

# Federalism and the Military Power of the United States

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*This Article examines the original meaning of the constitutional provisions governing the raising and organization of military forces. It argues that the Framers carefully divided the military between the federal and state governments. This division provided structural checks against the misuse of military power and made it more difficult to use offensive military force. These structural checks have been compromised by the creation of the U.S. Army Reserve, the dual enlistment of National Guard officers and soldiers, and the acceptance of conscription into the national army, all of which have enhanced federal military power beyond its original constitutional limits.*

*This Article then explains the relevance of deviations from original constitutional design for contemporary legal disputes. Most significantly, although the expansion of federal military power has largely come at state expense, this expansion has also disturbed the allocation of war powers between Congress and the president. In addition, understanding the original division of military power is relevant to determining modern limits on Congress’s power to raise and regulate the armed forces, including its power to impose military criminal jurisdiction on reserve soldiers.*

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## INTRODUCTION

The Constitution grants Congress the power to “raise and support Armies” and to “provide for organizing, arming, and disciplining, the Militia.”<sup>1</sup> Congress has broader power over the armies of the United States than it has over the militia.<sup>2</sup> For over a century, the Supreme Court has held that Congress’s Army Power is plenary and

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1. U.S. CONST. art. I, § 8, cls. 12, 16.

2. The Constitution limits Congress’s power to call forth the militia into the service of the United States to three cases: executing the laws, suppressing insurrections, and repelling invasions. *Id.* art. I, § 8, cl. 15. Federal power over the militia is additionally limited by the provision that states appoint the officers, conduct the training, and govern the militia when it is not in the service of the United States. *Id.* art. I, § 8, cl. 16.

unrestrained by the limitations in the Militia Clauses;<sup>3</sup> that all (or nearly all) members of the organized militia—including its officer corps—can be required to join the national army;<sup>4</sup> and that if Congress wants to evade the limitations of the Militia Clauses, Congress can deem militiamen to be army soldiers, thereby allowing Congress to exercise the same plenary authority over militiamen that it exercises over regular soldiers of the United States. This expansive federal power, the Court has said, “recognizes the supremacy of federal power in the area of military affairs.”<sup>5</sup>

This Article challenges that account. The Constitution divided military power not only horizontally between Congress and the president but also vertically between the federal government and the states. The Framers placed three critical limits in the Constitution. First, they separated the “Armies” from the “Militia.”<sup>6</sup> Second, the Framers placed restrictions on the federal government’s use of the militia.<sup>7</sup> Third, the Framers insulated the militia officer corps from direct federal supervision in peacetime by allowing states to select the officers.<sup>8</sup>

This Article argues that the federal government has undermined these three original structural limitations. First, Congress has evaded the limitations on its power over the militia through the creation of the U.S. Army Reserve. The U.S. Army Reserve is a wholly national militia that is accessible to the federal government outside of the three purposes enumerated by the Militia Clauses. Second, Congress has expanded its authority over the organized militia by requiring members of the National Guard to enroll in both the federal military reserve and the militia. This “dual enlistment” system has allowed Congress to exercise its plenary Army Power over the organized militia. And it has subverted the independence of militia officers from the federal

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3. See *Arver v. United States* (Selective Draft Law Cases), 245 U.S. 366, 382 (1918) (distinguishing the “constitutional provisions concerning the militia [from] that conferring upon Congress the power to raise armies” and noting that Congress retains “complete authority” regarding “[t]he army sphere”).

4. See *Perpich v. Dep’t of Def.*, 496 U.S. 334, 347 (1990) (noting that “every member of the Minnesota National Guard has voluntarily enlisted, or accepted a commission as an officer, in the National Guard of the United States and [has] thereby become a member of the Reserve Corps of the Army”); see also 10 U.S.C. § 246(b)(1) (2012) (defining the “organized militia” as the “National Guard” and the “Naval Militia”); 10 U.S.C. § 8904 (2012) (requiring ninety-five percent of naval militia members to be members of the U.S. Navy Reserve or U.S. Marine Corps Reserve to receive federal support).

5. *Perpich*, 496 U.S. at 351.

6. Compare U.S. CONST. art. I, § 8, cl. 12 (authorizing an exclusively federal army), *with id.* art. I, § 8, cl. 16 (keeping the militia attached to the states).

7. *Id.* art. I, § 8, cls. 15–16.

8. *Id.* art. I, § 8, cl. 16.

government because states must discharge National Guard officers who lose their federal recognition. Finally, Congress has collapsed the distinction between the militia and the army by allowing the federal government to conscript all able-bodied citizens into the national army. Through its power to raise armies,<sup>9</sup> the federal government may now swallow the entire militia.

After explaining how the federal government has assumed military power originally reserved to the states, this Article explains why the federal takeover of the militia matters for a variety of contemporary legal disputes. Far from being distinct spheres, the division of power horizontally through separation of powers and vertically through federalism are intertwined. Most seriously, the federal government's usurpation of state military power has destabilized the original horizontal division of military power between the president and Congress. The creation of a large military reserve force—an exclusively national militia in all but name—has substantially broadened presidential power to initiate and conduct hostilities without Congress's *ex ante* consent.

Finally, this Article argues for some new modern limits on Congress's power to raise and govern the armed forces based on the original understanding of the Militia Clauses. First, the Supreme Court should recognize new limits on Congress's power to conscript. Even assuming, *arguendo*, that Congress has some power of conscription into the federal army, Congress undoubtedly lacks the power to conscript citizens into federal military reserve forces. A military body comprised of conscripted citizens serving in part-time units constitutes a militia and thus must be organized pursuant to the Militia Clauses. Second, Congress should not be able to apply universal military criminal jurisdiction to reserve members of the army.<sup>10</sup> Constitutionally, part-time citizen-soldiers are members of the militia, not the army. Consequently, they should not be subject to military law except “when in actual service in time of War or public danger.”<sup>11</sup>

This Article will have four parts. Part I explicates the general division of power between federal and state governments and shows

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9. *Id.* art I, § 8, cl. 12.

10. The arguments in this Article would likely apply to the Air Force because the Air Force is part of the constitutional “Armies” of the United States. *See* 10 U.S.C. § 7001 (2012) (defining “Army” as “the Army or Armies referred to in the Constitution of the United States, less that part established by law as the Air Force”). The arguments would likely not apply to the naval reserve. Congress may have broader power to create and govern part-time naval forces. *See infra* note 56 (arguing that the “naval militia” is not part of the constitutional militia); *cf.* note 344 and accompanying text (suggesting that, even if conscription into the army is unconstitutional, Congress may have the power to conscript sailors).

11. U.S. CONST. amend. V.

how the Framers provided for partially decentralized armed forces. As they did with other governmental powers, the Framers paid careful attention to ensuring the existence of adequate checks and balances for military power. By dividing authority between the federal and state governments, the Framers hoped to create adequate fighting forces that the United States and the states could use for self-defense and law enforcement—while protecting the populace from oppression by either state or federal officials.

In Part II, I argue that Congress lacks the power to create an army reserve. Federal law currently requires all federally funded, organized militia members to simultaneously enroll in the National Guard of a state, which is the organized militia of that state, and in the “National Guard of the United States,” which is a reserve component of the armed forces.<sup>12</sup> The Supreme Court unanimously assumed the validity of this arrangement in *Perpich v. Department of Defense*,<sup>13</sup> a case that, although not formally upholding dual enlistment, leaves little doubt that the Supreme Court accepted its constitutionality. Dual enlistment, however, is unconstitutional. The U.S. Army Reserve is an organized militia. It is not part of the “armies” described in Article I, Section 8, Clause 12, which referred to land forces comprising regular troops. Because the U.S. Army Reserve is a militia, it is subject to the constitutional constraints imposed by the Militia Clauses, including restrictions against the federal government calling forth the militia and the requirement that states appoint the officers.<sup>14</sup> Congress cannot evade these limitations simply by labeling the force the “U.S. Army Reserve.” Correlatively, Congress cannot evade the limitations on federal use of the militia by having National Guardsmen simultaneously enlist in both the militia and the U.S. Army Reserve. Third, I argue that, a fortiori, Congress cannot constitutionally require militia officers to enroll in the U.S. Army Reserve. The Framers intended that officers of the militia would constitute a separate chain of command, one not under federal control except when in the actual service of the United States. By requiring officers of the militia to enroll in the federal army, Congress has subverted this structural limitation.

In Part III, I explain why Congress likely lacks a power of conscription, which the Supreme Court first upheld in the *Selective*

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12. For laws governing enlisted personnel in this regard, see 32 U.S.C. §§ 301, 322 (2012). For those governing officers in this regard, see 10 U.S.C. §§ 12211, 12212 (2012); 32 U.S.C. § 324 (2012).

13. See 496 U.S. 334, 350 (1990) (“Over the years, Congress has exercised this power in various ways, but its current choice of a dual enlistment system is just as permissible as the 1792 choice to have the members of the militia arm themselves.”).

14. See U.S. CONST. art. I, § 8, cls. 15–16.

*Draft Law Cases*.<sup>15</sup> My argument is structural. The Constitution restricted the federal government's ability to call forth the militia to three activities: executing the laws, suppressing insurrections, and repelling invasions. After the *Selective Draft Law Cases*, however, these checks became mostly meaningless because the federal government could label the militia as an "army" and then exercise plenary control.<sup>16</sup> My argument is that Congress cannot evade the limitations on its Militia Power simply by relabeling the militia as an army. This Part also argues that, even assuming Congress has some power of conscription, Congress lacks the power to draft soldiers into a federal reserve army. Shortly after the Framing, Congress debated what distinguished a "militia" from an army. Some argued that a militia was conscripted, while an army comprised volunteers; others argued that a militia comprised part-time citizen-soldiers while an army comprised regular soldiers.<sup>17</sup> Under either approach, a conscripted, part-time fighting force is a "militia."

Part IV addresses the broader implications for the destruction of federalism-based checks on contemporary disputes. This Part examines how the destruction of military federalism affects federal-state relations, separation of powers, and the constitutional limits of federal military criminal jurisdiction. Its primary theme is that originalists must engage in a "second-best originalism" in response to pervasive deviations from original constitutional design. For example, the destruction of federalism-based checks has enlarged the power of the president well beyond what the Framers intended and diminished the power of Congress. Originalists who call for a robust, preclusive Commander-in-Chief Power need to account for how deviations from military federalism have enhanced the president's unilateral power. On this view, laws such as the War Powers Act may help rebalance horizontal separation of powers in line with the Framers' original intent. Originalists will also need to engage in second-best originalism when examining the constitutional limits of military criminal jurisdiction over reservists, whom the Framers would have classified as militiamen rather than as regular soldiers.

## I. THE CONSTITUTIONAL DIVISION OF MILITARY POWER

The Constitution splits power based on three principles. The first is separation of powers, which is the formal separation of

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15. *Arver v. United States (Selective Draft Law Cases)*, 245 U.S. 366 (1918).

16. *See Perpich*, 496 U.S. at 347–48.

