

Constitutional Implications of the Cost of War

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Institutional practices evolve to fill gaps in all constitutional blueprints. One of the underappreciated features of the initial constitutional settlement of war powers was the accountability of the executive through the process of budgetary authorization and the corresponding need for Congress to answer to the citizenry for the tax implications of military expenditures. This political accountability is more complex than often described, consisting not merely of the division of the Declare War and Commander-in-Chief Clauses of Article I and Article II, but also of the temporal limitation of the budgetary power for the army and a variety of practical and political obstacles to prevent the president from going it alone in warfare. The thesis of this Essay is that critical features of the ensuing constitutional equilibrium, which largely controlled the war power even in the absence of formally declared hostilities, have come undone as a result of the declining social and economic costs of modern forms of warfare, the development of the permanent and socially insular standing army, and the rise of its associated military-industrial complex as an independent institutional actor. The combination of an enormous, permanent military budget and the elimination of conscription has eroded the effectiveness of the institutional division of authority over war that emerged in the earliest days of the republic. This broader phenomenon of constitutional disequilibrium, in which constitutional doctrines and settlements prove dependent on the existing state of technology and institutional arrangements, in turn highlights the difficulty of managing today's warfare in a fashion that avoids executive unilateralism.

INTRODUCTION

An idealized rendition of the constitutional powers regarding war would indicate an elaborate balance of authority among the coordinate branches of government. The power to “declare war”—as distinct from the power to “make war”—is entrusted to Congress, while the conduct of the war itself falls within the

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president's authority as commander in chief.¹ War presumably requires positive fiscal appropriations, which are textually limited to a duration of two years for the army²—another requirement of congressional reengagement with any serious military conflict. The war powers exist against the backdrop of the shared authority between the president and the Senate over foreign relations in the realization of treaties and the appointment of ambassadors.³

Further, when issues in foreign relations lead to war, the constitutional framework presupposes additional engagement between the branches. The power to conscript soldiers, though not directly engaged by the text of the Constitution, requires affirmative legislative action subject to presentment to the president. To that we may add the political consequences of the shared burdens of taxation and sacrifice in warfare, something that has been recognized as the defining feature of democratic societies at war since the time of Thucydides.⁴

Apart from the scripted forms of institutional responsibility, the lived experience of governance under a constitution impresses itself on the original design of our Constitution. Much of the actual functioning of government is the product of bargaining and accommodation among the various institutional actors.⁵ Whether we address the scope of judicial review, the rise of the administrative state, or the use of the filibuster, the text of the Constitution gives only the most rudimentary outline of how these practices would evolve over centuries of application. We start from the premise that the war powers are no exception to the rule of structural evolution. Extensive scholarship has mined the constitutional debates over each of the clauses addressing war and foreign relations, and the debates over the War Powers Resolution⁶ and the scope of modern presidential

¹ Compare US Const Art I, § 8, cl 11, with US Const Art II, § 2, cl 1.

² See US Const Art I, § 8, cl 12.

³ See David M. Golove and Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 NYU L Rev 932, 989–1015 (2010).

⁴ See Thucydides, *History of the Peloponnesian War* 143–51 (Penguin 1972) (Rex Warner, trans) (giving an account of Pericles's funeral oration, which extolled the virtues of democracy and cautioned the Athenians that each citizen must undergo hardships in winning the war).

⁵ See Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 Colum L Rev 1595, 1601 (2014) (arguing that “intermural negotiation is a pervasive and enduring feature of the constitutional landscape”).

⁶ Pub L No 93-148, 87 Stat 555 (1973), codified as amended at 50 USC § 1541 et seq.

authority have forced constitutional scholars to revisit these issues time and again.⁷

Our attention here is not so much on the particular practical arrangements that emerge over time but rather on how changed circumstances alter heretofore-stable institutional settlements under the constitutional framework. A simple example of the fiscal cost of overseas military engagement makes this introductory point.

The Spanish-American War is estimated to have cost about 1.1 percent of the United States' gross domestic product (GDP) in its peak year of 1899, out of a total annual defense budget of 1.5 percent of GDP.⁸ Even a secondary foreign engagement that did not necessitate a draft of civilians as soldiers required a substantial proportion of the GDP and, more significantly, consumed almost the entirety of the military appropriation.⁹ By contrast, the Persian Gulf War is estimated to have had an incremental cost of 0.3 percent of GDP, out of a total defense budget in 1991 of 4.6 percent of GDP.¹⁰ In other words, by 1991, the marginal cost of engaging in limited foreign combat to overthrow an occupying power had fallen to an additional 7 percent of baseline defense spending, from an additional 275 percent of baseline defense spending in 1899. By the time of the 2011 NATO campaign against Libya, the marginal cost of overthrowing a foreign government had fallen to \$1.1 billion¹¹ from a baseline defense budget of \$768 billion,¹² constituting an incremental increase of less than 0.2 percent of defense spending.

To push this point, the invasion of Grenada in 1983 cost \$134.4 million¹³—about the same amount as was proposed that year for new shortwave-broadcasting facilities for Voice of America in Sri Lanka and Botswana¹⁴—and in turn about one-third the

⁷ See William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 Cornell L Rev 695, 696–98 (1997).

⁸ Stephen Daggett, *Costs of Major U.S. Wars* *1 (Congressional Research Service, June 29, 2010), archived at <http://perma.cc/2LFR-MBSZ>.

⁹ *Id.*

¹⁰ *Id.* at *2.

¹¹ Kevin Baron, *For the U.S., War against Qaddafi Cost Relatively Little: \$1.1 Billion* (The Atlantic, Oct 21, 2011), archived at <http://perma.cc/YLK7-E4LJ>.

¹² See Rosa Brooks, *Welfare State* (Foreign Policy, July 19, 2012), archived at <http://perma.cc/E5ZG-VRCF>.

¹³ *The Military: Auditing an Invasion*, Time 49 (July 23, 1984).

¹⁴ See John E. Ward, Ithiel De Sola Pool, and Richard J. Solomon, *A Study of Future Directions for the Voice of America in the Changing World of International Broad-*

amount that was actually spent that year on improvements to Amtrak service on the Northeast Corridor.¹⁵ The toppling of the Grenadian regime cost about the same in constant dollars as was invested in 2013 in a Michigan automobile-battery-production facility.¹⁶

It would be foolhardy to indulge the belief that the falling marginal cost of overseas military activity would be without institutional and constitutional repercussions. But we want to use the concept of the falling marginal cost more expansively than simply noting the fiscal reality that much modern warfare requires little in the way of additional appropriations. Also significant is the relative isolation of the social costs of war as nonconscript armies localize the casualty side of combat to discrete communities, oftentimes far from the front lines of political engagement. In turn, the diminished fiscal strain and the lowered political costs allow war to be subsumed within customary partisan battles that do not compel the institutional give-and-take envisioned in the original constitutional design.

The main thesis presented here is that changes in the institutional forms of American political life, combined with technological developments and the altered nature of warfare, have placed stress on the original constitutional arrangement of the separation of powers regarding warfare. Among the developments examined are the rise of the standing American military as an independent institutional actor, the declining social and economic costs of warfare, and the eclipse of state-to-state relations as the drivers of international conflict. The focus here is not on efficient bargaining between the branches or the proper interpretation of the Declare War Clause itself but rather on the erosion of the background assumptions that underpin the suite of constitutional arrangements concerning warfare. Constitutional doctrines that are facially independent from the current state of technology and institutional arrangements prove vulnerable to unforeseen exogenous influences. In this Essay, we sketch out the implications of this constitutional disequilibrium for the evolved institutional settlement over the conduct of war.

casting *appendix 12 (MIT Research Program on Communications Policy, Apr 25, 1983), archived at <http://perma.cc/845W-95KP>.

¹⁵ *Annual Report 1983: Amtrak Is America's Railroad* *23 (National Railroad Passenger Corporation), archived at <http://perma.cc/PLE4-K4FK>.

¹⁶ Jim Harger, *Holland's LG Chem Plant Built 2 Years Ago Produces First Lithium Ion Batteries* (MLive, Aug 2, 2013), archived at <http://perma.cc/2NRM-M4Q6>.

I. DISEQUILIBRIUM

By their nature, constitutions leave gaps. Between the uncertainty of commitments to equality, liberty, or process and the incompletely realized instrumentalities of government, much work remains. With the advent of judicial review in the United States, some portion of the gap filling occurred through case elaboration—but only part of it. With respect to the mechanisms of actual governmental functioning, the normal processes involved institutional adaptation with only rare judicial intervention. For example, uncertainty over the ability of the federal government to expand the territorial union created a near constitutional impasse in President Thomas Jefferson's administration as it engaged the prospect of the Louisiana Purchase.¹⁷ Once resolved as a matter of practical politics, however, the initial purchase became unquestioned authority for the annexation of further territories, the purchase of Alaska, and the conquest of overseas lands in the Spanish-American War.¹⁸ Even when courts did enter the field in those later disputes, their review consisted primarily of citing the authority of the Louisiana Purchase as presumptive constitutional authority.

