

THE MILITARY'S CONSTITUTIONAL ROLE*

BRENNER M. FISSELL**

A basic principle of the American constitutional order is that civilian authority must be supreme over that of the military. The violation of this principle by the British was one of the grievances enumerated in the Declaration of Independence, and the Framers responded with a Constitution that made military rule impossible. But why is so-called “civilian control” of the military so important? This deep normative question has yet to be thoroughly answered by scholars, most of who assume it away as a given. This Article takes up that task, using contemporary political theory to defend the principle of civilian control.

The United States is a liberal democracy, while the military is an institution governed by principles that are opposed to both liberalism and democracy. Military law enforces command-based governance, hierarchy, and collectivism, with an eye toward success in violent conflict. These values conflict with liberalism’s commitment to reason-giving, autonomy, individualism, and pacifism; they also conflict with democracy’s demand for deliberation and majoritarian preference aggregation. Our commitment to liberal democracy, therefore, requires civilian control. This eliminates the possibility of legitimate military rule, but also that of a military that is autonomous and separate from civilian authority.

How is civilian control implemented today, though, in a stable polity unthreatened by overt military coup? This is primarily through fluid, unwritten norms of behavior that govern the conduct of senior military officers. The more realistic concern is not that of a coup, but of these officers’ undue influence in policymaking. To guard against such a threat, this Article argues that the civilian control norm should include a non-aggrandizement principle—that when military influence seeks to expand military authority at the expense of civilian authority, this is a strong indicator that the influence is violative of the

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underlying norm. Non-aggrandizement works to protect liberal democracy against the threat of either military rule or military autonomy.

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INTRODUCTION

“Will the spirits of people, as yet unsubdued by tyranny, unaw’d by the menaces of arbitrary power, submit to be govern’d by military force? No!”

—*Samuel Adams*

1768¹

Throughout history, one of the central questions of political life has been the role of the military.² The mustering of an armed, organized force is necessary for protection from external enemies, but it creates an internal threat—the possibility that the force raised to protect the community might turn against it, usurping power for its own ends. Military coups are a regular feature of the political history of many countries. Just last summer, the democratically elected president of Niger was ousted by a military force, which now rules in his stead.³ Direct military rule is one threat, but so too is the possibility that the military can become an autonomous, ungovernable constituency in a society. This was the state of affairs in Indonesia for decades during the twentieth century.⁴ The antidote to these extreme outcomes is a concept of constitutional organization that is widely referred to as “civilian control” of the military.⁵ Civil authority must be set up to be supreme over that of the military, and military officers should abide by norms of behavior that demonstrate respect for civilian leaders’ ultimate decision-making power. Civilian control acts as a guardrail to prevent the dangers noted above from coming to fruition. Compliance with the civilian control principle is seen as so critical to effective governance that it is a requirement of NATO membership.⁶

1. Samuel Adams (Vindex), BOS. GAZETTE & COUNTRY J., Dec. 5, 1768, at 1.

2. This was debated as early as Plato’s *Republic*. PLATO, REPUBLIC 375e, reprinted in *Plato’s Republic Book 1*, FOUND. FOR PLATONIC STUD. (David Horan trans.), <https://www.platonicfoundation.org/translation/republic/> [https://perma.cc/M9EW-ALSG] (discussing the “guardian” class).

3. C. Todd Lopez, *U.S. Says July Ouster of Niger’s Government Was a Coup*, DOD NEWS (Oct. 10, 2023), <https://www.defense.gov/News/News-Stories/Article/Article/3552918/us-says-july-ouster-of-nigers-government-was-a-coup/> [https://perma.cc/PP2G-9XR5].

4. Aurel Croissant & David Kuehn, *Patterns of Civilian Control of the Military in East Asia’s New Democracies*, 9 J.E. ASIAN STUD. 187, 194 (2009); see *infra* notes 50–51 and accompanying text.

5. Risa A. Brooks, *Integrating the Civil–Military Relations Subfield*, 22 ANN. REV. POL. SCI. 379, 385–88 (2019).

6. *Study on NATO Enlargement*, NATO, https://www.nato.int/cps/en/natohq/official_texts_24733.htm [https://perma.cc/3973-HQ4H (staff-uploaded archive)] (last updated Nov. 5, 2008) (“Prospective members will have to have . . . [e]stablished appropriate democratic and civilian control of their defence force.”).

The United States adheres strongly to civilian control.⁷ Writing in 1957, the Supreme Court described “this Nation’s tradition of keeping military power subservient to civilian authority” as “a tradition . . . firmly embodied in the Constitution.”⁸ Constitutional provisions vest ultimate authority over the military in the hands of the civilian branches, and statutes create a chain of command with the President and Secretary of Defense at the top.⁹ Moreover, senior officers are expected to follow norms and traditions that demonstrate their obedience to civilian government. During Senate confirmation hearings, senior uniformed leaders are routinely questioned as to how they will preserve and advance civilian control,¹⁰ and actions that overstep result in sharp rebuke.¹¹ The value placed on civilian control in the United States has deep historical roots in the Framers’ experience with the imposition of British military authority.¹² One of the enumerated grievances with the King in the Declaration of Independence was that “[h]e has affected to render the Military independent of and superior to the Civil power.”¹³

But *why* is civilian control so important? Scholars have failed to answer this important question thoroughly. Perhaps because the point seems obvious or intuitive, or because there is so much work to be done with respect to the principle’s implementation, the fundamental normative bases of civilian control

7. In a fall 2022 letter, eight past Secretaries of Defense and five past Chairmen of the Joint Chiefs of Staff stated, “[c]ivilian control of the military is part of the bedrock foundation of American democracy.” Ashton Baldwin Carter, William Sebastian Cohen, Mark Thomas Esper, Robert Michael Gates, Charles Timothy Hagel, James Norman Mattis, Leon Edward Panetta, William James Perry, Martin Edward Dempsey, Joseph Francis Dunford Jr., Michael Glenn Mullen, Richard Bowman Myers & Peter Pace, *To Support and Defend: Principles of Civilian Control and Best Practices of Civil-Military Relations*, WAR ON ROCKS (Sept. 6, 2022), <https://warontherocks.com/2022/09/to-support-and-defend-principles-of-civilian-control-and-best-practices-of-civil-military-relations/> [<https://perma.cc/B7BH-29N5>].

8. *Reid v. Covert*, 354 U.S. 1, 40 (1957).

9. See, e.g., Robert Kagan, Opinion, *The Battle of Lafayette Square and the Undermining of American Democracy*, WASH. POST (June 3, 2020, 2:38 PM), https://www.washingtonpost.com/opinions/why-mark-milley-striding-behind-trump-through-lafayette-square-was-so-troubling/2020/06/02/81ef5388-a503-11ea-b473-04905b1af82b_story.html [<https://perma.cc/QQH2-S44X> (staff-uploaded, dark archive)] (noting that a top military officer’s actions “raised questions about the military’s role as the country heads toward” a presidential election).

10. The standard questionnaire for the Chairman of the Joint Chiefs of Staff contains the following question: “If confirmed, what specific actions would you take to ensure that your tenure as Chairman of the Joint Chiefs of Staff epitomizes the fundamental requirement for civilian control of the Armed Forces embedded in the U.S. Constitution and other laws?” See, e.g., U.S. SENATE COMM. ON ARMED SERVS., 116th Cong., *Advance Policy Questions for GEN Mark A. Milley, U.S. Army Nominee for Appointment to be Chairman of the Joint Chiefs of Staff* (July 11, 2019), https://www.armed-services.senate.gov/imo/media/doc/Milley_APQs_07-11-19.pdf [<https://perma.cc/UAY7-W228>].

11. See *infra* Section V.A.; Associated Press, *U.S. General: Afghan Forces Could Face ‘Bad Outcomes,’ POLITICO* (May 2, 2021, 3:50 PM), <https://www.politico.com/news/2021/05/02/milley-afghanistan-bad-possible-outcomes-485208> [<https://perma.cc/782T-A4EG> (staff-uploaded archive)].

12. *Reid*, 354 U.S. at 40.

13. THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776).

have been undertheorized—bracketed off as an assumption not in need of serious defense. In the words of one scholar, civilian control is a “predicate presumption” and a “normative axiom”; its value is something that we take for granted.¹⁴ The most influential theory of civilian control today is that of Peter Feaver.¹⁵ He conceptualizes the relationship between civilian and military institutions as a “principal-agent problem” but does not fully articulate why civilian authority should be the principal and why military authority should be its agent.¹⁶ What is needed is a fulsome theoretical and normative defense of the constitutional role of the military—of civilian control—that does not treat it as an assumption but instead works to justify it. This is a task for political theory, the body of thought that undergirds constitutional theory. Contemporary political theory has never been brought to bear on the question of civil-military relations.

The civilian-control principle’s normative grounding can be found in two distinct, but related, theories of politics that serve as lodestars of American political life and American constitutionalism: liberalism and democracy. Unpacking the constituent features of each allows them to be contrasted with the features of militarism—the animating theory of the military as an institution. The incompatibility of militarism with liberal democracy results in the requirement of civilian control. It precludes both direct military rule and separate military autonomy from civil authority.

First consider liberalism. Liberalism is a constellation of ideas that makes individual freedom the primary value in political life.¹⁷ It is a theory that was first posited after the experience of centuries of brutal interreligious war, and which flowered more fully in opposition to the totalitarianism that led to World War II.¹⁸ Liberalism takes the individual person as the most significant moral unit in politics and seeks to enhance that individual’s autonomy to pursue her own ends.¹⁹ Accordingly, liberalism also demands reason-giving in political decision-making, and it implies pacifism to the extent it is feasible.²⁰

Democracy, which is far more ancient than liberalism, complements the latter by emphasizing the value of the procedures by which decisions are made in a political community.²¹ Crucial to the legitimacy of a decision is the deliberation that precedes it, which confers epistemic benefits and also

14. Dan Maurer, *Fiduciary Duty, Honor, Country: Legislating a Theory of Agency into Strategic Civil-Military Relations*, 10 HARV. NAT’L SEC. J. 259, 274 n.57, 275 (2019) [hereinafter Maurer, *Fiduciary Duty*].

15. For one of his seminal works, see PETER FEAVER, *ARMED SERVANTS* 14 (2003).

16. *Id.*

17. *See infra* Section III.A.1.

18. *See infra* Section III.A.4.

19. *See infra* Section III.A.2.

20. *See infra* Section III.A.4.

21. *See infra* Section III.B.3.

fairness.²² Inclusion of diverse viewpoints helps to arrive at wiser policy and assures even those who disagree with the eventual policy that their views were considered. At the end of deliberation, democratic theory requires that policy preferences be aggregated by a voting process, with the majority winning. Majoritarianism relates to another feature of democracy: egalitarianism.²³ Rejecting any distinctions in political power on the basis of caste or status, all people are legally equals in a democracy, and therefore the only legitimate way to count votes is by majority rule.

These values are directly opposed to the values of the military—what we can call “militarism.” Contemporary military law is a concrete manifestation of militarism, and its features are unmistakably illiberal and undemocratic. While military effectiveness may require these features, we must nevertheless state clearly that this comes at the expense of other values.²⁴

Central to the military’s institutional design is that it operates according to rule by command—in jurisprudential terms, according to peremptory, content-independent dictates.²⁵ A command ends the decision-making process and, once issued, provides its own reason for action regardless of the conduct it demands. Military commands require obedience and are backed by criminal sanction.²⁶ Command-based governance is illiberal in that it forsakes the need for reason-giving when using coercion, and its coercive nature restricts autonomy. This is also undemocratic, since commands cut off deliberation (to the extent they were even preceded by it) and do not issue following majoritarian voting.

Another fundamental feature of militarism is that it is hierarchical.²⁷ The commands discussed above flow down a chain with higher rungs issuing commands to lower rungs. Military law sharply divides the different classes of servicemembers into defined ranks and demands that those of lower rank obey and respect those of higher rank in interpersonal relations.²⁸ One can ascend the hierarchy, but the hierarchy is self-selecting, with senior officers determining who below them will be elevated.²⁹ This hierarchy offends democracy’s commitment to egalitarianism and the abolition of status-based power. Hierarchy coupled with the power to command also results in minority rule, which is inconsistent with democracy’s majoritarianism.

22. *See infra* Section III.B.1.

23. *See infra* Section III.B.4.

24. *See infra* Section IV.A.

25. *See infra* Section IV.A.

26. *See infra* Section IV.A.

27. *See infra* Section IV.A.

28. *See infra* Section IV.B.

29. *See infra* Section IV.B.

Militarism prioritizes the group over the individual and, as such, is at odds with liberalism's individualism. Military law demands self-sacrifice for the attainment of larger goals: it criminalizes cowardice in the presence of the enemy and rewards with honors and medals the risking of one's own life for others.³⁰ When a Union general at the Battle of Gettysburg ordered a soldier to sacrifice himself to strategically delay a much larger Confederate force advancing too quickly, he (and they) were celebrated for living up to military virtues.³¹ Moreover, military law prohibits many expressions of individual religious faiths and political viewpoints for the sake of group cohesion.³²

Finally, the military is an institution oriented toward violent armed conflict and is, therefore, opposed to liberalism's pacifist aspirations. This feature of militarism is best illustrated in military law by the law of war, which gives "combatant's privilege" to servicemembers, immunizing them from liability for what would otherwise be murder, aggravated assault, and the destruction of property.³³ In the words of one of the intellectual fathers of the international law of war, Hugo Grotius, "[w]ars, for the attainment of their objects, it cannot be denied, must employ force and terror as their most proper agents."³⁴

In short, the values of militarism and those of liberal democracy are irreconcilable. In a political community that is centrally committed to liberalism and democracy, this requires a constitutional design that subordinates military authority and makes civil authority supreme. Direct military rule clearly violates such a requirement, as it would subject subordinate liberal and democratic institutions to authoritarian command, thus obviating their central features. Similarly violative, though, is an autonomous, ungovernable military that is viewed as an independent constituency to which civil authority must cater. This is prudentially absurd, given that it insulates from control an institution that has the power of armed force, leaving civilian institutions defenseless. It is also irreconcilable with servicemembers' rights as concurrent liberal democratic citizens; only through subordination of the military to civilian authority can their concurrent rights be vindicated.

30. See *infra* Section IV.C.

31. William Lochren, *The First Minnesota at Gettysburg* (Jan. 14, 1890), in 3 GLIMPSES OF THE NATION'S STRUGGLE 42, 55–56 (Edward D. Neill ed., 1893) ("[T]here can be no question that the First Minnesota Regiment in that battle displayed such heroism and unselfish soldierly devotion as has not been shown, in equal degree, by any body of soldiers since Leonidas stood on the pass at Thermopylae.").

32. *United States v. Sterling*, 75 M.J. 407, 420 (C.A.A.F. 2016).

33. See *infra* Section IV.D.

34. HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 9 (Richard Tuck & Jean Barbeyrac eds., 2005) (1625).

Because direct military rule is less of a concern in the contemporary United States,³⁵ the most strenuous debates about civilian control focus on how it can be protected against encroachment, particularly by articulating norms of senior military officer behavior when interacting with civilian policymakers.³⁶ Attempts by officers to exert undue influence on policymaking via indirect means are not direct threats to civilian control, but they present the same functional threat. Paradigmatic cases of this include the public mocking of civilian officials and their Afghanistan War strategy by then-commander General Stanley McChrystal,³⁷ and General Colin Powell's lobbying campaign against President Clinton's intention to permit LGBT people to join the military.³⁸ The behavioral norms of civilian control are unwritten and amorphous, and compliance with them should be viewed as occurring on a spectrum, not in a binary.

This Article argues that, in assessing whether the civilian control norm is offended, a significant consideration should be whether the military influence seeks to aggrandize military authority at the expense of civilian authority. This *non-aggrandizement principle* addresses the prophylaxis of the norm toward what is most threatening to the values it seeks to protect. A slippery slope to military government or military autonomy is counteracted by non-aggrandizement, and in turn liberal democracy is safeguarded. The principle is functionalist in that it assesses the aims and contents of the military influence, and it is broad in that it looks to whether aggrandizement is occurring both with respect to the external deployment of the military and with its internal governance structures. A military non-aggrandizement principle finds support in analogous principles aimed at protecting the separation of powers.

35. Indeed, a concern of recent years has not been military disobedience, but the potential of a civilian leader co-opting military forces to perpetrate illegality. This was a topic of great interest during the waning months of the first Trump presidency. See Susan B. Glasser & Peter Baker, *Inside the War Between Trump and His Generals*, NEW YORKER (Aug. 8, 2022), <https://www.newyorker.com/magazine/2022/08/15/inside-the-war-between-trump-and-his-generals> [https://perma.cc/A862-YBF9 (dark archive)]. Such a situation is the red line of civilian control, though, and once it is crossed the law of military obedience inverts itself. There is no duty, legal or otherwise, for the military to obey an unlawful civilian order. 10 U.S.C. § 892 (lawfulness of order is element of disobedience offense); see also JOINT SERV. COMM. ON MIL. JUST., MANUAL FOR COURTS-MARTIAL UNITED STATES, pt. IV-27 (2019). Indeed, there is an affirmative duty to disobey in certain cases of manifest illegality, as an illegal order does not excuse the servicemember from punishment for the unlawful act that is commanded. *United States v. Huet-Vaughn*, 43 M.J. 105, 114 (C.A.A.F. 1995). All this is to say that the Nuremberg Principle—that superior orders are not a defense to criminal conduct—applies equally to orders given by civilians. Matthew Lippman, *Nuremberg: Forty Five Years Later*, 7 CONN. J. INT'L L. 1, 61 (1991) (describing “the abrogation of the superior orders defense” as a “fundamental aspect of Nuremberg”).

36. See *infra* Sections I.B, II.B.

37. Marybeth P. Ulrich, *The General Stanley McChrystal Affair: A Case Study in Civil-Military Relations*, 41 PARAMETERS 86, 86–87 (2011).

