

THE SWEEPING DOMESTIC WAR POWERS OF CONGRESS

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With the Habeas Clause standing as a curious exception, the Constitution seems mysteriously mute regarding federal authority during invasions and rebellions. In truth, the Constitution speaks volumes about these domestic wars. The inability to perceive the contours of the domestic wartime Constitution stems, in part, from unfamiliarity with the multifarious emergency legislation enacted during the Revolutionary War. During that war, state and national legislatures authorized the seizure of property, military trial of civilians, and temporary dictatorships. Ratified against the backdrop of these fairly recent wartime measures, the Constitution, via the Necessary and Proper Clause and other provisions, rather clearly augmented federal legislative power to prevail in domestic wars. The “Sweeping Clause” grants Congress far-reaching authority to carry federal powers—legislative, executive, and judicial—into execution. Using this authority, Congress may suspend the ordinary forms of government and some civil liberties as a means of implementing federal powers. For example, Congress may suspend the privilege of the writ of habeas corpus or authorize military trial of civilians if it supposes that such measures will help ensure that federal authority extends throughout the United States. Hence Congress has something of a domestic wartime power that permits it to enact laws meant to defeat rebels and invaders and thereby ensure the continuity of the Constitution and the federal and state governments that sustain it.

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[C]ertain proceedings are constitutional when, in cases of rebellion or Invasion, the public Safety requires them, which would not be constitutional when, in absence of rebellion or invasion, the public Safety does not require them—in other words, that the constitution is not in it's [sic] application in all respects the same, in cases of Rebellion or invasion . . . as it is in times of profound peace and public security.

— Abraham Lincoln¹

INTRODUCTION

From time to time, Americans (Supreme Court justices included) have insisted that the Constitution is not a suicide pact.² Undoubtedly it is not. While the Founders were not starry-eyed statesmen and must have known that all regimes eventually expire, they surely did not suppose that the regime they erected would quickly meet the fate of the “perpetual” Articles of Confederation.³ Those who made the Constitution law erected a “more perfect Union,”⁴ one that was meant to “endure for ages.”⁵

The difficulty lies in discerning which of the charter's features were meant to help it outlast emergencies. After all, a cursory reading of the Constitution intimates extremely limited federal emergency authority. As Justice

1. Letter from Abraham Lincoln to Erastus Corning and Others (June 12, 1863), *in* 6 THE COLLECTED WORKS OF ABRAHAM LINCOLN, 1862–1863, at 260, 267 (Roy P. Basler ed., 1953).

2. *E.g.*, *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting); RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (Geoffrey R. Stone ed., 2006).

3. ARTICLES OF CONFEDERATION of 1781, pmb1.

4. U.S. CONST. pmb1.

5. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

Jackson noted, the Constitution lacks anything resembling Article 48 of the Weimar Republic;⁶ it never expressly authorizes a raft of crisis measures, much less suspension of the Constitution.⁷ Though the federal government can declare war,⁸ the subsidiary powers that come immediately to mind—authorizing war and commanding the use of force⁹—do not seem to imply that Congress enjoys a broad wartime power. Two provisions in Article I mention invasions and rebellions, namely the Habeas and Militia Clauses.¹⁰ But the former limits federal power, rather than granting authority that becomes available during invasions or rebellions.¹¹ And while the latter clause grants power, it does no more than authorize the federal government to summon the militias to thwart invaders and rebels.¹² Finally, though the Guarantee Clause obliges the federal government to defend the states against invasion and “domestic Violence,”¹³ it conveys no power to counter invasions or rebellions.¹⁴

Hence we know with certainty that the federal government can use the militia to suppress invasions and rebellions and that the national regime has duties to the states with respect to both. Furthermore, despite the absence of any explicit power to suspend the privilege of the writ, there is an unshakable sense that the federal government may suspend that liberty. Beyond these basic conclusions, we are left with seemingly intractable questions. Do the Habeas and Militia Clauses imply that in cases of invasions and rebellions, the federal government can do nothing more than suspend the privilege of habeas corpus¹⁵ and summon the militias, meaning that military trial

6. DIE VERFASSUNG DES DEUTSCHEN REICHS Aug. 11, 1919, § 3, art. 48 (Ger.).

7. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 649–51 (1952) (Jackson, J. concurring).

8. U.S. CONST. art. I, § 8, cl. 11.

9. For a discussion of the many authorities that flow from the power to declare war, see Saikrishna Bangalore Prakash, *Exhuming the Seemingly Moribund Declaration of War*, 77 GEO. WASH. L. REV. 89 (2008); Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by “Declare War”*, 93 CORNELL L. REV. 45 (2007).

10. U.S. CONST. art. I, § 9, cl. 2 (Habeas Clause); *id.* § 8, cl. 15–16 (Militia Clauses).

11. *Id.* § 9, cl. 2.

12. *Id.* § 8, cl. 15–16.

13. *Id.* art. IV, § 4.

14. *Id.*

15. Scholars have debated whether suspensions of the privilege of the writ grant immunity to those who detain prisoners pursuant to those suspensions. Some have suggested that when the government suspends the privilege of the writ of habeas corpus, those officers who actually detain might remain liable for damages. In this view, statutory suspensions of the habeas privilege merely suspend one remedy against indefinite detention (discharge of the prisoner), leaving others untouched. *E.g.*, Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533, 1584–85 (2007). Professor Morrison leaves open the question of whether Congress can suspend other remedies for what he calls “unconstitutional detentions” in the wake of a suspension. *Id.* at 1583–84, 1590, 1595. I tend to agree with Professor Tyler’s argument that suspensions expand executive power and suspend rights related to personal liberty. Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600 (2009). I would add that because Congress may do more than suspend a particular judicial remedy designed to secure physical liberty, what really matters is what Congress intends to

of civilians and military rule are unconstitutional? In other words, does the *expressio unius* maxim suggest that the Constitution's list of permissible emergency measures is exclusive? And if the federal government can do more than suspend the privilege and summon the militias during a rebellion or invasion, where does the Constitution authorize these additional measures and what else may be done? Even the question of where the federal government gets its authority to suspend the writ of habeas corpus seems to pose a difficulty. If in foreign affairs the Constitution is a "strange, laconic document," full of "troubl[ing] . . . lacunae" as Louis Henkin observed,¹⁶ the emergency Constitution seems virtually mute, save for the occasional check on disquieting powers that seem to exist only by implication.¹⁷

In fact, the Constitution does not neglect invasions and rebellions, much less suggest federal impotence during them. The perceived neglect stems, in part, from the obsession with the Habeas Clause and the sense that it is *the* emergency provision in the Constitution. This is misguided. The Habeas Clause does not begin to tell us the contours of federal emergency authority. Rather it is a limitation on that power, whatever that power's scope. Gauging federal crisis power by focusing on the Habeas Clause is as backward as gauging the scope of federal power solely by reference to Article I, Section 9 and the Bill of Rights. The hyperfocus on the Habeas Clause had caused us to miss the forest for a single tree.

Formed on the heels of two emergencies, the Revolutionary War and Shays's Rebellion, the Constitution is not radically deficient when it comes to domestic wars. To the contrary, it unquestionably augmented the national government's powers during emergencies, but it did so in ways lost to modern eyes. The Constitution addresses emergencies. We just need to decode it to see how.

When it comes to invasions and rebellions ("domestic wars"), the case for expansive congressional power is as uncomplicated as it is obscured. First, the Constitution's backdrop hints at broad domestic wartime

accomplish when it purports to suspend the privilege. More precisely, the issue is what does the suspension statute authorize by way of detentions and which remedies, state and federal, does it eliminate. The Constitution cannot answer such questions.

16. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 13–14 (2d ed. 1996).

17. Judges and scholars tend to focus on the Habeas Clause, supposing that it is the Constitution's emergency provision. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring) (describing it as the only "express provision for exercise of extraordinary authority because of a crisis"); Bruce Ackerman, *The Emergency Constitution*, 113 *YALE L.J.* 1029, 1041 (2004) (calling it "a rudimentary emergency provision"); David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 *YALE L.J.* 1753, 1796 (2004) (calling it "the Constitution's only explicit 'emergency' provision").

authority for Congress.¹⁸ Backdrops matter because context matters.¹⁹ The Constitution was written against the background of state governments that endured the Revolutionary War via massive delegations of power to the executive and the short-term suppression of civil liberties. Similarly, the Continental Congress helped the nation defeat the British via its authorization of indefinite detentions, trial of civilians before military courts, and a temporary dictator. In both the states and the national government, legislatures were sovereign in the Schmittian sense because they decided when the state of exception existed and hence served as the gatekeepers of exceptional powers.²⁰ When cautious, legislatures might cede the power of the purse or permit the taking of private property. In more perilous times, they might authorize indefinite detention, military trials, and military rule. But the prerogative has always been with the legislature.

Second, the Constitution never hints that it departs from this established regime of broad legislative authority in emergencies. It never repudiates the emergency measures that served so well during the Revolutionary War. It never declares that during domestic wars Congress can neither suspend civil liberties nor convey sweeping powers to the executive. Although the Habeas Clause may seem something of an exception, in fact it imposes a rather narrow constraint, one that makes clear that Congress may suspend at least one civil liberty during domestic wars.

Third, the Constitution plainly augmented federal crisis power. Whereas Congress previously lacked power to suppress rebellions, the Constitution clearly granted such power. Moreover, the addition of the Necessary and Proper Clause gave further textual grounding to legislative measures designed to prevail in domestic wars. Laws designed to crush rebellions and repulse invasions may be necessary and proper for carrying into execution the federal government's powers. Congress may suspend habeas corpus during an invasion or rebellion not because Article I, Section 9 implies that there is such a federal power, but because doing so is necessary and proper for implementing federal powers.²¹ Similarly, Congress may authorize military trial of civilians or declare martial law during an invasion and rebellion when doing so is necessary and proper for executing federal powers. Finally, Congress may suspend some individual rights when their suspension is necessary and proper for safeguarding the Constitution (and its system of

18. I have previously argued that the Constitution itself never grants the president broad emergency authority during domestic wars or otherwise. Saikrishna Bangalore Prakash, *The Imbecilic Executive*, 99 VA. L. REV. 1361 (2013). As the current piece argues, the Constitution grants far-reaching domestic war authority to Congress and authorizes the latter to empower the executive during domestic wars. So while the Constitution itself conveys little emergency power to the president, it permits Congress to convey such authority during domestic wars.

19. Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813 (2012).

20. See CARL SCHMITT, *POLITICAL THEOLOGY* 5 (George Schwab trans., Mass. Inst. of Tech. 1985) (1922).

21. To be clear, I believe that had the Constitution omitted the Habeas Clause, Congress arguably would have had *broader* authority to suspend the writ. After all, the Habeas Clause does no more than limit when the privilege of the writ may be suspended.

rights) in the long run. The vital point is that federal powers will certainly *not be carried into execution throughout the United States* if rebels or invaders control some or all of the nation's territory.

Some scope limitations are in order. First, this Article focuses on domestic wars and says rather little about other sorts of crises, such as earthquakes or foreign wars. But it does briefly discuss the possibility that Congress enjoys a power of "self-preservation." Second, the Article will not define "rebellion" or "invasion." Admittedly, any comprehensive theory about the emergency Constitution must specify what "invasion," "public danger," "domestic violence," "insurrection," and "rebellion" mean.²² Yet while such definitions would be valuable, they are unnecessary to evaluate the Article's limited claims about the scope of legislative power during such crises. Reasonable people can disagree about whether a rebellion or invasion exists²³ even as they agree about the scope of federal power should either exist. Finally, the Article will not address whether the courts may second-guess either congressional judgments about the existence of an invasion or rebellion or the measures necessary to overcome either. While the arguments in favor of a sweeping domestic war power might be more palatable if they presume that courts could review the constitutionality of domestic war legislation, the claims made here do not turn on the availability of judicial review.

Part I suggests that the Constitution accommodates domestic wars and introduces the claim that the Constitution authorizes Congress to enact measures necessary to thwart invasions and rebellions. Part II brings to light early American practices that indicate the legislature's dominant role during domestic wars. Part III returns to the Constitution's text and argues that Congress has broad (but not unlimited) power in domestic wars and highlights early statutes supportive of that reading. Part IV considers what a

22. The Constitution uses all five terms. U.S. CONST. art. I, § 8, cl. 15; *id.* § 9, cl. 2; *id.* art. IV, § 4; *id.* amend. V. I regard the latter two (insurrection and rebellion) as synonymous. Both cover widespread, armed resistance to governmental authority. "Public danger," used in the Fifth Amendment, seems potentially broader than invasion or rebellion. "Domestic [v]iolence," found in the Guarantee Clause of Article IV, may cover more than rebellions or insurrections and likely includes situations where one state uses force against another. *Cf.* Debates of the Virginia Convention (June 16, 1788), *in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1299, 1311–12 (John P. Kaminski & Gaspare J. Saladino eds., 1993) (James Madison claiming that Guarantee Clause covers state-on-state violence via its use of "invasion").

23. Such disagreements reach back to the Constitution's earliest years. In the early stages of the Whiskey Rebellion, state and federal executives disagreed about what was brewing in Western Pennsylvania. Pennsylvania Governor Thomas Mifflin refused Washington's command to use state authority to direct the state militia to suppress the rebels. The governor believed that he could use military force only after the ordinary means of law execution proved inadequate and that no such showing had been made. Letter from Thomas Mifflin to George Washington (Aug. 5, 1794), *in* 16 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 514, 514–16 (David R. Hoth & Carol S. Ebel eds., 2011); Letter from Thomas Mifflin to George Washington (Aug. 12, 1794), *id.* at 553, 553–59. These disagreements can be understood as differences about whether there was a rebellion as opposed to a group of generally loyal citizens who, in an act of folly, had thwarted the collection of the federal excise tax.

broad congressional domestic war power means for the separation of powers, individual rights, and continuity in government.

I. AN ACCOMMODATIVE CONSTITUTION THAT
EMPOWERS CONGRESS IN CRISES

On one view, the Constitution is relatively inflexible in that it does not authorize wholesale departures from its ordinary constraints. Call this the “Rigid Constitution.” Under the Rigid theory, the federal government cannot, no matter the crisis, suspend rights like the right to a jury trial or the freedom of speech. After all, the Constitution never expressly authorizes the government to suspend these rights. The Rigid view further supposes that, no matter the circumstances, Congress can never delegate legislative and judicial powers to the executive because the Constitution never expressly sanctions such departures from its basic allocations. In sum, when it comes to rights and structure, the Constitution is unyielding, “equally in war and in peace.”²⁴

The Founders would have constructed a Rigid constitution if they esteemed the “preservation of civil liberty”²⁵ above all else. Writing in the midst of the Civil War, one Kentucky jurist insisted that “[t]he intention [of the Founders] was to grant all powers, deemed necessary for good government in any emergency, but, if inadequate, still none other was to be exercised.”²⁶ The Founders “greatly preferred all the evils that might ensue from the want of power, to incurring the hazard of the abuse of such powers as were withheld.”²⁷

Another perspective regards the Constitution’s constraints, related to rights and structure, as meant principally for tranquil times. In extraordinary times, when the fate of the Constitution and the nation hangs in the balance, many of these checks operate less stringently, or not at all. Under this reading, the Constitution creates rules that operate strictly in ordinary times but reveal their suppler nature in domestic wars. As Chief Justice Rehnquist put it, while the Constitution is not silent in time of war, it does “speak with a somewhat different voice.”²⁸ Borrowing from Eric Posner and Adrian Vermeule, we can call this the “Accommodative Constitution.”²⁹

24. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120 (1866).

25. S. S. NICHOLAS, *MARTIAL LAW* 11 (Philadelphia, John Campbell 1862).

26. *Id.*

27. *Id.* Justice Jackson said much the same. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring) (“[The forefathers] knew, too, how [emergency powers] afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies.”).

28. WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 224–25 (First Vantage Books 2000) (1998).

29. See Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 *STAN. L. REV.* 605, 606–07 (2003) (explaining the “accommodation view”).

The Rigid Constitution appeals to civil libertarians. An Accommodative regime ultimately may undermine the Constitution because unsavory officials may generate phony crises in order to seize powers.³⁰ Moreover, even genuine crises may lead to enduring restrictions on liberty as what was exceptional becomes normalized.³¹ Libertarians also might deny that an inflexible constitution will prove inadequate. The federal government has ample powers over money and the military, giving it all the tools it needs to ensure its survival. Tampering with the separation of powers or civil liberties during wars is wholly unnecessary.

An Accommodative Constitution appeals to those anxious about the Republic's possible collapse. Such individuals may believe that the Rigid theory shortsightedly holds certain principles sacrosanct at the expense of long-term constitutional viability. In the midst of a fierce domestic war, protecting jury trials and preserving the principle of nondelegation are senseless should a blinkered focus on them lead to the triumph of rebels or invaders who are bent on toppling the Constitution.

This Part advances two narrow propositions. First, it argues that the Accommodative reading of the Constitution is a reasonable one. Second, relying on previous work,³² it contends that Congress (and not the executive) may temporarily relax constitutional constraints.

A. *The Accommodative Constitution's Plausibility*

Before taking up the claim that the Constitution accommodates emergencies, briefly consider the alternative. The Rigid theory has its merits.³³ The Constitution generally does not read as if it establishes rules that do not apply in domestic wars. Many of the liberties the Constitution protects—jury trial, free speech, press, and assembly—contain nothing implying that these rights may be withdrawn or suspended during domestic wars.³⁴ “Congress shall make no law”³⁵ sounds like an unconditional prohibition on Congress making any law abridging free speech, press, and exercise of religion.³⁶ Article III demands that “all” criminal trials “shall be by Jury,”³⁷ while the

30. See *Youngstown*, 343 U.S. at 650 (Jackson, J., concurring) (noting that emergency clauses in constitutions may trigger more declarations of emergency).

31. Deborah N. Pearlstein, *Ratcheting Back: International Law as a Constraint on Executive Power*, 26 CONST. COMMENT. 523, 523–24 (2010) (noting that scholars have made such a claim); Posner & Vermeule, *supra* note 29, at 610–12 (same).

32. See Prakash, *supra* note 18.

33. In previous work, I tentatively endorsed some of the arguments favoring a rigid construction of the Constitution. See Saikrishna Prakash, *The Constitution as Suicide Pact*, 79 NOTRE DAME L. REV. 1299 (2004). The current Article, based on a more fulsome consideration of text and history, repudiates many of the arguments made in that earlier piece.

34. See U.S. CONST. art. III, § 2, cl. 3; *id.* amends. I, V.

35. *Id.* amend. I.

36. Justice Black was fond of making this sort of claim. See, e.g., *Smith v. California*, 361 U.S. 147, 157 (1959) (Black, J., concurring).

37. U.S. CONST. art. III, § 2, cl. 3.

Sixth Amendment stipulates that “all” shall have a right “to a speedy and public trial.”³⁸

The Constitution’s few accommodative provisions may seem to support the Rigid theory. Because reasonableness is its touchstone, the Search and Seizure Clause³⁹ is adaptive. A search that is wholly unreasonable in one context (peacetime) may be reasonable in others (domestic wars). The courts have read the Due Process Clause⁴⁰ to require varying levels of procedure based on balancing the interests of the person facing the loss of life, liberty, and property against the interests of the government.⁴¹ During crises, governmental interests are more weighty and pressing, permitting the government to use truncated procedures. Because a few of the Constitution’s key provisions clearly accommodate emergencies, it might be a mistake to conclude that the entire Constitution bends to accommodate crises.

Relatedly, the Habeas Clause might suggest that when the Constitution means to permit the suspension of civil liberties, it provides as much. Because only one clause permits the suspension of a civil liberty, a possible *expressio unius* implication is that the Constitution does not permit the suspension of other civil liberties. For instance, the Habeas Clause might suggest that while the government can detain individuals without trial, it cannot punish people outside the processes required by Article III and the Fifth, Sixth, and Seventh Amendments.