We seek to draw attention less to the processes of constitutional settlement than to the tectonics beneath those processes that produce disequilibrium. We suggest three sources of such disequilibrium—not so much to claim their exclusivity but rather to focus on how the original constitutional understanding of the powers over war and peace may have been altered over time. The sources of disequilibrium that concern us are technological change, institutional realignments, and societal relations.

A. Technological Change

An implicit assumption in constitutional law is that both formal constitutional strictures and less formal constitutional

¹⁷ This abbreviated account draws from Samuel Issacharoff, *Meriwether Lewis, the Air Force, and the Surge: The Problem of Constitutional Settlement*, 12 *Lewis & Clark L. Rev.* 649, 653–59 (2008).

¹⁸ This was the key recognition from the *Insular Cases*, a series of cases decided upon the conquest of new territories during the Spanish-American War. As the Court noted in one of the *Insular Cases*, the federal government's ability to acquire territory and structure the form of its governance was a matter of applied convention rather than of constitutional text. *Downes v Bidwell*, 182 US 244, 250 (1901) (“[T]he power to establish territorial governments has been too long exercised by Congress and acquiesced in by this court to be deemed an unsettled question.”).

settlements are grounded in an enduring constitutional balance that does not depend on a particular technological status quo.¹⁹ The same provisions that governed the early nation's army and navy govern an air force and a space program, and the same balance that determined the propriety of a steamboat monopoly²⁰ governs the ability of the federal government to police discrimination along the channels of interstate commerce.²¹ While mass political shifts can prompt a reconsideration of settled law,²² and while doctrines may have to grow in complexity to keep pace with the institutions they govern,²³ constitutional doctrines and settlements are not thought to be at the whim of the technological moment.²⁴

A brief example from the field of criminal procedure makes clear how problematic this assumption of stability may be. The third-party doctrine is a bedrock principle of Fourth Amendment law holding that a person has no legitimate expectation of privacy in information that is given to a third party or exposed to the public.²⁵ The paradigmatic examples of the former are bank records²⁶ and dialed phone numbers²⁷ and of the latter are one's movements in public.²⁸ Each case, and the broader doctrinal principle derived therefrom, seems to be straightforward and technologically neutral: once you give up your privacy in a given piece of information by exposing it to another person or to the public at large, you can no longer object when the government uses it, no matter how it was obtained.

¹⁹ See generally, for example, Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 Harv L Rev 476 (2011) (demonstrating how law has evolved in order to attempt to maintain the Fourth Amendment balance as technology has changed).

²⁰ See *Gibbons v Ogden*, 22 US (9 Wheat) 1, 89–90 (1824).

²¹ See *Heart of Atlanta Motel, Inc v United States*, 379 US 241, 252–55 (1964).

²² See, for example, *Brown v Board of Education of Topeka*, 347 US 483, 492 (1954) (“In approaching this problem, we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written.”).

²³ See, for example, *City of Arlington, Texas v Federal Communications Commission*, 133 S Ct 1863, 1866 (2013) (considering the degree of deference that ought to be accorded to agencies making determinations about the scope of their statutory jurisdiction).

²⁴ See, for example, *Kyllo v United States*, 533 US 27, 34 (2001) (“To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment.”).

²⁵ For an overview of this doctrine, see generally Lucas Issacharoff and Kyle Wirshba, *Restoring Reason to the Third Party Doctrine*, 100 Minn L Rev 987 (2016).

²⁶ See *United States v Miller*, 425 US 435, 442 (1976).

²⁷ See *Smith v Maryland*, 442 US 735, 742 (1979).

²⁸ See *United States v Knotts*, 460 US 276, 281 (1983).

While courts and scholars have strived for technological neutrality,²⁹ each of these examples has proved surprisingly dependent on assumed technological limitations. Courts have divided over the seemingly straightforward application of *Smith v Maryland*,³⁰ involving the government's collection of an *individual's* call records, to the NSA's collection and analysis of *everyone's* call records all of the time.³¹ By the time of *United States v Jones*,³² a majority of the justices had indicated that the proliferation of information in the hands of third parties and the expansion of police surveillance capabilities cast significant doubt on the continued viability of the third-party doctrine.³³

Previously, and independent of constitutional doctrine, government surveillance was self-limiting because of the expense and difficulty of following a suspect in public or eavesdropping on conversations. Technology changed the feasibility of all kinds of government oversight of citizens.³⁴ The declining marginal cost of executive action has significantly destabilized the third-party doctrine. While data mining and GPS tracking are particular technological developments with discernable impacts, the phenomenon of technological change undermining a settled allocation of powers between the government and the individual, or between the branches of government, is a broader one. The third-party doctrine is hardly the only area of criminal procedure to reveal a doctrinal dependence on a certain state of technology: The Court has recently refused to apply a doctrine allowing the warrantless search of an arrestee's effects to the search of the arrestee's cell phone, finding that the comparison of cell phones to wallets or purses "is like saying a ride on horseback is materially indistinguishable from a flight to the moon. . . . Modern

²⁹ See Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 Mich L Rev 561, 577–81 (2009).

³⁰ 442 US 735 (1979).

³¹ Compare *Klayman v Obama*, 957 F Supp 2d 1, 33 (DDC 2013), vacd and remd, 800 F3d 559 (DC Cir 2015), with *American Civil Liberties Union v Clapper*, 959 F Supp 2d 724, 752 (SDNY 2013), vacd and remd in part, 785 F3d 787 (2d Cir 2015). See also Note, *Data Mining, Dog Sniffs, and the Fourth Amendment*, 128 Harv L Rev 691, 697–98 (2014) (discussing *Smith* and the modern scope of the third-party doctrine).

³² 132 S Ct 945 (2012).

³³ *Id.* at 955, 957 (Sotomayor concurring); *id.* at 961–63 (Alito concurring in the judgment).

³⁴ See, for example, *Klayman*, 957 F Supp 2d at 33 (“[T]he almost-Orwellian technology that enables the Government to store and analyze the phone metadata of every telephone user in the United States is unlike anything that could have been conceived in 1979 [when *Smith* was decided].”).

cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse.”³⁵ And criminal procedure is hardly the only area of constitutional law to be unsettled by technological shifts;³⁶ as we argue, technological change has, in a similar fashion, critically undermined the original constitutional settlement regarding the war powers.

B. Institutional Realignments

The changing nature of institutions that are not explicitly recognized in the Constitution has had well-recognized destabilizing effects on constitutional settlements. Perhaps the most significant, and almost certainly the most examined, institutional shift in American constitutional life has been the rise of political parties—especially their consolidation into ideologically polarized and cohesive entities. Professors Daryl Levinson and Richard Pildes have discussed in detail how the consolidation of political parties has undermined the assumptions underpinning the core constitutional framework of checks and balances.³⁷ The notion of checks and balances, as laid out in Federalist 51, requires that “[a]mbition must be made to counteract ambition,” thus “giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others.”³⁸ Yet even if ambition among the political class has not notably subsided

³⁵ *Riley v California*, 134 S Ct 2473, 2488–89 (2014).

³⁶ The Court still struggles to apply its personal jurisdiction jurisprudence to commerce and speech conducted via the Internet. See, for example, *J. McIntyre Machinery, Ltd v Nicastrò*, 131 S Ct 2780, 2793 (2011) (Breyer concurring in the judgment) (“The plurality seems to state strict rules that limit jurisdiction. . . . But what do those standards mean when a company targets the world by selling products from its Web site?”). See also *Blumenthal v Drudge*, 992 F Supp 44, 49 (DDC 1998) (noting the “unprecedented challenges relating to . . . reputational rights of individuals” posed by the Internet).

³⁷ Daryl J. Levinson and Richard H. Pildes, *Separation of Parties, Not Powers*, 119 Harv L Rev 2312, 2315 (2006) (noting the shifts in political dynamics that depend on whether the government is divided or unified by political parties and explaining how these call into question the assumption of separation of powers). For a challenge to this basic thesis, see Richard A. Epstein, *Why Parties and Powers Both Matter: A Separationist Response to Levinson and Pildes*, 119 Harv L Rev F 210, 211 (2006) (“[T]he conventional tools of constitutional interpretation lead, without any detour into political realism, to a conclusion that Professors Levinson and Pildes defend by much unnecessary labor: the Congress sets the rules, which the President and only the President implements.”).

³⁸ Federalist 51 (Madison), in *The Federalist* 347, 349 (Wesleyan 1961) (Jacob E. Cooke, ed).

since 1787,³⁹ the means of its furtherance have been dramatically altered by institutional shifts. The ability of the Speaker of the House or of the president to pursue an agenda now depends less on the relative strength of his or her respective branch of government and more on the presence of partisan compatriots in the other political branch—hence Senator Mitch McConnell’s profoundly realist statement in 2010 that “[t]he single most important thing [the Republican Senate] want[s] to achieve is for President Obama to be a one-term president.”⁴⁰ Other scholars have shown how partisan politics unsettles the similar assumptions of competition underpinning federalism,⁴¹ as well as the supposed dynamics of interbranch settlements reflected in Justice Robert Jackson’s *Youngstown* framework.⁴²

As Levinson and Pildes note, courts have proved slow to acknowledge this shift and have overlooked Jackson’s cautionary note in his concurrence in *Youngstown Sheet & Tube Co v Sawyer*⁴³ regarding the political complements to presidential authority.⁴⁴ But while partisan politics has yet to make much of a mark on the United States Reports, it has destabilized the practical settlement of institutional practices from the filibuster⁴⁵ to

³⁹ See Jessica Bulman-Pozen, *Partisan Federalism*, 127 Harv L Rev 1077, 1090 (2014) (“The state and federal governments may not themselves be self-interested political actors with empire-building ambitions, pitted against each other in a competition for power . . . but this is a decent description of the partisan officials who populate them.”) (quotation marks omitted).