38. See *infra* Section V.A.

Recognition of the non-aggrandizement principle helps us evaluate a number of recent, high-profile cases of senior officers intervening in political debates. The most dangerous form of military aggrandizement is warmongering; a close second is when the military fights against peace after a war has begun. The latter occurred in 2021 when General Mark Milley strenuously argued against the United States' withdrawal from Afghanistan.³⁹ In an "emotional" closed-door speech to high-level administration officials, Milley argued that too much "blood and treasure" had been spilled to leave.⁴⁰ He was overruled, but his attempt to capitalize on the public veneration of the military, by appealing to "blood" spilled, illustrates well the dangers of military influence. The desire for the military to remain in an active combat theater is an aggrandizing policy aim—it seeks to preserve the resources, power, and deference that are accorded to the military in times of war.

Aggrandizement can also target the internal governance structures of the military. This occurred when the head uniformed lawyers for each service—the Judge Advocates General—came under fire in 2021 for attempting to prevent reform relating to the prosecution of sexual assault in the military.⁴¹ Representative Jackie Speier, a proponent of the reform, wrote that the senior officers' lobbying "shows utter contempt for the principle of civilian control of the military."⁴² The specific policy that the Judge Advocates General were advocating against was a provision that took away the power of military commanders to determine whether or not to prosecute a sexual assault case, placing it in the hands of an independent military prosecutor reporting directly to a civilian service secretary.⁴³ The non-aggrandizement principle proposed in this Article indicates that the Judge Advocates General threatened civilian control more egregiously because of the specific position they took. The policy they defended was premised on the militaristic claim that criminal punishment is a secondary consideration to military necessity, and therefore must be controlled by a commander and not a lawyer. It sought to insulate military criminal justice decision-making from civilian review, thus aggrandizing military authority.

The military's constitutional role, while fundamental to the system of American government, has been undertheorized. This Article uses the tools of contemporary political theory to fill that gap, and in doing so, aims to shed light on current debates about the role of the military in political decision-making. Part I introduces the concept of civilian control, situating it as a norm that is grounded in constitutional and statutory law. Part II surveys the literature on

39. See *infra* Section V.A.; Associated Press, *supra* note 11.

40. See *infra* Section V.A.

41. See *infra* Section V.A.2.

42. See *infra* Section V.A.

43. See *infra* Section V.A.

civil-military relations theory, concluding that its most basic normative premise—the value of civilian supremacy—has yet to be thoroughly defended. Part III lays out core relevant components of liberalism and democracy, while Part IV uses military law to demonstrate the core theoretical features of militarism, concluding that they are incompatible with liberal democracy. Part V turns from theory to application, arguing that the substantive content of military influence over policymaking should be relevant to considering whether it violates the norm of civilian control—specifically, whether the advocacy aims at aggrandizing military authority at the expense of civilian authority. The part concludes by applying this framework to recent controversies, including the Afghanistan war withdrawal, as well as the reform of sexual assault prosecution.

I. CIVILIAN CONTROL AS CONSTITUTIONAL NORM

The authority to control armed forces is among the most important powers of any government. Nearly every country in the world maintains a military for the purpose of protecting itself from armed external threats but, in doing so, they create an armed internal threat—an organized violent force that has the capability to seize political authority should it choose to do so. In the words of Peter Feaver, “because we fear others we create an institution of violence to protect us, but then we fear the very institution we created for protection.”⁴⁴

In some states, such a takeover has occurred, resulting in what is often-referred to as a military “junta”—government by the military itself.⁴⁵ Today, Myanmar is governed by Senior General Min Aung Hlaing, the leader of its large and powerful military.⁴⁶ Similarly, the internationally-recognized government of Niger was overthrown in July 2023 by a military commander, General Abdourahamane Tchiani, who now rules there.⁴⁷ History is replete with examples. Augusto Pinochet, the head of state of Chile from 1973 to 1990, was concurrently an active-duty military officer with the rank of “Captain General,”⁴⁸ and the now-advanced democracy of Spain was governed by military dictators for much of the twentieth century.⁴⁹

44. He calls this the “civil-military problematique.” Peter D. Feaver, *The Civil-Military Problematique: Huntington, Janowitz, and the Question of Civilian Control*, 23 *ARMED FORCES & SOC’Y* 149, 150 (1996) [hereinafter Feaver, *Problematique*].

45. Barbara Geddes, Erica Frantz & Joseph G. Wright, *Military Rule*, 17 *ANN. REV. POL. SCI.* 147, 148 (2014) (“Military rule entails governance by men who specialize in armed force and maintaining order rather than in political affairs.”). Scholars note a distinction between a military dictatorship, where a single autocratic ruler is part of the military and backed by it, and a type of rule that is “led by somewhat collegial bodies representing the officer corps.” *Id.* at 152.

46. Morten B. Pedersen, *Myanmar in 2021: A State Torn Apart*, 2022 *SE. ASIAN AFFS.* 235, 236 (2022).

47. Lopez, *supra* note 3.

48. See Geddes et al., *supra* note 45, at 151.

49. Adrian Shubert, *The Military Threat to Spanish Democracy: A Historical Perspective*, 10 *ARMED FORCES & SOC’Y* 529, 530 (1984).

However, direct military rule is not the norm. In most countries, the head of state is a civilian, and the institutions of governance are not coterminous with military hierarchy. But even in these states, one would be concerned if the military were able to act autonomously, outside of the control of civilian authority. Something close to this occurred during the second half of the twentieth century with Indonesia's "New Order" regime, where the military was an independent political constituency—"a sociopolitical force with the right to participate in government"⁵⁰—with an allotted number of seats in the country's legislature (100 of 500).⁵¹ In such a case, the military would possess the authority to use violence on a large scale in the name of the larger political community, but would be unaccountable to it. The military would be truly a "separate" society,⁵² existing alongside the civilian world, but with its own distinct interests and decision-making processes.

To avoid this, it is not enough for civilian authority to exist alongside military authority. Instead, the civilian authority must be supreme with the ultimate say over decisions regarding military policy and the use of force. Such a system of civilian supremacy and military subordination is referred to as "civilian control" over the military.⁵³ Civilian control is a feature of a politically stable and developed state, a requirement of NATO membership, and a prerequisite to normal diplomatic and trade relations with the rest of the world.⁵⁴

50. Croissant & Kuehn, *supra* note 4, at 194.

51. Dewi F. Anwar, *Negotiating and Consolidating Democratic Civilian Control of the Indonesian Military*, E.-W. CTR. OCCASIONAL PAPERS, Feb. 2001, at 5 ("The creeping politicization of the Indonesian military and the militarization of Indonesian politics each reinforced the other. This led to the general application of the dual-functions doctrine in which the military was regarded not only as a defense force, but also as a social-political force. This doctrine legally bestowed upon the military the right to become actively involved in almost all aspects of public life beyond its conventional duties of defending the homeland from external attacks."); *see also* Croissant & Kuehn, *supra* note 4, at 194 ("In Suharto's New Order, the Armed Forces of the Republic of Indonesia (ABRI) had been the main pillar of regime stability, dominating the security sector and enjoying privileged access to the political center."). Croissant and Kuehn describe similar examples of semi-autonomous militaries in other Southeast Asian countries. *See id.* at 199 ("In Thailand, even before the military coup of 2006, civilians had almost no influence in defense policymaking, leaving all external defense issues to the military.").

52. *Parker v. Levy*, 417 U.S. 733, 743 (1974).

53. *See* Richard H. Kohn, *How Democracies Control the Military*, 8 J. DEMOCRACY 140, 140 (1997).

54. Terri M. Cronk, *Nations Undergo Rigorous Process to Join NATO*, DOD NEWS (June 3, 2022), <https://www.defense.gov/News/News-Stories/Article/Article/3052427/nations-undergo-rigorous-process-to-join-nato/> [<https://perma.cc/Q5QB-LS5X>] ("The nations' military forces must be under firm, civilian control."); *Minimum Requirements for NATO Membership*, BUREAU EUR. & CANADIAN AFFS., U.S. DEP'T OF STATE (1997), https://1997-2001.state.gov/regions/eur/fs_members.html [<https://perma.cc/H6EH-VWES>] ("Their military forces must be under firm civilian control."); *Study on NATO Enlargement*, *supra* note 6 ("Prospective members will have to have . . . [e]stablished appropriate democratic and civilian control of their defence force."). On Myanmar's resultant isolation, *see* Cecile Medail, Tamas Wells & Gota Seto, *Myanmar in 2022: The Conflict Escalates*, 2023 SE. ASIAN AFFS. 197, 209–12 (2023).

The United States adheres to the principle of civilian control. This is true both in terms of written law that governs the hierarchy of civilians and the military, as well as the norms that have arisen regarding the proper interactions between these two types of officials.

A. *The Law of Civilian Control*

Civilian control is compelled by the Constitution, as well as by numerous statutes and regulations.⁵⁵

Most significantly, Article II, Section 2 makes the civilian President the “Commander in Chief of the Army and Navy of the United States,” and Article I, Section 8, reserves the power “To declare War” to Congress.⁵⁶ Many other clauses also reinforce this hierarchy, especially Congress’s enumerated power to “make Rules for the Government and Regulation of the land and naval Forces.”⁵⁷ Combining the Make Rules Power with the Commander in Chief Power prevents the possibility of a self-governing or autonomous military force.

Textual bases for the civilian control principle are also supported by evidence that the Framers were animated by a fear of standing armies usurping political power.⁵⁸ This can be placed in a deeper intellectual history that influenced them, including both the republican tradition and Whiggish thought.⁵⁹ The Supreme Court described “a widespread fear [at the Constitutional Convention] that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the separate States.”⁶⁰ This is evident in the ruminations of Federalist No. 8:

The perpetual menacings of danger oblige the government to be always prepared to repel it; its armies must be numerous enough for instant defense. The continual necessity for their services enhances the importance of the soldier, and proportionably degrades the condition of

55. DANIEL MAURER, CRISIS, AGENCY, AND LAW IN US CIVIL-MILITARY RELATIONS 37, 41 (2017) [hereinafter MAURER, CRISIS] (noting that the Constitution “structures” civil-military relations, while legislation “organizes” them).

56. U.S. CONST. art. I, § 8; *id.* art. II, § 2.

57. See Deborah N. Pearlstein, *The Soldier, the State, and the Separation of Powers*, 90 TEX. L. REV. 797, 831 (2012) (listing other clauses relating to civilian control, including Congress’s power to “provide for the common Defence”).

58. Charles J. Dunlap, Jr., *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341, 348 (1994) (“Antimilitarism spurred much of the thinking about the organization of the new nation’s defenses.” (citing Richard H. Kohn, *The Constitution and National Security: The Intent of the Framers*, in THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES, 1789-1989, at 61-94 (Richard H. Kohn ed., 1991))).

59. Robert Leider, *The Modern Militia*, 2023 MICH. ST. L. REV. 893, 907 (2023) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *404); Lawrence Delbert Cress, *Radical Whiggery on the Role of the Military: Ideological Roots of the American Revolutionary Militia*, 40 J. HIST. IDEAS 43, 43 (1979).

60. *Perpich v. Dep’t of Def.*, 496 U.S. 334, 340 (1990).

the citizen. The military state becomes elevated above the civil. The inhabitants of territories, often the theatre of war, are unavoidably subjected to frequent infringements on their rights, which serve to weaken their sense of those rights; and by degrees the people are brought to consider the soldiery not only as their protectors but as their superiors. The transition from this disposition to that of considering them masters is neither remote nor difficult . . .⁶¹

The Framers were clearly familiar with the creeping danger of military governance, and they drafted a constitution that worked to prevent it.⁶²

While text and history support the principle of civilian control, it would be required even absent both these sources of constitutional meaning. In other words, civilian control is a *structural* requirement of the Constitution. “[T]he most typical forms of structural argument focus not on the *words* of the Constitution, but rather on the *institutional* arrangements implied or summoned into existence by the document,” writes Akhil Amar.⁶³ Another scholar describes structural argumentation as the “drawing [of] inferences from the structures of government.”⁶⁴ If civilian control is not a structural principle, then nothing is; the entire edifice of representative government created by Articles I and II would be destroyed were we to permit military-dictated policy.⁶⁵

These deeper constitutional roots of civilian control in American law are further reinforced by statutory enactments. Recent scholarship has noted that there are really two “militaries”: an “operational military” that “plan[s] and fight[s] the nation’s wars,” and an “administrative military” that works on “personnel management” as well as “equipping” the operational military.⁶⁶ Civilian control is statutorily compelled for both the operational, combat-fighting side as well as its administrative-agency-like side.⁶⁷

61. THE FEDERALIST NO. 8, at 42 (Alexander Hamilton) (Lawrence Goldman ed., 2008).

62. Samuel Huntington agrees that this was the intention of the Framers but argues that certain clauses undermine civilian supremacy by fragmenting civilian control amongst various civilian leaders and institutions. See Samuel P. Huntington, *Civilian Control and the Constitution*, 50 AM. POL. SCI. REV. 676, 682 (1956). Even if this is the effect of these clauses, it is surely not their purpose. As Huntington himself admits, the fragmentation is an accommodation to values (namely, those justifying the separation of powers) that compete with, and may trump, the value that seeks maximization of unitary civilian control. *Id.* at 699.

63. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 790 (1999).

64. Michael C. Dorf, *Interpretive Holism and the Structural Method, or How Charles Black Might Have Thought About Campaign Finance Reform and Congressional Timidity*, 92 GEO. L.J. 833, 838 (2004).

65. The larger claim of this Article is, in a sense, an attempt to buttress this structural argument.

66. Mark Patrick Nevitt, *The Operational and Administrative Militaries*, 53 GA. L. REV. 905, 909–10 (2019).

67. *Id.* at 916.

Regarding the operational side, the Goldwater-Nichols Act⁶⁸ was passed in 1986 to “strengthen civilian authority” in the Department of Defense.⁶⁹ It establishes that the command authority over combatants—the power to issue orders to fighting troops and ships—flows from geographically-organized senior military officers directly to the Secretary of Defense, then to the President.⁷⁰

Regarding the administrative side, each military department has a Secretary at the apex of the organizational hierarchy, but this Secretary must *not* be a uniformed servicemember—she must be “appointed from civilian life.”⁷¹ For good measure, the statute also requires that the candidate not have been in uniformed service for a number of years—usually seven—prior to appointment.⁷² This can be contrasted with the military leaders of the departments, the Service “Chiefs,” like the Chief of Staff of the Army, who are chosen “from the general officers of the [service].”⁷³ Crucially, these Service Chiefs are subordinate to the Service Secretaries.⁷⁴

At the very highest levels of the Department of Defense, which is superior to each military department, is the Chairman of the Joint Chiefs of Staff (the chair of the Service Chiefs), who is subordinate to the Secretary of Defense.⁷⁵ The Secretary of Defense must also be a civilian who has not served on active duty within a certain number of years.⁷⁶

Above all these officials, though, is the President. The President cannot be a uniformed military servicemember either. While not mentioned in the constitutional qualifications for the office of the president,⁷⁷ in the *Steel Seizure* case, Justice Jackson wrote: “The purpose of lodging dual titles in one man was to insure that the civilian would control the military, not to enable the military to subordinate the presidential office.”⁷⁸ Similarly, longstanding Defense

68. Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992 (codified as amended in scattered sections of 10 U.S.C.).

69. *Id.* at pmb1., 100 Stat. at 992.

70. *Id.* § 164(b)(1); Nevitt, *supra* note 66, at 916–17 (“This [law] reinforces civilian control of the military through the formation of a lawful chain of command that subordinates the military to civilian oversight.”).

71. 10 U.S.C. §§ 113(a)(1), 7013(a)(1).

72. *Id.* §§ 113(2)(a)–(b), 7013(a)(2).

73. *Id.* § 7033(a)(1).

74. *Id.* (“[T]he Chief of Staff performs his duties under the authority, direction, and control of the Secretary of the Army and is directly responsible to the Secretary.”).

75. *Id.* §§ 151(g)(2), 163(b)(2).

76. *Id.* § 113(2)(a).

77. U.S. CONST. art. II, § 1, cl. 5. David Luban has argued that the civilian status of the President also implies that he or she have a more restricted role in managing the military—one of oversight and control, but not of “micromanag[ing] military decisions.” *See infra* note 124, at 485.

78. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 646 (1952) (“That military powers of the Commander-in-Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history.”).

Department regulations prohibit servicemembers from being a nominee or candidate for federal office.⁷⁹

All these sources of law enforce a baseline requirement of civilian control in the United States. But in American legal and political discourse, civilian control means far more than bare compliance with these fundamental rules. Unlike in Myanmar or Niger, in all its history, the United States has never faced even the remote prospect of a military-led coup attempt.⁸⁰ Thus, as will be explained below, while civilian control is based in constitutional and statutory law demanding formal military obedience, it is not exhausted by it.⁸¹ This explains why, in his responses to a Senate questionnaire in 2023, the current Chairman of the Joint Chiefs repeatedly referred to civilian control as consisting of “norms” as well as laws.⁸²

B. *The Norm of Civilian Control*

The civilian control principle in the United States operates most importantly as a norm that polices the interactions between senior civilian and military officials—a norm that works to safeguard the status quo and to inculcate values that prevent a formal breakdown of civilian authority. The prospect of a full military usurpation of power is lessened when the norm instills deference to civilian authority.

79. U.S. Dep't of Def., Directive No. 1344.10, Political Activities by Members of the Armed Forces 5 (2008). Technically, this is permitted if the Secretary of Defense grants approval.