17. *See infra* notes 361–375.

legislative, executive, and judicial power into separate governmental departments.<sup>18</sup> The second is checks and balances, which use the partial “intermingling of functions in order to permit the branches to provide a check on their counterparts.”<sup>19</sup> And the third is federalism, which is based on “the unique insight that freedom is enhanced by the creation of two governments, not one.”<sup>20</sup>

The Constitution divides the military power along all three lines. Horizontally, the Framers divided power over the military between Congress and the president, both separating functions and providing checks. For example, the Constitution gave Congress the powers to raise armies, provide for a navy, organize the militia, declare war, regulate the armed forces, and tax and appropriate money for military affairs.<sup>21</sup> The president was made commander in chief of the military and had the power to appoint the officers with the Senate’s consent.<sup>22</sup>

Less appreciated, however, is that federalizing the military was another way in which the Framers divided the military power.<sup>23</sup> The vertical division of military power resulted from conflict and compromise about what kind of forces the country should rely on for national defense. In principle, most Framers preferred maintaining a militia over having a standing army. The Framers were concerned that professional soldiers could become tools of governmental oppression, and prevailing republican sentiment disfavored the maintenance of standing armies in times of peace. But the Framers also recognized that standing armies were more practical for national defense. Citizen-soldiers were often more citizen than soldier. The lack of preparation, discipline, and coordination among American forces during the Revolutionary War had nearly led to defeat against the British regulars.

The compromises over the Constitution’s military clauses derive from the Framers’ desire to gain the benefits of having both professional soldiers and an armed citizenry—that is, to have a strong national defense without risking national oppression. To do this, the Constitution created two interoperable—but partially separate—military structures: first, full-time professional servicemen under plenary federal control; and second, citizen-soldiers who would be

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18. See Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1522–24 (1991).

19. Daniel Epps, *Checks and Balances in Criminal Law*, 74 VAND. L. REV. (forthcoming 2021) (manuscript at 19) (on file with author).

20. *Alden v. Maine*, 527 U.S. 706, 758 (1999).

21. U.S. CONST. art. I, § 8, cls. 1, 11–14, 16.

22. *Id.* art. II, § 2.

23. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1496 (1987).

organized into a hybrid national-state militia system. The Framers then used the partial separation of these forces both to limit federal military power and to provide checks against the use of illegitimate force by private parties, state actors, and federal officials.

This Part has four sections. Section A will examine the decision to grant Congress plenary authority to raise a professional military. Sections B and C will examine the militia. Section B will describe the federal character<sup>24</sup> of the militia system and argue that the Framers mostly nationalized the militia. Section C will explain some of the practical legal implications of the militia's federal character. Finally, Section D will explain how the Framers intended the division of authority over the professional military and the militia to contribute to a system of military checks and balances.

### *A. Professional Forces*

The Framing generation generally opposed maintaining full-time professional soldiers, especially in peacetime. In part, these objections were philosophical. Many thought the profession of arms was incompatible with republican civic virtue.<sup>25</sup> Professional soldiers make it their career to become proficient in the skill of killing other human beings.<sup>26</sup> Professional soldiers also could not be trusted to preserve free government.<sup>27</sup> Regular soldiers were subject to constant military discipline and were thereby removed from the freedoms enjoyed by the republican political community that they were defending.<sup>28</sup> Worse,

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24. By “federal character” I mean that the federal and state governments share authority over the militia. *See, e.g.*, THE FEDERALIST NO. 39, at 244–46 (James Madison) (Clinton Rossiter ed., 1961) (distinguishing “national character” from “federal character”). When I use this phrase, I do not mean that the militia is a military force belonging to the federal government alone.

25. CHARLES ROYSTER, A REVOLUTIONARY PEOPLE AT WAR 354–56 (1979) (noting the belief that officers could be “trained to monarchy by military habits”).

26. *Cf.* 2 WILLIAM BLACKSTONE, COMMENTARIES \*413–14 (noting that even troops’ entertainment is hunting because it resembles killing).

27. *See* Massachusetts Convention Debates (February 1, 1788), *in* 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1390, 1396, 1399–1400 (John P. Kaminski et al. eds., 2000) (statement of Nasson in Massachusetts ratifying convention) (describing standing armies as the “bane of republican governments”); Albany Antifederal Committee, N.Y.J., Apr. 26, 1788, *reprinted in* THE ORIGIN OF THE SECOND AMENDMENT 337, 337 (David E. Young ed., 1991) (objecting against “[t]he power to raise, support, and maintain a standing army *in time of peace*” as “[t]he bane of a republican government” in that standing armies have reduced “most of the once free nations of the globe . . . to bondage”); *see also* SAMUEL P. HUNTINGTON, THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS 20–21 (1964) (noting that officers prior to 1800 generally were mercenaries, who viewed officership as a business rather than a profession and who judged success by monetary standards).

28. *See, e.g.*, 1 BLACKSTONE, *supra* note 26, at \*416–17 (“These men . . . seeing the liberty which others possess, and which they themselves are excluded from, are apt . . . to live in a state of perpetual envy and hatred towards the rest of the community . . .”).

armies were often composed of unsavory characters, sometimes impressed into service.<sup>29</sup> For these reasons, the Framing generation viewed professional soldiers as unreliable guardians of free government.<sup>30</sup> The Framers also had practical objections to having a standing army. Professional soldiers are maintained at public expense, and paying and equipping regular troops is burdensome.<sup>31</sup>

The Framing generation's objections to standing armies largely derived from over a century of conflict. In the seventeenth century, English monarchs had used the army and other volunteer forces, which belonged solely to the Crown, to attack Parliament and religious and political opponents.<sup>32</sup> As Frederic Maitland explains, "England came under the domination of the army" during the English Civil Wars.<sup>33</sup> Following those conflicts, King Charles II formed a select militia, and many feared that he would disband Parliament and rule using the army.<sup>34</sup> These actions, and others, led to popular hatred of standing

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29. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 53 (1998) ("These men, full-time soldiers who had sold themselves into virtual bondage to the government, were typically considered the dregs of society—men without land, homes, families, or principles."); CORRELLI BARNETT, *BRITAIN AND HER ARMY 1509–1970: A MILITARY, POLITICAL AND SOCIAL SURVEY* 41–42 (1970) (describing an impressment system that generally caused drunks, criminals, and the idle to be enlisted into the professional army).

30. See *supra* note 27 and accompanying text.

31. THE FEDERALIST NO. 46, *supra* note 24, at 299 (James Madison) (discussing how many regular soldiers can be raised by a populace); 3 ADAM SMITH, *THE WEALTH OF NATIONS* 50 (P.F. Collier & Son 1909) (1776) (discussing how countries "pay[] the expense of [these soldiers'] service" and how this is financially burdensome).

32. See, e.g., BARNETT, *supra* note 29, at 73–78 (recounting the history of King Charles I's power struggles with Parliament between 1639 and 1642); F.W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 326 (Cambridge Univ. Press 1968) (1908) (describing fears that King Charles I would overthrow Parliament using the standing army).

33. MAITLAND, *supra* note 32, at 326.

34. See JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* 63 (1994) (discussing the formation of the "select militia" and the articles of impeachment against Edward Hyde, Earl of Clarendon, who was accused of telling the king to effectively replace Parliament with a standing army). A "select militia" is the older terminology for "organized militia." Like today's "organized militia" (e.g., the National Guard), the select militia was a subset of the entire political community capable of bearing arms. Often this subset voluntarily enlisted, though occasionally it was drafted by lots. See generally BARNETT, *supra* note 29, at 34 (discussing the formation of "trained bands" in England); 1 BLACKSTONE, *supra* note 26, at \*412 (describing the system of organizing part of the militia with organized militiamen chosen by lots).

armies and select militias among England's political elite.<sup>35</sup> The American Founding generation shared that distrust.<sup>36</sup>

Yet, the opposition to a professional military was not absolute. Virtually all the Framers recognized the need to have some regular soldiers.<sup>37</sup> The United States had frontiers to protect and garrisons to guard, which required at least a small, but constant, military presence in times of peace.<sup>38</sup> The country also needed a navy.<sup>39</sup> And a state-based militia system created several practical problems, including states improperly training and supervising their militias and state governments unwilling to send militias to suppress insurrections.<sup>40</sup> Thus, while many in principle preferred the militia to the army, the

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35. See MAITLAND, *supra* note 32, at 326 (“At the Restoration the very name of a standing army had become hateful to the classes which were to be the ruling classes.”); Russell F. Weigley, *The American Civil-Military Cultural Gap: A Historical Perspective*, *Colonial Times to the Present*, in *SOLDIERS AND CIVILIANS: THE CIVIL-MILITARY GAP AND AMERICAN NATIONAL SECURITY* 215, 219 (Peter D. Feaver & Richard H. Kohn eds., 2001) (“In reaction to Cromwell and the Stuarts, however, there emerged an English national tradition of suspicion of the military as an intrinsic threat to civilian self-government and liberties.”); *see also* *District of Columbia v. Heller*, 554 U.S. 570, 592–93 (2008) (noting that King Charles II’s “order[ing] [of] general disarmaments of regions home to his Protestant enemies” made the English “extremely wary of concentrated military forces run by the state and . . . jealous of their arms”).

36. See *Heller*, 554 U.S. at 598–99 (“During the 1788 ratification debates, the fear that the Federal Government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric.”); *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 156–57 (1840) (recounting the English history as providing the primary impetus for preferring armed citizens for collective defense); Jason Mazzone, *The Security Constitution*, 53 *UCLA L. REV.* 29, 73 (2005) (“To many observers, the British regulars who arrived in Boston in October 1768 to enforce the Townshend duties signified the danger of a military no longer under the control of the people. . . . By the fall of 1774, opposition to professional soldiering had reached national proportions.”); Weigley, *supra* note 35, at 219 (“The American colonists fully accepted the Whig antimilitary tradition and indeed integrated it into American political culture.”).

37. See Mazzone, *supra* note 36, at 73 (“Eighteenth-century Americans were not opposed to armies entirely, and the wisdom of professional military training was widely appreciated.”). Even Elbridge Gerry and George Mason, who were so adamantly opposed to standing armies that they refused to sign the Constitution in part for that reason, recognized the need for *some* troops. See, e.g., 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 633 (Max Farrand ed., 1911) [hereinafter *RECORDS*] (statement of Elbridge Gerry) (noting that the Constitution permitted the federal government unlimited power to raise troops). Gerry unsuccessfully tried to limit the number of troops maintained in time of peace to two or three thousand. 2 *RECORDS*, *supra*, at 329–30. Mason understood the need for troops but wanted some declaration about the dangers of standing armies. 2 *RECORDS*, *supra*, at 616–17. Charles Pinckney introduced language to prohibit keeping troops in time of peace except with the legislature’s consent and limiting the appropriations for “military land forces” for one year. See 2 *RECORDS*, *supra*, at 323, 329, 341.

38. *THE FEDERALIST NO. 24*, *supra* note 24, at 161 (Alexander Hamilton) (discussing both the necessity of and the problem of manning the garrisons); *HUNTINGTON*, *supra* note 27, at 166–67.