While the Rigid theory has its appeal, it is not the only way of making sense of the Constitution. Consider the plausibility of the Accommodative theory, one that imagines that some constraints do not apply in emergencies. The Constitution contains clues hinting that it is accommodative, especially in the face of invasions and rebellions. Though the Constitution never specifically vests the power to suspend the privilege of habeas corpus, we know that Congress can suspend it.⁴² After all, there is no reason to limit the occasions for suspension if there is no power to suspend the privilege in the first instance. By constraining suspensions of the privilege, the Habeas Clause implies that Congress otherwise would have unconstrained power. But if Congress has implied authority to suspend the writ perhaps Congress also enjoys other implied emergency powers.⁴³

38. *Id.* amend. VI.

39. *Id.* amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”).

40. *Id.* amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law . . .”).

41. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). For an application of this test in wartime, see *Hamdi v. Rumsfeld*, 542 U.S. 507, 528–35 (2004) (plurality opinion).

42. U.S. CONST. art. I, § 9, cl. 2. More accurately, we know some federal entity may suspend the privilege. For an argument that only Congress (and not the president) may suspend the privilege of the writ, see Saikrishna Bangalore Prakash, *The Great Suspender’s Unconstitutional Suspension of the Great Writ*, 3 ALB. GOV’T L. REV. 575 (2010).

43. See, e.g., Debates of the Virginia Convention, *supra* note 22, at 1332 (William Grayson inferring broad federal power from the Habeas Clause’s prohibition).

Consider also the Constitution's implicit exceptions to its rights protections. The criminal trial provisions of the Bill of Rights and Article III do not apply to members of the armed forces, despite the fact that the only express exception applies to the presentment or indictment provision of the Fifth Amendment.⁴⁴ As the Supreme Court correctly explained in *Ex parte Milligan*, the jury trial right does not apply to soldiers and sailors, despite the absence of any text specifying as much.⁴⁵ Just as there are implicit court-martial exceptions to the Constitution's jury trial rights, so too might there be implied exceptions to other individual rights.

The Accommodative theory not only finds support in the Constitution's text, it also makes practical sense. Implied exceptions to rights enable the nation to defeat its enemies during domestic wars.⁴⁶ In the midst of a war on American soil, executives may need to rule by decree because domestic wars often demand swift and vigorous action, something not possible when antecedent, inflexible laws create one-size-fits-all rules. Similarly, military trial of civilians may be necessary when quick justice is essential. The example made of rebels or traitors is more vivid when trial and punishment are not dragged out.

I draw the same inference from the Takings Clause, for it clearly presupposes that there is federal power to take property in the first instance. See U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”). Again, there is no need to specify the limited circumstances in which a governmental power may be exercised if there is no power in the first instance. After all, one does not erect *partial* checks on *phantom* powers. Hence I disagree with Professor Baude's well-argued claim that because taking property was a “great power” it could be exercised by a government of limited and enumerated powers only when expressly conveyed. William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1741–45 (2013). As discussed later, nothing in the Articles of Confederation expressly granted the Continental Congress the power to take private property, but that body repeatedly authorized takings during the Revolutionary War. See *infra* text accompanying notes 177, 180. The power to take property was evidently understood to be part of the power to wage war because it was necessary to prevail in wars. More precisely, the power to “determin[e] on peace and war,” ARTICLES OF CONFEDERATION of 1781, art. IX, para. 1, included the subsidiary power to wage and win wars, including authority to take property. See *infra* text accompanying notes 195–196. With respect to the Constitution, I likewise believe that Congress continues to have power to take private property whenever doing so is necessary and proper to carry into execution its powers over the armed forces, warfare, military fortifications, postal roads, etc.

44. U.S. CONST. amend. V.

45. 71 U.S. (4 Wall.) 2, 123 (1866); see also *Ex parte Quirin*, 317 U.S. 1, 40–41 (1942) (recognizing that the existence of an exception to the right to a jury trial for army and navy personnel does not preclude an exception for unlawful combatants).

46. The idea of implicit constitutional powers, duties, rights, and exceptions to those rights should be familiar, for our constitutional practice is rife with them. For instance, though the Constitution never says as much, presidents must execute judicial judgments, whether they come from the Article III courts or the Senate impeachment court. See William Baude, *The Judgment Power*, 96 GEO L.J. 1807, 1835 (2008). For an alternative view of presidential duty, see Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO L.J. 217, 222–23 (1994).

As noted, a broad emergency power to respond to domestic wars can be hazardous to a republic's long-term viability.⁴⁷ Yet those crafting constitutions might suppose that the choice is between two evils. If they construct a government too impotent and hamstrung, their edifice might collapse in the first storm, leading to foreign domination or victorious rebels. This is no better (and arguably much worse) than making the government too powerful in the first instance. As President Lincoln asked in his 1861 speech to Congress, "Is there, in all republics, this inherent, and fatal weakness? Must a government, of necessity, be too *strong* for the liberties of its own people, or too *weak* to maintain its own existence?"⁴⁸

The best way to resolve this tension, constitution makers might suppose, is to create strict rules that apply in ordinary times but allow departures from them when there is an existential threat.⁴⁹ Lincoln saw the Constitution in this light, arguing that sometimes a doctor must sacrifice a limb to save the patient.⁵⁰ He actually overstated the sacrifice. If the loss of limb is temporary, the appendage is not totally sacrificed. When the domestic war is over, the ordinary rules are supposed to spring back into operation, meaning that any sacrifice should be temporary.⁵¹ There is no permanent sacrifice of the jury trial right, the freedom of speech, or of the structural constitution, just transitory legislative measures meant to ensure the long-term viability of the Constitution.⁵²

Again, my point is not that the Constitution is clearly accommodative. Nor is it that the Rigid theory is implausible. The narrow claim is that the Constitution can reasonably be read as establishing default peacetime rules, about rights and structure, rules that do not apply with the same severity during a domestic war.

B. *The Legislature as Gatekeeper to Emergency Authority*

If the Constitution is accommodative, which branch determines that an emergency exists and authorizes ordinarily illegal measures that are temporarily necessary to avoid catastrophe? Arguably, the executive seems best positioned to learn of an existential threat. Unlike Congress, the executive

47. See *supra* text accompanying note 27.

48. Abraham Lincoln, Message to Congress in Special Session (July 4, 1861) (internal quotation marks omitted), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 1860–1861, *supra* note 1, at 421, 426.

49. To be sure, some revolutions bring benign, even welcome changes. But every regime wishes to maintain itself, meaning the question to ask is whether those who construct a new government will choose to enfeeble it by barring the use of extreme measures that might be necessary to save it on the chance that the regime's successor might be more to their liking.

50. Letter from Abraham Lincoln to Albert G. Hodges (Apr. 4, 1864), in 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN 1863–1864, *supra* note 1, at 281, 281.

51. See Posner & Vermeule, *supra* note 29, at 619.

52. Those who suppose that crises have a one-way ratchet effect in favor of governmental power, see *supra* text accompanying note 31, may believe that Lincoln's analogy better describes reality. The abrogation of limits on governmental power during crises may seem, to them at least, akin to an injurious amendment to the Constitution.

never recesses, making it more likely that he will become aware of an invasion or rebellion first.⁵³ Moreover, the executive branch has eyes and ears (officers and employees) throughout the nation that report back to the chief magistrate. The Constitution presupposes that the executive has an informational advantage, as it demands that the president share information about the “State of the Union” with Congress.⁵⁴

As a matter of structure, the executive is built for speed and vigor, meaning that his branch is less likely to be paralyzed by dissension.⁵⁵ The president also might be more apt to render decisions based on the national interest, as he is elected in a nationwide contest.⁵⁶ As a matter of text, only the president takes an oath to preserve, protect, and defend the Constitution.⁵⁷ And only he is made commander in chief and granted the executive power. Perhaps his unique oath and the grants of executive and military powers suggest that the Constitution establishes a constitutional protectorate under the president.⁵⁸

As I have argued elsewhere, this theory—that the Constitution itself grants the president a host of emergency powers related to habeas corpus, military trials, and martial law—is beset with difficulties.⁵⁹ From a design perspective, the president who can act with information, energy, and unity of purpose and action may also be the one entity most tempted to go rogue, to declare an emergency that could lead to the Constitution’s demise.⁶⁰ If in the “contest for liberty, executive power has been regarded as a lion which must be caged,”⁶¹ then allowing the executive to declare an emergency and decide what measures to adopt is to read the Constitution as if it empowered the lion to release itself.⁶²

When we turn to the Constitution’s text, the case for a constitutionally granted presidential crisis power fares no better. The president’s oath does not empower the chief executive. Rather it imposes a duty, requiring him to

53. See, e.g., Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701, 713 (1995).

54. See U.S. CONST. art. II, § 3, cl. 1.

55. See, e.g., THE FEDERALIST NO. 70 (Alexander Hamilton).

56. See Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 35 (1995).

57. U.S. CONST. art. II, § 1, cl. 8. In contrast, others take an oath to support the Constitution. *Id.* art. VI, cl. 3.

58. See Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1261 (2004).

59. Prakash, *supra* note 18.

60. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 649–51 (1952) (Jackson, J., concurring).

61. DANIEL WEBSTER, MR. WEBSTER’S SPEECH ON THE PRESIDENT’S PROTEST: DELIVERED IN THE SENATE OF THE UNITED STATES 23 (Washington, Gales & Seaton 1834).

62. Cf. *Youngstown*, 343 U.S. at 642 (Jackson, J., concurring) (pointing out that because President Truman entered the war unilaterally, it seems odd to suppose that he could thereby clothe himself with emergency powers).

use his powers, whatever their scope, to protect the Constitution.⁶³ Although the oath perhaps implies that the president will have *some* means to “preserve, protect and defend” the Constitution, it hardly establishes that he may do whatever he believes is necessary to safeguard it.⁶⁴ If the president otherwise lacks a sweeping power to take all measures he deems necessary to counter invaders and rebels, his duty to protect the Constitution does not change that result.⁶⁵

The grant of executive power⁶⁶ and the authority implied in military command⁶⁷ do not grant the president an emergency power. Though the “executive power” encompasses authority to control aspects of foreign affairs, direct and remove executive officers, and execute the laws,⁶⁸ it fits uneasily with authority to enact crisis measures because the power to execute the laws does not imply a power to make (and unmake) them.⁶⁹ Nor does the commander-in-chief power encompass broad authority to respond to crises. Justices have rightly observed that the Constitution makes the president the supreme commander of the military, not of society and its civilians.⁷⁰

As a matter of constitutional backdrop, none of the American precursors to the presidency—the state governors or the commander in chief of the Continental Army—were thought to have an emergency power.⁷¹ None had constitutionally granted power to take property, try civilians in military courts, or appropriate funds. Any such powers came via legislation and when such legislation expired, so did the powers.⁷² This meant that legislatures were the gatekeepers of crisis authority and that executives were relatively impotent in the absence of statutory grants of crisis authority. Against

63. U.S. CONST. art. II, § 1, cl. 8.

64. *Id.*

65. A thought experiment makes this clear. Any supporter of the Constitution, either civilian or military, may take an oath to preserve, protect, and defend it. But taking such an oath hardly means that she thereby has acquired all sorts of authority that she previously lacked, including the authority to suspend the Constitution’s various features. Moreover, some states during the founding era required their officials to take a similar oath. *E.g.*, S.C. CONST. OF 1790, art. IV. To my knowledge no one supposed that each state official thereby became an omnipotent protector, implicitly endowed with a host of emergency powers.

66. U.S. CONST. art. II, § 1, cl. 1.

67. *Id.* § 2, cl. 1.

68. Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 *YALE L.J.* 541 (1994); Saikrishna Prakash, *Removal and Tenure in Office*, 92 *V.A. L. REV.* 1779, 1815–44 (2006); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 *YALE L.J.* 231 (2001).

69. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582, 587 (1952) (“[T]he President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”).

70. See *id.* at 643–44 (Jackson, J., concurring) (noting that the Constitution does not suppose that the president is “Commander in Chief of the country, its industries and its inhabitants”).

71. See Prakash, *supra* note 18, at 1381–89.

72. *Id.* at 1387.

this established framework, the Constitution contains nary a hint that it energizes the executive in emergencies. Rather, by adopting the same phrases—granting executive power and making the president commander in chief—it adopts the terminology of executive impotence in crisis.⁷³ That is to say, the Constitution itself never grants the president a crisis power, even if it may grant Congress the ability to vest crisis authorities with the president.

Indeed, as compared to the president, Congress is a far more likely repository of any crisis powers. Whatever the scope of the federal government's authority in domestic wars, the Constitution hints that Congress is the vital player. The power to suspend the privilege of habeas corpus was long thought of as a legislative power⁷⁴ and the limitation on its exercise is found in a section that almost exclusively limits legislative power.⁷⁵ Until the Civil War, no American supposed that the president could suspend habeas corpus. Rather, everyone discussing the matter declared that the suspension power rested with the legislature, as it had in the states and in England.⁷⁶

If only Congress may suspend the privilege, thereby authorizing executive detention, it seems plausible that only Congress can invoke other federal emergency powers, whatever they are. Indeed, it is hard to fathom why the power to authorize indefinite detention would be within Congress's exclusive control, but that the president could unilaterally authorize military trial of civilians.

Another clue pointing to congressional authority is the president's power to summon Congress on "extraordinary Occasions."⁷⁷ This power seems to presuppose that the executive might request legislation. Authority to summon Congress does not exist so that a president may inform Congress of his extraordinary measures as a courtesy to an inferior branch. For example, Lincoln convened Congress in 1861 to seek congressional authority during a crisis.⁷⁸

A final hint comes from Congress's authority over certain indispensable means of handling crises. While the president is commander in chief of the

73. *Id.* at 1391.

74. Prakash, *supra* note 42, at 592–94.

75. *See* U.S. CONST. art. I, § 9.

76. Prakash, *supra* note 42, at 601.

77. U.S. CONST. art. II, § 3.

78. While Lincoln had already taken many emergency measures, he also repeatedly suggested that Congress might need to pass some legislation either to authorize such measures going forward or to retroactively approve some of his measures. *See* Lincoln, *supra* note 48, at 429–31 (inviting and suggesting congressional legislation with respect to army and habeas suspension). In 1797, President John Adams similarly convened Congress to consider measures against France. *See* John Adams, Proclamation (Mar. 25, 1797), *in* 1 MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 232 (James D. Richardson ed., 1896); John Adams, Special Session Message (May 16, 1797), *id.* at 233, 237–38 (discussing laws that Congress might pass or revise).

military and the militias,⁷⁹ Congress determines whether this office is meaningful. Only Congress can create armies and a navy.⁸⁰ And only Congress can decide when to summon the state militias.⁸¹ Moreover, Congress also establishes civilian offices,⁸² meaning that the president is also dependent in this regard. If Congress determines whether the president will have a military, a militia, and prosecutors—institutions crucial in a domestic war—perhaps it makes sense to suppose that it also may determine whether (and to what extent) the president will have domestic wartime authority.⁸³

The plausibility of the claim that Congress has authority to take advantage of the Constitution's flexibility rests, in part, on its textual foundation. What is the source of Congress's authority to thwart invasions and rebellions? The Necessary and Proper Clause.⁸⁴ It grants Congress authority to enact legislation necessary and proper for carrying into execution all powers of the federal government.⁸⁵ As argued in greater detail later, the Necessary and Proper Clause seems tailor-made to authorize extreme measures in extreme times. What is necessary and proper in times of tranquility seems more limited than what might be permitted in times of emergency.

My goals in this Part have been modest. First, I have suggested that the Constitution's rules apply more flexibly during domestic wars, an Accommodative Constitution if you will. Second, I have argued that if the Constitution authorizes the relaxation of its rules in domestic wars, it empowers Congress to do so.

Part II demonstrates that the Constitution was enacted against a backdrop of legislatures that enjoyed broad emergency powers. Part III argues that reading the Constitution in light of this context strongly suggests that Congress has extensive authority to thwart rebellions and invasions and to ensure the federal government's long-term viability.

II. AMERICA'S EARLY EMERGENCY CONSTITUTIONS

Constitutions are products of a particular time and place. The context in which the Founders created the 1787 Constitution—the events that shaped

79. U.S. CONST. art. II, § 2, cl. 1.

80. *Id.* art. I, § 8, cl. 12–13.

81. *Id.* cl. 15.

82. *See id.* art. II, § 2, cl. 2 (“[H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and *which shall be established by Law . . .*” (emphasis added)).

83. For a similar structural argument against the claim that the Constitution grants the president an executive privilege, compare Saikrishna Bangalore Prakash, *A Critical Comment on the Constitutionality of Executive Privilege*, 83 MINN. L. REV. 1143 (1999).

84. U.S. CONST. art. I, § 8, cl. 18 (“[Congress shall have power t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

85. *Id.*

their perspectives and influenced their lives—helps us divine the Constitution's meaning.⁸⁶ Practice predating the Constitution helps frame how we ought to read its seeming gaps related to emergencies, domestic wars in particular. This is especially so given that the United States was born of a crisis, one that required the sacrifice of treasure, blood, and civil liberties.

When we look to those practices, certain propositions seem reasonably clear. First, prior to the Constitution, state and national legislatures enjoyed and exercised broad crisis powers. Legislatures enacted dozens of crisis measures, including suspending habeas corpus and authorizing military trial of civilians.⁸⁷ In extreme cases, assemblies declared martial law, allowing the executive to rule by decree.⁸⁸

Second, and relatedly, the legislature served as a gatekeeper of crisis authority. Executives had little constitutionally granted crisis authority. Instead, their crisis powers came from statutory grants, meaning that legislatures decided the scope of crisis grants, their duration, and their geographic reach.

Third, the emergency measures from the Revolutionary War were lawful. Although some quibbled with certain aspects of such legislation, many more admitted that legislatures enjoyed the ability to enact crisis measures meant to ensure the viability of the new nation and its constituent states.

A. Legislative Authority over Crisis Powers

As noted, before the Constitution's creation, legislatures repeatedly enacted crisis legislation that authorized the taking of property, indefinite detentions, and military trial of civilians. Such statutes were necessary because executives, both state and national, lacked constitutional authority to take such measures. No matter the crisis, executives could not take property, suspend the privilege of the writ of habeas corpus, or try civilians in military courts.

Legislatures even authorized "martial law." In enacting martial law, legislators understood that they were emulating the Roman practice of creating dictators, with the invigorated executives regarded as such.⁸⁹ To be sure,

86. Sachs, *supra* note 19. Many suppose that what has transpired since the Constitution's creation ought to matter in its interpretation. See, e.g., DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010). I do not wish to quarrel with such views here but only point out that on many accounts of the Constitution's meaning, the events leading up to the founding are quite relevant.

87. See, e.g., Act of May 5, 1781, ch. 7, 1781 Va. Acts 140 (expired) (suspending habeas corpus); 1 *JOURNALS OF THE PROVINCIAL CONGRESS, PROVINCIAL CONVENTION, COMMITTEE OF SAFETY AND COUNCIL OF SAFETY OF THE STATE OF NEW-YORK 1775-1776-1777*, at 856-57 (Albany, Thurlow Weed 1842) (authorizing military trials).

88. See *infra* Section II.A.1.

89. See, e.g., H. J. ECKENRODE, *THE REVOLUTION IN VIRGINIA* 229 (1916); Debates of the Virginia Convention (June 9, 1788), in 9 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 1050, 1058 (John P. Kaminski & Gaspare J. Saladino eds., 1990); Debates of the New York Convention (June 28, 1788), in 2 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 356, 360 (Jonathan Elliot

martial law might not seem to be “law” at all, but rather something extralegal that may need to be indulged in certain situations.⁹⁰ Moreover, given complaints about martial law, early Americans might have seemed implacably opposed to it.⁹¹ But in American governments, martial law arose from statutes, not from executive decree. It was valid and legitimate law, albeit a version not to be resorted to lightly. American martial law satisfied the need to keep the military subordinate to the civil, for a wholly civil authority—the legislature—authorized it.