80. Scholars of civil-military relations do not view a military coup in the United States to be a realistic possibility. James Burk, *Theories of Democratic Civil-Military Relations*, 29 ARMED FORCES & SOC'Y 7, 8 (2002) [hereinafter Burk, *Theories*] (“[T]his issue should not be at the center of a normative theory about civil-military relations in mature democracies. In these countries, there is no realistic expectation that the military will intervene to overthrow civilian rule or even that the military will influence a civilian government to pursue a more aggressive military policy than it otherwise would.”). Rather, attention has now turned to the threat of a civilian President *using* the military to accomplish a coup. See Anthony J. Ghitto, *The Presidential Coup*, 70 BUFF. L. REV. 369, 372 (2022).

81. Glenn Sulmasy & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 UCLA L. REV. 1815, 1817–18 (2007) (“Measuring civilian control of the military by whether a coup has occurred, however, would miss the full scope of the relationship, as would limiting our inquiry in administrative law only to whether agency officials have directly disobeyed directives from the executive branch or from Congress.”); Justin Walker, *F.B.I. Independence as a Threat to Civil Liberties: An Analogy to Civilian Control of the Military*, 86 GEO. WASH. L. REV. 1011, 1015 (2018) (“Civilian control, however, means more than the avoidance of a military coup. It is undermined when members of the military disobey orders, freelance without adequate monitoring by civilians, or exert excessive influence on the policymaking of elected officials. Such failures in turn flout our constitutional structure, frustrate democratic accountability, and often infringe on individuals’ civil liberties.”).

82. U.S. SENATE COMM. ON ARMED SERVS., 118th Cong., *Advance Policy Questions for General Charles Q. Brown, Jr., USAF Nominee for Appointment to be Chairman of the Joint Chiefs of Staff* 4 (2023) [hereinafter *Gen. Brown Senate Committee Policy Questions*], https://www.armed-services.senate.gov/imo/media/doc/brown_apq_responses.pdf [<https://perma.cc/2SQD-SG6U>] (“I am fully committed to the laws, policies, and norms associated with civilian control of the United States Armed Forces and look forward to working collaboratively with the Office of the Secretary of Defense.”).

Legal scholars have recently made advancements in the understanding of constitutional norms. Josh Chafetz and David Pozen define these as “that subset of informal norms that regulates the public behavior of actors who wield high-level governmental authority, thereby guiding and constraining how these actors ‘exercise political discretion.’”⁸³ They “enjoy a wide measure of approval within the relevant community and . . . are widely believed to ‘vindicate basic purposes of the constitutional system.’”⁸⁴

All this is true of the norm of civilian control over the military. It is informal, in that there is no binding, written set of rules that delineate its content.⁸⁵ It is applicable to high officials, concerning itself with the interactions of the most senior military and civilian leaders in the national security apparatus.⁸⁶ Moreover, it governs what are really discretionary decisions. It is a norm that covers the multifarious forms of political influence an officer might wield, with the presumption that this influence should be limited. The norm is especially concerned with the decision of an officer to speak up (or not) regarding her view on a matter of military policy. Thus, at his confirmation hearing, the Chairman of the Joint Chiefs of Staff General Charles Q. Brown Jr. testified that his “engagements will remain apolitical” so as to demonstrate “the utmost respect for American civil-military . . . norms.”⁸⁷ Finally, civilian control is a popular principle⁸⁸ that is implemented for the purpose of preserving democratic government.

83. Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430, 1433–34 (2018) (quoting Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. ILL. L. REV. 1847, 1860 (2013)); see also Ashraf Ahmed, *A Theory of Constitutional Norms*, 120 MICH. L. REV. 1361, 1390–91 (2022) (“Widespread norm erosion thus reflects the breakdown of a particular form of constitutional morality.”).

84. Chafetz & Pozen, *supra* note 83, at 1434 (quoting Neil S. Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 IND. L.J. 177, 190 (2018)).

85. Maurer, *Fiduciary Duty*, *supra* note 14, at 288 (“Finally, despite routine references by all involved to constitutional values, neither the Constitution itself nor case law that interprets it have spoken clearly as to what the nature of a healthy relationship ought to look like according to certain standards, consistent with its generic elevation of civilian political authority over military matters [N]either military doctrine nor its various martial codes, nor DoD ethics policy, provide for clear-cut standards or impose relevant, material neutral principles for these strategic actors. Indeed, many commentators lament the lack of these principles anywhere at all.”).

86. Brooks, *supra* note 5, at 380 (“The primary emphasis within the discipline . . . is on relations between political elites and the senior military leadership at the state’s apex.”).

87. SENATE COMMITTEE POLICY QUESTIONS, *supra* note 82, at 6.

88. *But see* Ronald R. Krebs, Robert Ralston & Aaron Rapport, *No Right to Be Wrong: What Americans Think About Civil-Military Relations*, 21 PERS. ON POL. 606, 609 (2023). These scholars report very recent survey data taken during the first Trump presidency that indicate a partisan effect on support for civilian control. *Id.* It is too early to generalize from this study, taken during unusual times, a larger conclusion that Americans do not support civilian control.

In the words of Samuel Huntington, “the problem in the modern state is not armed revolt but the relation of the expert to the politician.”⁸⁹ This is a problem of influence on decision-making authority, not a formal usurpation of that authority. This problem is addressed by the norm of civilian control.

II. CIVIL-MILITARY RELATIONS THEORY

Despite being a fundamental principle of constitutional law and democratic government, civilian control over the military remains undertheorized in legal scholarship.⁹⁰ To the extent that the concept has received any sustained treatment, it has been in the field of political science.

Surveying the state of the larger field of civil-military relations scholarship, Risa Brooks recently divided the field into four recognizable sub-parts: “military coups, military defection, civilian control, and societal–military (dis)integration.”⁹¹ The study of military *coups d'état* began in earnest in the 1970s after scholars observed a large number of such coups in Latin America, Africa, and Asia.⁹² A more recent wave of coups in the last ten years has revitalized this field.⁹³ The goal of this research has been mostly descriptive—how do coups affect democratic institutions, why do they happen, and how do military dictators preserve their power?⁹⁴ “Military defection,” writes Brooks, is the study of “the decision by senior military leaders to abstain from using force to disperse mass unarmed protests that threaten a regime.”⁹⁵ This research field also grew out of a response to actual events, especially the Arab Spring protests in 2011.⁹⁶ Like with the study of coups, the study of military defection is primarily descriptive: “scholars have worked backward to find a common cause for the outcome.”⁹⁷ The third research focus, “societal–military (dis)integration,” analyzes the relationship between military and civilian cultures, especially in the United States.⁹⁸ This sub-part of the field is especially

89. SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS* 20 (1957).

90. Sulmasy & Yoo, *supra* note 81, at 1816 (“Analysis of civilian-military relations is virtually nonexistent in the legal academic literature. A few articles have appeared in the law reviews of the Armed Forces or military academies, but for the most part they detail the recent history of civilian-military disputes, such as the controversy surrounding gays in the military.”); Pearlstein, *supra* note 57, at 801 (“Yet for all the appropriately intense focus in recent years on the legality of what the military does, where the modern military fits in our constitutional democracy has remained remarkably undertheorized in legal scholarship.”).

91. Brooks, *supra* note 5, at 381.

92. *Id.*

93. *Id.* at 382.

94. *Id.*

95. *Id.* at 384.

96. *Id.*

97. *Id.*

98. *Id.* at 388.

empirical, relying heavily on polling and survey data, as well as qualitative interviews.⁹⁹

Finally, there is the field of “civilian control,” discussed earlier, which asks “how do civilian political actors manage (or fail to manage) to subordinate the military to their authority?”¹⁰⁰ This field is concerned with “a more encompassing expression of civilian authority than is analyzed in the coup and defection scholarship,” as it looks to which institution’s preferences are enacted in policy, and not merely on formal usurpation of power.¹⁰¹ The field is concerned not so much with “extreme forms of military insubordination,” but instead the de facto subversion of civilians’ “capacity to make or implement policy.”¹⁰² The civilian control scholarship moves beyond the descriptive explanation of the other fields, in that it prescribes institutional rules and behaviors in the hopes that it will advance civilian preference-enactment—it therefore has “a more normative orientation.”¹⁰³

While the study of civilian control is the most normative of the various sub-parts of the field of civil-military relations, it too suffers from a lack of normative depth. It is normative in that it makes claims about what should be done to facilitate robust civilian authority, but it assumes away the normative justification of that end goal. It never provides a thoroughgoing defense of civilian control; it never tells us *why* we should protect that value—at least not in any depth. While civil-military relations are a sub-field of political science, the field has engaged very little, if at all, with the field of political theory.

A. *Early Work*

The study of civilian control is usually thought of as starting in earnest with the flourishing of thinking that followed World War II.¹⁰⁴ Feaver and Seeler describe the period as being “dominated by two visions of democratic civil-military relations: liberal-democratic and civic republican,” with the former focused on “protecting democratic values from external threat and internal abuse,” and the latter focused on “sustaining and promoting democratic values through active civic engagement by citizens within the military establishment.”¹⁰⁵ Methodologically, these scholars focused on “traditional

99. *Id.*

100. *Id.* at 385.

101. *Id.*

102. *Id.*

103. *Id.* at 386.

104. Peter D. Feaver & Erika Seeler, *Before and After Huntington: The Methodological Maturing of Civil-Military Studies*, in *AMERICAN CIVIL-MILITARY RELATIONS: THE SOLDIER AND THE STATE IN A NEW ERA* 72, 76 (Suzanne C. Nielsen & Don M. Snider eds., 2009) (“While important civil-military works were written before World War II, civil-military relations did not become a widely recognized field of study until after the war.”).

105. *Id.* at 79.

legalistic, historical, and philosophical approaches” as well as “empirical methods and testing.”¹⁰⁶

Most significant in this era was Samuel Huntington’s *The Soldier and the State*, published in 1957.¹⁰⁷ Huntington was the first to develop a more general theory,¹⁰⁸ which he called “objective” control of the military.¹⁰⁹ Previous eras in history demonstrated “subjective” control of the military by civilians, in that dominant social classes (either in an aristocracy or a party) simultaneously served as generals and civilian leaders.¹¹⁰ The alternative to this politicization of the military is “objective” control, in which that institution remains independent of and neutral with respect to changes in civilian leadership and politics.¹¹¹ According to Huntington:

Civilian control in the objective sense is the maximizing of military professionalism Subjective civilian control achieves its end by civilianizing the military, making them a mirror of the state. Objective civilian control achieves its end by militarizing the military, making them the tool of the state The essence of objective civilian control is the recognition of autonomous military professionalism¹¹²

Thus, the military would be rendered “politically sterile and neutral” and would be “ready to carry out the wishes of any civilian group which secures legitimate authority within the state.”¹¹³ The military loses its ideological or political valence, but this is a tradeoff in which “professionalism” is recognized in exchange, along with autonomy and independence within the delimited professional sphere. This is superior to subjective control because it allows for the military to be subordinated to civilian authority yet remain an effective fighting force. Risa Brooks calls this a “division of labor,” which Huntington expected would promote “an apolitical professional ethos among officers, who become experts in the ‘management of violence,’ while steering clear of politics

106. *Id.* at 77.

107. *See* HUNTINGTON, *supra* note 89.

108. Feaver & Seeler, *supra* note 104, at 72–73.

109. HUNTINGTON, *supra* note 89, at 83.

110. *Id.* at 81–82; *see also* Pearlstein, *supra* note 57, at 857 (“Huntington’s attraction to his model of objective control was driven in large part by his fear of what he thought was his model’s inevitable opposite: subjective control in which civilians keep members of the military in line by insisting that they internalize the values of the particular civilian leadership. In Huntington’s history, such a mechanism could tie the military closely to a particular party but could also make the military an enemy of democratic governance once that civilian party left power.”).

111. HUNTINGTON, *supra* note 89, at 83–84.

112. *Id.* at 83.

113. *Id.* at 84.

and remaining deferent to civilian authority.”¹¹⁴ Huntington’s theory has had, and continues to have, an extremely strong influence.¹¹⁵

B. *Contemporary Theory*

Today a new paradigm predominates. The field now conceives of civil-military relations as centrally a “principal-agent” relationship—a conception most associated with the Duke University political scientist Peter Feaver. The principal-agent relationship is, “in [its] most basic form, a strategic interaction carried out within a hierarchical setting”—meaning, each side acts based on the anticipation of the way the other side acts, with one side having superiority.¹¹⁶ “[C]ivilian and military actors have divergent preferences and private information relevant to the relationship,” and therefore “these conditions complicate the way [the two] interact,” but “civilians can mitigate these problems with monitoring and punishment mechanisms.”¹¹⁷ Feaver’s theory is expressly derived from economics—he begins by analogizing civilians to an employer (the principal) and the military to a worker (the agent),¹¹⁸ but he quickly notes that this principal-agent framework has been used in the political context to explain interactions between the Congress, the President, and bureaucracy.¹¹⁹ He summarizes:

[C]ivil-military relations is a game of strategic interaction. The “players” are civilian leaders and military agents. Each makes “moves” based on its own preferences for outcomes and its expectations of how the other side is likely to act. The game is influenced by exogenous factors, for instance the intensity of the external threat facing the state made up of the players. The game is also influenced by uncertainties. The civilians cannot be sure that the military will do what they want; the military

114. Brooks, *supra* note 5, at 386; see also Feaver, *Problematique*, *supra* note 44, at 160 (“The reason, according to Huntington, is that there exists a form of civilian control that simultaneously maximizes military subordination and military fighting power, ‘objective civilian control.’ Objective control guarantees the protection of civilian society from external enemies and from the military themselves. The key to objective control is military professionalism.”).

115. Brooks, *supra* note 5, at 386 (internal citations omitted) (“Huntington’s objective control powerfully frames the scholarly debate on civilian control in the United States. As Cohen puts it, Huntington’s is ‘the normal theory’ against which all other approaches must position themselves. Huntington’s objective control concept also has had intense normative reverberations within the American military. In particular, his standard of apolitical professionalism is the backdrop against which political behaviors by military leaders are evaluated by analysts and often by officers and senior leaders themselves.”).

116. FEAVER, ARMED SERVANTS, *supra* note 15, at 54.

117. *Id.*

118. *Id.* at 55 (citing economics literature).

119. *Id.* at 55–56 (citing political science literature, including McNollgast).

agents cannot be sure that the civilians will catch and punish them if they misbehave.¹²⁰

Feaver uses “game” here as a term of art—meaning game theory—and in what follows, he builds a “formal game” with mathematical formulas to help explicate the features of the civil-military relationship.¹²¹

Feaver’s principal-agent theory now predominates, having supplanted Huntington’s theory of objective civilian control.¹²² In the words of Daniel Maurer, Huntington’s “aging” theory “is not as compelling or realistic a model as those (such as Feaver’s) that followed him in the last half-century.”¹²³ To the extent that Feaver’s theory goes beyond explanation and into prescription, it is that the pathological dynamics of the principal-agent relationship can be ameliorated by “intrusive civilian monitoring” of the military without too much damage to military effectiveness.¹²⁴

The principal-agent theory can be critiqued on its own terms as internally erroneous or as yielding dubious conclusions. It can also be critiqued in a more fundamental (but external) way, in that its self-imposed limitations render it of lessened value.

120. *Id.* at 58.

121. *Id.* at 95–96.

122. See Hannah Martins Miller, Note, *Generals & General Elections: Legal Responses to Partisan Endorsements by Retired Military Officers*, 73 VAND. L. REV. 1209, 1217–18 (2020) (“Modern principal-agent theorists critique and build on Huntington’s insights.”); Pearlstein, *supra* note 57, at 816–17; Eyal Benvenisti & Amichai Cohen, *War Is Governance: Explaining the Logic of the Laws of War from a Principal-Agent Perspective*, 112 MICH. L. REV. 1363, 1368–69 (2014) (“These diverse conflicts can all be framed as principal-agent (‘P-A’) conflicts, situations in which each ‘principal’ (the public, elected officials, high command) necessarily employs an ‘agent’ (elected officials, high command, combat soldiers, respectively) to further its goals and secure its interests.”); Ziv Bohrer, *The Superior Orders Defense: A Principal-Agent Analysis*, 41 GA. J. INT’L & COMPAR. L. 1, 6 (2012) (analyzing superior orders defense from principal-agent theory perspective); Sulmasy & Yoo, *supra* note 81, at 1826–27 (“We propose instead to analyze civilian-military relations using principal-agent models developed to understand the administrative state.”).

123. Dan Maurer, *Sovereign, Employer, Community: A Theory of Military Justice Beyond Discipline, Obedience, and Efficiency*, 107 MARQ. L. REV. 399, 452 n.202 (2023). One reason that the theory has aged is that its normative prescriptions were explicitly historically contingent, and its predictions were simply proven wrong by subsequent historical development. Specifically, Huntington identified an inherent tension between liberalism and military professionalism and claimed that only by shifting from liberalism to conservatism—itsself more hospitable to the military—could the United States prevail against the Soviet Union in the Cold War. HUNTINGTON, *supra* note 89, at 464. “The requisite for military security is a shift in basic American values from liberalism to conservatism. Only an environment which is sympathetically conservative will permit American military leaders to combine the political power which society thrusts upon them with the military professionalism without which society cannot endure.” *Id.* Of course, neither eventuality came to pass: the United States became more liberal, and yet it won the Cold War. See Feaver, *Problematic*, *supra* note 44, at 161–63.

124. FEAVER, ARMED SERVANTS, *supra* note 15, at 178–79, 299–300; David Luban, *On the Commander in Chief Power*, 81 S. CAL. L. REV. 477, 558 (2008) (“Feaver’s chief innovation is the added insight that maintaining this division of labor often requires intrusive civilian monitoring of the military, in order to solve the principal-agent problem.”).