39. 2 *RECORDS*, *supra* note 37, at 450.

40. See *id.* at 330, 332 (statements of Charles Pinckney) (noting that the lack of militia discipline caused problems both during the Revolutionary War and during Shay’s Rebellion); *id.* at 387 (statement of Edmund Randolph) (observing that “the Militia were every where neglected by the State Legislatures, the members of which courted popularity too much to enforce a proper discipline”); *id.* (statement of James Madison) (“The States neglect their Militia now . . .”).

Framing generation still widely recognized (even if many begrudgingly accepted) that having *some* professional soldiers was necessary for national defense.

Not all Framers viewed a standing army as a necessary evil. Some—most vocally Alexander Hamilton and George Washington—accepted the legitimacy of professional soldiers. They recognized that the art of war requires practice to achieve proficiency.<sup>41</sup> And the militia was unreliable. Ordinary citizens resented being pulled away from their homes to train and fight, especially for long periods of time.<sup>42</sup> Lacking the virtues of good soldiers, ordinary citizens often acted incompetently in battle.<sup>43</sup> Hamilton further argued that, although a professional army was costly to maintain, so too was a universal militia; equipping and disciplining the entire able-bodied citizenry bore high actual and opportunity costs.<sup>44</sup>

The Framers ultimately decided to substantially broaden Congress's military power. Under the Articles of Confederation, there was “doubt . . . whether Cong[ress] . . . ha[d] a right to keep Ships or

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41. See, e.g., THE FEDERALIST NO. 25, *supra* note 24, at 166 (Alexander Hamilton) (“War, like most other things, is a science to be acquired and perfected by diligence, by perseverance, by time, and by practice.”); 3 SMITH, *supra* note 31, at 56; Debates of the Virginia Convention (June 14, 1788), in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 27, at 1258, 1278–79 (statement of Nicholas) (questioning the adequacy of “men unacquainted with the hardships, and unskilled in the discipline of war”); see also RUSSELL F. WEIGLEY, HISTORY OF THE UNITED STATES ARMY 74 (1967) (quoting George Washington as demonstration of his belief “that the military experience of the Revolution proved America’s need for a professional army”).

42. See, e.g., Debates of the Virginia Convention (June 14, 1788), *supra* note 41, at 1278–79 (statement of Nicholas); Letter from George Washington to the President of Congress (Sept. 24, 1776), in 6 THE WRITINGS OF GEORGE WASHINGTON 106, 110 (John C. Fitzpatrick ed., 1932) (describing relying on the militia as “resting upon a broken staff,” especially considering how it consisted of “[m]en just dragged from the tender Scenes of domestick life”); see also 3 RECORDS, *supra* note 37, at 172, 207–08 (statement of Luther Martin to the Maryland ratifying convention) (explaining that he refused to sign the Constitution, among other things, because of the possible burdens placed on militiamen and the refusal to limit the size of the standing army to what was necessary).

43. See, e.g., THE FEDERALIST NO. 25, *supra* note 24, at 166 (Alexander Hamilton) (“The steady operations of war against a regular and disciplined army can only be successfully conducted by a force of the same kind.”); 3 SMITH, *supra* note 31, at 56; Debates of the Virginia Convention (June 14, 1788), *supra* note 41, at 1278–79 (statement of Nicholas) (questioning whether the country would be safe with solely a militia upon invasion and stating that the “inadequacy [of a militia] is proved by the experience of other nations”); Letter from George Washington to the President of Congress (Sept. 15, 1780), in 20 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 42, at 49–50 (distinguishing the troops of a militia from those of an army); see also WEIGLEY, *supra* note 41, at 74 (quoting George Washington as saying, “No Militia will ever acquire the habits necessary to resist a regular force. . . . The firmness requisite for the real business of fighting is only to be attained by a constant course of discipline and service”).

44. THE FEDERALIST NO. 29, *supra* note 24, at 182–83 (Alexander Hamilton) (“To oblige the great body of the yeomanry . . . to be under arms . . . would form an annual deduction from the productive labor of the country, to an amount which . . . would not fall far short of the whole expense of the civil establishments of all the States.”).

troops in time of peace.”<sup>45</sup> The Constitution settled this question in the affirmative, granting Congress broad power to “raise and support Armies”<sup>46</sup> and to “provide and maintain a Navy.”<sup>47</sup> Despite the Framing generation’s consternations about standing armies, those in favor of a broad military power defeated attempts during the Constitutional Convention to limit the Army Power. These proposals included limiting the number of troops that the federal government could raise and even cautionary declarations about the dangers of standing armies.<sup>48</sup> Later, during discussion over the Bill of Rights, the Framers refused to adopt proposals to require a supermajority of Congress before keeping professional troops in time of peace.<sup>49</sup> The only adopted limitation on the Army Power was that “no Appropriation of Money to that Use shall be for a longer Term than two Years,”<sup>50</sup> which facilitated Congress periodically debating whether to continue funding a standing army.

With less controversy, the Framers continued restrictions against states having professional militaries. The Articles of Confederation had prohibited states from maintaining “vessels of war” or “any body of forces” in peacetime, with narrow defensive exceptions that had to be approved by Congress.<sup>51</sup> The states, however, did not faithfully follow these prohibitions.<sup>52</sup> At the Constitutional Convention, the delegates reaffirmed the prohibition against professional soldiers and sailors, with no serious debate about removing them. Hamilton proposed early that “[n]o state [shall] have any forces land or Naval.”<sup>53</sup> James Madison noted that an uneven distribution of military force among the states could allow a minority of states with more military

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45. 1 RECORDS, *supra* note 37, at 287.

46. U.S. CONST. art. I, § 8, cl. 12.

47. *Id.* art. I, § 8, cl. 13.

48. *See supra* note 37 and accompanying text.

49. *See* 1 ANNALS OF CONG. 780–81 (Joseph Gales ed., 1834) (1789) (rejecting a proposal to add a two-thirds requirement for standing armies in times of peace to what is now the Second Amendment); *see also* Maryland Ratifying Convention (1788), *reprinted in* 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 729, 735 (Bernard Schwartz ed., 1971) (“That no standing army shall be kept up in time of peace, unless with the consent of two thirds of the members present of each branch of Congress.”); New Hampshire Ratifying Convention, 1788, *reprinted in* 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, *supra*, at 758, 761 (proposing a requirement that three-fourths of the legislature approve a peacetime army).

50. U.S. CONST. art. I, § 8, cl. 12; 2 RECORDS, *supra* note 37, at 505.

51. ARTICLES OF CONFEDERATION OF 1781, art. VI, para. 4. In contrast to its general prohibitions against states maintaining professional land and naval forces, the Articles of Confederation made states duty-bound to maintain their militia. *Id.*

52. 1 RECORDS, *supra* note 37, at 316 (complaining that Massachusetts had raised troops without even notifying Congress).

53. *Id.* at 293.

might to rule over the majority.<sup>54</sup> After some minor stylistic revisions,<sup>55</sup> this became a prohibition against states “keep[ing] Troops, or Ships of War in time of Peace” without Congress’s consent.<sup>56</sup>

Thus, the first part of military federalism relates to the professional military services. The Constitution grants near-plenary control over the professional army and the navy to the federal government. The federal government may raise armies and provide for a navy. States, in contrast, are forbidden to do these things, except in time of war or with Congress’s consent.

### *B. (Mostly) Nationalizing the Militia*

This Section describes the constitutional organization of the militia. Despite the ubiquity of referring to the militia as “the state militia,” I argue that the Constitution transformed the American militia system into a primarily national military auxiliary to the professional forces. This national system, however, still contained some important limitations on Congress’s power. I will argue in subsequent Parts that Congress has improperly used its Army Power to subvert these limitations.

The partial nationalization of the militia resulted from the failure of a true state-based system under the Articles of Confederation. The Articles left a critical gap between power and responsibility.<sup>57</sup> The Articles left the making of war to Congress,<sup>58</sup> but Congress had to rely on state militias as the peacetime national defense force.<sup>59</sup> On paper, the Articles of Confederation obliged states to maintain a well-regulated militia.<sup>60</sup> In practice, however, the states neglected that

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54. *Id.* at 318.

55. For proposals and variations on the final language, see 2 *id.* at 169, 577, 597, 626.

56. U.S. CONST. art. I, § 10, cl. 3. Beginning in 1891, Congress has provided funds “for naval militia of various States.” An Act Making Appropriations for the Naval Service, ch. 494, 26 Stat. 799, 801 (1891), and in 1894, authorized federal loans of equipment for such organizations, An Act to Promote the Efficiency of the Naval Militia, ch. 192, 28 Stat. 219, 219 (1894). In 1914, Congress recognized the “Naval Militia” as part of the organized militia. 10 U.S.C. § 246(b)(1) (2012); An Act to Promote the Efficiency of the Naval Militia, ch. 21, 38 Stat. 283, 283 (1914). Today, a few states continue to maintain a “naval militia.” But whether a “naval militia” is part of the constitutional “Militia” seems dubious. A naval militia requires a state to maintain ships of war. And that, in turn, requires congressional consent under Article I, Section 10 of the Constitution. Given this, the “naval militia” is likely not part of the constitutional “Militia,” but rather a separate state navy. And if that is true, the maintenance of such organizations depends strictly on Congress’s consent; states have no inherent power to organize or arm a naval militia.

57. Mazzone, *supra* note 36, at 76–77.

58. *Id.* at 76.

59. WEIGLEY, *supra* note 41, at 82–85.

60. See ARTICLES OF CONFEDERATION OF 1781, art. VI, para. 4.

duty.<sup>61</sup> In response, the Constitution transformed the militia. The Framers created a hybrid national-state militia system. The states lost most policymaking authority regarding the militia, though they retained control of the militia except in cases of national emergency.<sup>62</sup>

The national-state hybrid system was the product of compromise at the Convention.<sup>63</sup> The Militia Clauses originated with Charles Pinckney's plan to provide Congress with "the exclusive Right of establishing the Government and Discipline of the Militia . . . and of ordering the Militia of any State to any Place within [the] U.S."<sup>64</sup> Eventually, this provision evolved into a few distinct proposals, including one from George Mason on August 18, 1787, that would give the federal government the power to provide uniformity in the arming and disciplining of the militia, while reserving the appointment of officers to the states.<sup>65</sup> In considering Mason's proposal, the delegates began to fracture in their views. Mason and Pinckney sought uniformity in the militia because of problems encountered during the Revolutionary War in having dissimilar forces trying to fight alongside each other.<sup>66</sup> James Madison and Pierce Butler wanted to go further: because the militia involved "public defence" (or, in Butler's words, "general defence"), the militia ought to belong entirely to the federal government, which was charged with providing for the common defense.<sup>67</sup> George Read disagreed with reserving the appointment of militia officers to the states; though if the Convention insisted on this, Read wanted the officers appointed by state governors, rather than by state legislatures or popular election.<sup>68</sup>

While Madison and Butler called for a fully national militia, few at the Convention advocated for the other extreme: leaving the militia under the plenary authority of the states.<sup>69</sup> George Mason, certainly one of the most ardent supporters of states' rights during the Convention, supported regulating the militia at the national level.<sup>70</sup> Oliver

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61. See 2 RECORDS, *supra* note 37, at 387 (statement of James Madison) ("The States neglect their Militia now . . .").