⁴⁰ Glenn Kessler, *When Did McConnell Say He Wanted to Make Obama a ‘One-Term President’?* (Wash Post, Sept 25, 2012), archived at <http://perma.cc/X6XK-DY2N>.

⁴¹ See, for example, Bulman-Pozen, 127 Harv L Rev at 1080 (cited in note 39) (“States oppose federal policy because they are governed by individuals who affiliate with a different political party than do those in charge at the national level, not because they are states as such.”).

⁴² *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579, 635–38 (1952) (Jackson concurring). See also Curtis A. Bradley and Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 Harv L Rev 411, 414–15 (2012) (suggesting a need to closely consider the reality of how the political branches interact, because “Congress as a body does not systematically seek to protect its prerogatives against presidential encroachment”).

⁴³ 343 US 579 (1952).

⁴⁴ Levinson and Pildes, 119 Harv L Rev at 2314–15 (cited in note 37), quoting *Youngstown*, 343 US at 654 (Jackson concurring):

[The] rise of the party system has made a significant extraconstitutional supplement to real executive power. No appraisal of [the president’s] necessities is realistic which overlooks that he heads a political system as well as a legal system. Party loyalties and interests, sometimes more binding than law, extend his effective control into branches of government other than his own and he often may win, as a political leader, what he cannot command under the Constitution.

⁴⁵ For a historical account of the use of the filibuster, from its absence in early Congresses to an explosion in use during the late twentieth century to Democrats’ resort to

the volatile swings in the frequency of oversight hearings, depending on whether control of the House, Senate, and presidency is divided or unified.⁴⁶

There is little need to remake the wheel regarding the effects of partisan politics on the checks and balances framework. Our goal, rather, is to situate the phenomenon as merely one area in which institutional change has destabilized constitutional arrangements. Others have pointed out how the rise of labor unions as a new institutional mediator of employer-employee relations in the late nineteenth and early to mid-twentieth centuries necessitated doctrinal accommodations in the areas of free speech⁴⁷ and due process.⁴⁸ Moreover, we aim to situate institutional change itself as merely one of a number of destabilizing factors that can operate to disrupt constitutional settlements.

C. Societal Change

Closely related to technological and institutional changes are shifts that take place at a societal level. Here we speak not of shifting political winds, such as attitudes toward interracial marriage (though these were undoubtedly influenced by societal shifts including the Great Migration and the integration of the military in the aftermath of World War II), but rather of shifts in the way that society itself is organized. Such a broad category can encom-

the “nuclear option” in 2013, see Tonja Jacobi and Jeff VanDam, *The Filibuster and Reconciliation: The Future of Majoritarian Lawmaking in the U.S. Senate*, 47 UC Davis L Rev 261, 273–84 (2013). See also Barbara Sinclair, *The New World of U.S. Senators*, in Lawrence C. Dodd and Bruce I. Oppenheimer, eds, *Congress Reconsidered* 1, 8 (CQ Press 10th ed 2013) (summarizing, quantitatively, the increase in filibusters from the mid-twentieth to twenty-first centuries).

⁴⁶ See Samuel Issacharoff, *Political Safeguards in Democracies at War*, 29 Oxford J Legal Stud 189, 207 (2009) (“[I]t is a matter of profound dishonour to our constitutional system that, prior to the 2006 elections, not once did Congress, under the control of the Republican Party, hold meaningful hearings over the conduct of the Iraq War by a Republican President.”).

⁴⁷ See Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 Mich L Rev 169, 183–84 (2015) (explaining Supreme Court jurisprudence holding that “[i]t was permissible to charge objectors for union expenditures that were germane to collective bargaining and contract administration” and that “whatever minor infringement agency fees entailed for dissenters’ free speech interests was justified by the state’s legitimate interest in preventing free riders from undermining the union’s ability to represent the whole bargaining unit”).

⁴⁸ See Harry H. Wellington, *The Constitution, the Labor Union, and “Governmental Action”*, 70 Yale L J 345, 345 (1961) (arguing that, while the Due Process Clause of the Fifth Amendment applies against only the federal government, plaintiffs—including those discriminated against by labor unions—can succeed in Fifth Amendment suits if they show a “sufficient nexus” between the private organization and the government).

pass everything from urbanization to the transition from an agricultural to a manufacturing to a services economy, but here we focus briefly on the increasingly national scope of economic activity and economic actors beginning in the mid-nineteenth century. The basic point is that societal change can prove to be a significant destabilizing factor in institutional settlements.

The increase in the size and scope of interstate economic activity in the latter half of the nineteenth century is in many ways a story about the railroads that Cornelius Vanderbilt and others built into massive and powerful corporate entities. Dissatisfaction with the untrammelled power of both the railroads and the marketplace in which they were forced to compete led to pressure for regulation from producers and consumers of rail transit.⁴⁹ This pressure led, in the United States and elsewhere, to national regulatory action.⁵⁰ Two sets of constraints—the constitutional disability of the states to regulate interstate rail networks⁵¹ and the institutional inability of a legislature to engage in the frequent, iterative regulatory mechanism of rate setting—forced on the political branches a radical innovation in the form of the Interstate Commerce Commission (ICC).⁵²

Prior to the creation of the ICC, the executive branch's role in economic regulation was remarkably limited: economic regulation was thought to be largely in the hands of the states, with occasional congressional and judicial interventions when commerce crossed state lines. One indication of this limited scope is the size of the federal civilian workforce: in the early 1870s, the federal government employed only 51,020 civilians, of whom more than 70 percent were postal workers.⁵³ Yet the ICC marked not merely a shift in scope or policy but rather a constitutional innovation: “[n]ever before had Congress established an independent regulatory commission to exercise the commerce power

⁴⁹ See Paul Stephen Dempsey, *The Rise and Fall of the Interstate Commerce Commission: The Tortuous Path from Regulation to Deregulation of America's Infrastructure*, 95 Marq L Rev 1151, 1153–58 (2012) (describing how the Panic of 1873 led to “[a] widespread interest in regulation”).

⁵⁰ See *id.* at 1160.

⁵¹ See *Wabash, St. Louis and Pacific Railway Co v Illinois*, 118 US 557, 572–73 (1886) (noting that the Commerce Clause was adopted to prevent states from devising their own rules and prices for transportation).

⁵² See Francis Fukuyama, *Political Order and Political Decay: From the Industrial Revolution to the Globalization of Democracy* 166–73 (Farrar, Straus and Giroux 2014) (chronicling the necessity for and development of national railroad regulation).

⁵³ Daniel Yergin and Joseph Stanislaw, *The Commanding Heights: The Battle for the World Economy* 30 (Simon & Schuster 2002).

conferred under Article I, Section 8 of the Constitution.”⁵⁴ Thus, the changing national economy forced a new understanding of constitutional doctrine, wherein Congress could delegate significant portions of its regulatory power to the executive. The implications of this shift were vast, paving the path for the more long-lasting regulatory reforms of the Progressive Era and the New Deal⁵⁵ and prompting accompanying shifts in legal doctrine to enable national regulation of a national economy. The Supreme Court was forced (sometimes reluctantly) to pave the way for legislative and regulatory encroachments on labor contracts,⁵⁶ local economic production,⁵⁷ and even federal courts’ jurisdiction.⁵⁸ A century and a quarter later, Chief Justice John Roberts noted with dismay the scope and power of the administrative state, describing it as “wield[ing] vast power and touch[ing] almost every aspect of daily life” as it stands astride the legislative, executive, and judicial branches.⁵⁹

The debates in *Citizens United v Federal Election Commission*⁶⁰ further expose the vulnerability of institutional settlements to destabilization in the face of significant societal transformations. In that case, Justices Antonin Scalia and John Paul Stevens, concurring and dissenting respectively, vigorously contested the original understanding of how the First Amendment applied to corporate speech.⁶¹ Yet they agreed that the shift from a small number of legislatively chartered corporations to general-purpose corporations of enormous size and number affects the implications of that understanding, whatever it was.⁶² Stevens saw this as the rise of actors with tremendous power to shape

⁵⁴ Dempsey, 95 Marq L Rev at 1161 (cited in note 49).

⁵⁵ See id at 1161–66.

⁵⁶ See, for example, *West Coast Hotel Co v Parrish*, 300 US 379, 399–400 (1937) (upholding the constitutionality of a state minimum wage law).