Temporary dictatorships were familiar and useful, if alarming. Early Americans, wedded to republicanism, borrowed from the Roman Republic. Dictators resembling Julius Caesar were to be feared. But dictators emulating Cincinnatus—those who surrendered crisis powers once the storm had passed—were to be lauded. State and national assemblies consciously drew on the Roman example of temporary dictatorship, aware that someone thought to be a Cincinnatus might be a Caesar. George Washington was equated to Cincinnatus not merely because he surrendered military command at the end of the war but also because he repeatedly relinquished short-term grants of dictatorial powers.⁹²

1. The State Assemblies

During the war, state assemblies served as gatekeepers of crisis authority. Driven by the exigencies of a fierce war, these legislatures repeatedly ceded crisis powers to their executives. Most of these laws granted specific authority, such as sanctioning the taking of property or the detention of Tories.⁹³ Such legislation was always temporary in nature and often geographically constrained. Sometimes the laws expired after a set number of days,⁹⁴ in other cases, they expired after the legislature reconvened.⁹⁵ While the latter rule might suggest a limited period, the possibility that an invasion

ed., 2d ed. Philadelphia, Burt Franklin 1888); *Monarchical Tendencies in America*, in 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 168 (John P. Kaminski & Gaspare J. Saladino eds., 1981) (quoting Letter from Philip Schuyler to Alexander Hamilton (Sept. 10, 1780)); Remarks on an Act Granting to Congress Certain Imposts and Duties (Feb. 15, 1787), in 4 THE PAPERS OF ALEXANDER HAMILTON 71, 77 (Harold C. Syrett ed., 1962).

90. See MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 26 (Charles M. Gray ed., The Univ. of Chi. Press 1971) (1739) (explaining that martial law was “in Truth and Reality . . . not a Law” but was to be indulged because of its necessity).

91. See, e.g., THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776); 2 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 150–52 (Worthington Chauncey Ford ed., William S. Hein & Co. 2005) (1905); Letter from George Washington to Lieutenant General Thomas Gage (Aug. 11, 1775), in 1 THE PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR SERIES 289 (Philander D. Chase ed., 1985).

92. See, e.g., John M. Kang, *Manliness and the Constitution*, 32 HARV. J.L. & PUB. POL’Y 261, 310–11 (2009).

93. MARGARET BURNHAM MACMILLAN, THE WAR GOVERNORS IN THE AMERICAN REVOLUTION 203–09, 258–59 (Peter Smith 1965) (1943).

94. *Id.* at 86.

95. See *id.* at 73.

might delay the next legislative session meant that the grant could last indefinitely.

Occasionally assemblies ceded far-reaching powers to their executives. Usually these powers were granted to an executive and checked by a council, with the advice and consent of the latter a precondition of their exercise.⁹⁶ Some state constitutions had established an executive council and the statutes drew on that existing structure as a means of restraining the executive.⁹⁷

South Carolina's delegations were breathtaking. From 1779 to 1783, South Carolina enacted laws that delegated specific powers to the governor and council, with a sweeping catchall delegation nested among the specific grants.⁹⁸ The statutes often began with a justificatory preamble:

W[hereas], in times of danger and invasion it has always been the policy of republics to centre the powers of society in the hands of the supreme magistracy for a limited time, to give vigor and despatch to the means of safety . . . it behooves us, for our common safety, to follow such example⁹⁹

The acts went on to grant specific powers over the militia, commercial transactions, forts, etc.¹⁰⁰ The 1779 version's catchall provided that the governor and council could "do all other matters and things which may be judged expedient and necessary to secure the liberty, safety, and happiness of this State," save that the militia could not be made subject to Congress's articles of war.¹⁰¹ The 1780 and 1783 versions added an additional exception—"except taking away the life of a citizen without legal trial."¹⁰² While the governor ordinarily needed conciliar consent to exercise these extraordinary authorities, the acts permitted unilateral gubernatorial action when the council could not assemble.¹⁰³

In his article discussing South Carolina Governor Rutledge's dictatorial authority, Robert Barnwell asserts that the legislature perhaps added the capital exception because of the rumored summary execution of three blacks in 1779.¹⁰⁴ The executions ignited an uproar. To Loyalists, the slayings

96. See, e.g., H.D. Res. of Dec. 21, 1776, Gen. Assemb., Reg. Sess. (Va. 1776), reprinted in JOURNAL OF THE HOUSE OF DELEGATES OF VIRGINIA 1776, at 107–08 (Richmond, Samuel Shepherd & Co. 1828); 4 THE STATUTES AT LARGE OF SOUTH CAROLINA 1752–1786, at 470, 506, 567 (Thomas Cooper ed., Columbia, A.S. Johnston 1838); Letter from George Washington to Joseph Reed (July 4, 1780), in 19 THE WRITINGS OF GEORGE WASHINGTON 113 (John C. Fitzpatrick ed., 1937).

97. See Act of Feb. 14, 1781, ch. 5, 1781 N.C. Sess. Laws 378, 378 ("An Act to Establish a Council Extraordinary"); Robert W. Barnwell Jr., *Rutledge, "The Dictator"*, 7 J. S. HIST. 215, 219 (1941).

98. THE STATUTES AT LARGE OF SOUTH CAROLINA 1752–1786, *supra* note 96, at 470, 504, 567.

99. E.g., *id.* at 470.

100. *Id.* at 470–71, 504–06.

101. *Id.* at 471.

102. *Id.* at 505; see *id.* at 567.

103. *Id.* at 506, 568.

104. Barnwell Jr., *supra* note 97, at 217–18.

demonstrated that the rebels did not value the rights of man.¹⁰⁵ The furor may have precipitated the capital exception.¹⁰⁶

Barnwell concludes that Rutledge was justifiably seen as a dictator.¹⁰⁷ Using his wide-ranging statutory authority, Rutledge punished those residents who previously had sought and received British protection.¹⁰⁸ Even after they took oaths of American allegiance, Rutledge barred them from voting and ordered them to serve in the militia on pain of confiscation and banishment.¹⁰⁹ These measures were extremely harsh because people who had sworn allegiance to the Crown while the British controlled South Carolina had little practical choice.¹¹⁰ Rutledge took many of these measures unilaterally because consultation with the council proved impossible.¹¹¹ A contemporaneous historian, David Ramsay, agreed that the governor, acting with the council, exercised “dictatorial powers.”¹¹²

South Carolina was no outlier. When events suggested that Virginia’s executive needed more power, Virginians chose to “suspend the rules”¹¹³ and create what was termed at the time a “dictator.”¹¹⁴ In 1776, this meant the legislature granted extraordinary powers to the governor, acting with conciliar consent.¹¹⁵ The Congress had just fled to Baltimore and the Northern front had collapsed.¹¹⁶ Believing that extra executive vigor was indispensable, George Mason supported a motion that “the usual forms of Government should be suspended during a limited time” for the speedy implementation of forceful measures to repel an anticipated invasion.¹¹⁷ The Virginia Senate amended the motion’s preamble, eliminating the reference to the suspension of forms but left the additional powers intact.¹¹⁸ As enacted, the resolution allowed the executive to increase the army’s size, deploy it anywhere, and withdraw from the treasury at will.¹¹⁹

105. *Id.*

106. *See id.*

107. *Id.* at 224.

108. *See id.* at 221–24.

109. *Id.* at 221–23.

110. *See id.* at 222.

111. *Id.* at 219–20.

112. 2 DAVID RAMSAY, *THE HISTORY OF THE AMERICAN REVOLUTION* 443 (Lester H. Cohen ed., LibertyClassics 1990) (1789).

113. JOHN E. SELBY, *THE REVOLUTION IN VIRGINIA 1775–1783*, at 119, 130 (1988).

114. *Id.* (internal quotation marks omitted).

115. H.D. Res. of Dec. 21, 1776 Gen. Assemb., Reg. Sess. (Va. 1776), reprinted in *JOURNAL OF THE HOUSE OF DELEGATES OF VIRGINIA 1776*, *supra* note 96, at 107–08.

116. *See, e.g.*, 6 *JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789*, at 1027 (Worthington Chauncey Ford ed., William S. Hein & Co. 2005) (1906); Letter from Charles Thomson to George Washington (Dec. 11, 1776), in 7 *THE PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR SERIES* 302, 302 n.1 (Philander D. Chase ed., 1997).

117. Va. H.D. Res. of Dec. 21, 1776.

118. *Id.*

119. *Id.*

The next experiment occurred in 1780. In May, the assembly declared that because of the public danger and the enemy's rapid progress it was necessary "to vest the executive with extraordinary powers for a limited [sic] time."¹²⁰ The executive could call out 20,000 militia and send them out of state, take property, detain those disaffected from the American cause, and use military courts to try those citizens who aided any insurrection or British invasion.¹²¹

In the spring of 1781, after the Virginia legislature was forced to flee Charlottesville and reconvene in Staunton, there was a move to vest even greater power.¹²² Delegate George Nicholas moved to appoint "a Dictator . . . who should have the power of disposing of the lives and fortunes of the Citizens . . . without being subject to account."¹²³ Patrick Henry favored the motion and argued that the executive's title mattered little, so long as the powers were adequate.¹²⁴ Much later, Thomas Jefferson would claim that the motion lost by six votes.¹²⁵ Even if Jefferson was right about the particular motion, its spirit prevailed, for shortly thereafter the legislature granted the governor, acting with the executive council's consent, the most sweeping powers yet. The executive could call out the militia and deploy it anywhere, impress military supplies, detain anyone, banish suspected Tories on pain of death, unilaterally extend enlistments, and create substitute criminal courts.¹²⁶ In a separate act, the legislature imposed "martial law" within a twenty-mile radius of any American and British encampments.¹²⁷

North Carolina embraced similar measures. In 1780, the legislature created a Board of War to handle military matters should the legislature be unable to meet.¹²⁸ Among other things, the board could empower the executive to take any measures "necessary and expedient for the public security."¹²⁹ After the governor complained that the board had usurped his constitutional authority to execute the laws,¹³⁰ the legislature created a "Council Extraordinary."¹³¹ This time the assembly vested power in the governor, acting with the council's consent, "to do and execute *every other act*

120. Act of May 4, 1780, ch. 35, 1780 Va. Acts 130 *reprinted in* 10 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA at 309, 309–310 (William Waller Hening ed., Richmond, George Cochran 1822).

121. *Id.* at 310–12.

122. Letter from Henry Young to William Davies (June 9, 1781), *in* 6 THE PAPERS OF THOMAS JEFFERSON 1781–1784, at 84, 84–85 (Julian P. Boyd ed., 1952).

123. *Id.*

124. *Id.* at 85.

125. *Id.*

126. *See* ECKENRODE, *supra* note 89, at 229.

127. Act of May 5, 1781, ch. 4, 1781 Va. Acts 140.

128. Act of Sept. 13, 1780, ch. 10, 1780 N.C. Sess. Laws 355.

129. *Id.* at 356.

130. Gov. Abner Nash to the General Assembly (Jan. 28, 1781), *in* 15 THE STATE RECORDS OF NORTH CAROLINA 225, 227 (Walter Clark ed., Goldsboro, Nash Bros. 1898).

131. Act of Feb. 14, 1781, ch. 5, 1781 N.C. Sess. Laws 378, 378 ("An Act to Establish a Council Extraordinary").

and thing which may conduce to the security, defence and preservation, of this State.”¹³² In a separate act, the legislature allowed incumbent governors to continue in office whenever a successor could not be chosen.¹³³ Essentially, the legislature erected a statutory bypass of the constitutionally prescribed means of choosing the governor.

At George Washington’s behest, Pennsylvania declared martial law in the summer of 1780. In a letter to the president of the state’s Supreme Executive Council, Washington expressed his desire that the assembly would “vest the [state] Executive with plenipotentiary powers.”¹³⁴ Three days later, the assembly obliged.¹³⁵ It declared “the exigencies which may arise in a state of war are frequently of a nature that require such sudden and extraordinary exertions as are impossible for the legislative body to provide for by the ordinary course of the law.”¹³⁶ To respond to such urgent needs, the assembly empowered the council to “Declare Martial Law.”¹³⁷ Although James Madison believed that the executive council could not take the lives of citizens,¹³⁸ there was no such exception.¹³⁹ The council’s president more accurately described the resolve as granting “a power of doing what may be necessary, without attending to the ordinary forms of law.”¹⁴⁰ Washington rejoiced that the council had “full discretionary power” to do “anything which the public safety may require.”¹⁴¹

Occasionally, lawmakers enacted emergency laws even before a constitution was in place. The New York provisional convention, a body drafting a state constitution, resolved that spies and suppliers of the enemy could face “martial [l]aw,” meaning they could be tried by military courts.¹⁴² Likewise,

132. *Id.* (emphasis added). These measures created a plural dictatorship. See DAVID SCHENCK, *NORTH CAROLINA 1780–’81*, at 268–69 (Raleigh, Edwards & Broughton 1889); Kemp P. Battle, *General Jethro Sumner*, in 8 *THE NORTH CAROLINA BOOKLET* 111, 130 (Mary Hilliard Hinton & E.E. Moffitt eds., 1908).

133. Act of Feb. 14, 1781, ch. 6, 1781 N.C. Sess. Laws 379.

134. Letter from George Washington to Joseph Reed (May 28, 1780), in 2 WILLIAM B. REED, *LIFE AND CORRESPONDENCE OF JOSEPH REED* 202, 206 (Philadelphia, Lindsay & Blakiston 1847).

135. REED, *supra* note 134, at 208.

136. General Assembly of Pennsylvania, Proclamation of Martial Law (June 1, 1780), in REED, *supra* note 134, at 208, 208.

137. *Id.* at 209.

138. Letter from James Madison to Thomas Jefferson (June 2, 1780), in 3 *THE PAPERS OF THOMAS JEFFERSON 1779–1780*, *supra* note 122, at 411, 412.

139. See Proclamation of Martial Law, *supra* note 136, at 208–09.

140. Letter from Joseph Reed to George Washington (June 5, 1780), in REED, *supra* note 134, at 209, 211.

141. Letter from George Washington to Joseph Reed (July 4, 1780), in REED, *supra* note 134, at 220, 221.

142. Convention of the Representatives of the State of New York, For the Protection of the State (Apr. 1, 1777), reprinted in 1 *PUBLIC PAPERS OF GEORGE CLINTON, FIRST GOVERNOR OF NEW YORK 1777–1795, 1801–1804*, at 690, 690 (Albany, Wynkoop Hallenbeck Crawford Co. 1899). In 1780, the legislature enacted a more narrow statute subjecting spies to martial law. Act of June 30, 1780, ch. 75, 1780 N.Y. Laws 282.

months before the first Massachusetts Constitution would sanction the imposition of martial law, the General Assembly empowered Brigadier General Peleg Wadsworth to execute “martial law” in Lincoln County,¹⁴³ part of present-day Maine. In a proclamation, the general forbade assistance to the enemy on “Penalty of military Execution.”¹⁴⁴

Other times, irregular institutions purported to delegate extraordinary authority. In 1779, the British occupied much of Georgia, preventing the legislature from meeting and thereby precluding the election of an executive.¹⁴⁵ In this vacuum, a convention of the people assumed power and granted “supreme authority” to a Supreme Executive Council of its own creation.¹⁴⁶ The council had “every such power as . . . [it] deem[ed] necessary for the safety and defence of the State,” with the proviso that they were to “keep as near [to] the spirit and meaning of the Constitution . . . as may be.”¹⁴⁷ The council was a plural dictatorship.¹⁴⁸

The demand for crisis measures, including martial law, diminished once peace was struck with England. Yet the need was not eliminated. Anyone might rebel against established governments, as Americans surely understood. The most prominent rebellion prior to the Constitution (Shays’s Rebellion) took place in Massachusetts, where “Regulators” chafed against debt and tax collection.¹⁴⁹ The rebels disrupted courts and generally thwarted the state government’s writ.¹⁵⁰

Initially, Massachusetts was measured in its response. The governor, James Bowdoin, admonished the rebels and threatened punishment,¹⁵¹ but to no avail. In late 1786, the General Court (the legislature) passed a Riot Act¹⁵² and authorized the detention of “any person or persons whatsoever.”¹⁵³ The first law authorized force against those who failed to disperse after having been read the Riot Act.¹⁵⁴ The second suspended habeas corpus, allowing detention until July 1787.¹⁵⁵

143. Act of Mar. 25, 1780, ch. 863, 1780 Mass. Acts 397, 399.

144. Peleg Wadsworth, A Proclamation (Apr. 18, 1780), in 18 DOCUMENTARY HISTORY OF THE STATE OF MAINE 222, 223 (James Phinney Baxter ed., 1914).

145. 1 THE REVOLUTIONARY RECORDS OF THE STATE OF GEORGIA 400–01 (Allen D. Candler ed., 1908).

146. *Id.* at 403–04.

147. *Id.* at 404–05.

148. JAMES F. COOK, THE GOVERNORS OF GEORGIA, 1754–2004, at 29 (3d ed. 2005).

149. See LEONARD L. RICHARDS, SHAYS’S REBELLION: THE AMERICAN REVOLUTION’S FINAL BATTLE 63, 87–88, 117 (2002).

150. *Id.* at 9–12.

151. See DAVID BRION DAVIS & STEVEN MINTZ, THE BOISTEROUS SEA OF LIBERTY 227 (1998).

152. Act of Oct. 28, 1786, ch. 38, 1786 Mass. Acts 87, 87–88 .

153. See Act of Nov. 10, 1786, ch. 41, 1786 Mass. Acts 102, 102–03.

154. Mass. Act of Oct. 28, 1786.

155. Mass. Act of Nov. 10, 1786.

After these measures proved insufficient the legislature issued a declaration. “[I]n conformity to their oaths[,] [a]nd by virtue of the authority vested in them by the Constitution,” the legislature declared that a “horrid and unnatural Rebellion and War” had been waged against the commonwealth.¹⁵⁶ The legislature said that “all the power of the Commonwealth” would be used to suppress the rebellion.¹⁵⁷

At first glance the declaration seems pointless, for it did no more than declare that a rebellion existed,¹⁵⁸ a conclusion that observers must have reached without its aid. But its significance comes into focus when we consider it in light of the Massachusetts Constitution. The latter provided that martial law could not be imposed on civilians except by legislative authority.¹⁵⁹ The proclamation indirectly authorized as much. As Rufus King noted, because the general court had declared a rebellion, “the powers of the Governor, by our Constitution, become almost absolute.”¹⁶⁰ The governor could now “exercise Law martial” and treat the rebels as “open Enemies.”¹⁶¹ King evidently read the declaration as a legislative imposition of martial law on civilians.¹⁶² A letter from the general court to Governor Bowdoin suggested the same.¹⁶³ The legislature declared a rebellion to ensure that the governor would “be possessed of the *full* power of the Constitution,”¹⁶⁴ likely an oblique reference to martial law.¹⁶⁵

From America’s beginnings until its constitutional transformation in 1787, state legislators served as the gatekeepers of crisis authority. When confronted by invaders or rebels, these legislatures delegated sweeping authority to their executives, laws that swept aside structural and individual rights limitations found in state constitutions. State assemblies authorized their executives to seize property, detain indefinitely, try civilians in military courts, and rule by decree, measures meant to ensure the long-term survival of the state republics.

156. Declaration of Feb. 4, 1787, ch. 5, 1787 Mass. Acts 424, 425 (emphasis omitted).

157. *Id.* at 425–26.

158. *Id.* at 424–26.

159. MASS. CONST. pt. 1, art. XXVIII.

160. Letter from Rufus King to Henry Lee? (Feb. 10, 1787), in 24 LETTERS OF DELEGATES TO CONGRESS 1774–1789, at 86, 87 (Paul H. Smith ed., 1996).

161. *Id.*

162. See MASS. CONST. pt. 1, art. XXVIII; see also RONALD M. PETERS, JR., THE MASSACHUSETTS CONSTITUTION OF 1780: A SOCIAL COMPACT 55 (1978).