62. U.S. CONST. art. I, § 8, cl. 16.

63. See 2 RECORDS, *supra* note 37, at 329–33 (surveying the debate that produced the current system).

64. *Id.* at 159.

65. *Id.* at 330.

66. *Id.*

67. *Id.* at 331–32.

68. *Id.* at 333.

69. Luther Martin later claimed to have advocated for state control. See Luther Martin, *Genuine Information VII*, BALT. MD. GAZETTE, Jan. 18, 1788, reprinted in 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 27, at 410–12.

70. 2 RECORDS, *supra* note 37, at 326.

Ellsworth came closest to advocating state control when he cautioned against giving to the federal government “[t]he whole authority over the Militia.”<sup>71</sup>

Despite broad agreement to increase federal power over the militia, the delegates disagreed about exactly how much authority the states should retain. Arguing against Madison’s strong nationalist views, Ellsworth wanted to avoid removing the “whole authority over the Militia . . . from the States whose consequence would pine away to nothing.”<sup>72</sup> Roger Sherman also noted that states may need their militia “for defence [against] invasions and insurrections, and for enforcing obedience to their laws.”<sup>73</sup> As a result, he also argued against a complete federal takeover.<sup>74</sup> But even Ellsworth proposed giving the federal government direct control over the militia within a state whenever the state neglected its militia.<sup>75</sup>

The Convention resumed debate on the Militia Clauses on August 23, when the Committee of Eleven proposed a Militia Clause that, with minor stylistic changes, would become Article 1, Section 8, Clause 16.<sup>76</sup> As in the August 18 debate, the fractured views of the Convention surfaced. Madison strenuously argued that the militia was a matter of “*National* concern” and should belong to the national government.<sup>77</sup> Jonathan Dayton, Ellsworth, and Sherman offered proposals that would give the states more power over the militia, while still giving the federal government a limited power to ensure uniformity.<sup>78</sup> Edmund Randolph supported the proposal of the Committee of Eleven, which he thought was an acceptable compromise as-is. He complained that the states neglected their militia and that reserving the appointment of the officers to the states “protects the people [against] every apprehension that could produce murmur.”<sup>79</sup>

But Madison was not willing to let go of his attempts to nationalize the militia as much as possible. Immediately after Randolph’s attempt to lobby for the Committee’s proposal as an acceptable compromise, the Convention voted.<sup>80</sup> Faced with losing his proposal to have a complete federal takeover of the militia, Madison

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71. *Id.* at 331.

72. *Id.*

73. *Id.* at 332.

74. *Id.*

75. *Id.*

76. *Id.* at 384–85.

77. *Id.* at 387.

78. *Id.* at 385–86.

79. *Id.* at 387.

80. *Id.* at 387–88.

then proposed having the federal government appoint the generals; the states would appoint officers under that rank.<sup>81</sup> But his proposal met fierce resistance. Sherman thought that “allow[ing] the Most influential officers of the Militia to be appointed by the [General] Government” would consolidate a dangerous amount of military power in one government.<sup>82</sup> Elbridge Gerry, after sarcastically suggesting that the Convention might as well abolish state governments, warned “[against] pushing the experiment too far.”<sup>83</sup> Madison did not back down. He felt that only the federal government would adequately provide for the militia, and having a disciplined militia was the best way to avoid the need for a large standing army.<sup>84</sup> Ultimately, Madison lost the vote three states to eight, with only New Hampshire, Georgia, and South Carolina supporting him.<sup>85</sup>

As a product of these debates, the Constitution granted Congress plenary authority “[t]o provide for organizing, arming, and disciplining, the Militia.”<sup>86</sup> Through this provision, the Framers wanted the highest level of uniformity within the militia as was practicable. Mason said that “[h]e considered uniformity as necessary in the regulation of the Militia throughout the Union.”<sup>87</sup> Furthering Mason’s point, Pinckney noted that, “during the [Revolution] . . . dissimilarity in the militia of different States had produced the most serious mischiefs. Uniformity was essential.”<sup>88</sup> There were some dissenting views on whether the militia should have “so absolute a uniformity” across states: Dayton noted that some areas might need more cavalry or require rifles instead of muskets.<sup>89</sup> But whether the militia was absolutely uniform or mostly uniform across states, the basic point was the same: the transformation of the separate state militias into a national defense force.

The Constitution charges the states primarily with ministerial duties regarding the militia. First, they have the responsibility to train the militia, although this authority extends only to “the discipline prescribed by Congress.”<sup>90</sup> As Gerry mocked during the Convention, the

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81. *Id.* at 388.

82. *See id.* (statement of Roger Sherman).

83. *Id.* (statement of Elbridge Gerry).

84. *See id.*

85. *Id.*

86. U.S. CONST. art. I, § 8, cl. 16.

87. 2 RECORDS, *supra* note 37, at 330.

88. *Id.*

89. *Id.* at 386.

90. U.S. CONST. art. I, § 8, cl. 16.

states became the “drill-sergeants.”<sup>91</sup> Second, states have the authority to appoint the officers.<sup>92</sup>

This is not to say, however, that these tasks exhaust the state’s jurisdiction over its militia. A state’s militia, while not in the actual service of the United States, is available for all appropriate uses to which a militia may be put (e.g., assisting state law enforcement when the civil authorities are inadequate).<sup>93</sup> Likewise, a state has concurrent authority to discipline its militia.<sup>94</sup> But this power must be carefully characterized: while a state has concurrent authority to supplement federal militia law (e.g., to provide for arming its militia if Congress does not so provide), a state almost never has preclusive power to contravene federal militia legislation.<sup>95</sup> To analogize from Justice Jackson’s concurrence in the *Steel Seizure Case*,<sup>96</sup> states have a category two power over the militia (complementary authority to Congress), but *almost never* a category three power (inherent preclusive power).<sup>97</sup>

David Yassky argues that, even after the Constitutional Convention, the militia remained primarily a state institution. He points to a few features of the militia system. First, operational

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91. 2 RECORDS, *supra* note 37, at 385. As I explain below, Gerry’s statement is a bit of an exaggeration, but it captures the substantial diminution of state control over the militia. *See text accompanying infra* note 103.

92. U.S. CONST. art. I, § 8, cl. 16. The militia is a textually committed counterexample to *Printz v. United States*’s general anticommandeering principle: it is one of three instances stated in the Constitution where Congress can (1) dictate a mandatory policy not connected to any federal funding; and (2) delegate to state officials—not the president—the execution of that policy. *See, e.g., Printz v. United States*, 521 U.S. 898, 923–25 (1997) (announcing the principle). The other two counterexamples are the Elections Clause, U.S. CONST. art. I, § 4, cl. 1 (granting Congress the power to alter state election law concerning congressional elections), and the Supremacy Clause, U.S. CONST. art. VI, cl. 2 (binding state court judges). Indeed, the militia system may also be an exception to the rule announced in *New York v. United States*, 505 U.S. 144, 149 (1992), that Congress cannot compel states to enact certain kinds of legislation.

93. Debates of the Virginia Convention (June 16, 1788), in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 27, at 1299, 1304 (statement of James Madison).

94. *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 9 (1820).

95. *Id.* at 16–17:

But as State militia, the power of the State governments to legislate on the same subjects, having existed prior to the formation of the constitution, and not having been prohibited by that instrument, it remains with the States, subordinate nevertheless to the paramount law of the general government, operating upon the same subject.

*See generally* J. Norman Heath, *Exposing the Second Amendment: Federal Preemption of State Militia Legislation*, 79 U. DET. MERCY L. REV. 39 (2001) (arguing that courts have not interpreted the Second Amendment to give states the power to contravene federal legislation governing the militia).

96. For Jackson’s categories, see *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

97. The federal government could not directly commission the officers or conduct the training of the militia, but that probably exhausts the list of activities that would fall within the state’s preclusive power. *See* U.S. CONST. art. I, § 8, cl. 16.

governance of the militia occurred only during the limited times that the federal government called forth the militia, and federal governance was limited to the times that the militia was in “actual service.”<sup>98</sup> Second, the Constitutional Convention reserved to the states the appointment of all officers and the authority of training.<sup>99</sup> Yassky notes that the Convention even beat back Madison’s modest attempt to provide federal appointment of general officers.<sup>100</sup> Third, the Commander-in-Chief Clause states that the president is “Commander in Chief . . . of the Militia of the several States, when called into the actual Service of the United States.”<sup>101</sup> From this, he concludes that “[e]ven when undertaking national tasks under the direction of the President, the militia remain ‘of the several states.’”<sup>102</sup>

Yassky’s conclusion that the militia “remain ‘of the several states’” overstates state control over the militia following the adoption of the Constitution. Congress had full authority to dictate the militia’s structure, weapons, and discipline. The militia remained a “state militia” only insofar as the states kept usual possession of the militia and could use their militia for state purposes when the militia was not in the service of the United States.<sup>103</sup> But even during their training, states’ possession of the militia was subservient to national policy decisions.<sup>104</sup> And contrary to Yassky’s argument, the sharp defeat of Madison’s general officer proposal was not because state governments predominate over the militia. Instead, the reservations to the states of appointing all officers and conducting the training were modest concessions to state power during a series of debates where the Convention considered whether to fully nationalize the militia. Because the Convention had already transferred most authority over the militia to the federal government, the delegates resisted Madison’s further attempt to chip away at what little state power remained.

Perhaps reflecting the unusual, hybrid federal-state nature of the militia, the Framers and their contemporaries even inconsistently named the militia. Yassky correctly identifies both the Commander-in-

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98. David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 606–07 (2000).

99. *Id.* at 607.

100. *Id.*

101. *Id.* at 607 (quoting U.S. CONST. art. II, § 2, cl. 1).

102. *Id.*

103. *See, e.g.*, Amar, *supra* note 23, at 1496 (analogizing to property law by explaining that the Constitution had transferred “title” of the militia to the national government while allowing states to retain usual “possession” of the militia).

104. Samuel Huntington correctly noted that the militia is neither state nor federal, but shared between them. He criticized the arrangement since it entangles the militia “in the conflicting interests of the federal system.” HUNTINGTON, *supra* note 27, at 169.