⁵⁷ See, for example, *Wickard v Filburn*, 317 US 111, 128–29 (1942) (upholding federal regulation of wheat production as applied to an individual farmer’s wheat grown for personal use, on the ground that such farming would affect interstate commerce in the aggregate).

⁵⁸ See, for example, *Lockerty v Phillips*, 319 US 182, 187 (1943) (holding that the congressional power to create lower courts includes the power to determine the courts’ jurisdiction).

⁵⁹ *City of Arlington*, 133 S Ct at 1877–78 (Roberts dissenting), quoting *Free Enterprise Fund v Public Company Accounting Oversight Board*, 561 US 477, 499 (2010).

⁶⁰ 558 US 310 (2010).

⁶¹ Id at 385–93 (Scalia concurring); id at 425–32 (Stevens concurring in part and dissenting in part).

⁶² Id at 385–89 (Scalia concurring); id at 426–27, 469–70 (Stevens concurring in part and dissenting in part).

lives and distort discourse,⁶³ while Scalia argued that modern corporations, as opposed to their forebears' legislatively granted monopolies, are more benign participants in the marketplace of ideas.⁶⁴ While the doomsayers' predictions of a corporate takeover of electioneering have not come to pass,⁶⁵ the potential stakes of corporate political speech have risen dramatically. As the next Part argues, such changes in societal conditions—along with technological changes and institutional shifts—have caused equally influential shifts in the allocation of warmaking authority, yet with considerably less scholarly and judicial engagement.

II. THE COST OF WAR

Our thesis is that each of these sources of disequilibrium has taken hold in the modern era. To be sure, beginning with the Quasi War with France, the formal declaration of war has been secondary in American military endeavors.⁶⁶ But we argue that the current practice of conducting military operations of indefinite duration against nonstate enemies of indistinct territorial scope has altered the constitutional balance, even as compared with the Quasi War period. Applying the same sources of constitutional disequilibrium, we suggest that changes in the technology of war, the institutional presence of a formidable permanent military structure, and the increased social isolation of the armed forces have all contributed to a reordering of the structural balance that emerges in the war context.

A. The Altered Technology of War

Perhaps foremost in impact, the way that wars are fought has changed dramatically over time. In the quarter century since the United States first deployed a ground mobilization

⁶³ Id at 469 (Stevens concurring in part and dissenting in part) (“[T]here are substantial reasons why a legislature might conclude that unregulated general treasury expenditures will give corporations ‘unfair’ influence’ in the electoral process and distort public debate in ways that undermine rather than advance the interests of listeners.”) (citation omitted).

⁶⁴ *Citizens United*, 558 US at 387–89 (Scalia concurring).

⁶⁵ See Samuel Issacharoff and Jeremy Peterman, *Special Interests after Citizens United: Access, Replacement, and Interest Group Response to Legal Change*, 9 Ann Rev L & Soc Sci 185, 199–201 (2013).

⁶⁶ See J. Gregory Sidak, *To Declare War*, 41 Duke L J 27, 56 (1991) (“The first notable limited war was the Quasi-War with France in 1798-1800 in which President Adams did not seek and Congress did not issue a formal declaration of war in response to the French seizure of American ships.”).

against Saddam Hussein, combat has consisted primarily of repelling nonstate actors whose fighting is largely removed from the norms of state-to-state warfare.⁶⁷ The tools of warfare have moved toward sophisticated weaponry through the command of airspace, the use of drones for highly targeted attacks,⁶⁸ and the deployment of specialized forces through helicopter and mobile ground units.⁶⁹ In such a battlefield, conscripts are more of a liability than an asset against enemies who seek to capture ground troops not as prisoners of war but as hostages for ransom or for highly propagandized executions.

This is all well-trodden territory, but our focus is on the absence of the compelled political exchanges that necessarily accompany the mobilization for war when the state must conscript from across the population. Although conscription in the United States dates to the state militias of the colonial period,⁷⁰ federal conscription is a newer phenomenon. The first attempt at a federal draft came with the War of 1812, though the war ended before Congress was able to successfully pass a conscription bill.⁷¹ A small draft to reinforce the volunteer-heavy Union army during the Civil War provoked anticonscription riots in New York and elsewhere.⁷² The long-standing draft that continued after World War II came to a halt after fueling the Vietnam protests⁷³

⁶⁷ See Anthony H. Cordesman, *The Real Revolution in Military Affairs* (Center for Strategic and International Studies, Aug 5, 2014), archived at <http://perma.cc/2ECW-7QKG> (noting the rise of “conflicts between states and nonstate actors” that “are not high-technology duels between conventional forces, but struggles that pit governments and their allies against opponents that fight along religious and cultural lines and use their own internal divisions and populations as weapons”); M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-state Actors*, 98 J Crim L & Crimin 711, 714–15 (2008) (explaining that nonstate actors have fewer resources than governments, which prevents those actors from fighting with conventional methods and materials).

⁶⁸ See Greg Miller, *Under Obama, an Emerging Global Apparatus for Drone Killing* (Wash Post, Dec 27, 2011), archived at <http://perma.cc/DY5R-6MFT> (noting the development of secret bases, domestic and foreign, from which drone strikes are launched and controlled).

⁶⁹ See, for example, Thom Shanker, *Afghan Commandos Step Up Their Combat Role* (NY Times, May 14, 2013), archived at <http://perma.cc/26WP-VRKN> (discussing the significant role of US Special Operations forces in Afghanistan).

⁷⁰ See Matthew Ivey, *The Broken Promises of an All-Volunteer Military*, 86 Temple L Rev 525, 531 (2014) (“Prior to the Revolutionary War, each colony required all able-bodied males from sixteen to sixty to serve in the militia.”).

⁷¹ See Michael J. Malbin, *Conscription, the Constitution, and the Framers: An Historical Analysis*, 40 Fordham L Rev 805, 820–21 (1972).

⁷² See Timothy J. Perri, *The Evolution of Military Conscription in the United States*, 17 Indep Rev 429, 430 (2013).

⁷³ See Ivey, 86 Temple L Rev at 536–39 (cited in note 70).

and driving President Lyndon B. Johnson out of the 1968 presidential race.⁷⁴

In each instance, the draft raised the political stakes of war and forced the executive to cultivate a political base and make a political case for engaging in combat. These dynamics were independent of the formal constitutional division of authority between the war-declaration power of Congress and the commander-in-chief authority of the president. Conscription is an important element of the cost spreading of war; it ensures that broad political buy-in is required for military adventures and tempers the willingness of democracies to engage in war. As formulated by Immanuel Kant: “When the consent of the citizens of a state is required in order to decide whether there shall be war or not . . . nothing is more natural than that they will be very hesitant to begin such a bad game.”⁷⁵ In noting the disproportionate success of democracies in warfare, Professor Dan Reiter and Dean Allan Stam credit both the caution before entering war and the legitimacy of a democratic government’s undertaking as significant inhibitors of ill-advised foreign ventures.⁷⁶

Conscription fits poorly with a more capital-intensive military, which requires highly skilled armed forces much more than it requires high numbers of troops. One commentator has noted that

shifting to conscription would significantly weaken the military. New “accessions,” as the military calls them, would be less bright, less well educated, and less positively motivated. They would be less likely to stay in uniform, resulting in a less experienced force. The armed forces would be less effective in combat, thereby costing America more lives while achieving fewer foreign policy objectives.⁷⁷

The Department of Defense recently made a statement along similar lines: “Trimming force structure that is excess to strategic requirements will free up funds to ensure a ready, modern-

⁷⁴ See Burt Neuborne, *The Role of Courts in Time of War*, 29 NYU Rev L & Soc Change 555, 570 (2005).

⁷⁵ Immanuel Kant, *Toward Perpetual Peace: A Philosophical Project*, in Mary J. Gregor, ed and trans, *Practical Philosophy* 311, 323 (Cambridge 1996).

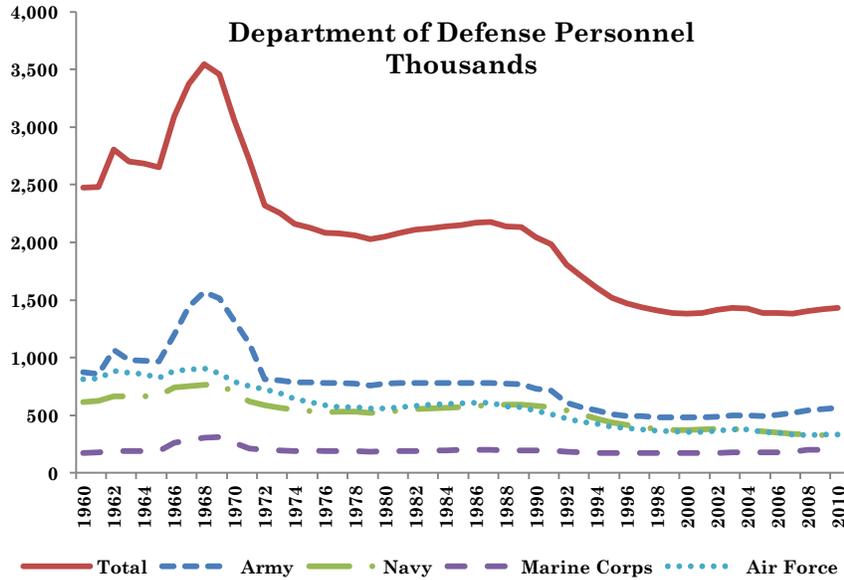
⁷⁶ See Dan Reiter and Allan C. Stam, *Democracies at War* 3–4 (Princeton 2002). For a fuller discussion of the role of democracy in war, see generally Issacharoff, 29 Oxford J Legal Stud 189 (cited in note 46).