163. Address of the General Court (Feb. 4, 1787), ch. 6, 1787 Mass. Acts 426, 426.

164. *Id.* at 426.

165. Correspondence from General Benjamin Lincoln of Massachusetts in January of 1787 also linked a declaration of rebellion with martial law. Letter from Benjamin Lincoln, Jr. to George Washington (Jan. 24, 1787), in 4 THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES 538, 539 (W.W. Abbot ed., 1995) (“The General Court will meet the next week and if the western counties continue obstinate a rebellion will probably be declared & martial law put in force.”).

2. The Continental Congress

Confronting the same perils as the states—the superiority of the British Army, a host of spies, and a population of dubious loyalty—the Continental Congress reacted in much the same way. It conveyed detention authority. It subjected civilians to military trial. And it granted sweeping powers to its commander in chief. These delegations were so extensive that many believed Congress had made George Washington a dictator.¹⁶⁶

Early resolves applied military justice to civilians. The nation's first Articles of War, a code of military discipline, extended military law to “suttlers [sic] and retailers to a camp, and all persons whatsoever, serving with the Continental Army in the field.”¹⁶⁷ Additionally, courts-martial could punish all those contemptuous of their proceedings.¹⁶⁸ Perhaps the extension to the army's civilian retinue could be justified as an appropriate and necessary regulation of the military's immediate associates.¹⁶⁹ And maybe the power to punish contemnors was part of the inherent authority granted to all tribunals, military and civil.¹⁷⁰ But Congress thereafter resolved that spies lurking around or in military camps and fortifications could be tried by court-martial.¹⁷¹ A broader resolve, part of a revised Articles of War, subjected anyone who supplied intelligence, money, food, ammunition, or shelter to the enemy to court-martial.¹⁷² Of course, most such fifth columnists were not part of an army's retinue, rendering the Continental Congress's regulatory power over the army insufficient as a justification.¹⁷³ By enacting these harsh rules, Congress had asserted a power to try civilians before military courts. And Congress made clear why severe measures were necessary: “it has been found, by the experience of all states, that, in times of invasion, the process of the municipal law is too feeble and dilatory to bring to a condign and exemplary punishment persons guilty” of traitorous practices.¹⁷⁴

166. See *infra* text accompanying notes 188–194.

167. JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 91, at 116.

168. *Id.* at 118.

169. Because the Articles of Confederation granted Congress authority to govern and regulate the army and navy, ARTICLES OF CONFEDERATION of 1781, art. IX, para. 4 (giving Congress the power to make “rules for the government and regulation of the said land and naval forces”), perhaps that authority encompassed authority over the military's civilian retinue.

170. See, e.g., *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1873) (“The power to punish for contempts is inherent in all courts.”).

171. 5 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 116, at 693. This resolve was limited to persons not members of, or owing allegiance to, any of the United States of America. *Id.*

172. *Id.* at 799. Whereas almost all provisions were expressly limited to officers, soldiers, or members of the armed forces of the United States, these provisions conspicuously left out such qualifiers. See *id.* art. 17–19 (providing that “whosoever” violates rules shall be punished by court-martial).

173. See ARTICLES OF CONFEDERATION of 1781, art. IX, para. 4 (giving Congress the power to make “rules for the government and regulation of the said land and naval forces”).

174. 7 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 784 (Worthington Chauncey Ford ed., William S. Hein & Co. 2005) (1907).

In mid-December of 1776, the fear that the British might conquer Philadelphia led Congress to move to Baltimore and grant George Washington “full power to order and direct all things relative to the department, and to the operations of war.”¹⁷⁵ By the end of the month, Congress went further. Believing that “desperate diseases[] require desperate remedies” Washington had requested powers that he admitted some might regard as “too dangerous to be [e]ntrusted.”¹⁷⁶ Congress obliged, temporarily authorizing him to raise sixteen infantry battalions along with three thousand light horse units, three artillery regiments, and a corps of engineers; to set pay for all of these soldiers; to request the militia from the several states; to remove and appoint all officers under the rank of brigadier general; to take private property; and, finally, to arrest and confine those opposed to the revolution and those who refused to take continental currency as payment.¹⁷⁷ A congressional committee gushed that the country was “happy” because it could safely entrust Washington “with the most unlimited Power.”¹⁷⁸ The general was gratified by a delegation that ceded powers “of the highest Nature and [almost] unlimited in extent.”¹⁷⁹

Subsequent congressional resolutions renewed some powers and added others. For instance, Congress reconveyed the power to take property.¹⁸⁰ Yet this power was granted only for sixty days and exercisable only within seventy miles of headquarters.¹⁸¹ In another resolve, Congress authorized the commander in chief to try, before military courts, inhabitants who aided the British (with supplies or information) and were captured within thirty miles of any town held by the British in New Jersey, Pennsylvania, and Delaware.¹⁸² Convicted civilians faced execution.¹⁸³ Later, Congress made it a court-martiable offense for civilians to kidnap Americans for purposes of taking them to the British, when the kidnapping occurred within seventy miles of the Continental or state armies.¹⁸⁴

175. JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 116, at 1027.

176. Letter from George Washington to John Hancock (Dec. 20, 1776), *in* 7 THE PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR SERIES, *supra* note 116, at 381, 381–82.

177. JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 116, at 1045.

178. Letter from Executive Committee of the Continental Congress to George Washington (Dec. 31, 1776), *in* 7 THE PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY SERIES, *supra* note 91, at 495, 495.

179. Letter from George Washington to Executive Committee of the Continental Congress (Jan. 1, 1777), *in* 7 THE PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY SERIES, *supra* note 91, at 499, 500.

180. 8 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 174, at 752.

181. *Id.*

182. 9 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 174, at 784.

183. *Id.*

184. 10 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 204–05 (Worthington Chauncey Ford ed., William S. Hein & Co. 2005) (1908).

As late as 1780, some wished to delegate dictatorial powers to Washington. In particular, a delegate to the Continental Congress proposed that the commander in chief be given authority to do whatever he felt was in the interests of the United States. *See* Letter from James Lovell to Elbridge Gerry (Nov. 20, 1780), *in* 16 LETTERS OF DELEGATES TO CONGRESS 1774–1789,

When trial of civilians in the regular courts was possible, Washington generally favored that mode over the use of the military courts.¹⁸⁵ Nonetheless, the commander in chief repeatedly had civilians tried via courts-martial.¹⁸⁶ Some received as many as 200 lashes, while others were executed.¹⁸⁷

Contemporaries described Washington as a dictator.¹⁸⁸ In 1780 and 1787, Alexander Hamilton—who had served as Washington’s trusted aide—observed that the Continental Congress had exercised the “highest acts of sovereignty,” including naming a dictator.¹⁸⁹ In 1781, New York Governor George Clinton noted that Congress had “invested a military officer with dictatorial powers,”¹⁹⁰ an evident reference to Washington. During the Constitution’s ratification, Edmund Randolph and Patrick Henry noted that the former commander in chief had enjoyed dictatorial authority.¹⁹¹ After ratification, judges of the Pennsylvania Supreme Court praised Washington for

supra note 160, at 363; *see also* Letter from Ezekiel Cornell to William Greene (Aug. 1, 1780), *in* 15 LETTERS OF DELEGATES TO CONGRESS 1774–1789, *supra* note 160, at 527, 527 (noting discussions of appointing Washington “sole Dictator [sic] of America”). Some thought the idea of “creating absolute Dictators” was “stupid.” Letter of James Lovell to Samuel Holten (Sept. 5, 1780), *in* 15 LETTERS OF DELEGATES TO CONGRESS 1774–1789, *supra* note 160, at 21, 21.

185. *See, e.g.*, Letter from George Washington to George Clinton (Sept. 25, 1778), *in* 17 THE PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR SERIES 124, 125 (Philander D. Chase ed., 2008).

186. *See, e.g.*, General Orders (Apr. 3, 1778), *in* 14 THE PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR SERIES 387, 387–88 (David R. Hoth ed., 2004).

187. General Orders (Mar. 1, 1778), *in* THE PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR SERIES, *supra* note 186, at 1, 2–3.

188. *See, e.g.*, Extract of a Letter to the President of the Convention of the State of New York (Dec. 30, 1776), *in* INDEP. CHRON. & UNIVERSAL ADVERTISER (Boston), Jan. 9, 1777, at 3; N.Y. GAZETTE & WKLY. MERCURY, Feb. 3, 1777, at 2, col. 4. *But see* Letter from John Adams to Abigail Adams (Apr. 6, 1777), *in* 2 ADAMS FAMILY CORRESPONDENCE 199, 200 (L.H. Butterfield ed., 1963) (denying that Congress had made Washington a dictator).

General Horatio Gates, sent to Canada, was also seen as a dictator. *See* Letter from John Adams to Horatio Gates (June 18, 1776), *in* 4 PAPERS OF JOHN ADAMS 319, 319 (Robert J. Taylor ed., 1979).

189. Letter from Alexander Hamilton to James Duane (Sept. 3, 1780), *in* 2 THE PAPERS OF ALEXANDER HAMILTON 400, 401 (Harold C. Syrett ed., 1961); *see also* Remarks on an Act Granting to Congress Certain Imposts and Duties, *supra* note 89, at 78.

190. 7 THE WRITINGS OF GEORGE WASHINGTON 442, 442–43 n.* (Jared Sparks ed., Boston, Russell, Odiorne, & Metcalf et al. 1835) (quoting Letter from New York Legislature to Congress (Feb. 1781)).

191. *See* Debates of the Virginia Convention (June 6, 1788), *in* 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 89, at 970, 983 (comments of Edmund Randolph); Debates of the Virginia Convention (June 9, 1788), *in* 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 89, at 1058 (comments of Patrick Henry); *see also* Debates of the Virginia Convention (June 10, 1788), *in* 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 89, at 1092, 1141 (comments of James Monroe).

the “tender regard” which he showed to “the laws and liberties” when he “possessed almost dictatorial power.”¹⁹²

Some saw the congressional creation of a dictator in a different light. Mercy Otis Warren, author of an early history of the American Revolution, claimed that many at the time were “disgusted with the dictatorial powers” granted to Washington.¹⁹³ During the war, an Englishman reveled in the fact that America had resorted to a dictator because it suggested that the rebels had been driven to desperation.¹⁹⁴

Significant for our inquiry is that the Continental Congress supposed that it had authority to do what was necessary to prevail in the war with Great Britain. Before and after the 1781 ratification of the articles, the Continental Congress believed it had more than just a narrow power to “determin[e] on peace and war.”¹⁹⁵ While this power could have been read as no more than a power to decide to wage war (to “determin[e]” on it), it was instead understood to include the power to prevail in the war that Congress declared. Hence despite the absence of any enumerated powers to take property, detain civilians, try them before military courts, or create a dictator, the Continental Congress confidently and repeatedly exercised these powers as part of its power to wage war domestically.¹⁹⁶

B. *The Legality of Wartime Emergency Measures*

As one might expect, some doubted the legality of emergency wartime legislation, particularly the state measures. After granting the governor broad authority, a 1776 Virginia statute declared that its supposed “departure from the constitution of government, being . . . founded only on the most evident and urgent necessity, ought not hereafter to be drawn into

192. 2 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 85 n.1 (Dorothy Twohig ed., 1987) (quoting Address from the Judges of the Pennsylvania Supreme Court).

193. 1 MERCY WARREN, HISTORY OF THE RISE, PROGRESS AND TERMINATION OF THE AMERICAN REVOLUTION 213 (Boston, Manning and Loring 1805).

194. See Debates in the Commons on the Budget (May 14, 1777), in 19 PARLIAMENTARY HISTORY OF ENGLAND 241, 268 (William Cobbett ed., London, T.C. Hansard 1814) (comments of Lord George Germain). *But see id.* at 270 (comments of Col. Barre) (denying that Washington was a dictator because he only had power over the military and because Washington had denied the charge).

195. ARTICLES OF CONFEDERATION of 1781 art. IX, para. 1.

196. There is some evidence that a few members of Congress believed in a congressional crisis power that extended beyond defeating foreign invaders. In 1782, a committee of Congress proposed issuing an ultimatum to the so-called “independent State of Vermont.” The inhabitants were to accept certain boundaries and be accepted into the Union. If they refused the conditions, a military commander would impose “martial law” and punish the “refractory.” Though Congress never issued the ultimatum, it is suggestive of a congressional power to use martial law against those who threatened the territorial integrity of the confederation. See Letter from James Madison to Edmund Pendleton (Jan. 22, 1782), in 4 THE PAPERS OF JAMES MADISON: CONGRESSIONAL SERIES 38, 40 n.6 (William T. Hutchinson & William M.E. Rachal eds., 1965).

precedent.”¹⁹⁷ Similarly, Jefferson argued that the creation of a dictator was contrary to “[e]very lineament” of the Virginia Constitution.¹⁹⁸ The example of Rome and its dictators was inapposite, for the constitution lacked a “residuary provision” that expressly permitted the creation of a dictator.¹⁹⁹ Pennsylvania’s Council of Censors, charged with identifying constitutional breaches,²⁰⁰ criticized the assembly’s 1780 imposition of martial law as a “dangerous violation.”²⁰¹

The question is whether such criticisms were isolated or were instead indicative of a broader sense that sweeping legislative authority over crises was unconstitutional. While definitive conclusions are difficult to reach, there are good reasons to suppose that only a minority shared these misgivings.

To begin with, consider the broader context in which these doubts were voiced. In Virginia, subsequent statutes delegated broad authority to the executive, with no textual admissions of any constitutional departures.²⁰² This suggests that later legislators did not view broad crisis grants as violations of the Virginia Constitution. Moreover, Jefferson’s denunciation likely stemmed from bitterness. He probably sensed, quite accurately, that the proposal to create a dictator reflected displeasure with his ineffectual gubernatorial tenure.²⁰³ On other occasions, when his personal reputation was not at stake, he endorsed sweeping delegations of crisis authority.²⁰⁴ Finally the criticisms of the Pennsylvania Council of Censors were rather mild. The council admitted that the supposed violation might have been justified by necessity, even if unlawful.²⁰⁵

More importantly, while the state constitutions separated governmental power and protected individual rights, they are best read as if they permitted legislatures to ignore many of those constraints in moments of crisis. The structure of constitutional prohibitions related to emergencies suggests that

197. H.D. Res. of Dec. 21, 1776 Gen. Assemb., Reg. Sess. (Va. 1776), reprinted in *JOURNAL OF THE HOUSE OF DELEGATES OF VIRGINIA*, *supra* note 96, at 107–08.

198. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 126–27 (William Peden, ed., Univ. of North Carolina Press 1982) (1853).

199. *Id.* at 129.

200. PA. CONST. of 1776, § 47 (establishing a Council of Censors and charging it with judging whether the Constitution has been “preserved inviolate in every part”).

201. *JOURNAL OF THE COUNCIL OF CENSORS, CONVENEED, AT PHILADELPHIA, ON MONDAY, THE TENTH DAY OF NOVEMBER, 1783*, at 166 (Philadelphia, Hall & Sellers 1783).

202. See *supra* text accompanying notes 120–127.

203. Jefferson’s tenure was much criticized and there was an investigation of it after he left office. See DUMAS MALONE, 1 JEFFERSON AND HIS TIME: JEFFERSON THE VIRGINIAN 360–66 (1948).

204. See *id.* at 360 (describing how Jefferson had favored granting sweeping authority to the governor); see also JEREMY D. BAILEY, THOMAS JEFFERSON AND EXECUTIVE POWER 61 (2007) (same).

205. *JOURNAL OF THE COUNCIL OF CENSORS, CONVENEED, AT PHILADELPHIA, ON MONDAY, THE TENTH DAY OF NOVEMBER, 1783*, *supra* note 201, at 166.

legislatures were generally understood to have power to counteract rebellions and invasions. For instance, the Maryland Constitution of 1776, rather than granting a limited martial law power, constrained who could be subject to martial law. It declared that “no person” except members of the armed forces and the militia (in actual service) “ought in any case to be subject to or punishable by martial law.”²⁰⁶ It thereby assumed that the Maryland government enjoyed a power to impose martial law even though such authority was not expressly granted. The framers of that constitution likely understood that absent the restraint the legislature could impose martial law on civilians.

The Massachusetts Constitution was erected on similar assumptions about the broad scope of legislative authority in crises. That constitution never expressly granted a power to suspend the privilege of habeas corpus. Instead it limited suspensions to a twelve-month period,²⁰⁷ a constraint evidently made necessary by an understanding that the legislature otherwise could suspend the writ indefinitely. Moreover, it also declared that “[n]o person can in any case be subject to law-martial, or to any penalties or pains . . . but by authority of the legislature.”²⁰⁸ Again, the provision did not grant power to impose martial law. Rather it assumed that the legislature could declare martial law and merely clarified that the executive could not. The latter limit likely was added out of an abundance of caution, for it reflected the common view that only the legislature could impose martial law.²⁰⁹

The sense that assemblies had broad emergency authority, derived from a careful reading of constitutional text, fits with the practice described earlier. As noted, Pennsylvania, New York, South Carolina, North Carolina, and Georgia declared martial law or the equivalent.²¹⁰ It seems likely that those constitutions also were read as authorizing the state legislatures to take extreme measures in times of war and rebellion as necessary means of defeating adversaries and maintaining the constitutional order.

In contrast to the handful who criticized a few state statutes, there seems to have been no one who condemned the Continental Congress for exceeding its authority. Perhaps the lack of censure reflected the fact that the Articles of Confederation contained no individual rights protections (unless one counts its debt guarantee²¹¹) and lacked anything resembling separation of powers.²¹² Yet given its limited grants of legislative power (it had but a handful), one might have charged the Continental Congress with exceeding its enumerated powers when it authorized the seizure of property, indefinite

206. MD. CONST. of 1776, art. XXIX.

207. MASS. CONST. pt. 6, art. VII.

208. *Id.* pt. 1, art. XXVIII.

209. See Prakash, *supra* note 18, at 1407.

210. See *supra* Section II.A.1.

211. ARTICLES OF CONFEDERATION of 1781, art. XII.

212. See *id.* art. II.

detentions, military trial of civilians, and dictatorial powers. After all, the Continental Congress was limited to powers “expressly delegated.”²¹³

Apparently congressional war powers were understood as quite sweeping. In 1780 Alexander Hamilton declared that the Congress was “vested with full power to *preserve the republic from harm*.”²¹⁴ Its acts of “the highest” sovereignty—the Declaration of Independence, the creation of an army and navy, emitting money, making treaties, and appointing a dictator—were never disputed, he claimed.²¹⁵

Was this “full power to *preserve the republic*” without limits? Of course not. There were constraints arising out of the limited authority thought to rest with Congress. The Continental Congress could not tax people; it was forced to requisition the states to get revenue,²¹⁶ making demands that often went unfulfilled. The Congress also relied on the states to supply soldiers,²¹⁷ a less-than-ideal arrangement because, though such requisitions were “binding” in theory,²¹⁸ they were not in reality. Finally, Congress could not regulate foreign commerce, an authority that was useful in preserving domestic war material for military use.

Still the fact remained that the Continental Congress had broad wartime authority. Judging by the statutes enacted and by the absence of criticism, it is fair to say that the Continental Congress had power not only to “determin[e] on” war,²¹⁹ but also authority to ensure that it prevailed in its wars. In other words, it had concomitant authority to adopt useful and appropriate measures necessary to ensure victory. Despite the absence of explicit authority, it could take property, authorize indefinite detention and military trials, and make a dictator of its commander because these measures were incidental to the war power and useful to prevailing over the British.

In sum, continental and state frameworks were read to grant legislatures sweeping wartime authority. The Continental Congress’s war power was understood rather expansively. State constitutions were read to permit departures from peacetime constraints related to rights and structure, with the legislatures serving as gatekeepers of crisis authorities. Using their wartime authority, both continental and state legislators ceded vast authority to executives, including dictatorial authority.