Chief Clause<sup>105</sup> and the Militia Act of 1792<sup>106</sup> as referring to “the militia of the several States.” But there are numerous examples of contrary usage referring to the militia as a national force. In Federalist No. 29, Hamilton argues against “disciplining all the militia of the United States.”<sup>107</sup> The Militia Act of 1792 was entitled “An Act More Effectually to Provide for the National Defence, by establishing an Uniform Militia throughout the United States.” The Second Amendment also treats the militia singularly (“[a] well regulated Militia”), calling it “necessary to the security of a free State”—by which it means a free country, not a free Pennsylvania or New York.<sup>108</sup> Prior to the 1792 Militia Act, George Washington submitted a proposal from Secretary of War Henry Knox concerning a “plan for the general arrangement of the militia of the United States.”<sup>109</sup> Early Congresses routinely referred to the “militia of the United States.” For example, the Journal of the Senate reports a proposed bill entitled, “An act to regulate the pay of the non-commissioned officers, musicians, and privates, of the militia of the United States, when called into actual service, and for other purposes.”<sup>110</sup> The Third Congress also proposed to reorganize the militia by declaring that “the Militia of the United States shall be composed of all able-bodied white male citizens, of the respective States, resident therein, [between certain ages].”<sup>111</sup>

Given the sui generis federalized nature of the militia, it is difficult to analogize to other governmental bodies. One helpful analogy, however, might be to a U.S. House delegation. All members of the House of Representatives are ipso facto members of their state’s House delegation. And a state’s House delegation, for some limited purposes, is treated as a distinct entity. For example, under the Twelfth Amendment, if no presidential candidate receives a majority of the Electoral College, then each state’s delegation receives one vote. But calling Nancy Pelosi solely a member of the California House Delegation states a half-truth. By being elected to the House of Representatives from California, Representative Pelosi simultaneously obtains membership in the U.S. House of Representatives and the

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105. U.S. CONST. art. II, § 2, cl. 1.

106. Act of May 8, 1792, ch. 33, 1 Stat. 271.

107. THE FEDERALIST NO. 29, *supra* note 24, at 184 (Alexander Hamilton).

108. U.S. CONST. amend. II. On the phrase “a free state” meaning “a free polity”—not a state government free from federal interference—see Eugene Volokh, “*Necessary to the Security of a Free State*,” 83 NOTRE DAME L. REV. 101 (2007).

109. Message from President George Washington to the Senate (Jan. 21, 1790), in 1 AMERICAN STATE PAPERS ON MILITARY AFFAIRS 6, 6 (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, Gales & Seaton 1832).

110. S. JOURNAL, 3d Cong., 2d Sess. 144 (1795).

111. 4 ANNALS OF CONG. 1214 (Joseph Gales ed., 1855) (1795).

California House Delegation. And, for most purposes, the California House Delegation consists of nothing more than a subset of the U.S. House of Representatives elected from California, even though, in limited cases, it exercises power as a distinct entity. Under the Constitution, the militia works the same way. All members of the militia of the United States are members of the militia of the state wherein they reside. For some limited purposes, each state's militia is a separate legal entity: it has, for example, a separate officer corps and conducts its training separately from the other states. But in the enumerated emergencies in which Congress and the president may call forth the militia, each state's militia is a constitutive part of the national military forces under the command of the president and subject to the government of Congress. A member of the militia of the United States who moves from New York and takes up residence in Pennsylvania, by that action alone, leaves the militia of New York and joins the militia of Pennsylvania.

It may be that some of the confusion over the nature of the militia derives from how our use of the word "militia" has changed over time. In the Second Amendment context, Chief Justice Burger characterized the militia as "state armies,"<sup>112</sup> a characterization often accepted by those who adopt the collective-rights view of that Amendment.<sup>113</sup> Under this view, the "state militia" is the name that we give to the state analogue of the federal army, just as "governor" is the state executive analogue of the federal president. Using "militia" in this manner, states can have multiple militias: it might have a National Guard and a state defense force.<sup>114</sup>

Although this language is in common use today, the Framers used the terms differently. When the Framers referred to "the militia" at the Convention, they were referring to the entire national able-bodied population subject to military service. They sometimes referred to this as "the whole militia."<sup>115</sup> From the whole militia, there might be

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112. Warren E. Burger, *The Right to Bear Arms*, PARADE MAG., Jan. 14, 1990, at 4, 4.

113. See, e.g., *Silveira v. Lockyer*, 312 F.3d 1052, 1060 (9th Cir. 2002).

114. *Perpich v. Dep't of Def.*, 496 U.S. 334, 352 (1990) (stating that the federal law authorizing state defense forces permitted a state "to [have] a separate militia of its own" (citation omitted)).

115. 2 RECORDS, *supra* note 37, at 331 (statement of John Dickinson); see also Debates of the Virginia Convention (June 16, 1788), *supra* note 93, at 1312 (statement of George Mason) ("[W]ho are the militia? They consist now of the whole people, except a few public officers."); *A Letter from a Gentleman in a Neighbouring State (New York) to a Gentleman in this City*, CONN. J., Oct. 31, 1787, reprinted in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION DIGITAL EDITION 380, 389 (John P. Kaminski et al. eds., 2009) ("The militia comprehends all the male inhabitants from sixteen to sixty years of age . . ."); Letter XVIII (Jan. 25, 1788), in LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN, reprinted in 17 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION DIGITAL EDITION, *supra*, at 360, 362 (ascribed to Richard Henry Lee) ("First, the constitution ought to secure a genuine and guard against a select militia,

discrete organized units, a “select militia” in the Framers’ terminology.<sup>116</sup> Thus, using the Framers’ terminology, the National Guard is a “select militia”—what today we call an “organized militia.” Indeed, the National Guard is only part of the organized militia of the state.<sup>117</sup> A state’s “defense force” or “state guard” is arguably a second organized component.<sup>118</sup> But the United States only has one general militia from which such forces are drawn.

Thus, the Constitution carefully split power over the militia between the federal and state governments. During national emergencies, the militia comprised an essential part of the nation’s military forces. Outside of those emergencies, Congress set national militia policy, but Congress had to rely on the states to execute its plans, including for militia training. Also, states retained the power to select the officers, which meant the national military system had two chains of command—a professional chain beholden to federal leaders and a nonprofessional chain beholden to the states. At least in theory, the division of the militia offered enough centralization to remedy the deficiencies of the decentralized system under the Articles of Confederation. But the Constitution stopped short of vesting all of the country’s military power in Congress and the president during peacetime.

### *C. Practical Implications of Shared Federal-State Control over the Militia*

The shared federal-state authority over the militia is not merely an academic observation. The federal character of the militia creates many difficult constitutional and legal issues.

#### 1. Is the Militia Part of the State or Federal Government?

The classification of militia as “state” or “federal” matters for a variety of constitutional and statutory reasons. One issue is whether a militia officer possesses “any Office under the United States” for

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by providing that the militia shall always . . . include . . . all men capable of bearing arms; and that all regulations tending to render this general militia useless and defenceless, by establishing select corps of militia . . . [are] to be avoided.”)

116. *See, e.g.*, 2 RECORDS, *supra* note 37, at 331 (statement of George Mason) (proposing a select militia for the federal government).

117. 10 U.S.C. § 246 (2012); 32 U.S.C. § 101(4) (2012). The naval militia is statutorily part of the organized militia, too. 10 U.S.C. § 246(b)(1). But I dispute this characterization above. *See supra* note 56.

118. On the questionable status of state guards and state defenses forces as “militia,” *see infra* notes 437–445 and accompanying text.

purposes of the Ineligibility Clause.<sup>119</sup> This first became an issue in 1802, when President Thomas Jefferson appointed Representative John P. Van Ness of New York to be a major in the District of Columbia militia. The House Committee of Elections studied the issue and recommended that Representative Van Ness's seat become vacant because he "accepted and exercised the office of Major of Militia, under the authority of the United States, within the Territory of Columbia, and [hath] thereby forfeited his right to a seat as a member of this House."<sup>120</sup> During the debates, Representative Van Ness inquired into whether all militia officers—including those of the territories or states—could not become members of Congress. He asked:

If it be determined that the militia officers of this District shall be excluded, the same rule will apply to all militia officers appointed by the Governors of the Territories of the United States. Do you not also exclude the militia officers of the States, who, though appointed in the States, are subject to the command of the United States?<sup>121</sup>

Over Representative Van Ness's objections, the House unanimously approved the recommendation.<sup>122</sup> The vote was understood as setting a clear precedent that District militia officers held offices under the United States and could not simultaneously serve as members of Congress.<sup>123</sup> Of course, Van Ness's case was overdetermined: he was a militia officer in the District of Columbia, which is a federal enclave. Logically, Van Ness could be a federal officer, even if the militia officers in the states were not. As a result, the precedent of his case is limited.

Congress studied the issue again in 1916, after the creation of the National Guard system—but before National Guard officers were required to simultaneously join the U.S. Army Reserve.<sup>124</sup> The House Judiciary Committee, after examining the extensive federal control over the National Guard, concluded that National Guard officers held offices under the United States.<sup>125</sup> The full House never acted on the report. Obviously, classifying the militia as "state" or "federal" is relevant to determining whether militia officers appointed by the states are federal officers for purposes of the Incompatibility Clause.

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119. U.S. CONST. art. I, § 6, cl. 2. My thanks to Will Baude for pointing out this issue.

120. H.R. JOURNAL, 7th Cong., 2d Sess. 290 (1803).

121. 12 ANNALS OF CONG. 397 (Joseph Gales ed., 1851) (1803).

122. *Id.* at 398.

123. *Id.* at 398–99 (statement of John Randolph) (calling this "a precedent so important as was about to be established by the vote of the House").

124. On dual enlistment, see *infra* notes 171–175 and accompanying text.

125. H.R. COMM. ON THE JUDICIARY, RIGHT OF A REPRESENTATIVE IN CONGRESS TO HOLD COMMISSION IN NATIONAL GUARD, H.R. REP. NO. 64-885, at 3 (1916).

Besides its constitutional significance, the characterization of militia as “federal” or “state” is relevant to federal statutory law. For example, in *In re Sealed Case*, the U.S. Court of Appeals for the District of Columbia Circuit decided that the Vermont Army National Guard could violate the federal Privacy Act by releasing private information even when the National Guard was not in active federal service.<sup>126</sup> Since the Act does not apply to private data releases by state officers, the classification of the militia as federal or state matters. And for purposes of federal jurisdiction over military offenses, nineteenth century court decisions held that the militia did not become employed by the United States “until their arrival at the place of rendezvous and muster.”<sup>127</sup>

On the issue of whether militiamen are part of the state or federal government, I do not offer a firm answer. For militia officers, the Constitution vests the power to appoint (and presumably the power to remove) in state governments, which gives strong reason to classify them as state officers. But militiamen are, as Representative Van Ness noted, subject to the command and control of the U.S. government whether in active service or carrying out Congress’s commands regarding the militia’s organization, arming, and discipline. Thus, because of the federal character of the militia, the federal or state status of militiamen is a close and difficult question. Ultimately, the answer may depend on the context in which the issue is raised.<sup>128</sup>

## 2. May States Refuse to Send Militia Forces?

A dispute over whether states may withhold their militia forces arose during the War of 1812, when Massachusetts, Connecticut, and Rhode Island refused to place their militias under the command of army officers assigned unified geographic commands. An opinion from the Massachusetts Supreme Judicial Court backed these states.<sup>129</sup> The court held that the two chains of command were completely separate:

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126. *In re Sealed Case*, 551 F.3d 1047 (D.C. Cir. 2009). While serving on the D.C. Circuit, then-Judge Kavanaugh correctly argued in his concurrence that this case might also be overdetermined since Vermont National Guard members were also members of the “National Guard of the United States,” which makes them members of a federal reserve force. *Id.* at 1054–55 (Kavanaugh, J., concurring).