⁷⁷ Doug Bandow, *A New Military Draft Would Revive a Very Bad Old Idea* (Forbes, July 16, 2012), archived at <http://perma.cc/Q8UD-PJBA>.

ized, and well-equipped military. The end strength cuts . . . are driven by the defense strategy, which deemphasizes large, protracted, and manpower-intensive stability operations.”⁷⁸

The results are readily observable, even after over a decade of war in Afghanistan and Iraq:

FIGURE 1. DEPARTMENT OF DEFENSE PERSONNEL⁷⁹



Data source: U.S. Census Bureau

cfr.org/cgs

Needless to say, conscription is not the only social cost when a democracy enters into war. But it serves as a shorthand here for the many institutional pathways by which political exchange is required for military undertakings, quite separate from the formal constitutional commands that Congress declare war and that the president conduct it. Consider, for example, the ability to bypass civilian institutions altogether through the expansive use of military contractors to conduct the work that would for-

⁷⁸ *Defense Budget Priorities and Choices Fiscal Year 2014* *17 (Department of Defense, Apr 2013), archived at <http://perma.cc/93L8-Q9XK>.

⁷⁹ See Dinah Walker, *Trends in U.S. Military Spending* (Council on Foreign Relations, July 15, 2014), archived at <http://perma.cc/BQ9D-2L9E>. We thank the Council on Foreign Relations for providing the data used to generate this figure.

merly have been undertaken by the military itself.⁸⁰ Or consider in this light the ability of the executive to evade much congressional oversight through the use of the intelligence services, primarily the CIA, to undertake increasingly military-style operations.⁸¹ These examples highlight how the specific institutional form of warfare is itself a response to the internal political dynamics triggered by the social costs of military engagement.

B. The Military-Industrial Complex

An old quip has it that the ideal military weapon is one that has components manufactured in all 435 congressional districts. In his farewell address in 1961, President Dwight Eisenhower, the last president drawn from the ranks of the military, cautioned that “we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex.”⁸² It would be simply extraordinary if the sheer size and formidable economic weight of the military had no influence on the balance of constitutional authority over warfare. Yet the role of the military in altering the constitutional balance remains underappreciated. The growth of an independent military-industrial complex, even larger and more entrenched than it was fifty years ago, is an institutional development with constitutional implications, particularly on the budgetary side.

Most legal scholarship about the war powers has paid insufficient attention to the role of Article I, § 8 in imposing a two-year limitation on the military budget cycle. Notably, little at-

⁸⁰ See Jon D. Michaels, *Privatization's Pretensions*, 77 U Chi L Rev 717, 754 (2010) (describing the high percentage of military contractors in Iraq and Afghanistan). See also generally Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 Wash U L Q 1001 (2004) (describing the offloading of political and psychological costs by using contractors instead of servicemen and servicewomen).

⁸¹ See Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J Natl Sec L & Pol 539, 611–13 (2012) (noting that the executive must notify only the House Permanent and Senate Select Committees on Intelligence about covert action, while, pursuant to the War Powers Resolution, the executive must consult Congress as a whole when armed forces are deployed, and also suggesting that unacknowledged military operations have fallen outside the Resolution's scope); Andru E. Wall, *Demystifying the Title 10-Title 50 Debate: Distinguishing Military Operations, Intelligence Activities & Covert Action*, 3 Harv Natl Sec J 85, 104–08 (2011) (arguing that Congress's “dysfunctional” approach—both in its arrangement of oversight committees and in its failure to enact intelligence authorization—renders congressional oversight of intelligence activities “complex”). Our thanks to Professor Jon Michaels for this point.

⁸² Dwight D. Eisenhower, *Farewell Radio and Television Address to the American People*, 1960–61 Pub Papers 1035, 1038.

tention has been given to the role of this limitation in reinforcing the separation of powers constraints on the ability to wage war.⁸³ Instead, the focus of most legal scholarship has been on the congressional power to declare war⁸⁴ and its seemingly quick erosion: the formal declaration of hostilities has preceded relatively few of the military engagements in American history and none since World War II.⁸⁵ But even a brief examination of the actual war practices of the young republic reveals that the exercise of the allotted powers of Congress and the executive was deeply conditioned by the overlay of the budgetary implications of military force.

Thus, although debates on the funding of the military did not occupy a central role in the Constitutional Convention, they were subsumed in the discussion on the question of a standing army, which itself did not even arise until late in the Convention, on August 18, 1787.⁸⁶ Nonetheless, a standing military was

⁸³ This argument is best made in Note, *Recapturing the War Power*, 119 Harv L Rev 1815, 1821–25 (2006). See also John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11* 154–56 (Chicago 2005) (arguing that the budgetary powers provide a significant—and perhaps sufficient—check on executive unilateralism in making war); Philip Bobbitt, *War Powers: An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*, 92 Mich L Rev 1364, 1390–99 (1994); Edward F. Sherman, *Legal Inadequacies and Doctrinal Restraints in Controlling the Military*, 49 Ind L J 539, 555 (1974).

⁸⁴ See, for example, John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* 7 n 38 (Princeton 1993) (acknowledging, in a single footnote, the relatively greater importance of preauthorization in an era of standing armies); Harold Hongju Koh, *The National Security Constitution: Sharing Power after the Iran-Contra Affair* 133, 191–93 (Yale 1990) (mentioning briefly Congress's budgetary powers and the proposed Byrd-Nunn-Warner-Mitchell revision to the War Powers Resolution that would have added an automatic budgetary cutoff); Henry P. Monaghan, *Presidential War-Making*, 50 BU L Rev 19, 33 (1970) (mentioning only in passing the power to end conflict through budgetary powers). See also generally, for example, Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by "Declare War"*, 93 Cornell L Rev 45 (2007); Robert F. Turner, *The War on Terrorism and the Modern Relevance of the Congressional Power to "Declare War"*, 25 Harv J L & Pub Pol 519 (2002).

⁸⁵ Particularly in the period since the passage of the War Powers Resolution, the combination of the constitutional power to declare war and the statutory limitation on the executive's unilateral authority has prompted great interest in the historic allocation of the warmaking powers. Thus, for example, Judge David J. Barron and Professor Martin S. Lederman's account of the Quasi War period focuses on the rise of executive war powers in light of the "undeclared war" status with France and its implications for the respective allocation of authority among the branches. David J. Barron and Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—a Constitutional History*, 121 Harv L Rev 941, 964–72 (2008). But their account makes no mention of anything related to the military budget, taxation, or other fiscal questions. See *id.*

⁸⁶ See Max Farrand, ed, 2 *The Records of the Federal Convention of 1787* 324–33 (Yale 1911). See also Bernard Donahoe and Marshall Smelser, *The Congressional Power*

understood as an integral part of limiting the reach of the federal government. Alexander Hamilton advocated the need for a permanent military capability to address “national exigencies,”⁸⁷ but opponents feared despotism.⁸⁸ The Convention compromise was that there would be “no Appropriation of Money to that Use . . . for a longer Term than two Years.”⁸⁹ Supporters like Noah Webster argued that the budgetary limitation eliminated the threat of a standing army: to include a provision that prohibited standing armies would be as unnecessary “as to prohibit the establishment of the Mahometan religion.”⁹⁰ Even Hamilton’s *Federalist* 24 conceded that the budgetary restriction was a “real security against the keeping up of troops without evident necessity.”⁹¹

The actual two-year limitation did not engender much serious discussion, except for a commitment that the budgets should change with each new wave of popularly elected representatives entering office every two years.⁹² Some Anti-Federalists, such as the *Federal Farmer*, argued presciently that new representatives would be hard-pressed to defund an already-standing army.⁹³ But Hamilton responded in *Federalist* 26 that the topic of

to Raise Armies: *The Constitutional and Ratifying Conventions, 1787-1788*, 33 *Rev Polit* 202, 203 (1971).

⁸⁷ *Federalist* 23 (Hamilton), in *The Federalist* 146, 147 (cited in note 38) (emphasis omitted).

⁸⁸ See Elbridge Gerry, *Observations on the New Constitution, and on the Federal and State Conventions: By a Columbian Patriot*, in Paul Leicester Ford, ed, *Pamphlets on the Constitution of the United States, Published during Its Discussion by the People 1787-1788* 1, 10–11 (1888) (expressing concerns that a standing army could be called out to suppress a few dissenters and expressing hope that this country would be ruled differently than European ones).

⁸⁹ US Const Art I, § 8, cl 12.