Internal critiques have claimed that the two-party model is overly simplified. There are in fact multiple “principals” given the division of authority between Congress and the President.¹²⁵ There can also be division amongst actors with the supposedly solitary “agent,”¹²⁶ and in some cases even military “agents” can work to vindicate the deeper concerns of civilian supremacy when “shirking” the directives of lawless civilian superiors.¹²⁷ Others claim that the regime of “intrusive monitoring” called for by the principal-agent theory insufficiently considers costs imposed on military effectiveness.¹²⁸

The limitations of an economically rooted theory in the context of civil-military relations are major external critiques. The theory is explicitly “rationalist,” but the organized use of violence and warfare surely involves many factors beyond mere rationality.¹²⁹ One critic notes that an economic view of military servicemembers can have the perverse effect of devaluing the worth of their lives.¹³⁰ Finally, some have noted that the sharp division between principal and agent is not accurate in a society in which servicemembers are simultaneously citizens.¹³¹

125. Michael A. Robinson, Lindsay P. Cohn & Max Z. Margulies, *Dissents and Sensibility: Conflicting Loyalties, Democracy, and Civil-Military Relations*, in RECONSIDERING AMERICAN CIVIL-MILITARY RELATIONS 63, 67–68 (Lionel Beehner, Risa Brooks & Daniel Maurer eds., 2020).

126. MAURER, CRISIS, *supra* note 55, at 85 (“Feaver does not address the more nuanced and realistic contexts where there is dispute or tension among senior military advisors, as between a combatant commander and a Service Chief of Staff, about long-term objectives and the number of troops needed to meet those objectives.”).

127. Pearlstein, *supra* note 57, at 803, 817, 841, 857–58. In making this critique she is primarily thinking of the role of military lawyers in fighting civilian leaders’ expansive claims that torture could be legal during the years following the 9/11 attacks. *Id.* at 800; see also JAMES M. DUBIK, JUST WAR RECONSIDERED: STRATEGY, ETHICS, AND THEORY 67 (2016) (“Compliance with orders is simply not enough; the substance of orders is also important. Justice in war demands more than compliance.”).

128. DUBIK, *supra* note 127, at 69 (“If, in some future study, Feaver takes up an analysis of the effect of agency theory on the functional imperative, he will have to explain not only how civilian control affects the military’s responsibilities for tactical, war-fighting functions but also how it affects the strategic, war-waging functions that senior political and military leaders share.”).

129. James Burk, *Book Review*, 30 ARMED FORCES & SOC’Y 485, 487 (2004) [hereinafter Burk, *Review*] (“Others will object that civilians and military professionals do not act solely as rational and self-interested or as unitary actors.”); MAURER, CRISIS, *supra* note 55, at 84 (“Feaver’s principal-agent framework, nevertheless, remains problematic for the generation of objective criteria . . . First, his model assumes rational actors and aggregates the conduct and decisions of many individuals on both sides of the civil-military divide. Consequently, it ignores irrational behavior, subsumes personal motives and competence, and only looks to choices of working, shirking, monitoring, and punishing.”).

130. DUBIK, *supra* note 127, at 70–71, 76 (“[B]ecause the economic-based principal-agent framework leaves out other aspects of the relationship between citizens-who-become-soldiers and their government, soldiers’ lives are treated as if they had less value than they actually have . . . If subordinates are treated merely as items to be ordered, monitored, and punished and they do not do what they were told as they were told to do it, then senior leaders develop an attitude toward them that fails to take their lives into consideration in ways that a valuable human life deserves.”).

131. Dubik alludes to this by his repeated use of the term “citizens-who-become-soldiers.” *Id.* at 61, 67, 75, 76. For a critique of the claim that military members and civilians live in “separate societies,”

The complexities of what are fundamentally *political* relationships are ground down in the economic analysis (so as to enable the formulae to be run) but, in doing so, much is lost. The principal-agent theory is up-front about this and claims only to offer a “rationalist baseline against which to measure the influence of these other considerations.”¹³²

C. *Missing Normative Arguments*

The limits of the principal-agent theory—its failure to thoroughly defend certain normative baselines—are shared by the entire field. Normative prescriptions are advanced to maximize civilian control, but without a full explanation of *why* that control is desirable.

Even before laying out his seminal theory, Feaver wrote in an article in 1999, “The [military and civilian] spheres are necessarily analytically distinct—a distinction that derives from democratic theory and the agency inherent in political community”¹³³ No citation or explanation is provided. Reviewing Feaver’s later monograph, one scholar states succinctly, without elaboration, “Surely military obedience to civilian masters is a necessary condition for democracy”¹³⁴ More recently, a trio of scholars writes that “[d]emocratic civil-military relations theory typically frames civilian control of the military—and consequently, obedience to elected officials—as the highest or final principle that service members must observe at all costs.”¹³⁵ Again, no citation or argument follows.

Some invoke the concept of accountability and legitimacy through electoral mandate,] but without much more. Thus, Marybeth Ulrich briefly references “the democratic principle that the elected political leadership has the electoral legitimacy and authority that military leaders, who are unaccountable to the public for their decisions, lack.”¹³⁶ Similarly, Deborah Pearlstein

taken from a line of Rehnquist opinions, see Diane H. Mazur, *A MORE PERFECT MILITARY: HOW THE CONSTITUTION CAN MAKE OUR MILITARY STRONGER* 53–91 (2010). Mazur’s critique is well taken, but she does not explicitly draw a connection between it and a weakness in the principal-agent theory.

132. FEAVER, *ARMED SERVANTS*, *supra* note 15, at 58 (“This rationalist approach to civil-military relations has its limitations. Some may find it off-putting to imagine the military choosing whether to obey or not based on crass calculations of self-interest. Indeed, most members of the military have a substantial moral commitment to what they do”); Burk, *Review*, *supra* note 129, at 487 (“To this objection, Feaver reasonably responds that the rationalist and unitary assumptions provide a benchmark from which we might measure the influence of normative commitments or effects stemming from multiple-principal or multiple-agent problems. How to do this, he does not say.”).

133. Peter D. Feaver, *Civil-Military Relations*, 2 *ANN. REV. POL. SCI.* 211, 220 (1999).

134. Burk, *Review*, *supra* note 129, at 487. The following sentence is “[y]et democracy requires more from civil-military relations than military obedience.” *Id.* Burk, therefore, does not see the need to elaborate more on even the most basic requirement.

135. Robinson et al., *supra* note 125, at 67–68.

136. Marybeth P. Ulrich, *Civil-Military Relations Norms and Democracy: What Every Citizen Should Know*, in *RECONSIDERING AMERICAN CIVIL-MILITARY RELATIONS*, *supra* note 125, at 41, 53.

identifies “the protection of individual rights and the maintenance of a noncorrupt, politically accountable system of government” as the goals of civilian control, grounding this in the experience of the Framers of the Constitution.¹³⁷ But she does not tell us more about why we should value civilian control—only that “the Framers thought civilian control” was valuable for these reasons.¹³⁸

Richard Kohn and James Burk come the closest to engaging with theoretical arguments, but they move on from them too quickly. In a one-page discussion of the value of civilian control, Kohn makes striking observations, but only in passing.¹³⁹ “Civilian control allows a nation to base its values, institutions, and practices on the popular will rather than on the choices of military leaders, whose outlook by definition focuses on the need for internal order and external security,” writes Kohn.¹⁴⁰ “The military is, by necessity,” he argues, “among the least democratic institutions in human experience; martial customs and procedures clash by nature with individual freedom and civil liberty, the highest values in democratic societies.”¹⁴¹ He goes on to note that the military is organized around coercion and hierarchy, and that its values are “inherently adversarial” to a democratic society.¹⁴² James Burk similarly adverts to liberal democratic theory, but too briefly.¹⁴³ Contrasting military and civilian values, he writes that “reliance on coercion as opposed to reason and persuasion should be minimized as a method for resolving conflicts,” and that “sovereignty of and respect for people who live within a democratic jurisdiction should be institutionalized.”¹⁴⁴ Kohn and Burk make important gestures toward the deeper theoretical arguments, but they do not elaborate.

More recently, Daniel Maurer—himself one of the deepest contemporary thinkers about military law—advances the claim that Feaver’s principal-agent theory can be further supported by introducing the notion of a fiduciary agent.¹⁴⁵ Such “jurisprudential agency,” borrowing from the law of agency, incorporates nonrationalist components such as a fiduciary duty of loyalty, candor, and good faith.¹⁴⁶ But Maurer does not explain why civilians should be principals in his fiduciary model. It is assumed. Indeed, in a later article, he

137. Pearlstein, *supra* note 57, at 857.

138. *Id.*

139. Kohn, *supra* note 53, at 141–42.

140. *Id.* at 141.

141. *Id.*

142. *Id.* at 141–42.

143. Burk, *Theories*, *supra* note 80, at 8.

144. *Id.*

145. MAURER, CRISIS, *supra* note 55, at 102–04.

146. *Id.* at 102.

states that civilian supremacy is a “predicate presumption” of the prior scholarship.¹⁴⁷

Nowhere can one find a thorough normative defense of civilian supremacy. Perhaps it simply seems too obvious and uncontroversial to be worth unpacking—something to be bracketed off for the more pressing and practical questions of application. But even the most uncontroversial principles require theoretical defense. Moreover, in thinking more deeply about the central shared premises of civilian control, we are likely to discover new insights that bear on how the principle can be applied. It is political theory—the body of thought that undergirds constitutional law—that provides the deepest source of the principle’s defense.

III. THE LIBERAL DEMOCRATIC FOUNDATION OF CIVILIAN CONTROL

The field of civil-military relations, currently settled into a theoretical framework defined by the quasi-economic “principal-agent” relationship, requires a deep and thorough articulation of its underlying normative presupposition: the supremacy of civilian authority over that of the military. In doing so, we can bring to bear advances in democratic theory that have taken place since the time of Huntington, and even since that of Feaver.¹⁴⁸ The argument will proceed in two sections, working through different concepts that, together, define the legal, political, and social arrangement of contemporary America: (1) liberalism and (2) democracy. While each independently implies civilian control, together they form a compelling and unassailable normative case for the principle.

A. *Liberalism*

Liberalism is the reigning political theory of contemporary Western democracies—a theory that prizes, as we will see below, individualism, freedom, and rationality. Those who study civil-military relations have long observed

147. Maurer, *Fiduciary Duty*, *supra* note 14, at 275; *see also id.* at 274 n.57 (characterizing Burk’s description of the field as concerned mostly with application, not justification, of the civilian supremacy norm: “[Burk] explain[s] that civil-military theory is premised on a normative axiom that democratic civilian control over military is better than a military-led authoritarian state, which forces the primary question to be ‘how civilian control over the military is established and maintained.’”). “Normative axiom” here seems to mean that the principle’s justification can be assumed.

148. Specifically, the so-called “deliberative turn” in democratic theory, which only began in the ‘90s. *See* ROBERT E. GOODIN, *INNOVATING DEMOCRACY: DEMOCRATIC THEORY AND PRACTICE AFTER THE DELIBERATIVE TURN*, at viii (2008). This work had likely not gained sufficient prominence to be considered during Feaver’s articulation of the principal-agent theory (published in final form in 2003).

that militarism is inherently in tension with liberalism, but they have done little to describe the latter in depth.¹⁴⁹ That is the task of this section.

Any explication of liberalism must begin with an acknowledgement of the difficulty of the undertaking, and a recognition of the contested and evolving nature of the theory. The intellectual historian Duncan Bell writes that “The history of liberalism . . . is a history of constant reinvention,” with our more modern understanding of the idea a product of post-War reactions to totalitarianism.¹⁵⁰ Even this post-War liberalism, though, is subject to endless debate about its contents. As Michael Freeden notes, while theorists “often proceed as if their accounts of liberalism are uncontentious, they produce manifold contrasting accounts, disagreeing on multiple axes of interpretation.”¹⁵¹ Thus, when summarizing liberal theory, one should “recognize that liberalism is not a single phenomenon, but an assembly of family resemblances.”¹⁵²

While the task is daunting, it is nevertheless necessary. Liberalism is far too significant a theory—both practically and in the academy—to give up on the definitional task. After describing its turns and shifts throughout the centuries, Bell concludes that liberalism “came to be seen by many as the constitutive ideology of the West,” and that “[t]oday we both inherit and

149. Thus, Huntington contrasted the “societal imperative” of liberalism with the “functional imperative” of military efficacy. HUNTINGTON, *supra* note 89, at 2; *see also id.* at 144 (“[L]iberalism does not understand and is hostile to military institutions and the military function.”). He spends only one page explaining what he means by liberalism, identifying its components of individualism, liberty, reason, self-expression, human progress, limited state power, economic welfare, and pacifism without explicating any of these concepts. *Id.* at 90–91. It should be noted that many of the theoretical advancements in the understanding of liberalism came after the time of *Soldier and State*, as this section will demonstrate. Most of the academic literature I rely on was published after the late 1990s.

150. Duncan Bell, *What Is Liberalism?*, 42 POL. THEORY 682, 705 (2014); *see also* HELENA ROSENBLATT, THE LOST HISTORY OF LIBERALISM 4 (“As I also endeavor to show, the idea that liberalism is an Anglo-American tradition concerned primarily with the protection of individual rights and interests is a very recent development in the history of liberalism. It is the product of the wars of the twentieth century and especially the fear of totalitarianism during the Cold War. For centuries before this, being liberal meant something very different. It meant being a giving and a civic-minded citizen; it meant understanding one’s connectedness to other citizens and acting in ways conducive to the common good.”). “Liberalism’ covers broad, well-trodden, and contested terrain; any definition is liable to be controversial.” JOSHUA L. CHERNISS, LIBERALISM IN DARK TIMES 3 (2021).

151. Michael Freeden & Marc Stears, *Liberalism*, in THE OXFORD HANDBOOK OF POLITICAL IDEOLOGIES 329, 329 (Michael Freeden & Marc Stears eds., 2013); *see also* MICHAEL FREEDEN, IDEOLOGY: A VERY SHORT INTRODUCTION 5 (2015) [hereinafter FREEDEN, A VERY SHORT INTRODUCTION] (“Yet the problem is this: There is no single, unambiguous thing called liberalism.”).

152. Freeden & Stears, *supra* note 151, at 329; Steven Wall, *Introduction*, in THE CAMBRIDGE COMPANION TO LIBERALISM 1, 1 (Steven Wall ed., 2015) (“Liberalism resists easy description. Whether it refers to a political ideology or to a political philosophy, it covers a broad swathe of ideas. The swathe of ideas it covers is so broad, in fact, that efforts to identify its essential and distinctive features almost always come off as hopelessly narrow Rather than identifying a single unifying commitment, others have sought, more promisingly, to pick out family resemblance characteristics to zone in on the target.”).

inhabit it.”¹⁵³ We are therefore liberalism’s “conscripts,” whether we like it or not, as the tradition now “encompass[es] the vast majority of political positions regarded as legitimate.”¹⁵⁴ Freedden is similarly direct: “Liberalism is . . . the dominant ideology of the developed world.”¹⁵⁵

With all this in mind, we can begin the task of describing liberalism. Rather than trying to give a comprehensive picture, I will lay out what almost all thinkers agree are four core components that are specifically relevant¹⁵⁶ to the present issue of civil-military relations.¹⁵⁷ Doing so will hopefully help to avoid the protracted debates in philosophy, history, and political theory on the content of liberalism, and will keep us focused on the subject at hand. Indeed, to dive too deeply into these debates would serve little purpose here, as *no* liberal, I think, has ever or would ever reject the principle of civilian supremacy over the military.¹⁵⁸ One might say that this principle forms a part of the overlapping consensus among liberal theorists, whatever their other disagreements might be.

1. Individualism

Liberalism holds that the central focus of politics is a respect for individuals.¹⁵⁹ This may seem contradictory—after all, politics is a group effort.

153. Bell, *supra* note 150, at 682.

154. *Id.* at 689. Bell also cites to Raymond Guess, a penetrating critic of liberalism who begrudgingly acknowledges the same: “We know of no other approach to human society that is at the same time as theoretically rich and comprehensive as liberalism and also even as remotely acceptable to wide sections of the population in Western societies.” *Id.*

155. Freedden & Stears, *supra* note 151, at 329.

156. Two components that are frequently mentioned, but which are less relevant for civil-military relations, are liberalism’s emphasis on human progress, as well as its universalism that transcends national identities and borders. See generally JOHN GRAY, LIBERALISM (Frank Parkin ed., 2nd ed. 1995) (discussing the various components of liberalism).

157. I recognize that even the task of labelling a component as “core” or not is one that is also fraught with controversy. Bell, *supra* note 150, at 684 (“A related policing strategy is to concede the intellectual diversity of liberalism while extracting its constitutive element(s)—its ineliminable core. This too is contested terrain . . . John Dunn once lamented the ‘dismaying number of categories’ that have been claimed as central to liberal ideology . . . Even its supposed core has proven rather elusive.”); Freedden & Stears, *supra* note 151, at 330 (“It is helpful to begin by noting that there are elements of liberalism that are widely accepted . . . It would be an error, however, to think that this common rendering of its content was uncontroversial.”).

158. The version of liberalism which would be most accommodating of a more robust military authority is liberal republicanism, and at times, republicans have emphasized the value of inculcating civic virtue through military service. Burk, *Theories*, *supra* note 80, at 11. No republican, though, could countenance subordination of civilian authority to that of the military. This would severely counteract the central value of “nondomination.” See Frank Lovett & Philip Pettit, *Neorepublicanism: A Normative and Institutional Research Program*, 12 ANN. REV. POL. SCI. 11, 11 (2009) (“[M]ost important is the conception of a free person as one who does not live under the arbitrary will or domination of others. Second is the associated conception of a free state as one that attempts to promote the freedom of its citizens without itself coming to dominate them.”).