Most of the era’s constitution makers (and most legislators) likely did not believe that curtailments of civil liberties in times of crisis necessarily led to continued restraints afterwards. They had seen other nations temporarily suspend civil liberties—most prominently Rome and England—only to see the liberties restored in peaceful times. The same happened in America, for

213. *Id.*

214. Letter from Alexander Hamilton to James Duane, *supra* note 189, at 401.

215. *Id.*

216. ARTICLES OF CONFEDERATION of 1781, art. IX.

217. *Id.* para. 5.

218. *Id.* para. 1.

219. *Id.*

individual rights reverted to their peacetime forms after the war. There was no permanent resort to indefinite detention or military trial of civilians.

III. THE DOMESTIC WAR POWERS OF CONGRESS UNDER THE NEW CONSTITUTION

With the advent of the Constitution, Congress gained a few important crisis powers and lost little. The new Congress could impose taxes and thus could support military and civilian establishments without petitioning the states for funds.²²⁰ It also acquired authority over foreign commerce and could impose embargoes that might help retain domestic supplies during wars and rebellions.²²¹ In the past, Congress could do no more than implore the states to impose such restraints.²²² Finally, Congress could provide for summoning the state militias to combat invasions and rebellions.²²³

Congress lost some authority over the military. First, it no longer could appoint commanders in chief because the president would be commander in chief of all branches of the military and all the militias, *ex officio*.²²⁴ Second, Congress could not saddle the commander with officers not of his choosing, for the president appointed military officers, with the Senate wielding a check.²²⁵ Third, though Congress retained sweeping authority to regulate the military, the president's veto was a substantial check on its exercise.²²⁶ Law-making had gone from a unicameral process to something of a tricameral one.

Despite these changes to congressional authority and the creation of an independent executive, the emergency Constitution shared the same basic structure as the many American frameworks that preceded it. The legislature (Congress) continued to enjoy the power to enact measures necessary to prevail in wars. By providing that Congress retained the powers to declare war, raise an army and navy, and regulate both, the Constitution implied that Congress could continue to pass laws needed to defeat foreign enemies.²²⁷ Moreover, the grant of authority to use the militias to suppress rebellions hinted that Congress had acquired a general power to enact measures meant to subdue rebels.

With the adoption of the Necessary and Proper Clause, powers that formerly rested on a broad reading of the power to “determin[e] on . . . war” now enjoyed the foundation of a clause meant to make clear that Congress enjoyed incidental powers. Under the “Sweeping Clause,” Congress could

220. U.S. CONST. art. I, § 8, cl. 1.

221. *See id.* cl. 3.

222. *See, e.g.*, 14 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 1007 (Worthington Chauncey Ford ed., William S. Hein & Co. 2005) (1909).

223. U.S. CONST. art. I, § 8, cl. 15.

224. *Id.* art. II, § 2, cl. 1.

225. *Id.* cl. 2.

226. *Id.* art. I, § 7, cl. 3.

227. *Id.* § 8, cl. 11, 12–15.

enact laws necessary to prevail in invasions and rebellions, such as laws authorizing the concentration of government powers, the taking of property, and the suspension of habeas corpus and some other civil liberties.

The augmentation of crisis powers likely stemmed from the deficiencies of the old regime. Under the Articles, Congress relied on the states to supply money and soldiers, a reliance that proved misplaced. The Continental Congress also lacked authority to help crush state rebellions. Some historians suppose that Shays's Rebellion spurred the Framers to propose vesting greater emergency powers in the national government and led some of the ratifiers to favor the Constitution.²²⁸

A. *The Case for a Domestic War Power*

The Constitution specifies that Congress has “[a]ll legislative Powers herein granted,”²²⁹ signifying that powers not granted by the Constitution to Congress do not rest with Congress. As noted earlier, some think the absence of an express “emergency power” suggests that the Constitution never cedes any crisis powers to Congress. This assessment is misguided, for it fails to heed Chief Justice Marshall’s admonition that constitutional text should be reasonably or fairly construed rather than “strictly” construed.²³⁰ We ought to give the text the reading that it most likely bears and not labor to read it in the narrowest way possible merely because such interpretations are possible. Additionally, as is now clear, the rigid reading of the Constitution fails to account for all that preceded it. If the rigid theory is correct, we must imagine that the Constitution granted the federal government *less* crisis authority than its predecessor wielded, even as that new regime acquired powers and duties with respect to rebellions. *Prima facie*, this is unlikely.²³¹

The far more plausible reading is that the federal government—Congress in particular—inherited the crisis powers of the Continental Congress. Had the Founders sought to diminish the national government’s crisis powers, they would have adopted a Constitution that expressly provided as much to remove all doubts. Imagine provisions in Article I, Section 9 that explicitly barred the use of military courts to try civilians and prohibited the concentration of federal powers in time of war. Moreover, had the Founders meant to deny or disparage the idea of implicit crisis powers, they might

228. Robert A. Feer, *Shays's Rebellion and the Constitution: A Study in Causation*, 42 *NEW ENG. Q.* 388, 388 n.1 (1969) (listing works in which historians link the rebellion and the Constitution); *see also* Letter from Thomas Jefferson to William Stephens Smith (Nov. 13, 1787), *in* 14 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 464, 465 (John P. Kaminski & Gaspare J. Saladino eds., 1983) (saying that the president was made too powerful because the “Convention has been too much impressed by the insurrection of Massachusetts [sic]” and that the Convention had set up “a kite to keep the hen yard in order”).

229. U.S. CONST. art. I, § 1.

230. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415, 421 (1819).

231. *Cf.* 1 *THE FEDERALIST* No. 23, at 143 (Alexander Hamilton) (Lawbook Exch. 2005) (discussing necessity of an energetic Constitution to the preservation of the Union).

have reintroduced a provision that specified that all powers not “expressly” enumerated were reserved to the states.²³²

Additionally, had the Founders wished to discard or disclaim emergency powers, they would not have littered the Constitution with references to invasions and rebellions. The Habeas Clause supposes that the federal government may suppress both, for it envisions that the government may use indefinite detentions to counter both.²³³ The Militia Clause provides that Congress may declare when the state militias may be called forth to thwart invaders and rebels,²³⁴ thereby hinting that the Congress has a generic power to foil invaders and rebels. The Guarantee Clause imposes a federal duty with respect to invasions and rebellions,²³⁵ thus implying at least some federal power to satisfy that duty.²³⁶ The Preamble speaks of a desire by “We the People” to “insure domestic Tranquility [and] provide for the common defence,”²³⁷ two ends that seem to speak to rebellions and invasions, respectively. Because there is an explicit limit on domestic war powers (the Habeas Clause), a provision that authorizes the use of a particular means to combat invasions and rebellions (the Militia Clause), a duty to come to the aid of states during domestic wars (the Guarantee Clause), and an oblique reference to suppressing rebellions and invasions (the Preamble), the Constitution should be read as authorizing the national government to combat invasions and to thwart rebellions.

Perhaps most importantly, had there been a desire to curb crisis powers, the Founders certainly would not have added an express clause—Article I, Section 8, Clause 18—that strengthens the textual case for crisis powers. The Necessary and Proper Clause bolsters the accommodative reading of the

232. ARTICLES OF CONFEDERATION of 1781, art. II (“Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation, expressly delegated to the United States, in Congress assembled.”). The Tenth Amendment lacks the adverb “expressly,” suggesting that the federal government has those powers expressly or implicitly delegated. See U.S. CONST. amend X.

233. See U.S. CONST. art. I, § 9, cl. 2. More precisely, the Habeas Clause poses no bar to suspensions when a foreign nation invades the United States. I do not mean to suggest that the Habeas Clause itself authorizes detentions, as some have argued. See *Debates of the New York Convention* (July 1, 1788), in *THE DEBATES IN THE SEVERAL STATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION*, *supra* note 89, at 377, 399 (“What clause in the Constitution, except [the Habeas Clause] itself, gives the general government a power to deprive us of that great privilege?”). As noted in the text, the power to suspend the privilege of the writ arises from the Necessary and Proper Clause.

234. U.S. CONST. art. I, § 8, cl. 15.

235. *Id.* art. IV, § 4.

236. See 2 *THE FEDERALIST*, *supra* note 231, No. 43, at 60–61 (James Madison) (discussing Guarantee Clause and noting that “a right implies a remedy”).

237. U.S. CONST. pmb.

Constitution, for it makes what was implicit under the Articles of Confederation express. Whereas before someone could have caviled about the Continental Congress's enactment of crisis measures, the Necessary and Proper Clause neutralizes such claims.²³⁸

Consider federal authority in the face of a military invasion. Despite the absence of any enumerated “repulsing” power, Congress indisputably has power to enact measures designed to thwart invaders.²³⁹ Again, the Constitution repeatedly mentions invasions, signaling that they are a matter of federal concern.²⁴⁰ In repelling invasions, the federal government is not limited to employing the militias and suspending habeas corpus merely because these measures are the only ones mentioned in connection with invasions. Instead, Congress, via the Necessary and Proper Clause, may take all useful and appropriate measures to thwart invaders. For good reason, no one doubts that Congress can use the army and navy to repel invaders even though neither branch of the armed forces is expressly mentioned in regard to invaders. Going further, Congress also may take property, delegate wartime discretion to the executive, and, if need be, impose martial law.²⁴¹ Under the right circumstances, such laws are necessary and proper to carry federal powers into execution because they help ensure that federal power meaningfully extends across the United States. Absent power to expel invaders, Congress could not ensure that federal powers—executive, legislative, and judicial—reigned supreme over the entire nation.

Likewise, though Article I lacks an enumerated “crushing” power, Congress certainly may enact laws necessary to crush rebellions. The federal obligation to counter “domestic Violence,” a duty triggered by a state request,

238. I count myself among those who suppose that the Necessary and Proper Clause is generally redundant in the sense that had it been omitted, Congress could enact laws designed to ensure that federal powers were meaningfully implemented. *See generally* THE FEDERALIST No. 44 (James Madison). Absent the Necessary and Proper Clause, Congress nonetheless would have had power to enact measures necessary to prevail in domestic wars, just as its predecessor the Continental Congress enjoyed such power, albeit without as firm a textual grounding. The Necessary and Proper Clause makes that power less subject to cavil.

239. U.S. CONST. art. I, § 8, cl. 15. Many supposed that defense against invaders was a principle object of the new government. *See, e.g.,* Roger Sherman, *A Citizen of New Haven: Observations on the New Federal Constitution*, CONN. COURANT, Jan. 7, 1787, reprinted in 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 280, 280–81 (John P. Kaminski & Gaspare J. Saladino eds., 1984) (claiming that the “great end of the federal government is to protect” states from foreign invasion).

240. U.S. CONST. art. I, § 8, cl. 15; *id.* § 9, cl. 2; *id.* art. IV, § 4. I do not mean to suggest that invasions are solely a federal concern, for I believe that the states have concurrent power to repulse invaders. Article I, Section 10 suggests as much. *See id.* art. I, § 10, cl. 3 (describing what states may do when they are invaded).

241. Unlike some authors, I do not believe that federal power to suspend habeas corpus somehow implies a power to declare martial law. *E.g.,* J.H.A., *Martial Law*, 9 AM. L. REG. 498, 507–08 (1861) (“The right to exercise one power [suspension], however, implies the right to exercise the other [martial law].”). A constitution could grant the power to suspend the privilege of the writ without also granting a power to declare martial law. Having said all that, I contend that the power to declare martial law arises from the Necessary and Proper Clause, a provision that likewise authorizes habeas suspensions.

suggests that the federal government has the power to subdue rebellions.²⁴² The express power to call the militias for the purpose of suppressing insurrections implies a general power to subdue them.²⁴³ The Habeas Clause presupposes a generic power to quash rebels, as it merely constrains when Congress may adopt a particular measure (suspension of the privilege).²⁴⁴ Again, in suppressing rebellions, the government is not limited to summoning the state militias and suspending habeas corpus merely because those are the only means expressly mentioned. Put another way, the partial enumeration of certain means of suppressing rebellions should not be construed to forbid the use of other means. During the Civil War, the federal government committed no constitutional wrong when it used the army and navy to suppress the Confederates because such use was necessary and proper to ensure that federal authority extended to *all* the states of the Union.

The federal powers to repel invaders and crush rebellions can be conceived as two parts of a single “domestic war power,” a power to defeat native and foreign enemies on American soil.²⁴⁵ This domestic war power, arising out of the Necessary and Proper Clause and its interaction with the provisions related to invasions and rebellions, authorizes measures necessary and proper to implement federal authority throughout the nation. Because rebels and invaders may thwart the execution of federal powers, Congress may enact measures to defeat both.

To return to the language of *McCulloch*, when it comes to thwarting rebellions and invasions there are legitimate ends—defeating invaders and rebels—that are clearly within the scope of the Constitution.²⁴⁶ Laws delegating broad powers and curtailing civil liberties during invasions and rebellions can be plainly adapted to those rightful ends. And the “letter and spirit of the [C]onstitution”²⁴⁷ accommodate emergency measures, permitting them because they are necessary to defeat invaders and rebels.²⁴⁸

242. See U.S. CONST. art. IV, § 4.

243. See *id.* art. I, § 8, cl. 15.

244. See *id.* § 9, cl. 2; Debates of the Virginia Convention (June 16, 1788), in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 449 (Jonathan Elliot ed., 2d ed. Philadelphia, J.B. Lippincott & Co. 1861) (noting that if there was no restriction on suspension, Congress would clearly have the right to suspend without limitation).

245. Cf. Resolution of the Legislature of the Commonwealth of Massachusetts (Feb. 9, 1799), in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 244, at 533, 534–35 (saying that Congress had the “right” to protect against internal and external enemies and that the federal government is “empowered” to repel invasions and suppress insurrections); *A Slave and a Son of Liberty*, N.Y. J., Oct. 25, 1787, reprinted in 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 133, 134 (John P. Kaminski et al. eds., 2003) (claiming that under the Constitution there will be a “power, and spirit, to . . . prevent encroachments, and repel invasions”).

246. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 381 (1819).

247. *Id.* at 421.

248. This power to take measures necessary to prevail in domestic wars is a sound, almost unassailable, implication of the Necessary and Proper Clause. Though beyond the scope of this Article, it also seems clear that there is a federal power to take necessary and proper measures

Earlier, Alexander Hamilton made the same point about federal power over domestic wars. Publius said one of the “principal purposes” of the Union was “the preservation of the public peace as well against internal convulsions as external attacks” and that “the persons, from whose agency the attainment of any *end* is expected, ought to possess the *means* by which it is to be attained.”²⁴⁹ In every case, the “*means* ought to be proportioned to the *end*.”²⁵⁰ Having made the federal government the guarantor against invasions and rebellions, the Constitution ceded it the means necessary to satisfy that pledge.

The power to take measures necessary to triumph in domestic wars is akin to the power to deliver mail, one never expressly granted to the federal government but nonetheless exercised since the Constitution’s inception.²⁵¹ When one gives power to a government to create post offices and roads, the strong implication is that government may deliver the post.²⁵² Likewise, when one imposes a duty to defend against invasions and rebellions and grants the powers to declare war and enact laws necessary to carry federal powers into execution throughout the nation, the government so empowered may enact laws useful and appropriate for prevailing in wars fought on American soil.

To sum up, the Necessary and Proper Clause authorizes Congress to take measures to ensure that the federal government triumphs in domestic wars. The Constitution contains too many indications (the Preamble, and the Guarantee, Habeas, and Militia Clauses) that domestic wars are a matter of paramount federal concern to imagine that there is no congressional power to take necessary and proper measures in order to prevail in rebellions or invasions.

to wage and win *foreign wars* (where the fighting occurs off of U.S. soil). During a foreign war, Congress may take domestic property useful to its prosecution, like steel and steel plants. In *Youngstown*, all the Justices supposed that the seizure of the steel plants would have been lawful if Congress had authorized it. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Similarly, in the midst of a large-scale foreign war, Congress might suppress civilian consumption of war material, thereby lowering procurement costs, again a necessary and proper measure for prevailing in war. *Cf. Lichter v. United States*, 334 U.S. 742, 780 (1948) (describing Congress’s power under the Necessary and Proper Clause in prosecuting war efforts to extend to controlling “production and distribution of . . . articles . . . which have direct relation to military efficiency” (quoting Charles E. Hughes, *War Powers Under the Constitution*, 2 MARQ. L. REV. 3, 17 (1917)) (internal quotation marks omitted)). While U.S. troops occupy foreign soil, Congress can also create a legal regime governing enemy territory because such laws are necessary and proper for carrying into execution the federal war power, a power that implicitly includes the power to administer conquered lands.

249. THE FEDERALIST, *supra* note 231, at 143–44.

250. *Id.*

251. See An Act to Establish the Post-Office and Post Roads Within the United States, ch. 7, 1 Stat. 232 (1792).

252. Martial Law, 8 Op. Att’y Gen. 365, 372 (1857).

B. *The Case for a Self-Preservation Power*

For some, an assertion that Congress enjoys a domestic war power naturally raises the question of what else Congress may do to ensure the implementation of federal powers. The domestic war power may well be part of a broader congressional power to adopt laws necessary to preserve the United States and its Constitution.²⁵³ While the existence (and contours) of a self-preservation power may seem something of a digression, a few comments seem necessary because some may balk at the collateral implications of accepting a domestic war power.

The Necessary and Proper Clause, the source of any domestic war power, indubitably has a reach that extends beyond hostilities. If Congress can legislate to overcome invaders and rebels because both are a threat to the execution of federal powers, perhaps Congress may pass measures meant to ensure that federal powers are executed across the nation, without regard to the obstructing crisis—rebellion, invasion, plague, or natural disaster. If a tornado thwarts the execution of federal laws in a locale because it destroys that area's federal apparatus, Congress may pass laws designed to revive federal authority. Congress might choose to use civilians to restore the rule of federal law, or it might, if the situation warrants, resort to the military or the militia.

The Constitution arguably presupposes a federal self-preservation power, for it assumes that the federal government can counter threats to itself. Consider the Treason Clause.²⁵⁴ Though the Constitution specifies what constitutes treason,²⁵⁵ it never makes treason a federal crime. Nor does it specifically authorize Congress to make treason a crime.²⁵⁶ Yet despite the absence of an express power, the Constitution implicitly empowers Congress to make treason a crime.²⁵⁷ Congress made treason a crime in the Crimes Act of 1790²⁵⁸ and it has been so ever since. Similarly, despite the lack of specific authorization in the Articles, the Continental Congress evidently thought that it could punish treason.²⁵⁹

The source of Congress's authority to make treason a crime is the Necessary and Proper Clause. As part of its power to preserve the federal government, Congress may deter Americans from subverting that government and hence may enact laws criminalizing treason. In the language of the Sweeping Clause, laws criminalizing treason are necessary and proper for

253. See 10 ANNALS OF CONG. 408–09 (1800) (claiming that the Necessary and Proper Clause “expressly delegates a general power of self preservation” because it includes a power “to preserve and maintain the powers delegated” so that they may be implemented).

254. U.S. CONST. art. III, § 3.

255. *Id.* art. III, § 3 cl. 1.

256. Instead, it authorizes Congress to set the punishment for treason. *Id.* art. III, § 3 cl. 2.

257. See, e.g., 2 THE FEDERALIST, *supra* note 231, No. 43, at 59 (James Madison).

258. An Act for the Punishment of Certain Crimes Against the United States (Crimes Act of 1790), ch. 9, § 1, 1 Stat. 112, 112.

259. See 9 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 174, at 894 (carving out treason as an exception to the general immunities held by members of Congress).

carrying into execution federal powers. The passage of such laws deters those contemplating treason. When executed, those laws incapacitate the treasonous.