⁹⁰ Noah Webster, *An Examination into the Leading Principles of the Federal Constitution Proposed by the Late Convention Held at Philadelphia: With Answers to the Principal Objections That Have Been Raised against the System; By a Citizen of America*, in Ford, ed, *Pamphlets on the Constitution of the United States* 25, 52 (cited in note 88).

⁹¹ *Federalist* 24 (Hamilton), in *The Federalist* 152, 153 (cited in note 38).

⁹² James Iredell, *Answers to Mr. Mason’s Objections to the New Constitution, Recommended by the Late Convention: By Marcus*, in Ford, ed, *Pamphlets on the Constitution of the United States* 333, 363–66 (cited in note 88). See also Donahoe and Smelser, 33 *Rev Polit* at 203 (cited in note 86).

⁹³ See Richard Henry Lee, *Observation Leading to a Fair Examination of the System of Government, Proposed by the Late Convention; and to Several Essential and Necessary Alterations in It: In a Number of Letters from the Federal Farmer to the Republican*, in Ford, ed, *Pamphlets on the Constitution of the United States* 277, 304 (cited in note 88).

the army would be so contentious that biennial, vigorous debate would be inevitable.⁹⁴

In contrast to a standing army, a navy poses less of a risk of either tyranny or a coup d'état; there is no analogous temporal limitation on naval appropriations in the Constitution. Nevertheless, an analogous debate played out at the Convention between the "navalists" and the "antinavalists." Navalists, largely backed by northeastern merchants defended by John Adams, sought a blue-water navy capable of protecting merchant shipping and projecting American power.⁹⁵ Antinavalists, led by southern planters like Thomas Jefferson, favored a coast guard made up of smaller gunboats intended for the protection of coastal waters.⁹⁶ Indeed, the arguments of the antinavalists directly tied their opposition to a naval force beyond a coast guard to the fear that "[a] peacetime navy could serve as a vehicle for unwanted involvement in European affairs, and its fiscal cost was likely to exceed even the most extravagant estimates."⁹⁷

Budgetary constraints were an ever-present limitation on the major military engagements of the early republic that were understood not to involve any foreign power at all: the persistent battles with Native Americans. Already in 1789, the Indian Wars demanded appropriation of "a sum far exceeding the ability of the United States to advance, consistently with a due regard to other indispensable objects."⁹⁸ A year later, President George Washington cited the possibility of war with the Creek tribe, "necessitating a 5,000-man army costing over \$1,000,000 per annum—enough to scare any congressman."⁹⁹

An examination of Hamilton's advocacy for a larger standing army shows how central the budgetary power was to military engagements and foreign relations, even in the Quasi War period. Hamilton urged the creation of a national peacetime army as early as at the 1783 Continental Congress.¹⁰⁰ This proposal was rebuffed at the Convention and then rejected in the constitutional text, which instead reserved to the states the

⁹⁴ Federalist 26 (Hamilton), in *The Federalist* 164, 168 (cited in note 38).

⁹⁵ See Craig L. Symonds, *Navalists and Antinavalists: The Naval Policy Debate in the United States, 1785–1827* 18–19 (Delaware 1980).

⁹⁶ See *id.* at 12–13.

⁹⁷ *Id.* at 11–12.

⁹⁸ Richard H. Kohn, *Eagle and Sword: The Federalists and the Creation of the Military Establishment in America, 1783–1802* 96 (Free Press 1975).

⁹⁹ *Id.* at 100.

¹⁰⁰ See Stanley Elkins and Eric McKittrick, *The Age of Federalism* 593 (Oxford 1993).

power to maintain and train the militias.¹⁰¹ In the specific context of tensions with France, particularly after the XYZ Affair, the budgetary power brought Congress into direct negotiations with the executive, even in the absence of a formal declaration of war.¹⁰² Congress authorized the first substantial expansion of the military in 1797, but that amounted to only \$800,000 and was funded by a stamp duty.¹⁰³ This changed with the XYZ Affair, which sparked the Quasi War and proved to be a pivotal point in authorizing and funding the army and navy. In May of 1798, Congress passed the Provisional Army Act,¹⁰⁴ supplementing the armed forces by twelve thousand men and authorizing the executive to call an additional ten thousand troops if war was declared, if an actual invasion took place, or if there was “imminent danger of such invasion.”¹⁰⁵

In the session before the XYZ Affair, Congress allocated \$454,000 for defense; following the XYZ Affair, Congress passed national defense legislation costing \$3,887,971—“more than the entire First Congress had appropriated for all government expenditures”—and added over \$6 million in the following session.¹⁰⁶ The naval budget for 1798—\$1.4 million—exceeded the combined naval spending from the country’s first decade.¹⁰⁷ This unprecedented spending was mirrored by unprecedented taxation. Congress authorized two forms of federal taxes to fund the national defense: the Stamp Act¹⁰⁸ (which “eerily resembled the British Stamp Act of 1765”¹⁰⁹) and a direct house tax.¹¹⁰ The latter, a graduated tax on houses, was the first federal tax levied directly on the people.¹¹¹

The significance of the appropriations extended beyond just congressional buy-in and reached the stage of engaging a “civi-

¹⁰¹ See US Const Art I, § 8, cl 16; US Const Amend X.

¹⁰² See Paul Douglas Newman, *The Federalists’ Cold War: The Fries Rebellion, National Security, and the State, 1787-1800*, 67 Pa Hist: J Mid-Atlantic Stud 63, 76–85 (2000) (discussing the interactions between Adams, Hamilton, and Congress in light of the XYZ Affair).

¹⁰³ See id at 79.

¹⁰⁴ Act of May 28, 1798 (“Provisional Army Act”), 1 Stat 558. See also Newman, 67 Pa Hist: J Mid-Atlantic Stud at 84 (cited in note 102).

¹⁰⁵ Provisional Army Act § 1, 1 Stat at 558. See also Richard J. Ellis, *The Development of the American Presidency* 204 (Routledge 2012).

¹⁰⁶ Newman, 67 Pa Hist: J Mid-Atlantic Stud at 86–87 (cited in note 102).

¹⁰⁷ Ellis, *The Development of the American Presidency* at 203 (cited in note 105).

¹⁰⁸ Act of July 6, 1797 (“Stamp Act”), 1 Stat 527.

¹⁰⁹ Newman, 67 Pa Hist: J Mid-Atlantic Stud at 87 (cited in note 102).

¹¹⁰ Act of July 14, 1798, 1 Stat 597.

¹¹¹ See Newman, 67 Pa Hist: J Mid-Atlantic Stud at 87–88 (cited in note 102).

cally militant electorate,” to use the terminology of two centuries later.¹¹² The new tax was met with stark popular opposition. In January and February of 1799, Congress received petitions protesting the tax, the new military measures, and the contemporaneously enacted Alien and Sedition Acts¹¹³—“[v]irtually every one of [the petitions] included the tag-word ‘standing army.’”¹¹⁴ On March 2, Congress passed the Eventual Army Act,¹¹⁵ authorizing the president to augment the national army with state militiamen not only in case of invasion but also to “suppress [domestic] insurrections.”¹¹⁶ Just five days later, John Fries and a group of armed Pennsylvanian Germans stormed Bethlehem, Pennsylvania, to free local citizens who had been arrested for resisting the direct house tax.¹¹⁷ Fries’s Rebellion successfully freed the tax-resisting neighbors and spread to other parts of Pennsylvania; the rebellion also came to be called the “Hot Water War,” as citizens took to throwing scalding water out of windows at tax collectors.¹¹⁸

In sum, even in the absence of declared war, budgetary restraints forced the president into direct engagement with Congress, which in turn was held acutely accountable to the citizenry for the tax consequences of its military expenditures.

Flash forward two centuries to another not-quite-declared war and the contrast looms large. Whereas the funding of the military provided the central site for interbranch discourse in the early phases of the American Republic, the prolonged engagements of the early twenty-first century show the ability of an institutionalized military to maintain its overseas obligations even in the face of domestic discord over war aims and uncertainty over the extent of battlefield engagement.

¹¹² *Baker v Carr*, 369 US 186, 270 (1962) (Frankfurter dissenting).

¹¹³ Act of June 18, 1798 (“The Naturalization Act”), 1 Stat 566, repealed by Act of Apr 14, 1802 (“The Naturalization Law of 1802”) § 5, 2 Stat 153, 155; Act of June 25, 1798 (“The Alien Act”), 1 Stat 570 (expired 1800); Act of July 6, 1798 (“The Alien Enemies Act”), 1 Stat 577, codified as amended at 50 USC §§ 21–24; Act of July 14, 1798 (“The Sedition Act”), 1 Stat 596 (expired 1801).

¹¹⁴ Elkins and McKittrick, *The Age of Federalism* at 615 (cited in note 100).

¹¹⁵ Act of Mar 2, 1799 (“Eventual Army Act”), 1 Stat 725.

¹¹⁶ Eventual Army Act § 7, 1 Stat at 726. See also Newman, 67 Pa Hist: J Mid-Atlantic Stud at 86 (cited in note 102).

