstract nor ahistorical but concrete and available to social participants." Id.

183. Brest, supra note 161.

multifold spheres of human activity."\textsuperscript{185} While his emphasis in that article is on workplace democracy, the underlying thesis applies equally well to local action.\textsuperscript{186}

Following Brest's advice, the final section of this Article will sketch out an argument for "genuine participatory democracy" at the grassroots level in the national security sphere. This argument has a foundation in ideas of federalism, but it is a federalism which must be carefully distinguished both from the old "states' rights" version, and also from the "new federalism" which is rooted in the federal government's attempt to cast off responsibility for the welfare of the citizenry.\textsuperscript{187} It is what I will call a "participatory federalism" — a federalism that has the goal of creating more opportunities for citizen empowerment and meaningful participation in national political life.

C. Grassroots Voices: Toward a Participatory Federalism

Historian Saul Cornell, writing about the constitutional contributions of the anti-federalists, recognizes that their heritage of decentralization has been appropriated both by the left, to support an ideal of "active participatory democracy," and by the right, to legitimize the "new federalism." In order to understand the positive aspects of the anti-federalist legacy, Cornell writes,

\begin{quote}
It is important to disentangle localism from its dark association with the racist dimensions of states' rights theory. Moreover, it is vital to overcome the post-New Deal association of central government with a progressive social vision. For much of the nineteenth century it was individual localities and states, not the federal government, that were at the forefront of progressive social change.\textsuperscript{188}
\end{quote}

\textsuperscript{185} Brest, \textit{supra} note 161, at 1623.

\textsuperscript{186} Indeed, Brest points out that political scientists have looked to action at the local government level as a critical education in citizenship. Id. at 1626. Kathryn Abrams also urges looking to local institutions to "contribute to the development of a self-conscious, normatively-based, deliberative popular politics . . . ," using as an example Boston's Coalition for Community Control of Development, to which she is an advisor. Abrams, \textit{supra} note 184, at 1604-08. For an extended discussion of the value of, and difficulties with, revitalizing local power, see Gerald E. Frug, \textit{The City as a Legal Concept}, 93 HARV. L. REV. 1057 (1980).

\textsuperscript{187} President Bush's most recent State of the Union address reflects this type of new federalism. In outlining his "long-term plan to guarantee our future" the President made repeated references to "get[ting] rid of 246 programs that don't deserve Federal funding. Some of them have noble titles, but none of them is indispensible. . . . It's time to replace the assumptions of the welfare state and help reform the welfare system." President George Bush, State of the Union Address (January 27, 1992), \textit{reprinted in} N.Y. TIMES, Jan. 29, 1992, at A1.

Cornell is correct that in order to envision an attractive federalism, as opposed to one linked with angry mobs keeping African-American children out of school or a federal government abandoning its responsibilities to the states, one must reject the automatic equation that "states' rights" equals "bad" and "federal government" equals "good." On the other hand, it would be just as mistaken simply to reverse the equation and look to local government for guaranteed progressivism and the central government for certain evil. At one time, as Cornell points out, progressive innovations originated at the state or local level and were undermined by an unresponsive federal judiciary.\textsuperscript{189} It is equally true that during other periods progressive change began at the federal level and was resisted by the states.\textsuperscript{190} The choice of which level of government is the most favorable locus for action cannot be made abstractly and ahistorically; the answer, as with so many things, is "it depends."

Exploring the question of whether minority groups would be likely to receive better protection from government at the local, state or federal level, Martha Minow reached a similar conclusion. She found that no universal lesson could be drawn from the experiences of various groups at various times and that the "importance of particular historical circumstances, political tides, and geographic distribution of minority groups" outweighed any structural abstraction.\textsuperscript{191}

Does this mean, then, that federalism as a value is empty, and that the only question is where, at any particular time on any particular issue, one is most likely to find a congenial result? Not quite. As Minow concludes, in relation to the interests of minority groups, "what may be most important is simply the existence of multiple governmental authorities, for it is the presence of multiple authorities that, paradoxically, gives minority groups and their members the opportunity to seek alternative answers."\textsuperscript{192} She ties this idea to Robert Cover's work on "jurisdictional redundancy," in which he argues that the overlapping federal and state court systems serve citizen's interests by permitting alternative opportu-

\textsuperscript{189} For example, in the late nineteenth and early twentieth centuries, wage and hour laws and other forms of protective worker legislation were passed by the state legislatures and then invalidated by the federal judiciary. \textit{See}, e.g., \textit{Morehead v. People ex rel. Tipaldo}, 298 U.S. 587 (1936) (invalidating state minimum wage law); \textit{Coppage v. Kansas}, 236 U.S. 1 (1915) (invalidating state prohibition of "yellow dog" contracts); \textit{Lochner v. New York}, 198 U.S. 45 (1905) (invalidating state maximum hour law).