127. 1 WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 95 (2nd ed. 1920) (collecting authorities).

128. For example, it is possible that militia officers can be treated statutorily as federal employees even if they are constitutionally state officers. *Cf. Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 564 (2012) (holding that a penalty for failure to purchase health insurance may constitute a “tax” under the Constitution, while not being a statutory “tax” for purposes of the Anti-Injunction Act).

129. *See Op. of the Justices*, 8 Mass. (8 Tyng) 548 (1812) (opining that the governor of the commonwealth has the exclusive authority to command the militia).

no officer of the army had a right to command the militia, and no officer of the militia had a right to command the army. While Congress could govern the militia when in the actual service of the United States, the Massachusetts court opined, “[T]o extend this power to the placing of them under the command of an officer, not of the militia, except the president, would render nugatory the provision, that the militia are to have officers appointed by the states.”<sup>130</sup> The court rejected the concept that the army and militia could form a unified force under the command of the national government in national emergencies.<sup>131</sup>

The federal government united in its opposition to Massachusetts’s position. Although no legislation or formal judicial opinion ensued on this subject, members of all three branches issued strong rebukes.

James Monroe, then the Secretary of War, sent the Senate Military Affairs Committee a long and detailed letter laying out his view of the relationship between the militia and the army, challenging the Massachusetts court opinion specifically. Monroe noted that the Constitution charges Congress—not the states—with determining when to call forth the militia to meet the constitutionally enumerated emergencies.<sup>132</sup> Requiring the federal government, first, to get approval of Congress to call forth the militia, and second, to negotiate with state governments individually, would make the militia practically useless.<sup>133</sup> And Monroe’s position is on strong ground: one of the motivating factors prompting the Constitutional Convention to increase federal power over the militia was the refusal of state governments to supply adequate forces to enforce national laws and suppress insurrections. If the Massachusetts court were correct, Congress’s power over the militia in emergencies would be virtually returned to the disastrous position it held under the Articles of Confederation. Further, the constitutional text confirms Monroe’s view: the only time in which state governments must be consulted before militia are called forth are cases of domestic violence within a state.<sup>134</sup> Given the unworkability of having separate chains of command during wartime, Monroe noted that the only reasonable response would be for the federal government to maintain a large standing army, which few at the Convention preferred. In Monroe’s view, the Constitution was meant to allow the country to provide for a true national defense. When the

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130. *Id.* at 550.

131. *Id.*

132. Letter from James Monroe, Sec’y of War, to Senate Military Affairs Comm. (Feb. 11, 1815), in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra* note 109, at 604, 605.

133. *Id.* at 605–06.

134. U.S. CONST. art. IV, § 4.

federal government gains control over the militia during the constitutionally enumerated emergencies, states no longer have any authority over it.<sup>135</sup> Like the army, the militia, when in federal service, is paid and governed by the national government and is subject to the command of the president. The army and militia are not merely allied forces. Rather, consistent with the Constitution's purpose to "provide for the common defense,"<sup>136</sup> the army and militia constitute "one national force"—a combined force of regulars and irregulars.<sup>137</sup>

The Senate Military Affairs Committee warmly received Monroe's position. While "refrain[ing] from entering into arguments to fortify the grounds taken by the Executive Government on this subject," the Committee nevertheless "express[ed] a decided approbation of its conduct."<sup>138</sup> The Committee found no authority within the Constitution to support the states' position, which, to quote Monroe, "pushe[d] the doctrine of State rights further than I have ever known it to be carried in any other instance."<sup>139</sup>

Finally, from the judicial branch, Justice Story recorded his opposition. Justice Story dimly noted that if the Massachusetts court's argument were sustained, "the public service must be continually liable to very great embarrassments in all cases, where the militia are called into the public service in connexion with the regular troops."<sup>140</sup>

As an originalist matter, Monroe's position on militia officers and command is correct. The Constitution, while reserving some authority over the militia to state governments, provided Congress and the president with supreme power over national defense. At the Virginia Ratifying Convention, Madison explained the importance of preventing states from obstructing the federal government's calling forth of necessary military forces in times of emergency.<sup>141</sup>

Constitutionally, the militia serves two masters and bridges the federal-state divide. Even when the militia is under state authority, militiamen directly execute some federal commands. For instance, the militia is organized pursuant to federal law, and the militia must train according to the discipline prescribed by Congress. When called into actual service, the militia is part of the national military leadership

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135. *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 34–35 (1820).

136. U.S. CONST. pmbl.

137. Letter from James Monroe, Sec'y of War, to Senate Military Affairs Comm., *supra* note 132, at 606.

138. *Id.* at 604.

139. *Id.* at 606.

140. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1210 (Boston, Hilliard, Gray & Co. 1833).

141. Debates of the Virginia Convention (June 14, 1788), *supra* note 41, at 1272, 1274 (statement of James Madison); *see also infra* note 423 (collecting authorities on the veto issue).

under the ultimate command of the president. When they are not in federal service, however, the militia reports to its respective states.

### 3. May States Deprive Their Citizens of the Right to Keep and Bear Arms?

The dual nature of the militia also matters for purposes of federal preemption of state gun control laws. Even absent the incorporation of the Second Amendment against the states, state governments cannot interfere with the federal power to call forth the militia, as the Supreme Court explained in *Presser v. Illinois*.<sup>142</sup> In that case, the Supreme Court affirmed convictions for parading in a city with arms and organizing as a private military company. Presser claimed, on appeal, that those laws violated the right to keep and bear arms and federal militia law. The Court, in explaining the limits of its decision, held that its decision only applied to two narrow sections of Illinois law that prohibited parading as a group with arms and associating as private military companies. Although, in this pre-incorporation decision,<sup>143</sup> the Court held that the Second Amendment did not apply to the states, the Court noted:

It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and, in view of this prerogative of the general government, as well as of its general powers, the States cannot, even laying the constitutional provision in question [i.e., the Second Amendment] out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.<sup>144</sup>

In other words, even if the Second Amendment had not been incorporated, the states would still lack authority to deprive citizens of their arms. Whatever concurrent authority the states possess to regulate the militia of that state, the states cannot exercise that authority in a way that impairs the ability of the national government to call forth the militia. A state law that broadly deprived citizens of their arms would do just that: impair the militia by making it impossible for citizens to train or to muster for military service at the call of the federal government during national emergencies.

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142. 116 U.S. 252 (1886).

143. *McDonald v. City of Chicago* subsequently applied the Second Amendment to the states. 561 U.S. 742 (2010).

144. *Presser*, 116 U.S. at 265.

*D. Military Checks and Balances*

In providing for a robust series of military checks and balances, the Framers paid excruciating detail to the possible combinations of private and state-sponsored violence. The Framers provided for protection against private mobs, insurrections against state or federal governments, foreign invasions, state oppression, violence between state governments, and federal oppression.<sup>145</sup>

Part of these reciprocal checks comprised duties of the federal government to the states and their inhabitants. To protect against abuses by state governments, the federal government had the duty to “guarantee . . . a Republican Form of Government” and to protect each state against “Invasion,” by which the Framers meant not just invasions by foreign powers, but also invasions by other states.<sup>146</sup> The Constitution also gave the federal government the direct power to call forth the militia to enforce federal law, suppress insurrections, and repel foreign invasions without the need to work through state governments.<sup>147</sup>

In addition to carefully guarding against abuse by state governments and lawless mobs, the Framers were concerned about oppression by federal officials. To prevent the president’s use of the armed forces for oppression, the Framers provided some horizontal checks on executive power. While the president is commander in chief, only Congress can raise an army, provide or maintain a navy, declare war, regulate the armed forces, or provide for calling out the militia.<sup>148</sup> This horizontal division of power has been the subject of lengthy scholarly discussion, and I will not delve further into this topic until Part IV.<sup>149</sup>

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145. On the checks being reciprocal, see, for example, THE FEDERALIST NO. 28, *supra* note 24, at 181 (Alexander Hamilton) (“Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government.”).

146. U.S. CONST. art. IV, § 4; *see also* Debates of the Virginia Convention (June 16, 1788), *supra* note 93, at 1311–12 (statement of James Madison) (“The word *invasion* here, after power had been given in the former clause to repel *invasions*, may be thought tautologous, but it has a different meaning from the other. This clause speaks of a particular State. It means that it shall be protected from invasion by other States.”). In the Federalist Papers, Madison says that the Article IV guarantee applies to both foreign invasions and to invasions by other states. THE FEDERALIST NO. 43, *supra* note 24, at 275–76 (James Madison) (“The latitude of the expression here used seems to secure each State not only against foreign hostility, but against ambitious or vindictive enterprises of its more powerful neighbors.”).

147. U.S. CONST. art. I, § 8, cl. 15.

148. HUNTINGTON, *supra* note 27, at 168–69.

149. *See, e.g., id.* at 177–84, 400–27; Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005) (presenting a framework for interpreting the 2001 Authorization for the Use of Military Force); Jonathan Turley, *The*

But the Constitution also provided *vertical* checks on military power.<sup>150</sup> The militia—the bulk of the people capable of bearing arms—were to be led by officers appointed by the states, not the federal government. The states, not the federal government, were to train and govern the militia, except when in the actual service of the United States (though the states had the obligation to follow Congress’s policy judgments on these matters). And after the ratification of the Bill of Rights, Congress lost any power to deprive citizens of their right to keep and bear arms.<sup>151</sup>

Thus, while the armies and navy of the United States remained exclusively in national control, control over the militia was divided between the national and state governments. The federal government could use the militia to enforce the laws, suppress insurrections, and repel invasions. In preparation for national defense, it could provide for the militia’s organization, arming, and disciplining, and it could govern the militia when it was called to federal service. Beyond setting national defense policy and having access to the full military power in times of emergency, the federal government did not govern the bulk of citizens capable of bearing arms. The militia, thus separated from the professional services and with a distinct officer staff not beholden to federal officials, could serve as a check on the illegal use of federal military power.<sup>152</sup>

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To ensure an adequate check on federal power by the state governments, the Framers placed several safeguards in the Constitution. They separated the “Armies” and the “Militia,” and placed limitations on the federal government’s power over the militia. Among these limitations, they required the federal and state governments to share control over the militia, and they insulated the militia officer corps from direct federal supervision in peacetime. Today, all of these checks have been dismantled.

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*Military Pocket Republic*, 97 NW. U. L. REV. 1, 40–47 (2002) (describing textualist and intentionalist rationales for a distinct military government); John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639 (2002) (articulating a flexible approach to presidential war powers).

150. HUNTINGTON, *supra* note 27, at 168–69.

151. U.S. CONST. amend. II.

152. See THE FEDERALIST NO. 46, *supra* note 24, at 299 (James Madison) (“[T]he existence of subordinate governments, to which the people are attached and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.”).