¹¹⁷ See Newman, 67 Pa Hist: J Mid-Atlantic Stud at 67 (cited in note 102).

¹¹⁸ See *id.* See also David F. Burg, *A World History of Tax Rebellions: An Encyclopedia of Tax Rebels, Revolts, and Riots from Antiquity to the Present* 315–19 (Routledge 2004).

Part of the reason for the current permanent military budget is that “[n]o modern military which must depend upon ongoing weapons research and technology could function under [the] burden” of securing new appropriations every two years.¹¹⁹ As captured by one commentator: “To render the Two-Year Clause effectual in the age of a standing army and significant investment in physical infrastructure, the President would not be allowed to use equipment and weapons (including long-term investments) funded under the Army Clause beyond the temporal limits of congressional authorization.”¹²⁰ Congress has gotten around the Two-Year Clause¹²¹ through the use of “no-year” funding, in which Congress will allocate a certain amount of money to the military that will remain available until it is spent.¹²²

Once again, the altered budgetary reality of the military recedes in the scholarly focus on the constitutional disputes after September 11. Instead, the crux of attention is the relation of the Authorization for Use of Military Force¹²³ to the constitutional power to declare war and to the statutory authorization under the War Powers Resolution.¹²⁴ But the military today looks

¹¹⁹ Sherman, 49 *Ind L J* at 555 (cited in note 83).

¹²⁰ Note, 119 *Harv L Rev* at 1833–34 (cited in note 83).

¹²¹ US Const Art I, § 8, cl 12.

¹²² Adam Yarmolinsky, *Civilian Control: New Perspectives for New Problems*, 49 *Ind L J* 654, 656 (1974) (noting that the attorney general has determined that the “no-year” funding does not violate the Two-Year Clause).

¹²³ Pub L No 107-40, 115 Stat 224 (2001).

¹²⁴ Barron and Lederman, whose account of post-9/11 conflicts focuses on presidential actions contravening statutory authorization, have described scholarly debate as focused on presidential action pursuant to statutory authorization:

Because Congress unambiguously authorized military operations against those responsible for the September 11, 2001, attacks in the Authorization for Use of Military Force (AUMF) signed one week after the attacks, and one year later enacted a similar authorization for the subsequent conflict in Iraq, scholarly debates over separation of powers in the current conflicts, including especially the war on terrorism, . . . have centered . . . on the scope of the President’s Article II powers to determine *how* to prosecute military campaigns that Congress has plainly authorized.

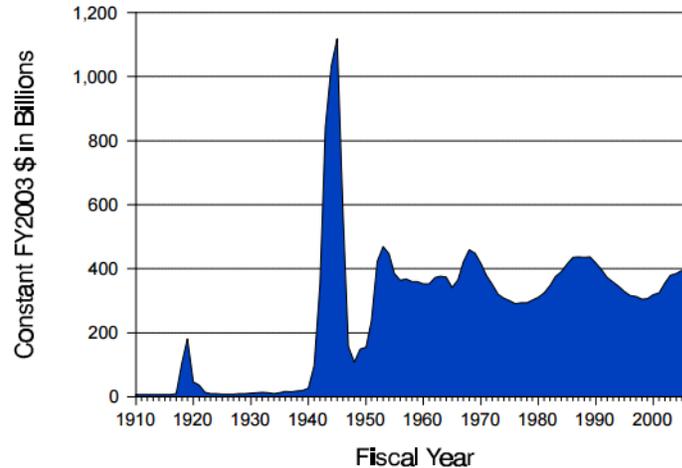
David J. Barron and Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 *Harv L Rev* 689, 700–01 (2008) (citations omitted). See also, for example, Curtis A. Bradley and Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 *Harv L Rev* 2047, 2052 (2005) (“[T]he AUMF should play a central role in an analysis of the war on terrorism.”); John C. Yoo, *Applying the War Powers Resolution to the War on Terrorism*, 6 *Green Bag* 2d 175, 175–77 (2003) (arguing that the War Powers Resolution justifies presidential action in the war on terrorism without further congressional authorization).

nothing like the army that could be funded (or defunded) in earlier phases of American history, in which military buildups for war were followed by the demilitarization of government activity.¹²⁵ Consider the current, relatively steady state of American defense spending in the post–World War II period, as compared to the more-typical mobilization and demobilization that accompanied World War I and World War II.¹²⁶

¹²⁵ See, for example, Ben Baack and Edward Ray, *The Political Economy of the Origins of the Military-Industrial Complex in the United States*, 45 J Econ Hist 369, 370 (1985) (noting that the navy had almost seven hundred ships during the Civil War but only forty-five ships within fifteen years after the war ended).

¹²⁶ See Stephen Daggett and Amy Belasco, *Defense Budget for FY2003: Data Summary* *22 (Congressional Research Service, Mar 29, 2002), archived at <http://perma.cc/2TZY-6JGH>.

FIGURE 2. NATIONAL DEFENSE OUTLAYS, FISCAL YEARS 1910–2007¹²⁷



Over time, an entire coterie has emerged of defense contractors, lobbyists, individuals who move between government service and the private sector, and local constituencies dependent on the spillover economic benefits of military activity.¹²⁸ As one study has concluded, after the fall of the Soviet Union,

[m]ilitary bases were shuttered or left open not due to military necessity, but rather following consultation with local economic leaders. Weapons systems were halted or sustained not because Pentagon planners desired or could do without them, but instead because contractors had wisely placed production facilities in the districts of influential legislators. By the 1990s, American labor finally won . . . widespread recognition of employment as a consideration in defense spending. In short, the military–industrial complex refused to let go even at the Cold War’s end, proving itself

¹²⁷ Id.

¹²⁸ See, for example, Edmund F. Wehrle, “Aid Where It Is Needed Most”: *American Labor’s Military-Industrial Complex*, 12 *Enterprise & Socy* 96, 101 (2011) (describing how labor organizers have sought to direct defense spending); Bruce G. Brunton, *Institutional Origins of the Military-Industrial Complex*, 22 *J Econ Issues* 599, 602 (1988) (noting the emergence of the Navy League of the United States in 1901 and the subsequent rise of defense lobbying groups).

an integral part of the structure of the American economy and political process.¹²⁹

Now consider how the permanent military is able to absorb even the costly wars of the past decade. Even at the outset of Operation Iraqi Freedom in March 2003, Treasury Secretary John Snow declared: “The cost of the war will be small. . . . We can afford the war, and we’ll put it behind us.”¹³⁰ The costs turned out to be significantly high, with an end-of-2014 estimate of \$1.6 trillion.¹³¹ Despite the rising price tag, though, military spending accounted for only 4 percent of the 2008 economy¹³² (with the Iraq War a still smaller 1 percent of the economy).¹³³ By contrast, military spending accounted for 9 percent of the national economy during the Vietnam War and 14 percent during the Korean War.¹³⁴

Unlike Vietnam, Korea, or any other American war, the conflicts in Iraq and Afghanistan have not been funded through higher taxation.¹³⁵ Two days after the beginning of Operation Iraqi Freedom on March 19, 2003, Congress passed a budget with *tax cuts* that totaled over two-thirds of a trillion dollars over the course of eleven years.¹³⁶ As many commentators have observed, “[t]his contrast—between an active war effort on one hand and substantial tax cuts on the other—has no precedent in American history.”¹³⁷ President George W. Bush was “bucking

¹²⁹ Jeffrey A. Engel, *Not Yet a Garrison State: Reconsidering Eisenhower’s Military-Industrial Complex*, 12 *Enterprise & Soc’y* 175, 194 (2011).

¹³⁰ David E. Rosenbaum, *Tax Cuts and War Have Seldom Mixed* (NY Times, Mar 9, 2003), archived at <http://perma.cc/6XKG-W2EF>.

¹³¹ Amy Belasco, *The Cost of Iraq, Afghanistan, and Other Global War on Terror Operations since 9/11* *5 (Congressional Research Service, Dec 8, 2014), archived at <http://perma.cc/393R-L2V2> (estimating “a total of \$1.6 trillion” in cumulative war funding after 9/11). But see Linda J. Bilmes, *The Financial Legacy of Afghanistan and Iraq: How Wartime Spending Decisions Will Constrain Future U.S. National Security Budgets*, 9 *Econ Peace & Sec J* 5, 13–14 (2014) (noting that by 2014 the United States had borrowed some \$2 trillion to finance the wars in Afghanistan and Iraq, and warning of the likelihood of further costs from interest on this borrowing).

¹³² Thom Shanker, *Proposed Military Spending Is Highest since WWII* (NY Times, Feb 4, 2008), archived at <http://perma.cc/RS4H-HGDR>.

¹³³ Daggett, *Costs of Major U.S. Wars* at *2 (cited in note 8).

¹³⁴ Shanker, *Proposed Military Spending Is Highest since WWII* (cited in note 132).

¹³⁵ See Bruce Bartlett, *The Cost of War* (Forbes, Nov 26, 2009), archived at <http://perma.cc/S25A-NA5R>.

¹³⁶ See Steven A. Bank, Kirk J. Stark, and Joseph J. Thorndike, *War and Taxes* 153 (Urban Institute 2008).