\textsuperscript{192} \textit{Id.} at 977-78.
nities to be heard and receive a favorable outcome.  

In this sense, what is important about federalism is not that it locates power “here” or “there” — not that some things are assigned irretrievably to the federal government or others to the states — but that it creates a tension about power, so that there are competing sources of authority rather than one unitary sovereign. Hannah Arendt has written that “perhaps the greatest American innovation in politics as such was the consistent abolition of sovereignty within the body politic of the republic, the insight that in the realm of human affairs sovereignty and tyranny are the same.” Akhil Amar has expressed what is actually the same basic insight in a very different formulation, writing that the American innovation was to place sovereignty “in the People themselves.”

Whether one views unitary sovereignty as abolished or relocated to the people, the key point is that it is no longer considered to be in any unitary government. Governmental institutions are divided and kept in tension. At the federal level, this is the familiar doctrine of separation of powers. The same principle animates federalism. The tension is valued because it creates space for the expression of suppressed viewpoints and helps to prevent any one orthodoxy from achieving complete hegemony. Amar sums up the contribution that this governmental innovation makes to the liberty of the people by writing: “As with separation of powers, federalism enabled the American People to conquer government power by dividing it. Each government agency, state and national, would have incentives to win the principal’s affections by monitoring and challenging the other’s misdeeds.”

This is a compelling insight, but the way Professor Amar has framed it presents two difficulties for present purposes. First, by naming only

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193. See Robert Cover, The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation, 22 WM. & MARY L. REV. 639 (1981). Public interest and civil rights lawyers have learned this lesson again in the 1990's, as they turn from filing cases in federal court to more receptive state courts instead.


196. Amar, supra note 195, at 1450. In her opinion for the Court in the recent case of Gregory v. Ashcroft, 111 S. Ct. 2395, 2400 (1991), Justice O'Connor describes these advantages of federalism at length: “Just as the separation and independence of the coordinate Branches of the Federal Government serves to prevent the accumulation of excessive power in any one Branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”
the "state" and "national" governments, it ignores the field of local government action, a field particularly accessible to the direct involvement of the very citizens who constitute Amar's sovereign "People." \(^{197}\) Second, by making the subject of the verb the "government agency," the sentence makes it sound as if it were the "government agency" which acts, rather than recognizing that it is people who act though the agencies of government.

Since the focus here is on federalism as a means of fostering civic participation, both of these qualifications are crucial. While state government will sometimes be an excellent locus for citizen action, often local government will provide the best forum for ordinary citizens to find their voices in civic conversation. And because the value of federalism for our purposes is in the enhanced opportunities it provides for citizen participation in policy development, the focus must be not on government institutions acting, but on people acting through them.

In summary, three key attributes of participatory federalism must be highlighted. The first is that what is most important is not where government power is assigned — to the federal government, the states, or the localities — but the very fact that there are shared and overlapping powers. This dispersion of power means that the citizen is better protected from the dangers that are inherent in being subject to any one unitary sovereign. \(^{198}\)

A second key attribute is that the value of this federalism lies not in the empowerment of government, but in the empowerment of people. Its animating purpose is not to add to or detract from the powers of any particular level of government, but to provide the most fruitful arrangements for enhancing the possibility of genuine citizen control over government.

Third, the only meaningful measure of the success or failure of this type of federalism is the extent to which it contributes to increased opportunities for citizens to have a voice in government. This must be not

\(^{197}\) Carol Rose has made a parallel point, observing that one difficulty with the linkage between republicanism and a "states' rights" view of federalism is that the states themselves are too large for the kind of direct civic participation that republicanism desires. She believes it would be more fruitful to look to "local political organizations," which really are small enough to permit expression of a "local civic voice." Carol M. Rose, The Ancient Constitution vs. The Federalist Empire: Anti-Federalism from the Attack on "Monarchism" to Modern Localism, 84 Nw. U. L. Rev. 74, 94-96 (1989).