Another provision that perhaps assumes a power to preserve the government is the Third Amendment. It bars involuntary peacetime quartering of soldiers in homes and nonlegislatively sanctioned wartime quartering.²⁶⁰ Yet the Constitution never expressly conveys a quartering power. Although this quartering power could be viewed as part of Congress's power to "support" the army,²⁶¹ the better view is that, in times of war, Congress may take property to carry on the war. In the language of the Necessary and Proper Clause, the physical occupation helps carry into execution the war powers of the federal government. This reading of the Constitution sensibly concludes that it perpetuates the wartime takings authority exercised by the Continental Congress under the Articles of Confederation, a takings power that, again, was not specifically enumerated.²⁶²

Having made a brief case for a federal self-preservation power, candor requires the admission that the Constitution's text does not as clearly support that power. While there are many references to invasions and rebellions, there are no references to other crises that might obstruct the implementation of federal powers. If the Constitution contained more clues that signaled a generic self-preservation power, the case for such a power would be stronger. For instance, if Article I, Section 9 imposed express limitations on what the federal government might do in response to natural disasters, the case for a generic self-preservation power to combat all manner of crises would be almost indisputable. Still there is a rather solid case that the Constitution empowers the federal government, via the Necessary and Proper Clause, to take measures to preserve itself.²⁶³

C. *The Influence of Context on the Scope of the Domestic War Power*

The idea that there is a domestic war power (or more broadly a self-preservation power) implies that the scope of federal power depends on context.²⁶⁴ That federal power varies according to the circumstances has long been understood. During the debate on the Bank of the United States, Elbridge Gerry made this precise point about the Necessary and Proper Clause:

260. U.S. CONST. amend. III.

261. *Id.* art. I, § 8, cl. 12.

262. See *supra* text accompanying notes 177, 180.

263. Some ratifiers spoke as if a power of self-preservation was a power enjoyed by all governments and did so in ways that bring to mind the Necessary and Proper Clause. See Debates of the Convention of North Carolina (July 25, 1788), in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 244, at 37, 54 ("And it seems *natural and proper* that every government should have in itself the means of its own preservation." (emphasis added)).

264. See Gary Lawson, *Ordinary Powers in Extraordinary Times: Common Sense in Times of Crisis*, 87 B.U. L. REV. 289, 308 (2007).

The meaning of the word “*necessary*” varies, also, according to circumstances: . . . if parts of the states should be invaded and overrun by an enemy, it would be thought necessary to levy on the rest heavy taxes, and collect them in a short period, and to take stock, grain, and other articles, from the citizens, without their consent, for common defence; but in a time of peace and safety such measures would be generally supposed unnecessary. Instances may be multiplied in other respects, but it is conceived that these are sufficient to show that the popular and general meaning of the word “*necessary*” varies according to the subject and circumstances.²⁶⁵

What Gerry said about “*necessary*” is true of “*proper*” as well. Congress may judge that some things that are improper in peacetime are quite “*proper*” in wartime on the theory that in judging the propriety of legislation it likewise should consider the context. Everyone understands that while swimming trunks are inappropriate attire for an opera, they are quite suitable for the beach. The same is true for legislation relating to military trials and martial law—what is improper in times of peace may be fitting in times of domestic war.

Others at the founding noted that the Necessary and Proper Clause was extremely useful during “*exigencies*”²⁶⁶ and a few noted that measures necessary in time of war might be impermissible in peacetime.²⁶⁷ Much later, Abraham Lincoln insisted that measures that are utterly unconstitutional in times of peace could be wholly constitutional in a domestic war. As he put it, he could

no more be persuaded that the government can constitutionally take no strong measure in time of rebellion, because it can be shown that the same could not be lawfully taken in time of peace, than [he] can be persuaded that a particular drug is not good medicine for a sick man, because it can be shown to not be good food for a well one.²⁶⁸

265. Debates on the National Bank (Feb. 2, 1791), in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 244, at 411, 419 (comments of Rep. Gerry).

266. See Alexander Hamilton, Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank (Feb. 23, 1791), in 8 THE PAPERS OF ALEXANDER HAMILTON 97, 105 (Harold C. Syrett ed., 1965) (“The means by which national exigencies are to be provided for . . . are of such infinite variety, extent and complexity, that there must, of necessity, be great latitude of discretion in the selection & application of those means. Hence consequently, the necessity & propriety of exercising the authorities intrusted [sic] to a government on principles of liberal construction.”).

One of the grounds for defending the Bank was that it would prove useful as a source of loans to the federal government during emergencies. *Id.* at 124 (saying that a bank “in sudden emergencies [is] an essential instrument in the obtaining of loans to Government”); see also 2 ANNALS OF CONG. 1957 (1791) (noting that bank can lend money to government “in time of sudden emergency”).

267. See, e.g., Debates of the Virginia Convention (June 13, 1788), in THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 22, at 1228, 1239–40 (James Madison denying that federal government could give up rights to navigation on the Mississippi during times of peace but admitting that during “emergencies,” including war, sometimes it was “*necessary*” to sacrifice territory).

268. Letter from Abraham Lincoln to Erastus Corning and Others, *supra* note 1, at 267.

While the reach of federal power undoubtedly expands during domestic wars, it is not without limits. While it might “have been a solecism, to have a government without *any means* of self-preservation,”²⁶⁹ it hardly follows that the government may do *anything* to prevail in domestic wars. The Constitution limits the domestic war power and it is worth pondering those limits.

For instance, suspensions of the privilege of the writ of habeas corpus are constitutional only “when in Cases of Rebellion or Invasion the public Safety may require it.”²⁷⁰ When neither rebellion nor invasion exists or when the public safety does not require it, Congress cannot suspend the privilege. Further, it is possible that whenever either rebellion or invasion “shall cease to exist, the suspension of the writ must necessarily cease also.”²⁷¹

Additionally, suspensions of the privilege of the writ are only permissible when they satisfy the Necessary and Proper Clause—the latter clause actually grants the authority to suspend. Hence, all suspensions must satisfy not only the Habeas Clause, but the Necessary and Proper Clause as well. A rebellion in Massachusetts would not permit suspension in Hawaii, unless such a suspension was necessary and proper to “prevent the rebellion extending” into Hawaii.²⁷²

Some rebellions or invasions might require little in the way of extreme measures. A rebellion might be so anemic that a suspension of habeas corpus would be unnecessary and improper and hence impermissible, even in the theater of the rebellion. Again, that the Constitution’s bar on suspending the privilege of the writ does not apply because there is an invasion or rebellion hardly establishes that a contemplated suspension is necessary and proper.

Given that Congress cannot suspend the privilege of the habeas writ except in cases of rebellion or invasion, it likely cannot suspend the jury trial right except in the same contexts. The suspension of jury trial rights are a greater infringement of civil liberty because a conviction before a military court not only permits detention long after a war ends, it also makes capital punishment a possibility.²⁷³ If a lesser infringement (detention) is constrained by a requirement of an invasion or rebellion, the greater infringement (punishment) ought to be subject to the same constraint because either legislation must be justifiable under a clause—the Necessary and Proper Clause—that conveys federal power in a context-sensitive manner.

269. Debates of the Convention of North Carolina, *supra* note 263, at 60.

270. U.S. CONST. art. I, § 9, cl. 2.

271. Debates of the Massachusetts Convention (Jan. 26, 1788), in 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1358, 1359 (John P. Kaminski & Gaspare J. Saladino eds., 2000) (Judge Dana of Massachusetts noting that though there was no temporal limit on suspensions, the Constitution limited the “nature of the cases” in which Congress could suspend the writ).

272. See Letter from Abraham Lincoln to Erastus Corning and Others, *supra* note 1, at 265–66.

273. See 10 U.S.C. § 818 (2012).

For similar reasons, it seems almost certain that domestic military rule is permissible only in times of invasion or rebellion.²⁷⁴

The general inquiry involves discerning whether a particular war measure is necessary and proper for carrying federal power into execution. While the “necessary” inquiry requires a showing that some measure is useful given the circumstances, the propriety inquiry entails a balancing of the measure’s need against the constitutional principles at stake.

In the first instance, Congress must decide which war measures are necessary and proper, taking into account the severity of the threat facing the nation and the impact those measures would have on constitutional principles relating to federalism, separation of powers, and individual rights. Upon presentment, the president must then determine whether Congress’s judgment is correct.

Because the constitutional text sets up a standard (determining whether some domestic war measure is necessary and proper to implement federal powers) rather than an easily administrable rule and because war measures are often divisive, determining whether a particular wartime statute is constitutional will stir up heated feelings. Yet the existence of such predictable disputes does not cast doubt on the claim that Congress has ample, if constrained, authority to ensure that the nation prevails in domestic wars.

D. *Early Congressional Statutes*

Federal laws reflected the sense that Congress could enact statutes that helped ensure the efficacy of federal power. As noted, the Crimes Act of 1790 outlawed treason,²⁷⁵ a prohibition the Necessary and Proper Clause made possible because treason undermined the federal government’s ability to implement its powers. The Act also enacted other crimes, many of which the Constitution nowhere specifically authorized. Included in this latter category were bars on freeing federal convicts, bribery, perjury, obstruction of judicial process, and misprision of treason (concealment of treason).²⁷⁶ Each proscription helped implement federal legislative, executive, and judicial powers.

The Crimes Act of 1790 was not the only early statute that helped safeguard the United States and its powers. Others are worth mentioning. In the Alien Enemies Act, Congress granted the president the power to deport any enemy alien upon a declaration of war or a planned or actual invasion of the United States.²⁷⁷ While modern judicial doctrine frowns on laws that turn on

274. See Martial Law, *supra* note 252, at 372 (noting that if invasion or insurrection are necessary to suspend habeas corpus, “surely that emergency must be not the less an essential prerequisite of the proclamation of martial law, and of its constitutional existence”).

275. An Act for the Punishment of Certain Crimes Against the United States (Crimes Act of 1790), ch. 9, § 1, 1 Stat. 112, 112.

276. See generally *id.* at 112–17.

277. An Act Respecting Alien Enemies (Alien Enemies Act of 1798), ch. 66, 1 Stat. 577.

alienage,²⁷⁸ expulsion of enemy aliens was a somewhat common feature of warfare in the seventeenth and eighteenth centuries.²⁷⁹ Though Congress had authority over naturalization and migration,²⁸⁰ it lacked specific textual authority to deport. Nonetheless it had such authority over *enemy* migrants because deporting enemy aliens (that might form a fifth column) was necessary and proper to overcoming wartime enemies.

Congress also legislated to protect itself from crises, including domestic wars. After a deadly yellow fever struck Philadelphia, leading to the deaths of thousands, Congress granted the president power to summon Congress to a place other than the capital when doing so protected the health and safety of legislators.²⁸¹ Such a law would be useful not only during plagues, but also during invasions and rebellions. If rebels or invaders captured the area where Congress was set to convene, the president could summon legislators elsewhere. The law was necessary and proper for ensuring the continued functioning of Congress.²⁸²

Legislation criminalizing certain wartime acts reflected an extremely broad sense of congressional power to ensure the continued viability of the federal government. Laws recreating the Articles of War for the navy made spying for an enemy, in certain circumstances, an offense triable by court-martial.²⁸³ Similarly, the army's Articles of War made aiding an enemy (corresponding, supplying provisions, or furnishing intelligence) a court-martialable offense.²⁸⁴ Both of these crimes seemed to apply only in wartime

278. *E.g.*, *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971) (“[T]he Court’s decisions have established that classifications based on alienage . . . are inherently suspect and subject to close judicial scrutiny.”).

279. *See* Prakash, *Exhuming the Seemingly Moribund Declaration of War*, *supra* note 9, at 114–17.

280. U.S. CONST. art. I, § 8, cl. 3–4; *id.* § 9, cl. 1.

281. An Act to Authorize the President of the United States in Certain Cases to Alter the Place for Holding a Session of Congress, ch. 17, 1 Stat. 353 (1794); Prakash, *supra* note 18, at 1402.

282. In other plague-related laws, early Congresses authorized federal inspectors to help enforce state quarantine laws. *See* An Act Respecting Quarantines and Health Laws, ch. 12, 1 Stat. 619 (1799); An Act Relative to Quarantine, ch. 31, 1 Stat. 474 (1796). There is no express federal power to impose quarantines and some members of Congress denied that Congress could isolate individuals infected with dangerous, communicable diseases. *See* DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801*, at 227–29 (1997). But a federal quarantine power arguably exists as part of the commerce authority. Without some federal power to regulate people crossing state and international borders, it is hard to see how Congress could have authorized the use of federal resources to aid in the execution of state quarantine laws. For an argument to this effect, see Edwin Maxey, *Federal Quarantine Laws*, 23 POL. SCI. Q. 617, 628–29 (1908).

283. *See* An Act for the Better Government of the Navy of the United States, ch. 33, § 1, art. 12, 2 Stat. 45, 47 (1800) (providing in the naval articles of war that all spies shall be subject to court-martial and may be executed); An Act for the Government of the Navy of the United States, ch. 24, § 1, art. 35, 1 Stat. 709, 712 (1799) (same).

284. Congress reenacted the army Articles of War extant during the Articles of Confederation, *see* An Act to Recognize and Adopt to the Constitution of the United States the Establishment of the Troops Raised Under the Resolves of the United States in Congress Assembled,

(because they spoke of an “enemy”) and were written in general terms, signifying that they applied to civilians (even citizens) and not just to military personnel.²⁸⁵ These were unique aspects of the Articles, most of which applied to the military only.

The Articles of War are important for two reasons. First, despite the absence of a specific power to criminalize wartime collaboration, Congress concluded that it could take measures designed to deter and punish those undermining the security of the United States during wartime. It likely concluded that it could deter and punish enemy abettors as necessary and proper for the execution of the federal government’s powers.²⁸⁶ Second, the reenactment of the Articles of War suggests that Congress believed it could continue to use military courts to punish civilians in time of war. The advent of Article III did not mean that the use of such military courts to try civilians was always unconstitutional. Rather the use of such courts could be justified as a necessary and proper means of ensuring the swift punishment of those who sought to assist the enemy in wartime. Like its predecessor the Continental Congress, the federal legislature likely supposed that “in times of invasion, the process of the municipal law is too feeble and dilatory” to punish those aiding an enemy.²⁸⁷

and for Other Purposes Therein Mentioned, ch. 25, 1 Stat. 95, 96 (1789), and those articles of war made aiding the enemy an offense triable before military courts. See 5 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 116, at 799, § 13, art. 18.

285. Compare 5 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 116, at 799, § 13, art. 17 (applying prohibition to “whosoever, belonging to the forces of the United States”), with *id.* art. 18–19 (applying prohibition to “whosoever”).

286. The interaction between these statutes and the federal treason law is a little unclear. Only those owing allegiance to the United States could commit treason. Spying and aiding the enemy were broader offenses because they covered foreign nationals. So perhaps Congress envisioned that non-U.S. citizens could be subject to courts-martial for these offenses, while U.S. citizens could only be tried in federal courts.

287. 9 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 174, at 784; *cf.* Letter from Abraham Lincoln to Erastus Corning and Others, *supra* note 1, at 264 (noting that “[n]othing is better known to history than that courts of justice are utterly incompetent” in rebellions and that during rebellions a jury often has “one member[] more ready to hang the panel than to hang the traitor”).

It is worth noting that in 1794, the Senate passed a bill that provided that those “warring against the Indians . . . shall thereby become liable and subject to the rules and articles of war.” Letter from Henry Knox to George Washington (Dec. 29, 1794), in 4 AMERICAN STATE PAPERS 543, 544 (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, Gales & Seaton 1832). But the House refused to adopt the provision. *Id.* The Senate may have supposed that white juries would not convict white murderers of Indians. See 4 ANNALS OF CONG. 1254 (1795) (Representative Wadsworth saying that no white jury would convict a settler who had murdered an Indian even when evidence was clear, hence the need for military trial as a means of taking away cases from biased juries). That is certainly what Knox supposed. See Letter from Henry Knox to George Washington, *supra*, at 544. This way of thinking suggested that military trial was a means of keeping the peace with Indian tribes because ordinary criminal trials were ineffectual means of punishing those who massacred Indians. Alternatively, it may be that the Senate wanted to act as if the white settlers were part of the federalized militia and hence could be subject to military trial. That is how Madison saw the matter. See Cabinet Secretaries’ Report (Jan. 12, 1795), in 15 THE PAPERS OF JAMES MADISON: CONGRESSIONAL SERIES 441,

A few thoughts on some notorious laws are in order. The Alien Friends Act and the Sedition Act have few champions today because they permitted high government officials to suppress their critics. Unlike the Alien Enemies Act, the Alien Friends Act granted the president broad discretion in times of peace to deport aliens.²⁸⁸ He could deport those he deemed “dangerous to the peace and safety of the United States” and those whom he suspected had “treasonable or secret machinations against the government.”²⁸⁹ The Sedition Act made it a crime to criticize members of Congress and the president.²⁹⁰ Though the Adams administration never deported anyone under the Alien Friends Act, it brought a number of prosecutions under the Sedition Act.²⁹¹

My aim is not to rehabilitate those infamous acts. Rather I wish to point out that the argument for their constitutionality rested in large measure on the Necessary and Proper Clause, and to assert that even if this argument was *wrong*, it was hardly silly. In Congress, Federalists argued that the Necessary and Proper Clause justified both acts.²⁹² Outside Congress, defenders made the same claim, arguing that the government could act against foreigners who might assist a potential invader and punish those making scurrilous attacks on the government.²⁹³

That Congress, in its early years, enacted laws not traceable to any express authorization in the Constitution is well known. In *McCulloch*, Chief Justice Marshall made much of the fact that Congress criminalized interference with the mails, arguing that the law was necessary and proper for carrying the mail power into execution.²⁹⁴ What has been perhaps overlooked is the extent to which Congress believed it could enact laws designed to ensure the robust exercise of federal powers and the federal government’s continued

442 (Thomas A. Mason et al. eds., 1985). Madison further believed that this “forced construction” was contrary to the Constitution. *Id.* Whether House members opposed the idea on policy or constitutional grounds is unknown. But the idea that settlers should be subject to military justice never became law.

288. An Act Concerning Aliens (Alien Friends Act of 1798), ch. 58, 1 Stat. 570.

289. *Id.* at 571.

290. An Act in Addition to the Act, Entitled “An Act for the Punishment of Certain Crimes Against the United States” (Sedition Act of 1798), ch. 74, 1 Stat. 596.

291. See JOHN FERLING, *JOHN ADAMS: A LIFE* 366–67 (1992).

292. See Joseph M. Lynch, *The Federalists and the Federalist: A Forgotten History*, 31 SETON HALL L. REV. 18, 23–24 (2000); see also 10 ANNALS OF CONG. 408 (1800) (explaining that the federal government has a power of self-preservation via the Necessary and Proper Clause); *On the Same Subject.—1799*, in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 244, at 441, 441 (report of Congress claiming that Congress must protect each state from invasion and that removal of aliens who may help an invasion is “necessary” for the purpose of preventing an invasion).

293. See, e.g., Patrick J. Charles, *Originalism, John Marshall, and the Necessary and Proper Clause: Resurrecting the Jurisprudence of Alexander Addison*, 58 CLEV. ST. L. REV. 529, 538 (2010) (discussing ALEXANDER ADDISON, *LIBERTY OF SPEECH AND THE PRESS: A CHARGE TO THE GRAND JURIES OF THE COUNTY COURTS OF THE FIFTH CIRCUIT OF THE STATE OF PENNSYLVANIA* (1798)).

294. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 385 (1819).

existence, including laws authorizing deportation of enemy aliens and laws against spying for, or aiding, an enemy. Congress generally had the proper sense of the Constitution. No less than its predecessors, the Constitution was erected on the assumption that legislatures could enact emergency laws necessary to preserve the government, a power that under our Constitution stems, in part, from the Necessary and Proper Clause.