## II. EXPANDING FEDERAL MILITARY POWER BY COLLAPSING THE DISTINCTION BETWEEN THE ARMY AND THE MILITIA

The first way in which the federal government has gained control over the militia is by collapsing the organized militia into the national army through the National Guard system. In this Part, I will make two claims. First, dual enlistment is unconstitutional because the army reserve is unconstitutional. The U.S. Army Reserve is an organized militia—not an army—and is therefore subject to the Militia Clauses. Second, the present system of dual enlistment of militia officers violates the constitutional requirement that the states appoint militia officers. Before delving into these arguments, however, I will briefly lay out the present militia system.

### *A. The National Guard: Part Militia and Part U.S. Army Reserve*

Congress has passed two major militia acts. The first such act was the Militia Act of 1792, which required all free able-bodied white male citizens between eighteen and forty-five years of age to enroll in the militia.<sup>153</sup> That law required militiamen to obtain certain weapons and authorized the president to call forth the militia for its constitutional purposes. Congress reenacted the law in 1795 with slight changes.<sup>154</sup> Congress bolstered the president's original authority with the Insurrection Act of 1807,<sup>155</sup> the Suppression of the Rebellion Act of 1861,<sup>156</sup> and the Ku Klux Klan Act of 1871,<sup>157</sup> which gave the president the authority to use either the militia or the armed forces to enforce federal authority and to prevent interference with state or federal law. Versions of these laws remain as federal law today.<sup>158</sup>

Although early Congresses attempted to provide for a universal militia system, the militia performed badly in the War of 1812, and any attempt to maintain a universal militia mostly died thereafter.<sup>159</sup> The

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153. The Militia Act of 1792 comprises two separate laws. *See* Act of May 8, 1792, ch. 33, 1 Stat. 271 (organizing the militia) (repealed 1903); Act of May 2, 1792, ch. 28, 1 Stat. 264 (repealed 1795) (giving the president authority to call forth the militia).

154. Militia Act of 1795, ch. 36, 1 Stat. 424. Among the changes was eliminating the requirement that a judicial officer certify the need to call out the militia before the president could use the militia to enforce the laws.

155. Insurrection Act of 1807, ch. 39, 2 Stat. 443.

156. Suppression of the Rebellion Act of 1861, ch. 25, 12 Stat. 281.

157. Ku Klux Klan Act of 1871, ch. 22, §§ 3–4, 17 Stat. 13, 14–15.

158. The current versions of these laws can be found in Title 10, Chapter 13 of the United States Code. *See* 10 U.S.C. §§ 251–255 (2012) (effective Dec. 23, 2016).

159. Frederick Bernays Wiener, *Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 188–93 (1940).

militia played a minor role in the Mexican War, although militia units were a source of federal volunteers for the expanded wartime army.<sup>160</sup> During the Civil War, the federal government began relying on federal conscripts into the regular army in addition to the militia.<sup>161</sup> Congress also expanded enrollment in the militia beyond white citizens.<sup>162</sup> Following the Civil War, however, the militia “virtually ceased to exist” and was replaced with volunteer militia units known as the National Guard.<sup>163</sup> Despite the emergence of the National Guard, the 1792 Militia Act, as amended, remained on the books through the rest of the nineteenth century, long after the Act was obsolete.<sup>164</sup>

In 1903, Congress overhauled the militia system with the Dick Act.<sup>165</sup> That Act declared that all able-bodied male citizens (and residents who intended to become citizens) between the ages of eighteen and forty-five were members of the militia, and it divided the militia into a volunteer, organized component—the National Guard—and a reserve militia. This framework is substantially the same as today’s militia law.<sup>166</sup> The Dick Act also imposed regular training requirements on the National Guard and prescribed qualifications for its officers and enlisted personnel. The Act made federal funds and regular army officers available to help organize and train the militia.

While the Dick Act attempted to modernize the militia, the law did not solve another irritant of early twentieth-century federal policymakers: the unavailability of the militia for overseas duty. The United States maintained only a small standing army, inadequate for its expeditionary campaigns in Cuba, the Philippines, and other foreign places. The Militia Clauses only provided for a defensive force, not a tool to project power around the globe.<sup>167</sup>

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160. JOHN K. MAHON, HISTORY OF THE MILITIA AND THE NATIONAL GUARD 91 (1983); see JERRY COOPER, THE RISE OF THE NATIONAL GUARD: THE EVOLUTION OF THE AMERICAN MILITIA, 1865–1920, at 18–19 (1997).

161. See COOPER, *supra* note 160, at 20–21.

162. Militia Act of 1862, ch. 201, sec. 1, 12 Stat. 597.

163. Wiener, *supra* note 159, at 191; see also JAMES T. CURRIE & RICHARD B. CROSSLAND, TWICE THE CITIZEN: A HISTORY OF THE UNITED STATES ARMY RESERVE, 1908–1995, at 8 (2d ed. 1997) (noting that, by the Mexican War, “few states retained an effective militia system”). The emergence of the National Guard partly had to do with states using the militia to control labor unrest. CURRIE & CROSSLAND, *supra*, at 9.

164. See COOPER, *supra* note 160, at 109.

165. Militia Act of 1903 (Dick Act), ch. 196, 32 Stat. 775.

166. See 10 U.S.C. § 246 (2012).

167. In 1908, Congress authorized the organized militia to serve “either within or without the territory of the United States.” Militia Act of 1908, ch. 204, § 4, 35 Stat. 399, 400. But the Attorney General concluded that the militia could not be used outside the United States except when the Constitution otherwise authorized the federal government to call forth the militia (e.g., repelling invasions). As a result, the president could not use the organized militia as an occupying army. Auth. of President to Send Militia into a Foreign Country, 29 Op. Att’y Gen. 322 (1912).

Congress attempted to escape the constitutional limitations on federal use of the militia with the National Defense Act of 1916.<sup>168</sup> This law contained a forerunner to modern dual enlistment. Section 111 of the Act authorized the president to draft members of the National Guard into the army in times of war.<sup>169</sup> Once drafted, individual Guard members lost their status as militiamen and became federal soldiers until discharged.

This system of drafting Guard members created several problems. First, the draft operated on Guardsmen as individuals, not as units. Consequently, Guard units lost much of their cohesion as their members dispersed into the army. Moreover, when the Guard members were discharged from the army, the National Defense Act did not automatically revert them back to being members of the National Guard.<sup>170</sup>

Congress remedied these issues with the National Defense Act of 1933.<sup>171</sup> That Act required the dual-enlistment system that the National Guard uses today. All officers and enlisted personnel of the National Guard simultaneously enroll in two organizations. First, they enroll in the “National Guard of [a state],” which is the organized militia of that state.<sup>172</sup> Second, they enroll in the “National Guard of the United States,” which is part of the U.S. Army Reserve.<sup>173</sup> The “National Guard [of all the states]” and the “National Guard of the United States,” therefore, have coextensive memberships.<sup>174</sup> Moreover, unlike the 1916 Act, the federal government can federalize entire National Guard units rather than merely drafting the Guard’s membership as individuals. This results in the National Guard having a “dual federal-state status [that] has been described as ‘murky and mystical.’”<sup>175</sup>

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168. National Defense Act of 1916, Pub. L. No. 64-85, 39 Stat. 166.

169. *Id.* § 111, 39 Stat. at 211.

170. *Perpich v. Dep’t of Def.*, 496 U.S. 334, 345 (1990).

171. National Defense Act Amendments of 1933, ch. 87, §§ 5–6, 11, 48 Stat. 153, 155–58.

172. See discussion *supra* note 12 and accompanying text.

173. See discussion *supra* note 12 and accompanying text.

174. In its brief in *Perpich*, the Government contended that the membership of the National Guard and the National Guard of the United States may not be perfectly coextensive. Brief for the Respondents at 4 n.3, *Perpich*, 496 U.S. 334 (No. 89-542), 1990 WL 505675 (asserting that “because no statute requires that all members of the National Guard be members of the [National Guard of the United States] as well, there may be rare instances in which an individual’s membership in the [National Guard of the United States] is terminated, while his membership in the state National Guard is not”). But federal law presently requires the discharge of National Guard members whose federal recognition is withdrawn. See 32 U.S.C. § 322(a)(2) (2012) (enlisted members); 32 U.S.C. § 324(a)(2) (2012) (officers).

175. *In re Sealed Case*, 551 F.3d 1047, 1049 (D.C. Cir. 2009) (quoting *Bowen v. United States*, 49 Fed. Cl. 673, 676 (2001)).

The creation of the “National Guard of the United States” as a component of the U.S. Army Reserve has allowed Congress to use the personnel and equipment of the organized militia for purposes beyond those enumerated in the Constitution’s Militia Clauses. For example, the militia cannot serve in Iraq or Afghanistan; such forces are not enforcing the laws, suppressing insurrections, or repelling invasions—the only purposes for which the Constitution allows the federal government to use the militia.<sup>176</sup> To avoid this constitutional problem, Congress simply changes the militia’s “hat.”<sup>177</sup> Thus, when National Guard units fight in Iraq or Afghanistan, they fight as members of the “National Guard of the United States”—that is, in their capacity as members of the army reserve. When performing state militia duties, they operate as members of the “National Guard of [their state].”

The Supreme Court effectively upheld this scheme in *Perpich v. Department of Defense*. In *Perpich*, President Reagan ordered the National Guard to train in Central America, but the governor of Minnesota objected to having the National Guard train abroad.<sup>178</sup> These “training missions” had become divisive: governors alleged that the President was using the “training missions” to undermine the Sandinista regime in Nicaragua.<sup>179</sup> The Armed Forces Reserve Act of 1952 required a declaration of a national emergency or a governor’s consent before sending the National Guard abroad for training.<sup>180</sup> When governors began objecting to the Central American mission, Congress passed the Montgomery Amendment, which partially repealed the ability of governors to withhold their consent.<sup>181</sup>

*Perpich* upheld the validity of the Montgomery Amendment. Assuming the validity of dual enlistment,<sup>182</sup> the Supreme Court unanimously held that the Guard members were sent for training as soldiers of the “National Guard of the United States,” not as militiamen in the National Guard of Minnesota.<sup>183</sup>

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176. See Auth. of President to Send Militia into a Foreign Country, 29 Op. Att’y Gen. 322 (1912).

177. *Perpich*, 496 U.S. at 348.

178. *Id.* at 336–38.

179. See Carl T. Bogus, *What Does the Second Amendment Restrict? A Collective Rights Analysis*, 18 CONST. COMMENT. 485, 503 (2001) (“[T]he federal government ordered more than 12,000 National Guardsmen for active duty training in Central America . . . . President Reagan wanted to use these exercises to intimidate the Sandinista government in Nicaragua with a show of force and to assist in developing a staging area for a Contra-rebel invasion of Nicaragua.”); see also Monte M.F. Cooper, Notes and Comments, *Perpich v. Department of Defense: Federalism Values and the Militia Clause*, 62 U. COLO. L. REV. 637, 644–45 (1991).

180. *Perpich*, 496 U.S. at 336–37.

181. *Id.*

182. *Id.* at 347.

183. *Id.* at 349–50.