159. Wall, *supra* note 152, at 2.

For liberals, though, this collective endeavor is undertaken pursuant to an ever-present concern for members of the collective in their individual capacity. Liberalism thus reflects a vision of human beings and their relationship to society, and, in the face of this relationship, “asserts the moral primacy of the person against the claims of any social collectivity.”¹⁶⁰ Michael Freedden thus identifies liberal individuality as “the notion of the person as a separate entity possessing unique attributes and capable of choice.”¹⁶¹ The emphasis on the primary status of the individual is reflected in the commonly used thought experiment of the “social contract,” which many liberals use to claim that human beings *start* as individuals, and only enter into society voluntarily for certain beneficial purposes.¹⁶²

Individualism is one of those concepts that is best understood when brought into relief by considering its opposite: collectivism. “[S]ignificant expressions of liberalism,” writes George Kateb, “are devoted to blocking the urge to treat people as objects in need of repair, or as well-tended animals prepared for burden or slaughter, or as forces in need of enlistment in projects that are not spontaneously their own.”¹⁶³ Liberal individualism is a rejection of these goals and an assertion instead of the inherent value of the human person on its own.

Asserting that individuals matter independent of their value to the collective may seem rather obvious to us, but that is because we are so thoroughly inculcated in the liberal mindset. Historically, and also today, one can observe many other political arrangements between the individual and society. A recent study of China, the world’s most populous country, concluded that a Maoist vision—itsself rooted in Confucianism—lives on in Chinese Communist Party ideology: “Rather than knowing and discovering and being authentic to your true self, the point was to focus on relationships, social

160. GRAY, *supra* note 156, at 86; Wall, *supra* note 152, at 2 (“And it is certainly true that liberals very much tend to embrace individualism in the sense that they hold that the claims of individual persons, as opposed to social collectivities, are morally primary.”); NICOLA LACEY, STATE PUNISHMENT 144 (1988) (“By individualism, I mean . . . a taking of individuals as the primary focus of concern in the moral assessment of any particular set of political arrangements. A central example of liberal concern for the individual is the principle of taking persons seriously as moral agents worthy of respect and concern.”).

161. MICHAEL FREEDDEN, IDEOLOGIES AND POLITICAL THEORY 50 (1996) [hereinafter FREEDDEN, IDEOLOGIES]. He calls this part of the “millite core” of liberalism, meaning the set of concepts derived from the thought of John Stuart Mill. FREEDDEN, A VERY SHORT INTRODUCTION, *supra* note 151, at 61 (“Individuality sees people as endowed with a qualitative uniqueness. They are regarded as capable of self-expression and flourishing, and they require those attributes in order to realize their full potential.”).

162. See, e.g., JOHN RAWLS, A THEORY OF JUSTICE, at viii (1971) (aiming to “generalize and carry to a higher order of abstraction the traditional theory of the social contract as represented by Locke, Rousseau, and Kant”); see also ERIC MACGILVRAY, LIBERAL FREEDOM 9–10 (2022) (describing while critiquing the contractarian turn in liberal theory).

163. GEORGE KATEB, THE INNER OCEAN 230 (1992).

relation, as these—and not that of individual monad—lie at the origin of what it means to be alive, human, in-the-world.”¹⁶⁴

2. Freedom

Inherently related to individualism, and equally important, is the value liberalism places of an individual's freedom or autonomy. The moral primacy of the individual in relation to society is only meaningful because the individual has freedom to think and to act; there would be no sense in placing emphasis on individuality if the individual were an automaton or a clone.¹⁶⁵ Steven Wall thus writes that “a strong commitment to individual freedom is at least a minimal unifying commitment of liberal political thought,”¹⁶⁶ while Freedden describes the value placed on “autonomous and purposive agency” such that individuals’ “capacity to plan, to anticipate, to seek the optimal options for themselves, [and] to be entrusted to make sensible decisions for themselves” is respected.¹⁶⁷ Underlying this is liberalism's bedrock moral commitment to the inherent value of human autonomy: “‘Moral autonomy’ refers to the capacity to subject oneself to (objective) moral principles. Following Kant, ‘giving the law to oneself’ in this way represents the fundamental organizing principle of all morality.”¹⁶⁸ Autonomy “finds its core meaning in the idea of being one's own person, directed by considerations, desires, conditions, and characteristics that are not simply imposed externally on one, but are part of what can somehow be considered one's authentic self.”¹⁶⁹

Like with individualism, liberal freedom is most fully understood when defined in the negative. Liberalism is therefore often thought of as being centrally concerned with the problem of coercion—its justification and its limits.¹⁷⁰ Gerald Gaus, then, is right to call this the “fundamental liberal

164. DANIEL F. VUKOVICH, *ILLIBERAL CHINA* 8 (2018).

165. FREEDDEN, *IDEOLOGIES*, *supra* note 161, at 2 (“The relationship of liberty, individualism, and progress is one of mutual dependence and definition. It is impossible to disentangle them . . .”).

166. Wall, *supra* note 152, at 2.

167. FREEDDEN, *A VERY SHORT INTRODUCTION*, *supra* note 151, at 5.

168. John Christman & Joel Anderson, *Introduction*, in *AUTONOMY AND THE CHALLENGES TO LIBERALISM* 1, 2 (John Christman & Joel Anderson eds., 2005).

169. *Id.* at 3. There is debate about what constitutes one's “true self” in the literature on autonomy, and on how thick of a conception it is, but this need not concern us for the sake of autonomy's relevance to civilian supremacy. See Gerald F. Gaus, *The Place of Autonomy Within Liberalism*, in *AUTONOMY AND THE CHALLENGES TO LIBERALISM*, *supra* note 168, at 272, 295 [hereinafter Gaus, *The Place of Autonomy*] (describing “perfectionist” conception of autonomy as “self-authorship” and critiquing it, while advancing a minimal conception that does not require self-reflection).

170. Matthew A. Shapiro, *Delegating Procedure*, 118 COLUM. L. REV. 983, 1043 (2018) (“[O]ne of the most basic tenets of liberal political theory [is] that the defining feature of political power is its coerciveness and that the central task of political theory is legitimating and limiting that coercion.”).

principle”: “we have liberty to act as we see fit unless reason can be provided for restriction.”¹⁷¹

3. Rationality

The justification of coercion takes us to a third element of liberalism: rationality. Given individuals’ status as beings with inherent moral value and autonomy, political actions (especially restrictions on their freedom) must be justified using terms that are accessible via reason. Liberalism’s commitment to rationality in politics, then, starts with an observation about human nature. Steven Wall writes that “if human beings can grasp the rational order in the world as the Enlightenment promised, then this order can be explained to them. The limits on their freedom need be neither arbitrary nor inexplicable.”¹⁷² Consider also John Rawls’s statement that one of human beings’ primary “moral powers” is “the capacity to form, to revise, and rationally to pursue a conception of the good.”¹⁷³ Rawls’s liberal theory therefore influentially claimed that “public reasons” must be given when deliberating about and deciding on political decisions—reasons that are accessible to all no matter their deeper worldview, whether it be religious or ethical.¹⁷⁴

Recall also Gaus’s formulation of the “fundamental liberal principle”: one has liberty unless *reason* can be provided for restriction.¹⁷⁵ Appeals to unknowable mystical truths, religious doctrine or revelation, or to any authority solely on the basis of its status as an authority—all these are clearly illiberal. MacGilvray lists a few political systems in which this principle is violated due

171. Gaus, *The Place of Autonomy*, *supra* note 169, at 274. The proper definition of the freedom or liberty that liberalism values is, arguably, the most central controversy among liberal theorists. One might claim that the importance of liberty justifies redistribution of wealth to enhance the opportunities of the poor, but one might also claim that the taxation required to effectuate the redistribution violates the liberty of the rich. For a very recent and comprehensive discussion of these competing visions of freedom in liberal theory, see MACGILVRAY, *supra* note 162, at 4. His attempted synthesis, *see id.* at 5, takes us beyond the scope of the present inquiry. We need not cherry-pick one version of liberal freedom here, as *any* liberal vision of freedom is incompatible with militarism. MacGilvray implies this when stating that ideologies that authoritarian are “fundamentally incompatible with, and irreconcilably opposed to” a “freedom-centered liberalism.” *Id.* at 185. Thus, under even the thickest, most justice-centered version of liberal republicanism—one which is concerned with the effects of markets on vulnerable classes, *id.* at 58—authoritarian militarism would be illegitimate.

172. Wall, *supra* note 152, at 4; Freedden & Stears, *supra* note 151, at 331–32 (identifying “rationality” as a core component of liberalism); *see also* FREEDDEN, A VERY SHORT INTRODUCTION, *supra* note 151, at 13.

173. John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 525 (1980).

174. John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 765–66 (1997); Gerald F. Gaus, *Public Reason Liberalism*, in CAMBRIDGE COMPANION TO LIBERALISM 112, 112–13 (Steve Wall ed., 2015) (“Liberalism and public reason, I argue, arose together as interrelated responses to the modern problem of creating a stable social order in societies deeply divided by religious and moral disagreements.”).

175. Gaus, *The Place of Autonomy*, *supra* note 169, at 274.

to authoritarianism: “a clerical hierarchy, as in ultramontane Catholicism or political Islamism; a privileged class, as in hereditary aristocracy or vanguardist socialism; or an idealized version of ‘the people’ themselves, as in fascism or populism.”¹⁷⁶ Similarly violative of liberal rationality would be an arbitrary political choice made without any reason given.

4. Pacifism

Liberalism also implies pacifism—a general stance against war and violence. This has deep roots in intellectual history. Liberalism’s first major flowering was in response to centuries of brutal, internecine religious war.¹⁷⁷ A second major development of liberal thought occurred in response to the atrocities of World War II, many of which were rooted in perfectionist ideologies that were also totalitarian and violent.¹⁷⁸ Thus, Joshua Cherniss argues that an underlying liberal “ethos”—its “sensibility or temper”—is to oppose the “ruthlessness” of anti-liberal thought.¹⁷⁹ Ruthless ideologies, according to Cherniss, were willing to contemplate widespread violence to achieve their goals.¹⁸⁰ Liberalism lowers the aspiration of society away from the perfection aspired to by ideology; instead, an ethos of *limited* politics allows people to at least live together in an imperfect world.¹⁸¹

This pacifist bent also flows from liberalism’s deeper commitments to autonomy and the moral primacy of the individual. Those commitments demand that one recognizes the shared humanity even of someone who is a citizen of a different country. Liberalism is often said to therefore be “cosmopolitan,”¹⁸² and this cosmopolitanism contains an inherent pacifism. Recognition of the shared value and autonomy of the other person or nation requires that one not kill or subjugate that person or nation. In the words of

176. MACGILVRAY, *supra* note 162, at 185–86.

177. “Toleration came when the religious wars were over; not because either side had willed it, but because neither was able to force its doctrine on the others. It was the exhaustion of religious conflict that became institutionalized in British toleration; secularization triumphed because religious compulsion was stalemated.” Randall Collins, *Liberals and Conservatives, Religious and Political: A Conjunction of Modern History*, 54 SOCIO. RELIGION 127, 138 (1993).

178. CHERNISS, *supra* note 150, at 3.

179. *Id.* at 197.

180. *Id.* at 17. Cherniss cites Trotsky, who argued that the “imminent requirements of history” could only be achieved through the “systematic and energetic use of violence.” *Id.* at 55.

181. *Id.* at 3.

182. See Charles R. Beitz, *Social and Cosmopolitan Liberalism*, 75 INT’L AFFS. 515, 519 (1999) (describing a “cosmopolitan liberalism” that “takes individuals as basic and accords no privilege to domestic societies or states”); Michael W. Doyle, *Three Pillars of the Liberal Peace*, 99 AM. POL. SCI. REV. 463, 464 (2005) [hereinafter Doyle, *Three Pillars*] (“Second, liberal principles add the prospect of international respect. Liberal principles, or norms, involve an appreciation of the legitimate rights of all individuals.”); FREEDEN, A VERY SHORT INTRODUCTION, *supra* note 151, at 63 (“In the liberal case, the default position of the sixth core concept is the desire to appeal to universal human interests as such, to what unites people rather than what divides them, even to some fundamental consensus.”).

John Owen, “each individual must be allowed to follow his or her own preferences as long as they do not detract from another’s freedom. People thus need to cooperate by tolerating one another and forgoing coercion and violence.”¹⁸³ Other liberals argue that since war in modern societies may involve involuntary conscription and will always involve compelling people to kill others, respect for autonomy requires the avoidance of armed conflict.¹⁸⁴

To be sure, liberalism has been used at times to justify violence—say, in the name of liberating a country from an autocratic ruler.¹⁸⁵ But these are, at the very least, extraordinary exceptions from the general pacifist bent of liberalism, and it may be that these arguments should even be rejected as illiberal.¹⁸⁶ To say that liberal ends justify illiberal means is to inject far too much consequentialism into a theory that is based in deontology.¹⁸⁷

In sum, liberalism is a political theory that values individualism, freedom, rationality, and pacifism. It is not the only set of operative values, though. In what follows, we turn to the features of democracy that bear on the issue of civilian control.

183. John M. Owen, *How Liberalism Produces Democratic Peace*, 19 INT’L SEC. 87, 94 (1994).

184. Robert L. Holmes, *Pacifism for Nonpacifists*, 30 J. SOC. PHIL. 387, 399 (1999) (“The social, political, and economic structures [society] must keep in place even to maintain readiness for war are incompatible with such a [liberal democratic] society. The toll that it takes of human liberty is simply too great. Any country that relies upon conscription is imposing involuntary servitude upon its young people, and, in a country like the United States, discriminatory servitude as well. And this, I should maintain, is incompatible with a free and open democratic society . . . [I]t doesn’t follow either that one is justified in compelling others to kill or that one is justified in killing at the command of others.”).

185. Doyle, *Three Pillars*, *supra* note 182, at 464 (“The historical liberal legacy is laden with popular wars fought to promote freedom, protect private property or support liberal allies against nonliberal enemies.”); Michael W. Doyle, *Liberalism and World Politics*, 80 AM. POL. SCI. REV. 1151, 1151 (1986) (noting contradiction between “liberal pacifism” and “liberal imperialism” and that “[l]iberal states have . . . also discovered liberal reasons for aggression, as [Kant] feared they might”). For an example of this, see Fernando R. Tesón, *The Liberal Case for Humanitarian Intervention*, in *THE MORALITY OF WAR: CLASSICAL AND CONTEMPORARY READINGS* 347 (2006).

186. We cannot resolve this debate here; for the purposes of the present study, it is enough to note that we adopt the pacifist variant of liberal theory. For a starting point on this literature, see Jedediah Purdy, *Liberal Empire: Assessing the Arguments*, 17 ETHICS & INT’L AFFS. 35, 35 (2002). Note also that by invoking liberal pacifism here we do not mean to invoke the substantial literature assessing the *descriptive* claim that liberalism has ensured and will ensure peace (for whatever reason)—so-called “liberal peace theory”—but instead the normative argument that the principles of liberalism require a pacifist bent. See Doyle, *Three Pillars*, *supra* note 182, at 463 (calling “liberal peace” an “explanation of two important regularities in world politics”).

187. See David Weinstein, *Nineteenth- and Twentieth-Century Liberalism*, in *THE OXFORD HANDBOOK OF THE HISTORY OF POLITICAL PHILOSOPHY* 419 (George Klosko ed., 2011). Even those who accept liberal principles for consequentialist reasons, though, would likely not accept the consequentialist reasoning of liberal imperialists—those willing to totally suspend liberal principles to achieve liberal ends through war. A liberal consequentialism that would permit such a suspension would no longer be recognizably liberal.

B. *Democracy*

Like with liberalism, theorists of civil-military relations have long claimed that civilian control is a requirement of democracy. Again, though, their invocations of that concept have been undertheorized and usually start and end with a reference to the need for “accountability.”¹⁸⁸ But contemporary democratic theory has articulated the values of democracy with far more sophistication than this.

While one must recognize the complexity of different models of democracy in contemporary thought,¹⁸⁹ many identify two distinct conceptual groupings: aggregative theories and deliberative theories.¹⁹⁰ Aggregative theorists have a view of democracy in which “competing for the majority’s vote is the essence of the exercise, and the challenge for democratic theorists as they conceive it is to come up with the right rules to govern the contest.”¹⁹¹ This view has been supplanted, though, by the development of the now-dominant deliberative theory.¹⁹² According to deliberative democrats, what makes something “democratic” is not the collection of majority preferences, but instead the process leading up to that collection—voting is merely the final, confirmatory stage of democratic political activity. Consider the following from theorist Bernard Manin: “[T]he source of [democratic] legitimacy is not the predetermined will of individuals, but rather the process of its formation, that is, deliberation itself.”¹⁹³ And what is deliberation? As Mark Warren writes,

188. Miller, *supra* note 122, at 1217–18; Pearlstein, *supra* note 57, at 817 (describing agency theory’s concern for “accountability”).

189. Dan M. Kahan, *Democracy Schmemocracy*, 20 CARDOZO L. REV. 795, 795 (1999) (“[D]emocracy is an essentially contested concept: there is not just one, but rather a plurality of competing conceptions of democracy, each of which emphasizes a different good commonly associated with democratic political regimes.”); Mark E. Warren, *A Problem-Based Approach to Democratic Theory*, 111 AM. POL. SCI. REV. 39, 40 (2017) (“The consequence is that we now have a proliferation of adjectives that name and differentiate models: electoral democracy, competitive elite democracy, competitive multiparty democracy, pluralist democracy, corporatist democracy, developmental democracy, republican democracy, advocacy democracy, agonistic and adversarial democracy, pragmatic democracy, participatory democracy, progressive democracy, and—of course—deliberative democracy.”).

190. JERRY L. MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY 165–70 (2018) (noting that aggregative and deliberative democracy are the two main paradigms in contemporary democratic theory); see Jack Knight & James Johnson, *Aggregation and Deliberation: On the Possibility of Democratic Legitimacy*, 22 POL. THEORY 277, 278 (1994).