E. *Commentary and Judicial Opinions*

This is not the place for a survey of the views of early politicians and commentators about Congress's domestic war powers. But a few comments are in order to get a sense of the sorts of arguments made after ratification. If we look to legal commentary, most of it focused on who could suspend habeas corpus. Few individuals discussed the scope of the domestic war power, martial law, or the use of military courts to try civilians. Noted commentators, including Professor St. George Tucker, Chancellor James Kent, and Justice Joseph Story ignored these matters. Yet it is worth noting that in the course of arguing that the states had power to thwart rebels and invaders, Justice Story rejected the claim that Congress had an "exclusive power" in that sphere, never pausing to question (much less deny) that Congress had a general power to crush rebellions and repel invasions.²⁹⁵ Justice Story understood what was implicit in the Constitution's authorizations (Militia Clause), limitations (Habeas Clause), and duties (Guarantee Clause).

Even during the War of 1812, the question of legislative power during domestic wars remained somewhat suppressed, for Congress never tried to suspend habeas corpus, much less impose martial law.²⁹⁶ But the matter did not remain totally obscure because members of the military claimed authority to rule by decree. In the waning days of the War of 1812, Andrew Jackson declared martial law in New Orleans.²⁹⁷ His move elicited a rebuke from his commander in chief. James Madison, speaking through his War Secretary Alexander Dallas, denied that the Constitution authorized the executive to declare martial law.²⁹⁸ But he noted that Congress might do so. "In the United States there exists no authority to declare and impose martial law, beyond the positive sanction of the Acts of Congress."²⁹⁹ Dallas went on to underscore what he meant by martial law: if a commander "undertake[s] to suspend the writ of habeas corpus, to restrain the liberty of the press, to

295. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 86 (Boston, Hilliard, Gray & Co. 1833).

296. Reginald Stuart describes a few instances in which some local military authorities imposed something like martial law. See REGINALD C. STUART, CIVIL-MILITARY RELATIONS DURING THE WAR OF 1812, at 107 (2009). But Congress never suspended the writ or authorized martial law. See MATTHEW WARSHAUER, ANDREW JACKSON AND THE POLITICS OF MARTIAL LAW: NATIONALISM, CIVIL LIBERTIES, AND PARTISANSHIP 42 (2006).

297. H.W. BRANDS, ANDREW JACKSON: HIS LIFE AND TIMES 260 (2005).

298. *Id.* at 303.

299. *Id.*

inflict military punishments upon citizens,” the commander could not cite the “law of the land for the means of vindication.”³⁰⁰

Much later, the Supreme Court concluded that the old order, in which legislatures could enact emergency statutes, survived the advent of the Constitution. *Luther v. Borden* endorsed the view that state legislatures could impose martial law, thus rejecting the idea that the institution that was quite common during the Revolutionary War was now impermissible.³⁰¹ While *Luther* said nothing directly about the federal government’s ability to declare martial law, it surely hinted that the federal government had the same authority as the states:

[A] State may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority. *The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the States of this Union as to any other government.* The State itself must determine what degree of force the crisis demands. . . . It was a state of war; and the established government resorted to the rights and usages of war to maintain itself, and to overcome the unlawful opposition.³⁰²

The opinion seemed to suppose that all governments had the right to “determine what degree of force” a war demands, including whether to impose military rule.

The majority also dismissed the relevance of arguments that the English Crown could not use military commissions to proceed against rebels. The martial law commissions issued by the Crown before the Petition of Right “bear no analogy in any respect to the declaration of martial law by the legislative authority of the State . . . when assailed by an armed force.”³⁰³ In other words, while the executive could not declare martial law, that had little bearing on whether a legislature could in America. Like President Madison, it seems as if the majority supposed that while Congress might declare martial law, the president could not.³⁰⁴

300. *Id.*; see also 33 ANNALS OF CONG. 1020 (1819) (comments of Rep. William Henry Harrison) (noting that only Congress could alter martial law). Others, in their rush to denounce General Jackson, took positions that could be read to suggest that military rule was impermissible even when authorized by the legislature. See *Johnson v. Duncan*, 3 Mart. (o.s.) 530, 538 (La. 1815).

It should be noted that while Madison admitted that Congress could impose martial rule, it was in a context in which that precise question was not in dispute.

301. 48 U.S. (7 How.) 1, 45 (1849)

302. *Luther*, 48 U.S. at 45 (emphasis added).

303. *Id.* at 46 (emphasis added).

304. See *id.* at 42–43. Justice Woodbury dissented at great length, arguing that the Rhode Island legislature’s declaration of martial law was illegal under state and federal law. *Id.* at 48, 58–88 (Woodbury, J., dissenting). But on the question of whether the federal government could declare martial law he equivocated. Initially he seemed to suggest that both the federal and state governments lacked such authority because the authority was fundamentally inconsistent with “political or civil liberty.” *Id.* at 62; see also *id.* at 69 (doubting whether legislative power in “this country” could impose martial law); *id.* at 75 (saying martial law was inconsistent with “free government[]”). At other points, however, he conceded that if anyone could

Finally, the case of *Ex parte Milligan* merits a few comments. During the Civil War, the military had convicted Lambdin P. Milligan before a military court (“a military commission”) at a time when the ordinary courts were open.³⁰⁵ In dicta, the five-justice majority denied that even Congress could authorize military trial of civilians.³⁰⁶ Chief Justice Chase, writing for three other justices, agreed that Milligan’s military trial was unlawful, primarily because Congress had denied the president authority to conduct such trials.³⁰⁷ Yet he disagreed with the gratuitous assertion that Congress could not have imposed martial law in Indiana. It is “within the power of Congress to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offences against the discipline or security of the army or against the public safety.”³⁰⁸ The chief justice believed that such power arose from the powers to govern and regulate the armed forces and to declare war. The latter power “necessarily extend[ed] to all legislation essential to the prosecution of war with vigor and success,” including imposing martial law and military courts.³⁰⁹

Chief Justice Chase was right, but ought to have cited the Sweeping Clause as well. The Constitution empowers Congress to adopt measures necessary and proper to thwart invaders and rebels, including, when necessary, the military trial of civilians and the imposition of military rule.³¹⁰

IV. THE DOMESTIC WAR POWER AND ITS RELATIONSHIP TO THE SEPARATION OF POWERS, INDIVIDUAL RIGHTS, AND ELECTIONS

This Article has maintained that Congress has a domestic war power and that it may authorize the seizure of property, indefinite detentions, military trials of civilians, and military rule. The case for why Congress has such sweeping authority largely has been made without reference to the Constitution’s principal features—such as the separation of powers and individual rights—that might be thought to bar some or all of these crisis measures. For instance, why doesn’t the Constitution’s implicit separation of powers bar delegations of vast wartime authority to the president? Or why doesn’t

declare martial law, the federal government could do so because it was invested with exclusive war powers. *Id.* (admitting that federal government might have power to declare martial law); *id.* at 83 (recognizing that if either government possessed authority to declare martial law it was the federal government).

305. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 107 (1866).

306. *Id.* at 121–22.

307. *Id.* at 132 (Chase, C.J., concurring).

308. *Id.* at 140.

309. *Id.* at 139.

310. See *Martial Law*, *supra* note 252, at 372–73 (1857) (arguing that the Constitution permits martial law during invasions and rebellions and noting that legislatures have such authority in England and America); see also Letter from Judge F.A. Chenoweth to William L. Marcy (June 8, 1856), in S. EXEC. DOC. No. 41 (claiming that martial law “never will legally exist without the express provision of Congress”).

the Constitution's creation of seemingly unyielding rights, in the Bill of Rights and elsewhere, mean that the existence of a domestic war has no bearing on whether those rights can be made to yield?

This Part squarely addresses how Congress's domestic war power interacts with three of the Constitution's most central elements—the separation of powers, individual rights, and periodical elections for federal office—and why extreme crisis measures can be constitutional despite these features.

A. Separation of Powers

For this discussion, assume that the Constitution has an implied principle requiring some separation of powers across the three branches. That is to say, what the Constitution vests in separate hands (legislative, executive, and judicial power) generally must stay separated, meaning that no one federal institution may exercise two or more powers. Almost everyone supposes the rule is immanent in the Constitution even as the degree or manner of separation remains disputed.³¹¹

My claim is that notwithstanding this implied separation of powers principle, the Constitution permits Congress to vest the legislative and judicial powers with the executive, thereby temporarily uniting the three federal powers. When arguing against a plural executive at the Philadelphia Convention, Edmund Randolph noted that the “[l]egislature may appoint a dictator when necessary,” suggesting that the national legislature could concentrate power.³¹² The principle of incidental and implied powers, made express in the Necessary and Proper Clause, authorizes the creation of a dictator. As Washington noted during the Revolutionary War, because “desperate diseases[] require desperate remedies,”³¹³ Congress may conclude that the concentration of powers in the executive is a “necessary,” even indispensable, means of ensuring that federal powers are implemented. Congress also may judge that concentrated powers in wartime are “proper,” because as argued earlier, Congress may judge propriety by reference to context. Given that “it has always been the policy of republics to centre the powers of society in the hands of the supreme magistracy for a limited time”³¹⁴ as a means of overcoming a crisis,³¹⁵ and given that previous American republics had done so in the years prior to the Constitution's creation, it seems fair to say that

311. For a discussion of how early statesmen dealt with this issue, see GERHARD CASPER, *SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD* (1997). For an unconventional understanding of legislative power in the context of the need to keep it separate from executive, see Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002). For a defense of the traditional sense of legislative power, see Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003).

312. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 73 (Max Farrand ed., 1966).

313. Letter from George Washington to John Hancock, *supra* note 176, at 382.

314. THE STATUTES AT LARGE OF SOUTH CAROLINA 1752–1786, *supra* note 96, at 470.

315. See *supra* note 99 and accompanying text.

the Congress may conclude that it sometimes is necessary and proper to adopt the age-old policy of republics and unite powers during extraordinary times.

For those particularly skeptical about the constitutionality of delegations of legislative power, perhaps a few additional comments are requisite. If ever there were a needful and fitting occasion for the delegation of such power, surely it would be in the context of domestic wars, when the nation and the legal framework that helps constitute it are imperiled. There can be no more compelling case for the delegation of lawmaking authority because if the rebels or invaders prevail, they may extinguish the entire system of separated powers.³¹⁶

Different arguments help explain why it is permissible to permit adjudication in the executive branch during domestic wars. On some accounts, Article III vests the entire federal judicial power in the Supreme Court and inferior federal courts that Congress may create,³¹⁷ meaning that the federal executive cannot exercise judicial power because the Constitution grants it exclusively to the courts. This suggests that Congress cannot authorize military tribunals or commissions to hear ordinary, nonmilitary criminal cases or to adjudicate disputes between private parties. Indeed, even if the ordinary civilian courts were closed because of warfare, or even if there was an acute need to provide swift punishment, there can be no federal power to create a system of military courts for nonmilitary personnel because Article III erects an insuperable barrier.

I believe that one should read Article III as establishing how federal civilian courts should function, but as saying nothing about whether Congress can, under limited circumstances, erect alternative courts. *Dynes v. Hoover*, from the mid-nineteenth century, concluded as much when the Court rejected the claim that courts-martial violated Article III.³¹⁸ Congress's "power to [provide for the trial of military and naval offenses] is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States,"³¹⁹ meaning that Article III had no bearing on whether military courts could try cases of desertion.

316. I thus disagree with Professor Lawson's categorical claim that delegations of legislative power are per se unconstitutional. See Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 350 (2002) ("There is not the slightest doubt that a statute delegating legislative power would not be 'proper' and hence would not be authorized by the Sweeping Clause."). Were we to ask how "a fully informed eighteenth-century audience," *id.*, would regard delegations of legislative power during invasions and rebellions, I believe that most in the audience would find them necessary and proper. More congenial to this Article's argument is Lawson's recent suggestion that more laws pass muster under the Necessary and Proper Clause in times of crisis, meaning that Congress can do more in times of crisis. See Lawson, *supra* note 264, at 308.

317. See, e.g., Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985) (analyzing Justice Story's claim that Article III requires all federal judicial power to be vested in federal courts).

318. 61 U.S. (20 How.) 65, 78–79 (1857).

319. *Dynes*, 61 U.S. at 79.

A parallel argument can be made about the use of military courts to try cases that ordinarily would be heard in the federal courts. While Article III addresses the features of the federal civilian judicial system, it does not speak to (much less constrain) what cases may be adjudicated in military courts. The question is whether the Constitution elsewhere empowers Congress, in time of a domestic war, to establish military courts to try civilians. Like the power to establish military courts for military personnel, the power to set up military courts for civilians (if it exists) is “entirely independent”³²⁰ of the judicial power of Article III.

In my view, the Necessary and Proper Clause authorizes Congress, during a domestic war, to set up military courts to adjudicate cases that involve civilians. The necessity and propriety of such laws is evidenced by the fact that before the Constitution’s creation, military courts repeatedly adjudicated cases involving crimes committed by ordinary citizens both at the continental and state levels.³²¹ After the Constitution’s creation, Congress declared that those who spied for, or abetted, an enemy (crimes that could be adjudicated only in times of hostilities) could be tried before military courts.³²² Such legislation was necessary and proper under the plausible theory that in times of war, swift and exemplary punishment of those aiding the enemy could be expected only from military courts.³²³

At the extreme, Congress might wholly supplant the civil courts when legislators conclude that those courts cannot function. For example, if civil judges, marshals, clerks, or bailiffs have fled due to an invasion, Congress might conclude that a functioning system of justice is indispensably necessary as a means of reassuring the populace that the government still functions. To satisfy that need, Congress could provide that military courts would dispense justice in the interim. Or consider an area where judicial personnel have abandoned their posts and joined a rebellion. If that area is under threat of a rebel takeover and some judicial system is requisite, military courts may be the only alternative.

In *Ex parte Milligan*, the majority concluded that when the ordinary courts are open, military courts could not adjudicate the alleged crimes of noncombatants.³²⁴ The focus on whether the courts are open is misplaced. In deciding whether to bypass the ordinary courts, members of Congress should be mindful of whether those courts are open and should consider the types of cases that might be shifted to the military courts. But those are not the only relevant factors. For instance, Congress may consider possible judicial bias in the civilian courts (especially when concerned about rebellion), the pace at which civilian courts hear and decide cases, and whether civilian judges are as competent in cases involving the laws of war. Taking these factors into account, Congress may conclude that it should bypass fully

320. *Id.*

321. *See supra* Section II.A.

322. *See supra* note 283 and accompanying text.

323. *See supra* text accompanying notes 283–287.

324. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866).

functioning ordinary courts during a domestic war because it needs impartial courts, swifter justice, or more expert judges.

Thus far I have argued that Congress can transfer power away from itself and the judiciary and make a dictator of the president. But perhaps Congress may transfer power away from the executive as well. There may be little reason to suppose that while the Necessary and Proper Clause authorizes domestic wartime legislation diminishing Congress and the federal judiciary, it absolutely forbids laws that diminish the president. While Article II creates a strong executive, little in it suggests that it alone among the first three Articles is beyond the reach of Congress's considerable powers during invasions and rebellions.³²⁵

During a domestic war, Congress might weaken or constrain the executive in two different ways. First, and more speculatively, perhaps Congress can temporarily supplant the president as commander in chief. It might have such power if it thought the measure was necessary for preserving the powers of the federal government. For instance, if an incumbent commander in chief proved a poor wartime steward, perhaps Congress could vest ultimate control in some more competent military figure, say an existing general or admiral.

In times of war, there is a long tradition of executives being eclipsed or superseded by others. During the Roman Republic, a dictator would supplant the two executive consuls and assume supreme control over the military.³²⁶ In the Civil War, while some regarded Lincoln as having seized the powers of a dictator,³²⁷ other voices claimed that a military dictator ought to supplant Lincoln.³²⁸ Similar sentiments were expressed in the Confederacy.³²⁹

Second, Congress might impose a conciliar check on the crisis delegations it cedes to the president. When it comes to law execution and military matters, the Constitution does not oblige the president to obtain either the

325. See U.S. CONST. art. II.

326. See GREGORY K. GOLDEN, *CRISIS MANAGEMENT DURING THE ROMAN REPUBLIC: THE ROLE OF POLITICAL INSTITUTIONS IN EMERGENCIES* 11–12, 24–25 (2013). Roman law barred the consuls from serving as a dictator, meaning that the consuls could not appoint one of their own. See CLINTON ROSSITER, *CONSTITUTIONAL DICTATIONSHIP: CRISIS GOVERNMENT IN MODERN DEMOCRACIES* 21 (1948) (2009).

In 1798, John Adams made George Washington “Commander in Chief” of the army as a means of invigorating it in the face of a potential French invasion. See Letter from George Washington to John Adams (July 13, 1798), in 2 *THE PAPERS OF GEORGE WASHINGTON: RETIREMENT SERIES* 402, 404 n.1 (W.W. Abbot ed., 1998) (discussing George Washington’s commission). Even though Adams had appointed someone who, by virtue of his past, would operate with a good deal of latitude, this example is not entirely apposite because Adams clearly retained constitutional authority over Washington. See *id.*

327. See, e.g., DAVID DONALD, *CHARLES SUMNER AND THE RIGHTS OF MAN* 26 (1970) (Charles Sumner stating that Lincoln “is now a dictator, imperator”).

328. See T. HARRY WILLIAMS, *LINCOLN AND HIS GENERALS* 212 (1952) (noting that there was talk of a dictator replacing Lincoln).

329. See WILFRED BUCK YEARNES, *THE CONFEDERATE CONGRESS* 173, 226–27 (1960) (noting that some members wanted to make Robert E. Lee a dictator).

Senate's consent or the assent of some other council.³³⁰ Moreover, in ordinary times Congress could not require that the president seek the assent of anyone in the exercise of his constitutional powers. Nonetheless, as a condition of granting extraordinary crisis powers, perhaps Congress could require the consent of an executive council prior to the president's exercise of them. If, as argued above, Congress can make a dictator of the president, it is less of a stretch to suppose that Congress might also be able to convey additional powers to the president with the proviso that he first secure a council's advice and consent.³³¹

As I have tried to make clear throughout, the Constitution limits Congress's authority to tamper with the separation of powers. In particular, such authority may be exercised when there is a domestic war, meaning that there are rebels or invaders fighting on American soil. Relatedly, it may be that Congress can delegate sweeping authority only in a theater of war, much as the Continental Congress ceded geographically constrained martial law authority to the commander in chief during the Revolutionary War. The underlying (and sound intuition) is that while military rule may be requisite around the vicinity of active fighting on American soil, it may not be necessary and proper hundreds or thousands of miles away.

B. *Constitutional Rights*

Two conceptions of federal constitutional rights seem relevant to our discussion of congressional power during domestic wars. First is the view that constitutional rights provisions establish absolute bars, applicable at all times. Professor Fallon gives the example of compelled prayer because he believes that a law compelling prayer is per se unconstitutional, whatever the context.³³² If Congress enacted a statute that compelled prayer, as a means of placating a foreign power that controlled a large portion of New England and credibly threatened to decimate its populace unless the prayer law was adopted, the prayer law would violate the Free Exercise and Establishment Clauses of the First Amendment. Essentially, where compelled prayer is concerned the circumstances are irrelevant.³³³ We will call such rights "unqualified rights," because they are insensitive to context, including the governmental interests at stake.

An alternative view regards constitutional rights as context sensitive. Rights are qualified either because some circumstances permit the infringement of constitutional interests that are ordinarily protected or because those interests always must be balanced against governmental interests in

330. See U.S. CONST. art. II, § 2, cl. 1; *id.* § 3, cl. 5.

331. This sort of delegation has the same structure as a legislative veto, except the veto rests with the council rather than with Congress.

332. RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 78 (2001).

333. To be clear, I am agnostic about whether the right against compelled prayer is unqualified. I discuss the issue of compelled prayer merely to give an example of a right thought by many to be unqualified.

order to judge whether the constitutional rights are violated in the first instance. Where context matters, we have “qualified rights” because the constitutional interest does not invariably prevail.

The notion that *all* constitutional rights are unqualified and can never be overcome, whatever the context, may be deeply appealing to civil libertarians because it resonates with their priors.³³⁴ Yet if we ask which sorts of rights the Constitution embraces, it seems quite likely that it contains both qualified and unqualified rights. Both text and doctrine affirm as much.