¹³⁷ *Id.* at xii. See also Robert D. Hormats, *The Price of Liberty: Paying for America’s Wars* 252–53 (Times Books 2007) (explaining how the onset of the Iraq War departed

history” in that “taxes ha[d] been increased for every war the United States has fought.”¹³⁸

Despite some resistance, the bottom line is that neither the political branches nor the public had to absorb either the costs of war in the form of political accountability or a direct impact on consumption in the form of higher taxes. Congress both authorized the war and cut taxes, and the American public, through deficit spending,¹³⁹ passed the full costs of war on to future generations, who are conspicuously absent from any contemporary political debates. To the extent that the warmaking powers have been constitutionally and politically constrained by their budgetary implications, that element of the calculus is in significant decline.

C. The Isolated Armed Forces

There is no escaping the fact that the casualties of war touch fewer and fewer Americans. Only about 0.5 percent of the US population has served in active military duty.¹⁴⁰ In fact, as the following figure from The Pew Research Center shows, the level of military service by Americans in the years since September 11, 2001, approaches the historic lows that existed before the draft for World War I and in the interwar period—despite the combat operations in Iraq and Afghanistan that now constitute the longest sustained military engagement in American history.¹⁴¹

from most twentieth-century US wars by not including “a reassessment of American fiscal policy to help muster the resources needed to meet additional wartime expenditures”).

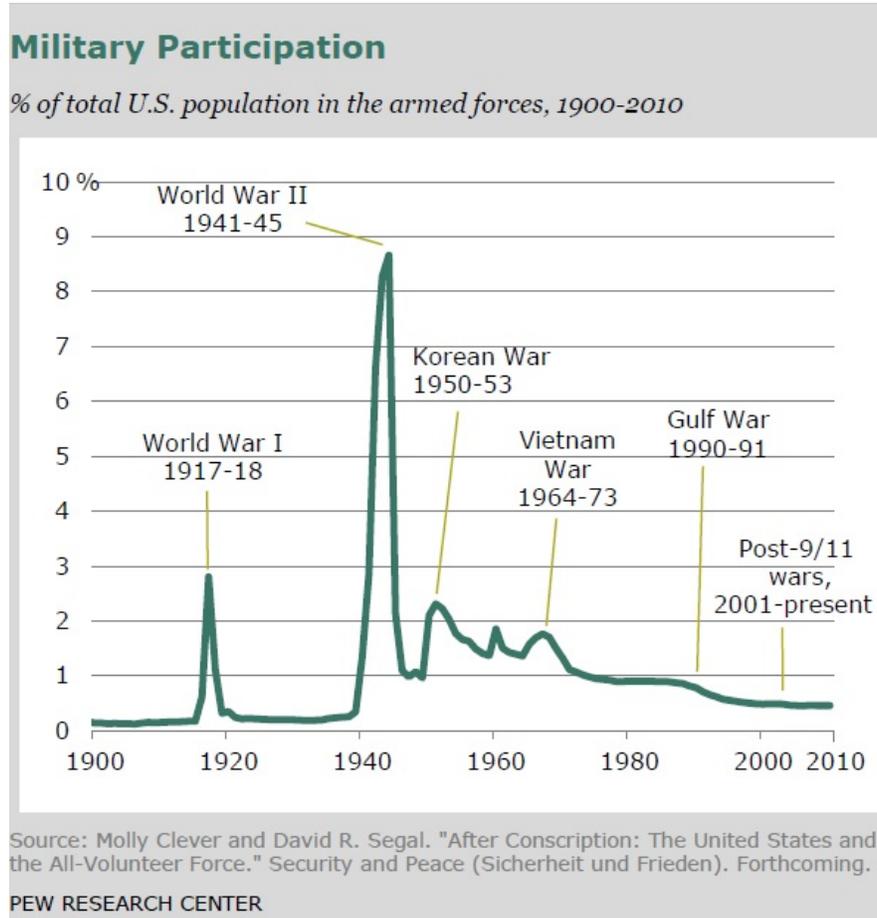
¹³⁸ Rosenbaum, *Tax Cuts and War Have Seldom Mixed* (cited in note 130) (noting the war against Mexico in the 1840s as one exception).

¹³⁹ See Bilmes, 9 *Econ Peace & Sec J* at 13 (cited in note 131) (“The U.S. has already borrowed some US\$2 trillion to finance the Afghan and Iraqi wars and the associated defense build-up.”).

¹⁴⁰ *Small Share of Americans in Active Military Duty* (Pew Research Center, May 23, 2012), archived at <http://perma.cc/JUM2-CGSR>.

¹⁴¹ See Paul Taylor, et al., *The Military-Civilian Gap: War and Sacrifice in the Post-9/11 Era* *73 (Pew Research Center, Oct 5, 2011), archived at <http://perma.cc/434M-TT5G>.

FIGURE 3. AMERICANS' PARTICIPATION IN THE ARMED FORCES DURING THE TWENTIETH CENTURY¹⁴²



Increasingly, the military is almost a segregated caste in American society. Some 60 percent of veterans under the age of forty have an immediate family member who served in the military, while the number among the overall civilian population under the age of forty is 39 percent.¹⁴³ This trend is likely to increase over time, as 77 percent of adults over the age of fifty report having an immediate family member who served in the military; that number drops to 57 percent of those ages thirty to

¹⁴² Id.

¹⁴³ *The Military-Civilian Gap: Fewer Family Connections* (Pew Research Center, Nov 23, 2011), archived at <http://perma.cc/2PC8-6PJK>.

forty-nine and then to only 33 percent for those ages eighteen to twenty-nine.¹⁴⁴

Modern warfare allows the broad population to have greater psychological and economic distance from conflict. Elsewhere, one of the authors of this Essay has addressed the strategic implications for ill-considered war efforts when a democracy resorts to covert action and when its populace is largely free from the burdens of war, both in terms of mandatory military service and in terms of increased taxation.¹⁴⁵ As Reiter and Stam concluded in their study of democratic success in war, covert action “increases the risks of policy failure.”¹⁴⁶ Undoubtedly, no nation can choose all the wars that it is forced to fight. However, the focus here is not on the strategic risk that follows but rather on the implications for constitutional accountability of the war effort.

CONCLUSION

We began with the phenomenon of constitutional disequilibrium, the process by which technological, institutional, and societal changes destabilize a settled understanding of the allocation of constitutional authority. Our claim is that forces external to the constitutional text and its formal allocation of authority have significantly undermined the efficacy of checks on the president’s ability to make war. The military has evolved from an ad hoc agglomeration of militias or a mass draftee army, depending on the conflict, to a professional, socially isolated institution with tremendous political and economic sway and the ability to conduct technologically advanced warfare at little marginal cost in domestic human or economic terms. By and large, these shifts would not appear to directly implicate the Declare War Clause.¹⁴⁷ This makes it not at all puzzling that the War Powers

¹⁴⁴ See *id.*

¹⁴⁵ See Issacharoff, 29 *Oxford J Legal Stud* at 198 (cited in note 46) (“The democratic advantage shrinks as the population gains psychological and economic distance from the conflict.”).

¹⁴⁶ Reiter and Stam, *Democracies at War* at 160 (cited in note 76).

¹⁴⁷ However, the Obama administration’s interpretation of the War Powers Resolution as applied to Libya, which maintains that “hostilities” do not exist without the presence of US ground forces or the risk of US casualties, would obviously place a large range of future military actions outside the ambit of “hostilities,” let alone “war.” See *United States Activities in Libya* *25 (June 15, 2011), archived at <http://perma.cc/U3GD-7RNJ> (noting the administration’s assertion that since the United States’ role in the Libyan conflict is limited, the War Powers Resolution’s sixty-day termination provision does not apply).

Resolution—which recognizes the desuetude of the Declare War Clause but narrowly targets the same formal mechanisms—has not restored the balance between the legislature and the executive.

The framework laid out here suggests an answer to the question of why the War Powers Resolution has underperformed in its objectives: The power to make war is not governed merely by the Declare War and Commander-in-Chief Clauses. Rather, an important and underappreciated part of the constitutional equilibrium came through the two-year budgetary limitations on the length of appropriations for the army. And while there has been some interest in an automatic funding cutoff to revivify the War Powers Resolution,¹⁴⁸ even such proposals would not redress the erosion of the implicit strictures caused by political resistance to the social and political costs of making warfare on a significant scale. It is these practical, real-world constraints on the power to make war, far more than the Declare War Clause itself, that have been thrown into disequilibrium. While a revitalized War Powers Resolution is outside this Essay's scope, an effective strategy for rekindling accountability must recognize the complexity of the original constitutional equilibrium governing war and the corresponding diversity of the sources of disequilibrium.

¹⁴⁸ See, for example, Ely, *War and Responsibility* at 121 (cited in note 84) (arguing that an automatic funding cutoff is a good idea and tracks with Congress's existing power to end a war by terminating appropriations); Koh, *The National Security Constitution* at 191 (cited in note 84) (discussing a proposed amendment to the War Powers Resolution that would implement "an automatic appropriations cutoff device").