191. IAN SHAPIRO, THE STATE OF DEMOCRATIC THEORY 3 (2003).

192. Warren, *supra* note 189, at 40 (calling the deliberative model “now arguably the most productive research paradigm within democratic theory”); see also FRANK CUNNINGHAM, THEORIES OF DEMOCRACY: A CRITICAL INTRODUCTION 163 (2002) (calling deliberative democracy the “currently popular school of democratic theory”).

193. Bernard Manin, *On Legitimacy and Political Deliberation*, 15 POL. THEORY 338, 351–52 (1987); James A. Gardner, *Anonymity and Democratic Citizenship*, 19 WM. & MARY BILL RTS. J. 927, 935 (2011) (“Deliberation is thus doubly important in these theories: it is not only the forum in which citizens

deliberation involves “the giving and responding to reasons and coming to a collective decision.”¹⁹⁴

As we will discuss below, deliberation is valuable for different reasons, and it results in a final decision by an aggregative-type majority vote.¹⁹⁵ All this is relevant for civilian control over the military.

1. Deliberation: Epistemic Benefits

One influential justification of deliberative democracy hinges on the epistemic benefits of deliberation—when we deliberate before making a decision, we will make a better decision. According to David Estlund, “[t]here is something about democracy other than its fairness that contributes to our sense that it can justify authority and legal coercion,” and this is that democratic actions “are produced by a procedure with a tendency to make correct decisions.”¹⁹⁶ This is based on the assumption of “dispersed knowledge”¹⁹⁷: no one person is likely to have all the information helpful in making a decision, and therefore the pooling of information through deliberation is a superior method.¹⁹⁸ More recently, Hélène Landemore has theorized that the commonly-discussed epistemic benefits of information pooling, weeding out arguments, and working toward consensus, are ultimately the product of a social science concept: “cognitive diversity.”¹⁹⁹ This is “a diversity of perspectives (the way of representing situations and problems), diversity of interpretations (the way of categorizing or partitioning perspectives), diversity of heuristics (the way of generating solutions to problems), and diversity of predictive models

forge agreement on what to do, but also the very means by which they legitimately bind themselves to what they have collectively decided.”).

194. Warren, *supra* note 189, at 40.

195. “[U]nder ideal conditions there is no promise that consensual reasons will be forthcoming. If they are not, then deliberation concludes with voting, subject to some form of majority rule.” Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS* 67, 75 (James Bohman & William Rehg eds., 1997).

196. DAVID ESTLUND, *DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK* 6–8 (2008). Note that Estlund does not claim that this is just a *tendency*. “It is not an infallible procedure, and there might even be more accurate procedures. But democracy is better than random and is epistemically the best among those that are generally acceptable in the way that political legitimacy requires.” *Id.* at 8.

197. *See id.* at 177.

198. Warren, *supra* note 189, at 48 (stating that the strengths of deliberation include “revealing preferences and pooling information”).

199. HÉLÈNE LANDEMORE, *DEMOCRATIC REASON: POLITICS, COLLECTIVE INTELLIGENCE, AND THE RULE OF THE MANY* 89 (2013).

(the way of inferring cause and effect).²⁰⁰ All these work to produce better decisions in a problem-solving context.²⁰¹

2. Deliberation: Fairness

The second justification of deliberation flows not from improved decision making, but from the fairness of the process. Consider again Bernard Manin: “As political decisions are characteristically imposed on all, it seems reasonable to seek, as an essential condition for legitimacy, the deliberation of all or, more precisely, the right of all to participate in deliberation”²⁰² This right in deliberation is especially important in diverse and polarized societies, where people are likely to disagree fundamentally about many important things. Rawls called this condition “the fact of reasonable pluralism,”²⁰³ while Jeremy Waldron describes it as “the circumstances of politics”—“the felt need . . . for a common framework or decision or course of action [despite] disagreement about what that framework, decision, or action should be.”²⁰⁴ In such a pluralistic society, there must be a way to make decisions fairly, such that the divergent viewpoints and worldviews are respected, even if they do not carry the day. In the words of Amy Guttmann and Dennis Thompson, “[i]f we have to disagree morally about public policy, it is better to do so in a democracy that as far as possible respects the moral status of each of us.”²⁰⁵ Deliberation, according to them, demands reciprocal reason-giving, and, in doing so, allows even the losers in a political dispute to see themselves as respected and included: “Even with regard to political decisions with which they disagree, citizens are likely to take a different attitude toward those that are adopted after careful consideration of the relevant conflicting moral claims and those that are adopted only after calculation of the relative strength of the competing political interests.”²⁰⁶ One

200. *Id.* at 102. Landemore, presumably confining her claim to the work of Hong and Page, excludes diversity of interests from her claim regarding the epistemic benefits of cognitive diversity. *Id.* “Cognitive diversity is not diversity of values or goals, which would actually harm the collective effort to solve a problem.” *Id.* She does not elaborate on this or cite to any further work. For our purposes, it is sufficient to note that this limitation is not essential to the theory of deliberative democracy. Landemore herself notes that many deliberative theorists, which she calls “type II deliberative democrats,” still see value in diversity of values. *See id.* at 94. She quotes Jane Mansbridge, who argues that “when interests or values conflict irreconcilably, deliberation ideally ends not in consensus but in a clarification of conflict and structuring of disagreement, which sets the stage for a decision by non-deliberative methods, such as aggregation or negotiation among cooperative antagonists.” *Id.* (quoting Jane Mansbridge, James Bohman, Simone Chambers, David Estlund, Andreas Føllesdal, Archon Fung, Cristina Lafont, Bernard Manin & José Luis Martí, *The Place of Self-Interest and the Role of Power in Deliberative Democracy*, 18 J. POL. PHIL. 64, 68 (2010)).

201. *Id.* at 90 (noting the Hong and Page study).

202. *See, e.g.*, Manin, *supra* note 193, at 352.

203. JOHN RAWLS, *POLITICAL LIBERALISM* 4 (1996).

204. Jeremy Waldron, *Legislation, Authority, and Voting*, 84 GEO. L.J. 2185, 2197–98 (1996).

205. AMY GUTTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 26 (1996).

206. *Id.* at 41–42.

can say that deliberation enhances procedural legitimacy,²⁰⁷ and is therefore intrinsically valuable regardless of any epistemic benefits it produces.

3. Aggregation & Voting

While most democratic theorists see deliberation as the central legitimating feature of democracy, this does not mean that deliberation totally supplants the need for preference aggregation through majority voting.²⁰⁸ Rather, they are “complementary decision-procedures.”²⁰⁹ Since deliberation will rarely, if ever, produce unanimity, the next best option is to make a decision through a majority vote. Voting and preference aggregation, then, follows deliberation.²¹⁰

Decisions are made on the basis of a majority vote as a requirement of fairness stemming from a recognition of fellow citizens as equals. As Jeremy Waldron writes:

[T]he most powerful case that can be made for [Majority Decision] is that it is required as a matter of fairness to all those who participate in the social choice Informally, people may be persuaded that [Majority Decision] is fair because, although they are losers this time around, they may be winners in the next political cycle Formally, we may defend [Majority Decision] as a way of respecting political participants as equals.²¹¹

Other theorists, such as Landemore, also see epistemic benefits in majoritarian decision making.²¹²

207. See, e.g., Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 284, 298 (2003) (“[P]eople’s reactions to legal authorities are based to a striking degree on their assessments of the fairness of the processes by which legal authorities make decisions and treat members of the public. . . . [W]hen the authorities are managing a dispute, the fairness of their approach is linked to whether they allow disputants to participate in finding a solution to the dispute.”).

208. David Estlund & Hélène Landemore, *The Epistemic Value of Democratic Deliberation*, in THE OXFORD HANDBOOK OF DELIBERATIVE DEMOCRACY 113, 124–25 (Andre Bächtiger, John S. Dryzek, Jane Mansbridge & Mark Warren eds., 2018) (“[I]nfluential deliberative democrats have recently gone back to embracing the full legitimacy of stopping-rules for deliberation . . . such as majority rule In this approach, the ideal termination of deliberation is not agreement but disagreement, followed by a non-deliberative decision rule.”).

209. *Id.* at 125.

210. Christian List, *Democratic Deliberation and Social Choice*, in OXFORD HANDBOOK OF DELIBERATIVE DEMOCRACY, *supra* note 208, at 469. List calls this a “mixed model” of democracy, in which “deliberation complements aggregation” when “people first deliberate and then vote.” *Id.*

211. JEREMY WALDRON, *POLITICAL THEORY* 264 (2016).

212. LANDEMORE, *supra* note 199, at 146 (“This chapter argues that simple majority rule is an essential component of democratic decision making with its own distinct epistemic properties and a certain task specificity, namely a predictive function: majority rule is ideally suited to predict which of two options identified in the deliberative phase is best.”).

All of this should be quite familiar to us as a basic component of democracy. In no legislature in the United States can an action be taken on the basis of a minority vote—such a process would be a democratic absurdity.

4. Egalitarianism

Last to consider, but underlying much of what has already been said, is democracy's principle of egalitarianism. Both in deliberation and in voting, democratic citizens participate as equals with each other. This is a foundational moral commitment,²¹³ grounded in recognition of the dignity of each human being and the implication this has for the "equal moral status" of human persons.²¹⁴ From this moral presupposition, one can easily discern political implications—equal worth as humans suggests that a political system should also be structured on terms of equal citizenship.²¹⁵ "Democracy, in its best, aspirational sense," writes James Lindley Wilson, "is a political regime in which all citizens recognize one another as equals in political status."²¹⁶ Thus, democracy can be contrasted with aristocracy or oligarchy in which certain people have more political power by virtue of some social "status."²¹⁷

In sum, democracy, like liberalism, presents a constellation of values that bear on the issue of civilian control over the military. These are deliberation, preference aggregation, and egalitarianism.

213. Nadia Urbinati & Mark E. Warren, *The Concept of Representation in Contemporary Democratic Theory*, 11 ANN. REV. POL. SCI. 387, 395 (2008) ("Although there are important variations in the normative presuppositions embedded in this principle, most democratic theorists hold that (a) individuals are morally and legally equal and (b) individuals are equally capable of autonomy with respect to citizenship—that is, conscious self-determination—all other things begin equal."). In some sense this must be treated as a presupposition, as it is difficult to philosophically unpack the egalitarian intuition. Perhaps for this reason, theorists have been more concerned with the implications of equality than with justifying it. "In the voluminous modern literature on egalitarianism, there is a tremendous amount on equality as a policy aim Much less has been devoted to the more abstract philosophical question: 'What is the character of our deeper commitment to treating all human beings as equals . . . ?'" JEREMY WALDRON, GOD, LOCKE, EQUALITY 1–2 (2002).

214. See THOMAS CHRISTIANO, THE CONSTITUTION OF EQUALITY 17 (2008); JAMES L. WILSON, DEMOCRATIC EQUALITY 30 (2019) ("[E]galitarian relationships are constituted by mutual recognition of the equal worth or value of all persons in the relationship.").

215. Ronald Dworkin, *What Is Equality? Part 4: Political Equality*, 22 U.S.F. L. REV. 1, 1–2 (1987). This is not a necessary implication, though. Catholic political theory, for example, holds that human beings are morally equal but that neither political equality nor a democratic regime type is required. "[T]here is no reason why the Church should not approve of the chief power being held by one man or by more, provided only it be just, and that it tend to the common advantage." Pope Leo XIII, *Diuturnum* (June 29, 1881), https://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_29061881_diuturnum.html [<https://perma.cc/7WXH-TFC8>].

216. WILSON, *supra* note 214, at 48.

217. *Id.* at 20 ("Think of the status of 'untouchable' or 'slave,' or of 'commoner' in an aristocratic regime").

IV. MILITARISM AS ILLIBERAL AND UNDEMOCRATIC

Equipped now with a deeper exposition of the relevant features of both liberalism and democracy, we are fully ready to assess the military's proper place in any institutional hierarchy. If liberalism and democracy are the animating theories of American politics, then they are the measuring sticks by which we judge the legitimacy of our institutional design. Accordingly, it is necessary to assess how the military comports with these values in order to situate it properly in any hierarchy. As we will see, the organizing principle of the military—a constellation of ideas we can call “militarism”—is fundamentally both illiberal and undemocratic, and because of this, military supremacy or military autonomy are incompatible with American politics. Rather, liberal democracy demands civilian control of such an institution in order to prevent militarism from subverting the polity's most cherished values.

But how can one assess the contents of militarism? The military has no authoritative theorist, and its leaders change frequently. Past commentators have looked to training materials and publications created for officers,²¹⁸ or to qualitative sociological methods.²¹⁹ In what follows, we will use a different method, unpacking the salient features of militarism by investigating military *law*. The legal authority conferred on the military, and the limitations imposed on it, are the most concrete manifestations of militarism. One can say that these laws, at the very least, *enforce* what might otherwise be unwritten. And military law is unmistakable in both its illiberalism and its undemocratic features.

As we proceed, it is important to not lose sight of a crucial point: militarism *may have very good reasons* for functioning the way it does. Indeed, we ought to presume that the features we describe below are necessary for any military to function effectively.²²⁰ Nevertheless, we must also admit that these

218. MAURER, CRISIS, *supra* note 55, at 59 (quoting CTR. FOR THE ARMY PRO. & ETHIC, U.S. ARMY TRAINING & DOCTRINE COMMAND, THE ARMY ETHIC, at i, 1–2, 7 (2014), <https://api.army.mil/e2/c/downloads/356486.pdf> [<https://perma.cc/W7E7-JGCQ>]).

219. *See generally* MORRIS JANOWITZ, THE PROFESSIONAL SOLDIER (1960) (using sociological methods to describe the evolution of the military during the first half of the twentieth century).

220. This Article takes for granted that the militarism of today's military is an inherent organizing feature of all militaries. Certainly, the violent aspect of militarism is impossible to avoid. While it is conceptually possible to imagine a military without commands or hierarchy, in which decisions were made by voting and by deliberation, history gives few examples of this in the real world. The Bolshevik Army abolished ranks and other symbols of hierarchy during the Russian Revolution but restored them eighteen years later. *See Abolition of Rank in the Army*, SEVENTEEN MOMENTS IN SOVIET HIST., <https://soviethistory.msu.edu/1917-2/red-guard-into-army/red-guard-into-army-texts/abolition-of-military-ranks-and-titles/> [<https://perma.cc/A35N-4U8Q>]; LEON TROTSKY, THE REVOLUTION BETRAYED 221–25 (Max Eastman trans., 1937). In 1971, a secret memorandum of the Central Intelligence Agency claimed that the Bolsheviks realized the deleterious effects of this action only one year later, and sought to reverse them indirectly: “The Spring 1918 declarations were admissions of the detrimental effect the abolition of ranks had on military skill and recruitment, and a pragmatic

features are at odds with the civilian values described above. It is this tension²²¹ that is the point of the present discussion, not an internal critique of militarism.

A. *Command*

The military as an institution is governed by the principle of command authority. In the words of the Supreme Court, “[a]n army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier.”²²² The federal law establishing the operational chain of command over the military provides that military commanders are empowered to “giv[e] authoritative direction to subordinate commands and forces necessary to carry out missions assigned to the command, including authoritative direction over all aspects of military operations, joint training, and logistics.”²²³ Beyond giving commands, commanders also dictate who is in their “chain of command” and “assign[] command functions to subordinate commanders.”²²⁴ The metaphor of

admission of the need for a disciplined military force . . .” Memorandum from the Cent. Intel. Agency on The Decree of 29 December 1917—The Abolition of Ranks in the Bolshevik Revolutionary Army 2 (Aug. 31, 1971), <https://www.cia.gov/readingroom/docs/CIA-RDP73B00296R000100120004-4.pdf> [<https://perma.cc/XN9L-8CZV>].

221. That a liberal democratic society permits such an important institution to exist within it, and yet be governed internally by values that are antithetical to that society, is a vexing philosophical problem. Theorists have made surprisingly little headway in addressing this question. Some liberals, staying true to their individualistic and pacifistic core, claim that no institution operating according to principles can be legitimate:

The social, political, and economic structures [society] must keep in place even to maintain readiness for war are incompatible with such a [liberal democratic] society. The toll that it takes of human liberty is simply too great. Any country that relies upon conscription is imposing involuntary servitude upon its young people, and, in a country like the United States, discriminatory servitude as well. And this, I should maintain, is incompatible with a free and open democratic society. . . . [I]t doesn’t follow either that one is justified in compelling others to kill or that one is justified in killing at the command of others.

Holmes, *supra* note 184, at 399. But if one sees the task of legal theory to be reconstruction, then an outright pronouncement of illegitimacy in the face of an enduring human institution is too easy a way out. The most interesting work in this vein addresses the legitimacy of the draft in a liberal society. *See generally* April Carter, *Liberalism and the Obligation to Military Service*, 46 POL. STUD. 68 (1998) (arguing “that liberalism’s failure to address systematically the question of citizens’ obligation to military service is indicative of its wider failure to develop a satisfactory concept of citizenship”). It may be that liberalism permits a limited suspension of its principles as a matter of necessity for the survival of the state. 1 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW* § 5 (1984) (“The question of military conscription is a more difficult one, but the liberal is surely not opposed to it in an absolute way in any and all circumstances. Sometimes, after all, failure to serve is to inflict a social harm that the state is entitled to prevent, and in those circumstances, therefore, conscription receives support from the harm principle.”). For the purposes of the present study, we must assume that the military is a legitimate institution, reserving this question for future inquiry.

222. *In re Grimley*, 137 U.S. 147, 153 (1890).

223. 10 U.S.C. § 164(c)(1)(A).

224. *Id.* § 164(c)(1)(B), (E).

the chain is apt—every servicemember is subject to the authority of a commander, and these commanders are in turn commanded by other commanders.