\(^{198}\) This is why champions of decentralization like the anti-federalists can be viewed as linked to an older anti-monarchical tradition. See Morgan, supra note 195, at 280-87; see also Rose, supra note 197, at 80-89.
at the level of deceptive abstraction — “the People speak” — but at the very concrete level of actual people with actual voices. The goal is for more people to be able to speak up in settings more empowering than their living rooms — and certainly state and local governments, while not the only possible settings, provide such an opportunity.

In conclusion, these general principles of participatory federalism must be linked to the specific case of federalism in connection with military policy. The constitutional arrangements concerning military power which were described in Section II fit with these three attributes of participatory federalism quite well.

The first attribute calls for dispersing power by sharing it. As has already been suggested, the military arrangements in the Constitution were designed to achieve exactly this sort of liberating tension between the national government’s military powers and the decentralized state and locally-controlled institutions by which these powers were to be carried out.

The second attribute calls for empowering people rather than governmental institutions. Here, too, the constitutional arrangements seem to fit. The purpose of the grants of power in the relevant constitutional clauses was not to endow any unit of government with the prerogatives of military power for its own sake. The reason for creating these powers was not to strengthen government but to protect the citizenry — to “provide for the common defense.” Given this, it seems anomalous for the federal government — or any branch of the American government — to claim a right to control or use military violence as an inherent attribute of sovereignty. The only justification for this power is in whether it contributes to the security of the citizens.

Finally, the idea that federalism should serve the purpose of enhancing citizen voice can also be linked to decentralized arrangements for the control of military power. In the eighteenth century, as I have suggested earlier, the mechanism for expressing “voice” was physical: the militia-member showed up at muster, rifle on shoulder, to participate bodily in a “conversation” about military force. Today, it can be hoped that our civic conversation can be more verbal. However, we should translate the

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199. But see supra notes 79-86 and accompanying text (discussion of Curtiss-Wright).
200. The militia’s mode of citizen participation centered around the display and practice of physical force. Frequently it was organized in a hierarchical and authoritarian fashion. But since it was a military institution, the militia could also serve as an important locus for actual conversation and dialogue that led to the generation of revolutionary ideas. Compare Morgan, supra note 195, at 169-71 (describing service in the militia as a “school of subordination”) with Eric Foner, Tom Paine’s Republic: Radical Ideology and Social Change, in THE AMERICAN REVOLUTION: EXPLORA-
underlying meaning of the eighteenth century mechanism — a meaning of citizen participation and consent — into a modality more appropriate to contemporary life rather than relinquish it altogether.

I would argue that such a translation leads to three central conclusions. The first is theoretical: we must challenge those mental preconceptions which favor totally centralized power in the military policy arena. We must stop seeing control over military power as belonging "naturally" to the federal government and even more narrowly to the executive branch within it. Instead, we must reconceptualize our understanding of the national arrangements to envision a dynamic and uncertain balance among different sources of power, not only among the three branches of the federal government, but between centralized and decentralized institutions of government as well. While the role of the federal government is, of course, crucial, the roles of the states and localities are more than interstitial and should not be allowed to atrophy. Only in this dynamic tension does the best protection for the citizenry lie.

The second conclusion is doctrinal. Legal doctrine should not raise barriers to local action in the field of military policy on the grounds that such action is per se unconstitutional because it intrudes into an area exclusively committed to the national government. This means that the reasoning of cases like United States v. City of Oakland or Fossella v. Dinkins, which describe military policy as the exclusive province of the federal government, should be rejected and that of cases like Arthur D. Little, Inc. v. Commissioner of Health & Hospitals of Cambridge, which recognize that "not every regulation which has some incidental effect on a defense program is invalid under the supremacy clause," should be followed.

201. Cf. Jeffrey M. Blum, Critical Legal Studies and the Rule of Law, 38 Buff. L. Rev. 59, 67 n.18 (1990) (suggesting we would be "safer and better off" if local government controlled our nuclear and covert action policies rather than federal bureaucracies).

202. No. C-89-3305 IPV (N.D. Cal. Aug. 23, 1990), appeal pending, No. 90-16538 (9th Cir.).


204. 481 N.E.2d 441 (Ma. 1985).