Consider provisions that reveal that their rights do not apply in certain contexts. The Third Amendment creates a right against the quartering of soldiers in one’s home.³³⁵ Yet it also makes clear that quartering is permissible in wartime.³³⁶ Essentially, the amendment reveals that in wartime, Congress may subordinate a homeowner’s interest against quartering to the nation’s paramount interest in defeating the enemy. The Fifth Amendment requires that those tried for “infamous crime[s]” must first be subject to a presentment or a grand jury indictment.³³⁷ But it also implies that in “time of War or public danger” persons in the militia may be tried for “infamous crime[s]” without either.³³⁸ In this case, the right of a member of a militia not to be tried without prior action by a grand jury is clearly subordinated in domestic wars and beyond. Finally, while Congress cannot suspend habeas corpus during an overseas war or due to a collapse in civil law enforcement, it can authorize indefinite detentions during domestic wars.³³⁹

Judicial doctrine also makes clear that certain rights are qualified. The First Amendment’s Freedom of Speech Clause,³⁴⁰ as refracted by doctrine, supplies an example in which governmental interests can overcome the constitutionally protected interests of individuals. While a statute discriminating on the basis of viewpoint is unconstitutional if the government lacks a compelling interest, that same statute is constitutional when its enactment was undergirded by such an interest and the means furthering that interest are the least restrictive.³⁴¹ For instance, if Congress suppressed speech critical of a foreign nation because that nation demanded as much in return for ending a war, that statute would be constitutional if there are no other viable means of ending the war (surely the termination of a war counts as compelling).

334. Those who tend to see the Constitution in rigid terms are most apt to see rights as uniformly unqualified.

335. U.S. CONST. amend. III.

336. *Id.*

337. *Id.* amend. V.

338. *Id.*

339. *Id.* art. I, § 9, cl. 2.

340. *Id.* amend. I.

341. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395–96 (1992) (applying strict scrutiny to a regulation that the Court had condemned as viewpoint based); *Texas v. Johnson*, 491 U.S. 397, 412 (1989) (applying strict scrutiny to a law barring flag desecration). For a more informed view of the test for viewpoint discrimination, see Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2425 n.44 (1996).

Some nontextual constitutional interests are also qualified. The Supreme Court has said that confinees in mental institutions continue to enjoy constitutional rights against bodily restraint.³⁴² But the very case announcing the right permitted the government to trump those interests. The test is whether a health professional exercised “accepted professional judgment” in concluding that physical restraints were necessary.³⁴³ If so, there is no violation of the constitutional right to be free of bodily restraints. One could go on, but the point is made. As a matter of doctrine, some rights are qualified in the sense that the interests they protect must be balanced against the government’s interests.³⁴⁴

My reason for discussing qualified and unqualified rights is to make clear that I do not believe that the Necessary and Proper Clause permits Congress, during domestic wars, to overcome all constitutional rights. Rather I believe that while some rights are context sensitive and hence may be overcome given important enough interests, others are not and must always be respected. How best to classify a particular right is challenging, requiring a deep and historically informed inquiry. While I leave a thorough catalogue of federal rights for another day, a few tentative comments seem appropriate.

Qualified rights include the freedom of speech and press, and I would add the freedom of assembly because it is hard to suppose that the latter is unqualified when its close counterparts, the freedoms of speech and press, are clearly qualified. In other words, if discerning whether the government has violated the freedoms of speech and press requires a consideration of governmental interests in the suppression of either, it seems that the same framework ought to apply to freedom of assembly, especially because the right to assemble is associated with the freedom of speech.

The jury trial right must be added to the list. As noted earlier, despite the absence of any express exceptions to the jury trial right, the federal government may punish soldiers and sailors without regard to that right.³⁴⁵ More precisely, if Congress wishes to make soldiers and sailors subject to courts-martial, it may do so. For these individuals, the Article III right to a jury trial has always been understood to be qualified.

Of course, ordinary citizens stand on a different footing. I think it unnecessary and improper for Congress to subject ordinary civilians, unconnected with the military, to military trials in times of peace or during foreign wars. In such contexts, the need for military trials of civilians seems minimal to nonexistent. But in a domestic war, Congress may conclude that

342. *Youngberg v. Romeo*, 457 U.S. 307, 319–20 (1982).

343. *Id.* at 321, 323.

344. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987) (examining the widespread nature of balancing in constitutional law).

345. *Compare* U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.”), *with Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866) (concluding that the Framers intended to confine the Sixth Amendment right to trial by jury to those who must be indicted under the Fifth Amendment, which excludes members of the armed forces).

the rights to indictment or presentment and to a petite jury should yield. During invasions and rebellions, Congress may substitute military courts for civilian courts when it appears that the latter cannot function because of the ongoing conflict. Rather than wait for the civilian courts to reopen, a delay that may extend months or years, Congress might choose to have military courts hear civil and criminal cases involving civilians. Alternatively, during an invasion or rebellion, Congress might decide that even when the ordinary courts operate normally, certain war crimes should nonetheless be heard in military courts because of the need for expertise, quick justice, and secrecy. At least some of the Founders understood that Congress might need to circumvent the jury trial right in the context of a domestic war.³⁴⁶

The list of *unqualified* rights certainly includes the prohibition on bills of attainder.³⁴⁷ Bills of attainder were commonly enacted during wars and rebellions as a means of punishing individuals without trial.³⁴⁸ Because they were particularly associated with invasions and rebellions it makes sense to suppose that the federal bar was meant to apply in both contexts, regardless of how useful bills of attainder might be in defeating invaders and rebels. Put another way, the Constitution does not suppose that bills of attainder are ever necessary and proper means of carrying federal powers into execution. Some Founders might have thought bills of attainder unnecessary in the sense that they were not particularly useful. A speedy military trial was always available as a means of punishing the truly guilty. Others might have thought that such measures were an improper means of defeating an enemy because they punished without any trial.

More generally, we might say that when the Constitution protects rights that were typically only relevant in war or most likely to be infringed during war, it makes sense to suppose that these rights are unqualified. In these situations, the right almost brings to mind a war, thereby suggesting that it was meant to apply no less in wartime.

Another right that seems unconditional is the ban on ex post facto laws.³⁴⁹ Consider, in this regard, George Mason's objection to the bar. Despite the fact that Anti-Federalists clamored for a bill of rights, Mason complained about this limit on federal power, insisting that all legislatures inevitably enact ex post facto laws in crisis.³⁵⁰ Given that Congress likely

346. See Debates of the Virginia Convention (June 20, 1788), in *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION*, *supra* note 22, at 1412, 1418 (James Madison noting that jury in the vicinage might not be possible as when a whole district was in rebellion and noting that there had been "greater deviations" from trial by jury in America since independence as compared to England). Madison was likely referring to the use of military courts during the Revolutionary War to try civilians.

347. See U.S. CONST. art. I, § 9, cl. 3.

348. See Charles H. Wilson, Jr., Comment, *The Supreme Court's Bill of Attainder Doctrine: A Need for Clarification*, 54 CALIF. L. REV. 212, 216 & n.28 (1966).

349. See U.S. CONST. art. I, § 9, cl. 3.

350. See Objections of the Hon. George Mason, in 1 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 494, 496 (Jonathan Elliot ed., 1901).

would enact ex post facto laws during wartime, the existence of the bar guaranteed that Congress would violate the Constitution, or so Mason insisted.³⁵¹ Federalists replied that ex post facto laws were only required in a government with a “capital [grave] defect,” implying that the new system was so well formed that it would never need to pass such laws.³⁵² Mason’s complaint and the responses to it assumed that the prohibition on ex post facto laws was unqualified, applicable no less during invasions or rebellions.

Finally, Congress likely cannot authorize the president (or anyone else) to punish civilians during domestic wars without a trial. If the Congress could empower the president to punish without a trial, Congress essentially would be delegating a power to impose a bill of attainder by administrative fiat. Because Congress lacks the power to pass a bill of attainder, it likely cannot delegate such a power. This implied delegation prohibition perhaps reflects the disquiet that attended instances in which a Southern executive, during the Revolution, executed individuals without the check of a criminal trial.³⁵³ In sum, it seems clear that the Constitution forbids laws that permit summary punishment without any opportunity to be heard, call witnesses, and dispute the law and facts.

Of course, some will find any limits on the power to prevail during domestic war senseless and dangerous. Senseless because some will suppose that the “means of security can only be regulated” by the nature of the threat.³⁵⁴ Dangerous because “it plants in the constitution itself necessary usurpations of power, every precedent of which is a germe [sic] of unnecessary and multiplied repetitions.”³⁵⁵ Nonetheless, for the reasons given earlier, the Constitution is best read as imposing some absolute constraints on Congress’s domestic war power.

My narrow goal has been to suggest that while some constitutional provisions protect unqualified rights, other provisions safeguard rights that are sensitive to context. Because context matters for the Constitution’s many qualified rights, Congress, using the Necessary and Proper Clause, may enact legislation during domestic wars that it could not enact outside that setting.

C. *Continuity of Government*

The Constitution does more than establish separation of powers, federalism, and rights. It also supplies the means of selecting the president³⁵⁶ and Congress,³⁵⁷ procedures that seem exclusive. Yet domestic wars can interrupt

351. *Id.*

352. See An Impartial Citizen VI, PETERSON VA. GAZETTE, Mar. 13, 1788, reprinted in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 492, 493–94 (John P. Kaminski & Gaspare J. Saladino eds., 1988).

353. See *supra* text accompanying notes 104–106 .

354. 2 THE FEDERALIST, *supra* note 231, No. 41, at 40 (James Madison).

355. *Id.*

356. U.S. CONST. art. II, § 1.

357. *Id.* art. I, §§ 1–5.

those methods. In my view, the Constitution grants Congress, via the Necessary and Proper Clause, the power to ensure the continuity of the government.³⁵⁸ The 1794 statute authorizing the president to convene Congress elsewhere³⁵⁹ (discussed in Part III) was an exercise of that power. To see more of the outlines of such a power, consider hypothetical laws that help ensure that the nation's highest offices remain occupied.

For instance, Congress likely can enact laws designed to ensure quorums in its chambers.³⁶⁰ The Constitution provides that when a vacancy exists in a state's representation in the House, the relevant governor may conduct a new election.³⁶¹ This process works well in peacetime. But domestic wars may make elections in many states impossible. Given the House's centrality during wars and rebellions and the constitutional need for a quorum, Congress can enact laws that provide for alternative means of filling delegations. It might provide that an outgoing representative will continue in office if a state cannot hold new elections. Where outgoing representatives are unable or unwilling to serve, Congress might appoint someone else to serve a congressional district. While such a power might be wielded to favor the existing majority, that legitimate fear of self-dealing is outweighed by the need to ensure a quorum in the midst of a crisis. That Congress might enact legislation that favors incumbents in no way proves that Congress lacks the power to enact such legislation. Congress clearly may alter how states conduct their federal elections³⁶² even though this power may be used to favor incumbents. Similarly, the possibility that a prevailing legislative majority might exploit a

358. The Founders understood that the supervening congressional power over state elections for federal office would be useful during an invasion. See *Debates of the Convention of North Carolina* (July 25, 1788), *supra* note 263, at 54 (noting that because large states may prevent elections, Congress needed authority over state elections for federal office); *Debates of the Massachusetts Convention* (Jan. 17, 1788), in *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION*, *supra* note 271, at 1224, 1226 (Judge Sumner noting that congressional power to provide elections would be necessary if France captured a state capital). But the power to alter the time, place, and manner of elections does not encompass the power to decide that someone should serve in the House or Senate without an election, as when elections in a state are simply impossible. The latter power comes from the Necessary and Proper Clause.

359. An Act to Authorize the President of the United States in Certain Cases to Alter the Place for Holding a Session of Congress, ch. 17, 1 Stat. 353 (1794).

360. The Constitution's quorum rule, U.S. CONST. art. I, § 5, cl. 1 ("[A] Majority of each [chamber] shall constitute a Quorum to do Business."), is best read as turning on whether a majority of possible legislators is present as opposed to merely a majority of all those seats that are occupied. The former quorum rule focuses on the chambers as institutions without regard to the number of seats that are unoccupied for whatever reason. The latter rule focuses on the number of members currently serving. For an argument that the Constitution defines quorum in regards to the chamber's current institutional maximum, see John Bryan Williams, *How to Survive a Terrorist Attack: The Constitution's Majority Quorum Requirement and the Continuity of Congress*, 48 WM. & MARY L. REV. 1025, 1064 (2006).

361. U.S. CONST. art. I, § 2, cl. 4.

362. *Id.* § 4, cl. 1.

domestic war to add members to its coalition hardly demonstrates that Congress lacks power to ensure a quorum.³⁶³

Some might suppose that the Constitution's specific methods for filling vacancies are the only constitutional means of replacing members. But the relevant provisions do not by their terms claim that they are the only means of filling vacancies or, more precisely, that they apply even when holding elections is impossible.³⁶⁴ Moreover, one can read the Constitution as requiring state representation in the House and Senate, thereby creating a solid foundation for congressional legislation meant to ensure such representation. For instance, the Seventeenth Amendment declares that each state shall have two Senators, before further providing that the Senators shall be chosen by popular elections.³⁶⁵ One can read the Amendment as having two independent requirements—equal representation and popular election. If one obligation—popular election—proves impossible to satisfy, then Congress should try to fulfill the equal representation obligation, because satisfaction of one duty is preferable to failing both.

When it comes to presidential succession, the Constitution establishes a series of rules. The vice president becomes president (or “act[ing]” president) when the latter is removed, dies, or resigns.³⁶⁶ In cases of disability, the amended Constitution supplies complex mechanisms for judging whether the president is unable to discharge the office.³⁶⁷ Furthermore, Congress may provide who shall serve as president when neither the president nor the vice president may serve.³⁶⁸ The specific authority to create a line of succession covers death, disability, or resignation, meaning that recourse to the more general terms of the Necessary and Proper Clause is unnecessary in those contexts.³⁶⁹

Article II, as originally enacted, did not address one difficulty. Per the Constitution, the president's tenure automatically ends four years after he assumes office.³⁷⁰ The original Constitution never specified what would happen should neither the presidential electors nor Congress select a president and vice president. In my view, Congress likely had legislative power to enact measures determining who would serve as president when a presidential election yielded no president or vice president. Congress had such power because such measures were necessary and proper to carry into execution

363. The same reasoning applies to Senate vacancies. Though the Seventeenth Amendment creates mechanisms for filling Senate vacancies, U.S. CONST. amend. XVII (writs of elections or gubernatorial appointment), those means might break down during a domestic war.

364. See *id.* art. I, § 2, cl. 4; *id.* amend. XVII.

365. *Id.* amend. XVII.

366. *Id.* art. II, § 1, cl. 6 (amended 1967).

367. *Id.* amend. XXV.

368. *Id.* art. II, § 1, cl. 6 (amended 1967).

369. See *id.*

370. *Id.* art. II, § 1, cl. 1.

the powers of the federal government.³⁷¹ The Twentieth Amendment removed all doubts about congressional power when it explicitly provided that Congress may determine who may become president should a president's term expire and no successor be chosen.³⁷² I believe this particular provision was unnecessary as Congress already enjoyed authority under the Necessary and Proper Clause to ensure continuity in the apex of the executive.³⁷³

If one supposes that Congress enjoys a generic power of self-preservation, one will conclude that Congress may adopt measures to ensure continuity of the executive and legislative branches in the face of *any* crisis—war, plague, or otherwise. If, however, one believes that Congress enjoys a more limited power to prevail in domestic wars, then one will read the Necessary and Proper Clause as authorizing Congress to adopt measures to ensure continuity only during domestic wars.

Again, there are limits on the power to ensure continuity of government. Congress cannot supplant the Constitution's prescribed means of electing senators and representatives when those methods function adequately. The point is that measures necessary to ensure the continuity of the federal branches can be resorted to only when the normal procedures fail.³⁷⁴

CONCLUSION

As I have argued elsewhere,³⁷⁵ the modern emergency regime has three features. With the New Deal expansion of federal legislative power, modern Congresses naturally claim a broad domestic war power. In the tradition of

371. In his fascinating book, Professor Ackerman recounts that the Federalists considered legislation that would have appointed a statutory successor to Adams if it came to pass that a majority of the House delegations did not select either Jefferson or Aaron Burr. See BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* 41–53 (2005).

372. U.S. CONST. amend. XX, § 3.

373. Congress arguably exercised this necessary and proper authority in 1792. The 1792 act not only specified that the Senate's president pro tempore would "act as President" when both the presidency and vice presidency were vacant, it also specified that new elections would be called to replace the acting president. An Act Relative to the Election of a President and President of the United States, and Declaring the Officer Who Shall Act as President in Case of Vacancies in the Offices Both of President and Vice President, ch. 8, §§ 9–10, 1 Stat. 239, 240–41 (1792). The new elections provision was not justifiable under the constitutional provision that empowers Congress to decide which officer shall serve as acting president. See U.S. CONST. art. II, § 1, cl. 6 (amended 1967) ("Congress may by law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President declaring what Officer shall then act as President . . ."). By calling new elections, Congress was not "declaring what Officer shall" act as president but instead allowing the new election to determine as much.

374. The need for some limit to Congress's power to provide replacement representation is obvious. If Congress could provide for statutory solutions whenever there was a vacancy, it could wholly obviate the preferred constitutional solutions to congressional vacancies. Put another way, it would be unnecessary and improper for Congress to provide for the routine replacement of representatives and senators; it only has such power in emergencies, when the ordinary means have failed because elections are impossible to hold.

375. See Prakash, *supra* note 18, at 1425–28.

Lincoln, contemporary presidents now claim sweeping constitutional authority to adopt emergency measures, powers often said to arise from their status as commander in chief. Finally, because the executive believes he has broad crisis power, he never admits that it occasionally must take illegal measures and seek public or legislative absolution for them. To quote Richard Nixon's interview with David Frost: "[W]hen the President [takes crisis measures], that means that it is not illegal."³⁷⁶

The original regime had a different set of legs. Congress enjoyed broad legislative authority to help the nation weather domestic wars. Though the president was, for the most part, constitutionally impotent, he could exercise the considerable wartime authority that Congress might delegate. And when the president lacked statutory or constitutional authority, the executive could (and sometimes was expected to) act illegally, with Congress able to absolve the president's violations.

This Article has focused on the first leg of the original constitutional regime. While the Constitution seems to address emergencies only in passing, a careful and contextual reading reveals that it grants Congress broad power to safeguard the Constitution and its government from invasions and rebellions. Prior to the Constitution's creation, legislatures, both state and continental, served as the gatekeepers of emergency authority. Indeed, during the Revolutionary War, these legislatures adopted a host of far-reaching measures related to the taking of property, detention and military trial of civilians, and even going so far as vesting dictatorial authority with executives.

The Constitution never intimates that it departs from the established regime of robust legislative authority to prevail during domestic wars. To the contrary, it contains provisions making domestic wars a matter of paramount federal concern (the Preamble and the Guarantee Clause), that authorize certain domestic wartime measures (the Militia Clause), and that assume that there is power to prevail in domestic wars (the Habeas Clause). Additionally, Congress, via the Necessary and Proper Clause, may enact laws necessary and proper for carrying into execution the powers of the federal government. Measures designed to crush invaders and rebels help implement federal powers because defeating both ensures that the branches can exercise their powers throughout the United States.

The Necessary and Proper Clause ensures that the Constitution is supple enough to allow certain short-term deviations from some of its ordinary limitations and principles when doing so helps the Constitution endure for the ages. Faced with a domestic war, Congress, like its predecessors, may delegate legislative and judicial power to the executive, subject civilians to military courts, and make a dictator of the president. This is the way that the Emergency Constitution speaks with a "somewhat different voice"³⁷⁷ during invasions and rebellions.

376. DAVID FROST, *FROST/NIXON: BEHIND THE SCENES OF THE NIXON INTERVIEWS* 89 (2007).

377. REHNQUIST, *supra* note 28, at 225.