A command, in the military sense, is an order or demand to act or refrain from acting, with disobedience punished by criminal sanction. Military law punishes “willfully disobey[ing] a lawful command of [a] superior commissioned officer,”²²⁵ violating general standing orders promulgated by commanders,²²⁶ and “refus[ing] . . . to obey orders” with the intent to “override lawful military authority.”²²⁷

Command, then, is the central rule of decision in militarism. H.L.A. Hart claims that the concept of a “command” involves, first, its peremptory nature, in that it “is intended to preclude or cut off any independent deliberation by the hearer of the merits pro and con of doing the act.”²²⁸ Second, a command conveys a reason for action that is “content-independent,” in that it “function[s] as a reason independently of the nature or character of the actions to be done.”²²⁹ The illiberal and undemocratic features of militarism’s command-based governance include not only its authoritarian source, but also its form. There is no necessary participation by the governed in the making of the decision, and no reason need justify obedience other than the fact of the command. As such, militarism is fundamentally at odds with core components of liberalism and democracy.

1. The Illiberalism of Rule by Command

Militarism’s foundation in command violates most clearly the liberal demands of rational governance. Recall that liberal theory presupposes that coercion not be “arbitrary nor inexplicable,” and that since “human beings can grasp the rational order in the world,” institutional authority must endeavor to explain itself to its subjects via that reason.²³⁰ Since command-based governance is content-independent, though, it abandons this requirement. The order sending a servicemember to a new duty station thousands of miles away carries

225. *Id.* § 890.

226. *Id.* § 892(1).

227. *Id.* § 894(a)(1).

228. H.L.A. HART, *Commands and Authoritative Legal Reasons*, in *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 243, 353 (1982).

229. *Id.* at 254.

230. Wall, *supra* note 152, at 4; Freedden & Stears, *supra* note 151, at 341 (identifying “rationality” as a core component of liberalism); *see also* FREEDDEN, *A VERY SHORT INTRODUCTION*, *supra* note 151, at 13.

no explanation.²³¹ In a combat situation, an order to attack or retreat need not be accompanied by any rationalization to bind those receiving it.

Rule by command is also illiberal in that it looms as a constant threat to the autonomy of those who are subject to commands. Almost by definition, commands limit the freedom of those to whom they are directed. They provide peremptory reasons to act that are backed by a punitive sanction. They are coercive, and coercion is always suspect for liberals—always in need of justification and legitimation.²³² While liberalism does not view all coercion as illegitimate,²³³ coercion on the basis of a peremptory and content-independent command may always be illiberal.

2. Rule by Command as Undemocratic

Militarism's governance model is also undemocratic because the source of the commands is a higher authority that excludes other members of the community from decision making. The authoritarianism that makes command-based rule illiberal similarly makes it fail the test of democracy.

Commands are antithetical to deliberation—the core component of democracy. Recall H.L.A. Hart's claim that one of the central features of a command is its deliberation-stopping function.²³⁴ One might add that militarism's commands need not be *preceded* by any deliberation, either. Militaristic commands do not just stop the potential for any deliberation, they preclude it altogether. The command's authority flows from the status of the commander as a superior in the chain of a command. The metaphor of the chain implies exclusion from decision making by lower-ranking links. Due to this exclusion, the epistemic benefits of deliberation are cut off. So too is the fairness and procedural legitimacy that deliberation would bring to the community. Making decisions on the basis of peremptory, content-independent directives eviscerates deliberative values.

Commands also violate the majoritarian voting requirement that democratic theory sees as the second stage following deliberation. Just as lower-

231. See, e.g., Order from R.E. Milstead, Jr., Deputy Commandant for Manpower & Rsrv. Affs., U.S. Marine Corps, to the Distribution List, U.S. Marine Corps (Sept. 18, 2014), <https://www.marines.mil/portals/1/mco%201300.8.pdf> [<https://perma.cc/3YG7-L6MY>] (explaining requirements of permanent change of station orders).

232. Shapiro, *supra* note 170, at 1043 (“[O]ne of the most basic tenets of liberal political theory [is] that the defining feature of political power is its coerciveness and that the central task of political theory is legitimating and limiting that coercion.”).

233. Recall that Gaus saw the requirement of justifying coercion as being a dictate of the “fundamental liberal principle”: “we have liberty to act as we see fit unless reason can be provided for restriction.” Gaus, *The Place of Autonomy*, *supra* note 169, at 274. This means that the legitimation of coercion is a central task for liberal theory—not that such legitimation is impossible. The latter position would not be liberal, but anarchistic. See William A. Edmundson, *State of the Art: The Duty to Obey the Law*, 10 LEGAL THEORY 215, 218–19 (2004).

234. See HART, *supra* note 228, at 253.

ranking community members do not reciprocally give and receive reasons with each other before making a decision through voting, neither do they participate in the final act of the decision itself. It is imposed on them from higher up in the chain, even if a majority of lower-ranking links disagree with it. One might think of a naval ship as a self-contained community (consisting of thousands of individuals in the case of aircraft carriers). This mobile community has no say, and no vote is taken, before it is told to move locations or to cross an ocean. In many cases, the vast majority of the members of the ship community likely oppose the decision to deploy away from family for months on end. Majoritarian viewpoints—the touchstone of aggregative democracy—are irrelevant to a command-based institution of governance.

B. *Hierarchy as Inegalitarian & Minoritarian*

A second aspect of militarism, and closely related to its rule-by-command regime, is its hierarchical institutional structure. Commands flow down the hierarchical chain mentioned before. As such, the community fundamentally lacks equality and makes decisions on a minoritarian basis.

Individuals are assigned ranks, according to a hierarchy, which become almost coterminous with their identities. Their ranks replace their first names, since rank is the most significant thing one needs to know about another person in a military institution. Military law establishes this elaborate ranking system,²³⁵ as well as the number of individuals permitted to hold each rank.²³⁶ This hierarchy of rank is jealously protected by criminal punishment. Beyond the power of superiors to issue commands to those below, inferior ranks are also required to show respect in interpersonal interactions. It is an offense to “treat[] with contempt or [use] disrespectful . . . language or deportment” toward a superior officer,²³⁷ or to “behave[] with disrespect” toward the same.²³⁸ This rule has been interpreted broadly to include even social media communications outside the presence of the superior officer.²³⁹ While many systems of morality implore people to treat each other with respect, a punitive legal requirement to respect one’s superiors on the basis of status is at odds with the democratic demand of egalitarianism. Rather than recognizing equal political status, this creates a form of legal “status” that is aristocratic or oligarchical.²⁴⁰ As such, it is anti-democratic.

235. See, e.g., 10 U.S.C. § 8111 (“The commissioned grades in the Navy above the grade of chief warrant officer, W-5, are the following . . .”).

236. *Id.* § 523.

237. *Id.* § 891(3).

238. *Id.* § 889(a).

239. See *United States v. Brown*, 84 M.J. 124, 125 (C.A.A.F. 2024).

240. Recall J.L. Wilson’s example. WILSON, *supra* note 214, at 20 (“Think of the status of . . . ‘commoner’ in an aristocratic regime . . .”).

It is important to also observe that the hierarchy is self-selecting—that one climbs in military rank on the basis of decisions made by higher ranks. Military law calls the bodies that make these decisions “selection boards,” and the members of these boards “must be serving in a grade higher than the grade of the officers under consideration by the board.”²⁴¹ Moreover, as the ranks ascend in seniority, they reduce in numerosity, creating a pyramid shape.²⁴² Since commands flow downhill from the top parts of the chain, and since the top parts determine who are in the intermediate parts and the lower parts, this results in a minoritarian decision-making arrangement. It therefore offends democracy’s requirement that ultimately, following deliberation, decisions be made on the basis of majoritarian preference aggregation through voting.

C. *Group Prioritization as Anti-Individualistic*

Militarism prioritizes the collective group over the individual, even to the point of compelling self-sacrifice. As such, it is at odds with the core concern for the individual that is a hallmark of liberal politics.

This aspect of militarism is best exemplified in military law by the offense of “misbehavior before the enemy.” This is a capital offense, and punishing anyone who, “in the presence of the enemy,” “willfully fails to do his utmost to . . . destroy any enemy troops,” or who “does not afford all practicable relief and assistance” to allied troops.²⁴³ One also commits the crime through “cowardly conduct.”²⁴⁴ The risk of self-sacrifice is therefore compelled by criminal law, but it is also rewarded by various military honors. The Congressional Medal of Honor, for example, is only awarded for “gallantry and intrepidity at the risk of [one’s] life above and beyond the call of duty.”²⁴⁵ The self-sacrifice principle of militarism was famously lived out in one incident in the Civil War at the Battle of Gettysburg. There, General Hancock ordered a regiment of 250 men to charge into a 1,200-man brigade of Confederate troops for the purpose of buying time for reinforcements to arrive.²⁴⁶ Eighty-two percent died within five minutes, but the maneuver worked as intended.²⁴⁷ No one would describe Hancock’s actions as improper; rather, militarism celebrates the willingness to sacrifice for the greater goal.

Militarism’s prioritization of the collective over the individual is evident in less dramatic ways as well—such as the restriction of the expression of

241. 10 U.S.C. § 612(a)(1).

242. *See id.* § 523(a).

243. *Id.* § 899(8), (9).

244. *Id.* § 899(5).

245. *Id.* § 7271.

246. Lochren, *supra* note 31, at 49.

247. *Id.* at 50.

individual religious or ideological beliefs. In a case upholding a ban on the wearing of religious headgear, the Supreme Court wrote:

The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps. The essence of military service “is the subordination of the desires and interests of the individual to the needs of the service.”²⁴⁸

Nonreligious ideological commitments may also be suppressed lawfully.²⁴⁹ For example, the Defense Department recently banned servicemembers from displaying almost all flags on their vehicles other than the American flag.²⁵⁰ Militarism does not prize the values of individualism and individuality—rather, it works to counteract them.

D. *Violent, Not Pacifist*

The pacifist ethos of liberalism is at odds with militarism’s ultimate aim: “to fight or be ready to fight wars should the occasion arise.”²⁵¹ Not much need be said to explain this basic feature of a military. Perhaps the best illustration comes from the law of war (now called the law of armed conflict), which grants legal immunity for killing, maiming, and destroying property—conduct which would otherwise be criminal—under certain circumstances. This is referred to as the lawful “combatant’s privilege,” and is summarized by the Defense Department in the following way:

International law affords combatants a special legal immunity from the domestic law of the enemy State for their actions done in accordance with the law of war. This legal immunity is sometimes called the “combatant’s privilege” or “combatant immunity.” This means that a combatant’s “killing, wounding, or other warlike acts are not individual crimes or offenses,” if they are done under military authority and are not prohibited by the law of war. Similarly, a combatant’s warlike acts done

248. *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (citations omitted) (quoting *Orloff v. Willoughby*, 345 U.S. 83, 92 (1953)).

249. *Parker v. Levy*, 417 U.S. 733, 758 (1974).

250. Memorandum from Mark T. Esper, Sec’y of Def., U.S. Dep’t of Def., to the Chief Mgmt. Officer, U.S. Dep’t of Def., et al. (July 16, 2020), <https://media.defense.gov/2020/Jul/17/2002458783/1/-1/1/200717-FLAG-MEMO-DTD-200716-FINAL.PDF> [<https://perma.cc/VM8U-DJY2>].

251. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955).

under military authority and in accordance with the law of war also do not create civil liability.²⁵²

Less clinical in its tone is a statement from the father of international law, Hugo Grotius. “Wars,” he wrote, “for the attainment of their objects, it cannot be denied, must employ force and terror as their most proper agents.”²⁵³ A military is created for the purpose of using organized violence, and as such it is in clear tension with liberalism’s pacifist ethos.

E. *Summary: Militarism Implies Civilian Control*

Liberal democracy values individualism, freedom, rationality, pacifism, deliberation, majoritarian voting, and equality. Militarism, by contrast, is a system of governance that rules by commands issued by a collectivist hierarchy, all in service to a goal of victory in violent conflict. Militarism’s direct opposition to the values of liberalism and democracy demands that civilian authority be supreme over that of the military. This supremacy requirement has two corollaries.

First, of course, it rules out the possibility of military supremacy, in which a military government is superior to civilian authority. A militaristic control group on top of a subordinate liberal-democratic governing organ would be a contradiction in terms. The flow of authoritarian commands from the militaristic institution downward would obviate the liberal and democratic features of the sub-institution. It certainly makes sense to characterize a set of political institutions by the features that are possessed by the superior, and final institutional authority;²⁵⁴ therefore, military rule would be per se illiberal and undemocratic.

It would similarly threaten those values, though, to permit a military to exist as an autonomous entity alongside, but not subordinate to, civilian authority. While it is conceptually valid to have autonomous sources of

252. OFF. OF GEN. COUNSEL, U.S. DEP’T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL 108 (2023) (footnotes omitted) (quoting FRANCIS LIEBER, *General Orders No. 100: Instructions for the Government of Armies of the United States in the Field*, in INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (1898)).

253. GROTIUS, *supra* note 34, at 294.

254. Here we can draw on the field of comparative politics, which has long concerned itself with the classification of regime types:

A political regime is a set of rules that identifies: who has access to power; who is allowed to select the government; and under what conditions and limitations authority is exercised. Hence, two questions appear to be of fundamental importance for the classification of political regimes: (1) who rules? and (2) how is the rule exercised? And a third question is: why do rulers rule?

Steffen Kailitz, *Typologies of Autocratic Regimes*, in RESEARCH HANDBOOK ON AUTHORITARIANISM 11, 13 (Natasha Lindstaedt & Jeroen J.J. den Bosch eds., 2024).

authority in the same political system,²⁵⁵ and even sources that diverge fundamentally in their decision-making processes—say, Congress and the judiciary—it is *prudentially* absurd to permit this divergence when the institution’s purpose is the organized infliction of violence. Such an autonomous entity would stand as a constant threat to defenseless, coequal institutions. This structure would be a military coup waiting to happen. But military autonomy would also violate the demands of liberal democracy. How could it be that one person could exist both as a liberal, democratic citizen and as a militaristic subject? The competing claims of each would be irreconcilable.²⁵⁶ If the person were fundamentally a militaristic subject, then it would be more accurate to say that she lived in a different polity altogether. But this tension is resolved when one requires instead that she be *fundamentally* the former—a liberal, democratic citizen. This resolution is achieved through civilian supremacy and military subordination;²⁵⁷ it is impossible with military autonomy.

V. IMPLEMENTATION: THE NON-AGGRANDIZEMENT PRINCIPLE

The fundamental, normative bases of the civilian control principle give it solid grounding, but they are abstract. Civilian control is regularly invoked in controversial political debates regarding military policy and is therefore in need of pragmatic guidance for its implementation. How can a deeper understanding of the theory underlying civilian control shed light on the potential resolution of these debates—especially those surrounding the norms of behavior that cover senior military officers?

Here, we can fashion only a starting point. The complexities of the relations between senior civilian and military officials, as well as the context of their interactions, make the delineation of clear rules extremely difficult. Certainly, no such rules are written,²⁵⁸ and some have argued that this is a good

255. See JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 129–30 (3d ed. 1999).

256. This implicates the difficulty described more fully above, see *supra* note 221, of a liberal society permitting an illiberal institution in its midst.

257. Another way of putting this is to say that when the Supreme Court described military members as existing in a “separate” “society apart from civilian society,” *Parker v. Levy*, 417 U.S. 733, 744 (1974), it greatly overstated the proposition. Since military members do not shed their civilian citizenship upon entry into that institution, a better analogy would be that of dual citizenship in two societies. Moreover, based on what I say above, one can *only* understand this separate society as permissible and legitimate if civilian supremacy comes along with it. The Court’s discussion of a “separate society” implied, in other words, that that society be subordinate.

258. Maurer writes:

Finally, despite routine references by all involved to constitutional values, neither the Constitution itself nor case law that interprets it have spoken clearly as to what the nature of a healthy relationship ought to look like according to certain standards, consistent with its

thing.²⁵⁹ At most, we should aim to identify relevant variables or circumstances that bear on compliance with the norm. For example, one consensus position among civilian control theorists is that “[m]ilitary officers should express their views on military operations behind closed doors, not in public.”²⁶⁰ The publicity of the officer’s advocacy bears on the degree to which the norm applies, but that factor is, of course, not the only one that is relevant. Moreover, compliance should be understood to be a matter of degree, not as a binary. Thus, one should view an officer’s *sua sponte* statement to the press as more violative than, say, compelled testimony before a Congressional committee.

Consideration of many factors and circumstances, as well as treatment of compliance as a spectrum, is the appropriate way to interpret a constitutional norm. After all, such norms are informal and unwritten, and emerge in a decentralized, unplanned way.²⁶¹ Chafetz and Pozen write that these features of constitutional norms make it “difficult to pin down what [they] prescribe[] or proscribe[], beyond some core set of behaviors and expectations, or to determine how [their] current contours map onto those of prior iterations.”²⁶² Since constitutional norms are unwritten, constantly evolving, and lack precise definition at the margins, their implementation requires a certain functionalism.

With this said, I argue that the political theory discussed above sheds light on the implementation of the civilian control norm, in that it implies that there is an additional relevant factor that bears on compliance: the substantive content of the advocacy. If liberalism and democracy together entail a prohibition on both military rule and military autonomy, then the norm’s contours should serve as prophylaxes against either eventuality. The most direct prophylaxis in my view is one that squarely addresses the threat: a *non-aggrandizement principle*. Military influence is more violative of the civilian control norm if it aims, either

generic elevation of civilian political authority over military matters. . . . [N]either military doctrine nor its various martial codes, nor DoD ethics policy, provide for clear-cut standards or impose relevant, material neutral principles for these strategic actors. Indeed, many commentators lament the lack of these principles anywhere at all.

Maurer, *Fiduciary Duty*, *supra* note 14, at 288, 290–91 (footnotes omitted).

259. Pearlstein writes:

That conflicts and dilemmas of the nature discussed here continue to arise is not necessarily a sign that greater clarity is needed but rather an indication that the iterative process of democratic governance is working as it should. The Constitution sets down outlines, not detailed blueprints of government, and not every answer left blank poses a problem for its day-to-day functioning.