205. 481 N.E.2d at 449.

206. Supreme Court precedent, although less than crystal clear, seems to favor this conclusion. Three key cases are DeCanas v. Bica, 424 U.S. 351 (1976); Zschernig v. Miller, 389 U.S. 429 (1968); and Clark v. Allen, 331 U.S. 503 (1947). Clark rejected the claim that a California statute regulating the inheritance rights of aliens was an unconstitutional invasion of the field of foreign affairs "exclusively reserved... to the Federal Government," by calling the argument "farfetched." 331 U.S. at 516-17. But Zschernig, while expressly declining to overrule Clark, struck down a similar Oregon statute, because, as applied, it intruded too deeply "into the field of foreign affairs which the Consti-
This does not mean that there will never be a doctrinal basis for a federal check on local action, but only that the legal test for that check will fall within the doctrine of legislative pre-emption. As in the many other areas of national policy in which the federal, state and local governments have overlapping responsibilities, federal law — expressed through the will of Congress — will remain supreme. But where Congress has not acted, it should not fall to the judiciary to invalidate local action at the behest of the executive branch. The key, as in all pre-emption cases, should be congressional intent.\textsuperscript{207} Nor should the demand for a clear indication of congressional intention prior to finding pre-emption be any less rigorous here than elsewhere.\textsuperscript{208}

The final conclusion is pragmatic. It calls for re-invigorating local action not just through theory and legal doctrine but through actual grassroots practice. There is already, as Section I demonstrated, a surprisingly lively universe of local activity in the military policy arena. To the extent that our constitutional theory or our legal doctrine stand in the way of this, they can be cleared away. But removing barriers is only a first step. We also need to think seriously about committing resources, both intellectual and financial, to the renewal of a much broader and more diverse civic conversation about the true meaning of “national security.” A full discussion of the steps this might involve is beyond the scope of this paper,\textsuperscript{209} but action at the local level, for the reasons discussed in Section I, is one valuable locus for such conversations.


\textsuperscript{208} For arguments that the Court both has been, and should be, cautious in its reading of preemptive intent see Ronald D. Rotunda, \textit{Sheathing the Sword of Federal Preemption}, 5 CONST. COMMENTARY 311, 312 (1988) and Paul Wolfson, \textit{Preemption and Federalism: The Missing Link}, 16 HASTINGS CONST. L.Q. 69, 72 (1988).

\textsuperscript{209} A number of groups and individuals have recently been working on ways to revitalize grassroots debate and reconsideration of our military policy and of the true meaning of “national security.” The Committee on Common Security in Cambridge, MA and the SANE/Freeze Campaign for Global Security, headquartered in Washington, D.C., are two organizations which have been active in this process. Other important groups include the Center for Defense Information, Washington, D.C.; Mobilization for Survival, N.Y., N.Y.; and the Women's International League for Peace and Freedom, Philadelphia, PA. See \textsl{Pam Solo, From Protest to Policy: Beyond the Freeze to Common Security} (1988).
CONCLUSION

The dissolution of the Soviet Union and the end of the Cold War era require us to rethink the directions of our military policy.\(^\text{210}\) This historic turning point provides an opportunity to reconsider the process by which we arrive at our national security goals.

Some continue to believe that our safety lies in centralized power, in technical solutions, in expert control. No doubt all of these to some degree are necessary. But this view has monopolized the discussion for too long. It is time to broaden the conversation.

As a realist, I have to agree with Paul Brest that "[p]articipatory democracy has had few modern successes and many failures."\(^\text{211}\) But I also agree when he says, "the alternative is so bleak" that we must keep trying. This Article urges loosening the tightly centralized structure of control over military policy and creating space for and, indeed, welcoming diverse local voices.

Will decentralized participation be untidy, sometimes foolish, not always to my liking?\(^\text{212}\) Yes. But I believe it is worth the risk. I do not claim that local action will be a panacea for our problems. Mine is the more modest hope that it might help.


\(^{211}\) Brest, supra note 161, at 1631.

\(^{212}\) Communities may lobby for nuclear weapons facilities as well as to declare themselves nuclear free zones, or seek to attract military facilities as well as to oppose them. For a fascinating study of the symbiotic relationship between a nuclear weapons production plant and the town around it, see Paul R. Loeb, Nuclear Culture (1986).