Pearlstein, *supra* note 57, at 858.

260. Krebs et al., *supra* note 88, at 608.

261. Chafetz & Pozen, *supra* note 83, at 1433–34.

262. *Id.* at 1438.

in motivation or in content,²⁶³ toward the expansion of military authority and the diminution of civilian authority. Such a principle should apply broadly to both *internal* policymaking debates (those regarding military order and discipline) as well as debates regarding the *external* use of the military. Advocacy by military officers that aggrandizes military authority at the expense of civilian authority undermines civilian supremacy, moves us closer to military rule or military autonomy, and, in turn, undermines both liberalism and democracy.

Non-aggrandizement in the civil-military relations context is analogous to that same principle at work in other areas pertaining to the separation of powers. The Supreme Court has recognized a concern regarding Congressional self-aggrandizement,²⁶⁴ but scholars have extended the concept to the judiciary,²⁶⁵ as well as to administrative agencies.²⁶⁶ In the words of Abigail Moncrieff, non-aggrandizement rules “rest[] on a view that [institutions] engage in a kind of conflict of interest when they adjust their own mandates.”²⁶⁷ We should be more concerned when it is the military that engages in aggrandizement than when any other government institution does so. As the earlier sections of this Article demonstrate, the military is a highly organized force capable of great violence and intimidation, which, if misused, can be directed against its own citizens.

To take the content of the military’s influence into consideration is another way of saying that the norm of civilian control should be interpreted and applied in a functionalist manner, and that *what* a senior officer is advocating for has important implications for the norm’s proper functioning.²⁶⁸

263. The subjective intent to aggrandize offends the civilian supremacy, but so too does advocacy that objectively aggrandizes in its effect, even when unintentional.

264. *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 273 (1991) (“[T]he system of separated powers and checks and balances established in the Constitution was regarded by the Framers as ‘a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.’” (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976))); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 717–18 (1997).

265. “Judicial aggrandizement is the successful deployment of ideas and norms that reinforce the judiciary’s role as the final arbiter of political disputes at the expense of other governing institutions.” Allen C. Sumrall & Beau J. Baumann, *Clarifying Judicial Aggrandizement*, 172 U. PA. L. REV. ONLINE 24, 38 (2023).

266. “[C]ourts and commentators alike have recognized the possibility that an agency may adopt a statutory or regulatory interpretation that represents an exercise in agency aggrandizement—that is, an interpretation that advances the agency’s own interests *vis-à-vis* the interests of other agencies, other governmental institutions or private parties.” Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL’Y 203, 209 (2004) (footnote omitted). *But see* Abigail R. Moncrieff, *Reincarnating the “Major Questions” Exception to Chevron Deference as a Doctrine of Noninterference (or Why Massachusetts v. EPA Got It Wrong)*, 60 ADMIN. L. REV. 593, 616 (2008) (arguing against extension of non-aggrandizement into agency deference context).

267. Moncrieff, *supra* note 266, at 614 (footnote omitted). While she states this justification well, she is skeptical that it applies in the agency context.

268. “Functionalism, at least as an antipode, might be associated with standards or balancing tests that seek to provide public actors with greater flexibility.” William N. Eskridge, Jr., *Relationships*

This can be contrasted with a more formalistic or rigid analysis that would characterize military influence as per se threatening to the norm, regardless of its content.²⁶⁹ Deborah Pearlstein was the first to observe that civil-military relations should be viewed functionally, but her claim was grounded only on the intent of the Framers and was insufficiently broad.²⁷⁰

“[T]he Framers thought civilian control was important not because the military was categorically bad (or military judgment categorically wrong),” she wrote, “but because they feared the military would undermine particular constitutional values, including the protection of individual rights and the maintenance of a noncorrupt, politically accountable system of government. Mechanisms of military constraint that advance these goals may be favored. Mechanisms that work against them may not.”²⁷¹

We ought not ground the functionalist interpretation of civilian control in the Framers’ intent, though, nor ought we limit it to the categories Pearlstein identifies. Rather, it should be grounded in the political theories of liberalism and democracy expounded earlier, and concomitant with the goal of warding off the threat of either military rule or military autonomy. These concerns implicate, but are also broader than, individual rights, anti-corruption, and accountability.

As I argued above, the political theory undergirding the norm of civilian control supports a non-aggrandizement principle of military advocacy, which does require an inquiry into the content of the advocacy as well as its motivations. These should inform if, and how egregiously, the civilian control norm was breached. This is not to say that non-aggrandizement should be the sole consideration, or even the most important. However, it should be considered, and it should be seen as very important. Military officials who advocate for policies that tend to aggrandize the power of the military, both with respect to internal governance as well as external deployment, greatly offend the norm of civilian control.

A. *Case Studies*

The implementation of the non-aggrandizement principle is best illustrated through the discussion of case studies. Below, consider two recent examples of high-level military officers attempting to influence policy

Between Formalism and Functionalism in Separation of Powers Cases, 22 HARV. J.L. & PUB. POL’Y 21, 21 (1998).

269. Pearlstein, *supra* note 57, at 830 (describing formalistic objections to military influence).

270. *Id.* at 852.

271. *Id.* at 857–58. Elsewhere she identifies concerns that military officials would “influence the public to support certain normatively undesirable ends,” such as “infring[ing] on individual rights, enabl[ing] personal corruption, and encourag[ing] foreign or militaristic adventurism.” *Id.* at 852. The only addition from the above list appears to be the concern regarding foreign wars. Under the framework presented earlier, this could be housed under the value of liberal pacifism.

debates—first, regarding the external use of the military in Afghanistan, and second, regarding the military’s internal prosecution processes for sexual assault. In both cases, the non-aggrandizement principle was violated.²⁷²

1. The Afghanistan War Withdrawal

Perhaps the most egregious violation of the non-aggrandizement principle is a warmongering military. Since military power and influence expand during war, agitation *for* war is something especially violative of the civilian control norm. As Richard Kohn argued, it is “critical . . . to ensure that the decision to begin or end warfare lies in civilian hands,” as “war causes the military to expand, the power and importance of government to grow, and its intrusions into people’s lives to increase.”²⁷³ While warmongering to initiate a war is the greatest transgression of the non-aggrandizement principle, it is closely followed by advocacy aimed at *remaining* in war. Recent American history gives us an example of this.

Then Chairman of the Joint Chiefs of Staff, Mark Milley, vocally attempted to persuade the Biden administration to keep military forces in Afghanistan—opposing a proposed withdrawal.²⁷⁴ Media outlet Vox reported an early 2021 meeting of the National Security Council to discuss three options: total withdrawal, withdrawal at a later date, or remaining in the conflict indefinitely.²⁷⁵ Vox reported that at this meeting “Milley made an impassioned—and at times ‘emotional’ . . . case to consider keeping US troops in the country.”²⁷⁶ He made a range of arguments based on national security, human rights, and sunk costs.²⁷⁷ Nevertheless, civilian officials described his

272. I am unable to find a counterexample from recent history that is worth discussing—of a case where the military actively sought to cede its own authority to civilian institutions. This is a telling omission that reveals something about the nature of institutions and the way they guard their own power. However, the non-aggrandizement principle is not so demanding that it requires an attempt to affirmatively relinquish authority, but merely that the influence not aggrandize. In many cases of military influence, then, the principle will not be implicated.

273. Kohn, *supra* note 53, at 148.

274. The details of an important meeting on this issue were reported by Vox. Alex Ward, *An “Emotional” Moment at an NSC Meeting Shows Why Withdrawing from Afghanistan Is So Hard*, VOX, <https://www.vox.com/2021/3/4/22313380/afghanistan-nsc-milley-austin-biden> [https://perma.cc/H8JN-56D3] (last updated Mar. 4, 2021, 5:57 PM). They would later be re-hashed in a Congressional hearing, with much detail omitted. *Military Leaders, Gen. Milley Testify on Afghanistan Exit*, REV, <https://www.rev.com/blog/transcripts/military-leaders-gen-milley-testify-on-afghanistan-exit-full-hearing-transcript> [https://perma.cc/R6GK-FPZT].

275. Ward, *supra* note 274.

276. *Id.*

277. *Id.* (“Milley, who was the deputy commanding general of US forces in Afghanistan and served three tours in the country, essentially argued that if American forces fully withdraw by May 1, it would open the door for the Taliban to overtake the country, making life worse for millions of Afghans and imperiling US national security goals. Women’s rights ‘will go back to the Stone Age,’ Milley said,

advocacy against withdrawal as “a lot more emotion than substance,” and not “super logical.”²⁷⁸ The primacy of emotion over rationality in his speech led Secretary of Defense Lloyd Austin to respond: “We’re not going to make decisions based on emotion.”²⁷⁹

According to the normative framework presented above, Milley breached the norm of civilian control that day by violating the non-aggrandizement principle. Arguing to civilian leaders that we should continue to fight a war is military-aggrandizing advocacy.

2. Prosecuting Sexual Assault

Just as advocacy regarding the external deployment of the military can be aggrandizing, so too can advocacy regarding the military’s internal governance structures. One of the most important systems of military governance is its criminal justice system. One aspect of this system was recently the subject of heated debate. Until recently, the military justice system granted prosecutorial discretion to commanders rather than independent prosecutors.²⁸⁰ This command-driven prosecution model made the military justice system unique when compared to civilian jurisdictions, and critics charged that the expertise and incentives of commanders were not appropriately aligned with the task of prosecuting serious criminality (especially sex offenses).²⁸¹ A key political turning point was the high-profile homicide of a soldier named Vanessa Guillen in 2020, who was murdered by a male soldier after her repeated complaints about sexual harassment on the base.²⁸²

Led by Senator Kirsten Gillibrand, a supermajority of senators sponsored a measure to strip commanders of prosecutorial discretion power, replacing them with senior, independent uniformed prosecutors who reported directly to

according to two of the sources. He argued that it wasn’t worth leaving the country after ‘all the blood and treasure spent’ there over the last two decades. He also added that, in his view, the lack of 2,500 US troops in Afghanistan would make it harder to stem threats from a nuclear-armed Pakistan.”).

278. *Id.*

279. *Id.* (“Some in the room took that comment as a direct rebuke of Milley, while others understood the secretary’s remarks as simply saying he wanted the Afghanistan review to proceed in a professional, fact-based manner.”).

280. See Phillip D. Cave, Don Christensen, Eugene R. Fidell, Brenner M. Fissell & Dan Maurer, *The Division of Authority Between the Special Trial Counsel and Commanders Under the Uniform Code of Military Justice: Planning Now for the Next Phase of Reform*, LAWFARE (Feb. 28, 2022, 11:59 AM), <https://www.lawfaremedia.org/article/division-authority-between-special-trial-counsel-and-commanders-under-uniform-code-military-justice> [https://perma.cc/C5QL-9W6F].

281. *Id.*

282. Johnny Diaz, Maria Cramer & Christina Morales, *What to Know About the Death of Vanessa Guillen*, N.Y. TIMES (Nov. 30, 2022), <https://www.nytimes.com/article/vanessa-guillen-fort-hood.html> [https://perma.cc/8F3M-B8SK (staff-uploaded, dark archive)]; Dave Philipps, *Military Missteps Allowed Soldier Accused of Murder to Flee, Report Says*, N.Y. TIMES (Apr. 30, 2021), <https://www.nytimes.com/2021/04/30/us/vanessa-guillen-fort-hood-aaron-robinson.html> [https://perma.cc/8F3M-B8SK (staff-uploaded, dark archive)].

civilian service secretaries—not to higher-ranking admirals and generals.²⁸³ While this proposal was percolating in Congress, a member of the House, Representative Jackie Speier, reported that the leaders of the various Judge Advocate General’s (“JAG”) Corps—high-ranking generals and admirals called “TJAGs”—were making the rounds on the Hill, opposing the change.²⁸⁴ In criticizing the measure, Speier explicitly invoked the civilian supremacy principle:

We were appalled but hardly surprised to learn that the head uniformed attorneys, known as the judge advocate generals or TJAGs, for some of the military services are lobbying Congress to remove the provision that would place the new Office of the Special Victim Prosecutor under the service secretaries and instead allow the TJAGs to retain control. To be clear, it is the TJAGs who have vociferously opposed meaningful changes to the military justice system for more than a decade. This is yet another attempt to undermine reform, no matter the damage or cost to morale, readiness, and order. And, it shows utter contempt for the principle of civilian control of the military.²⁸⁵

There is no more public information regarding what the TJAGs said, or who they met with. Speier characterized their conduct to *The Washington Post* as “quietly lobbying” in order to “water down” the bill.²⁸⁶ This would not be the first time that senior military officials had advocated against the removal of the prosecutorial authority from commanders, though.²⁸⁷ One commentator

283. See Cave et al., *supra* note 280 (provisions adopted); Brenner M. Fissell, Opinion, *Our New Praetorian Guard?*, HILL (June 21, 2021, 2:30 PM), <https://thehill.com/opinion/judiciary/559388-our-new-praetorian-guard/> [<https://perma.cc/7TWW-ARLA> (staff-uploaded archive)] (noting political dynamics during passage).

284. Jackie Speier & Lynn Rosenthal, *Military Justice Reform Must Ensure Special Victim Prosecutors Are Under Civilian Control*, MIL. TIMES (Dec. 3, 2021), <https://www.militarytimes.com/opinion/commentary/2021/12/03/military-justice-reform-must-ensure-special-victim-prosecutors-are-under-civilian-control/> [<https://perma.cc/3VFZ-KWGQ> (staff-uploaded archive)].

285. *Id.*

286. Karoun Demirjian, *Broad Overhaul of Military Justice System Being Sidelined in Favor of Narrower Focus on Sexual Assault*, WASH. POST (Dec. 5, 2021, 6:00 AM), https://www.washingtonpost.com/national-security/military-sexual-assault-reform/2021/12/04/5946b0cc-5455-11ec-9267-17ae3bde2f26_story.html [<https://perma.cc/GAJ4-YV7S> (staff-uploaded, dark archive)].

287. John Donnelly reports:

In 2013, for example, Army Gen. Martin E. Dempsey, then chairman of the Joint Chiefs, wrote lawmakers to say that commanders are responsible for order in the ranks, and “a message that commanders cannot be trusted to mete out discipline will undermine this responsibility. . . .” Lawmakers, [Gillibrand] said at the time, “are not supposed to do what the generals have asked us to do.”

John M. Donnelly, *Gillibrand Calls New NDAA “Huge Milestone” in Military Justice*, ROLL CALL (Dec. 7, 2022, 1:05 PM), <https://rollcall.com/2022/12/07/gillibrand-calls-new-ndaa-huge-milestone-in-military-justice/> [<https://perma.cc/RSE4-DSV4> (staff-uploaded archive)].

rebuked Representative Speier for invoking the civilian supremacy principle, arguing, “[c]ivilian control of the military flourishes when the branches of government are kept fully informed, not when politicians try to gag military officers from offering their perspective on vital issues.”²⁸⁸

Application of our analytical framework to this case study reveals that this commentator is unduly forgiving of the TJAGs—that their actions were a larger threat to civilian control because of the specific position they took. Their position violated the principle of non-aggrandizement, in that it sought a militaristic carve-out from the standard civilian rule that prosecutors should be legally trained and independent. The notion that criminal punishment is a secondary consideration to military necessity, and therefore must be decided by a commander,²⁸⁹ is founded on the hierarchical and collectivist principles of militarism and seeks (or at least works) to insulate the military justice system from civilian oversight, thereby aggrandizing military power.

CONCLUSION

This Article has worked to establish a normative foundation for the principle of civilian control of the military. Using the tools of contemporary political theory, it has situated the military as necessarily subordinate to civil authority. The militarism that animates the military as an institution is in opposition to that of liberal democracy, which is the lodestar of American political life. To concretely protect the civilian supremacy norm, and to better assess when military influence is threatening that norm, we should implement a non-aggrandizement principle—asking what a military officer is advocating for, and whether that advocacy seeks to expand military authority at the expense of civilian authority.

Legal scholars must further engage with the central question of civil-military relations in the United States, and this Article is only a starting point. As a fundamental implication of the Constitution’s structure and history, civilian control must be a topic considered worthy of discussion in legal circles.

288. Charles J. Dunlap, Jr., *Why Are Politicos Trying to Silence the Senior Uniformed Lawyers Informing Congress About Critical Military Justice Issues?*, DUKE: LAWFIRE (Dec. 13, 2021), <https://sites.duke.edu/lawfire/2021/12/13/why-are-politicos-trying-to-silence-the-senior-uniformed-lawyers-informing-congress-about-critical-military-justice-issues/> [https://perma.cc/VP38-5X6B].

289. While we do not know if this is what the TJAGs actually said while “lobbying,” it is the most basic argument for the retention of commanders’ control over prosecutions. David A. Schlueter & Lisa M. Schenck, *Taking Charge of Court-Martial Charges: The Important Role of the Commander in the American Military Justice System*, 14 N.Y.U. J.L. & LIBERTY 529, 595–96 (2020) (“If Congress is to make any changes to the Uniform Code of Military Justice, it should be to first reaffirm the view that the primary purpose of the military justice system is to enforce good order and discipline, and second, retain the commander’s critical role in that system without limitation. The Supreme Court of the United States has stated that the purpose of the military is to fight and win wars. To that end, it is absolutely essential that commanders—who are ultimately responsible for accomplishing that mission—be vested with the authority and responsibility for maintaining good order and discipline within their command.”).

For far too long, this subject has been confined to political science departments. In future work, legal scholars should build on the liberal democratic theory of civilian control presented here, further sketching out the content of the norms that govern the military's constitutional role. Doing so will help to transcend the partisan, and often pretextual, invocation of the principle of civilian control. As the United States heads into an uncertain strategic environment, this topic becomes more pressing.