Although the Supreme Court assumed the validity of dual enlistment (because Minnesota did not challenge it), the dual-enlistment system has two constitutional infirmities. First, the U.S. Army Reserve is an organized “militia,” not an “army,” and this federally organized militia does not conform to the requirements of the Militia Clauses. Second, dual enlistment, as applied to militia officers, violates the requirement that state governments appoint militia officers.

### *B. Unconstitutionality of the U.S. Army Reserve*

The U.S. Army did not maintain a part-time citizen-soldier reserve force until the twentieth century. The army reserve was originally created in 1908 to provide medical officers to the army in times of emergency.<sup>184</sup> The 1912 Army Appropriations Act expanded the reserves by lengthening regular army enlistment contracts and having regular soldiers serve three or four years in a reserve status.<sup>185</sup> Significant organization of the reserves came in 1916 when Congress expanded the reserves to have a “Regular Army Reserve” and created the Reserve Officers Training Corps to supply temporary officers in wartime.<sup>186</sup> Following World War I, Congress passed the National Defense Act of 1920, which overhauled the federal army’s structure. The army gained a permanent combat reserve corps of officers and enlisted personnel, and the Act continued the president’s authority to draft National Guard soldiers.<sup>187</sup>

The U.S. Army Reserve has several components, including the Ready Reserve (which itself is broken down into the Selected Reserve, the Individual Ready Reserve, and the Inactive National Guard), the

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184. Act of Apr. 23, 1908, ch. 150, 35 Stat. 66; CURRIE & CROSSLAND, *supra* note 163, at 17.

185. CURRIE & CROSSLAND, *supra* note 163, at 23.

186. National Defense Act of 1916, Pub. L. No. 64-85, §§ 30–55, 39 Stat. 166, 187–97.

187. National Defense Act of 1920, Pub. L. No. 66-242, 41 Stat. 759. The creation of the U.S. Army Reserve had no analogue in historical British military practice. As in the United States, the creation of the British Army Reserve is fairly recent. In 1859, following problems with the Army during the Crimean War, the first volunteer reserve units formed (“the Volunteer Force”); Parliament legislated on the subject with the Army of Reserve Act in 1867, which authorized the creation of reserve forces from the militia and from regular soldiers about to end their enlistment contracts. BARNETT, *supra* note 29, at 296–98. This haphazard militia/reserve system ended with the Territorial and Reserve Forces Act of 1907, which disbanded the historical British militia. Territorial and Reserve Forces Act 1907, 7 Edw. 7 c. 9. The Act incorporated the militia—along with the Volunteer Force and the Yeomanry (which originated as volunteer cavalry regiments)—into the “Territorial Forces,” which became a reserve component of the standing British Army. Thus, until fairly recently, there was no history of reserve forces outside of the militia system in Britain.

Standby Reserve, and the Retired Reserve.<sup>188</sup> The Selected Reserve portion of the Ready Reserve is the active, drilling reserve (“one weekend a month, two weeks a year”).<sup>189</sup> Active members of the “National Guard of the United States” are members of the Selected Reserve.<sup>190</sup> The other reserves are a list of names subject to service upon being mobilized, but not otherwise in an active drilling capacity. My argument here will focus on the active, drilling reserve—the Selected Reserve. The National Guard dual-enlistment system is unconstitutional because the federal government has no constitutional authorization to keep an active, drilling army reserve.

The Constitution gives Congress the power “[t]o raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years.”<sup>191</sup> The Framers rejected every attempt to textually limit the Army Clause, except for requiring appropriations not to extend past two years.<sup>192</sup> Given this history, the constitutionality of the army reserve may seem like an easy case. Why does it matter how much service the federal government requires of its armies? With no textual limits on the Army Clause, the federal government can seek enlistments of one, two, or ten years. Why can it not require forty weekends of service during those one, two, or ten years instead of full-time service?

My answer to this challenge is that although the federal government has plenary authority over its “Armies,” this begs the question. The force at issue still must be part of the “Armies,” as that term is understood by the Constitution. The army reserve is not. Instead, the army reserve is an organized part of the constitutional militia and should therefore be subject to the Militia Clauses.

In several places, the Constitution differentiates between “Armies” and “Militia.”<sup>193</sup> Congress has the power to “raise and support Armies.”<sup>194</sup> It may “make Rules for the Government and Regulation of the land . . . Forces.”<sup>195</sup> The ordinary rules of criminal procedure do not

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188. *See, e.g.*, 10 U.S.C. §§ 10141–10154 (2012) (providing for and defining these categories and their subcategories).

189. 10 U.S.C. § 10143 (2012).

190. *Id.*

191. U.S. CONST. art. I, § 8, cl. 12.

192. *See supra* notes 37, 49–50 and accompanying text.

193. *See* S.T. Ansell, *Legal and Historical Aspects of the Militia*, 26 YALE L.J. 471, 476–77 (1917) (explaining the historical distinction between the two entities). This is not a comprehensive list of every constitutional provision. In addition, the Constitution makes the president commander in chief of the army and commander in chief of the militia—but for the latter, only “when called into actual Service of the United States.” U.S. CONST. art. II, § 2.

194. U.S. CONST. art. I, § 8, cl. 12.

195. *Id.* art. I, § 8, cl. 14.

apply to “cases arising in the land . . . forces.”<sup>196</sup> And States are prohibited from “keep[ing] Troops . . . in time of peace.”<sup>197</sup> In contrast, the federal and state governments share control over the militia.<sup>198</sup> And unlike the land forces, the militia is not subject to military law except “when in actual service in time of War or public danger.”<sup>199</sup> So what distinguishes “Armies,” “Troops,” and “land forces” from the “Militia”?

“Armies” referred to regular troops, which means that Congress’s power to “raise and support Armies” could have equivalently said that Congress has the power to “raise and support regular troops.” “Militia,” in contrast, referred to the entire able-bodied populace that, by law, was callable to military service in emergencies and, outside of those emergencies, was subject (or could be made subject) to periodic military training. *United States v. Miller* correctly summarizes this:

The Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the consent of Congress. The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia—civilians primarily, soldiers on occasion.

The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense. “A body of citizens enrolled for military discipline.”<sup>200</sup>

Framing-era sources confirm this usage. In a long passage, Adam Smith lays this out most clearly in *Wealth of Nations*, in which he differentiates “militia” from “armies”:

In these circumstances, there seem to be but two methods by which the State can make any tolerable provision for the public defence.

It may either, first, by means of a very rigorous police, and in spite of the whole bent of the interest, genius and inclinations of the people, enforce the practice of military exercises, and oblige either all the citizens of the military age, or a certain number of

196. *Id.* amend. V.

197. *Id.* art. I, § 10, cl. 3.

198. *Id.* art. I, § 8, cls. 15–16.

199. *Id.* amend. V.

200. *United States v. Miller*, 307 U.S. 174, 178–79 (1939); *see also* *Burroughs v. Peyton*, 57 Va. 470, 475 (1864) (decided under the Confederate Constitution):

*An army* is a body of men whose business is war: *the militia* a body of men composed of citizens occupied ordinarily in the pursuits of civil life, but organized for discipline and drill, and called into the field for temporary military service when the exigencies of the country require it;

Nelson Lund, *The Past and Future of the Individual’s Right to Arms*, 31 GA. L. REV. 1, 22 (1996) (drawing similar conclusions from the textual evidence); Glenn Harlan Reynolds & Don B. Kates, *The Second Amendment and States’ Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737, 1747 (1995) (same).

them, to join in some measure the trade of a soldier to whatever other trade or profession they may happen to carry on.

Or, secondly, by maintaining and employing a certain number of citizens in the constant practice of military exercises, it may render the trade of a soldier a particular trade, separate and distinct from all others.

If the State has recourse to the first of those two expedients, its military force is said to consist in a militia; if to the second, it is said to consist in a standing army. The practice of military exercises is the sole or principal occupation of the soldiers of a standing army, and the maintenance or pay which the State affords them is the principal and ordinary fund of their subsistence. The practice of military exercises is only the occasional occupation of the soldiers of a militia, and they derive the principal and ordinary fund of their subsistence from some other occupation. In a militia, the character of the laborer, artificer, or tradesman predominates over that of the soldier: in a standing army, that of the soldier predominates over every other character; and in this distinction seems to consist the essential difference between those two different species of military force.<sup>201</sup>

Thus, we see two categories of land forces emerge. There are “armies,” which consist of full-time soldiers. And there are “militia,” which consist of citizens with civilian occupations who are subject to occasional military exercises. There is no third category of “armies subject only to occasional military exercises”—which is what the army reserve purports to be. Just as “bachelors” are “unmarried men,” a “part-time army” is a “militia” by definition.

Framing-era commentary demonstrates that this usage of “army” versus “militia” was widespread, if not universal.<sup>202</sup> The debates at the Constitutional Convention consistently used the terms “army” and “armies” to refer to *regular, professional forces*.<sup>203</sup> So did the Federalist Papers. For example, in speaking of how to man peacetime garrisons, Hamilton stated that they “must either be furnished by occasional detachments from the militia, or by permanent corps in the pay of the government . . . [which] amounts to a standing army.”<sup>204</sup> Other Federalist Papers presupposed that armies constituted regular troops, distinguishing them from the militia, a part-time military force.<sup>205</sup>

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201. 3 SMITH, *supra* note 31, at 53–54. Part of this quotation is cited with approval in *Miller*. See 307 U.S. at 179.

202. “Troops” was used more haphazardly during the Framing. The immediate text following Adam Smith’s quotation above, for example, speaks of militia being organized into a “particular body of troops.” 3 SMITH, *supra* note 31, at 55. Hamilton, in Federalist No. 28, however, uses “troops” to refer to more permanent forces than “militia.” THE FEDERALIST NO. 28, *supra* note 24, at 178–79 (Alexander Hamilton). The Constitution seems to equate “troops” with “regular soldiers.” See U.S. CONST. art. I, § 10, cl. 3.

203. See, e.g., 2 RECORDS, *supra* note 37, at 329 (statement of Elbridge Gerry) (using “troops” to describe those manning the army); *id.* at 617 (statement of Gouverneur Morris) (stating that armies comprise the “military class of citizens”).

204. THE FEDERALIST NO. 24, *supra* note 24, at 161 (Alexander Hamilton).

205. See, e.g., THE FEDERALIST NOS. 9, 16 (Alexander Hamilton), NO. 20 (James Madison) (discussing the British Army); THE FEDERALIST NO. 22 (Alexander Hamilton) (discussing the

The Antifederalist Papers were even more explicit. Richard Henry Lee wrote, “The military forces of a free country may be considered under three general descriptions—1. The militia. 2. the navy—and 3. the regular troops.”<sup>206</sup> Lee explained that “[a] militia, when properly formed, are in fact the people themselves, and render regular troops in a great measure unnecessary.”<sup>207</sup> Consistent with the usage of Adam Smith and Alexander Hamilton, Lee drew a sharp distinction between “militia” and “regular troops.”

Contemporary newspaper accounts also used the term “regular troops” to describe those who man an “army.” In discussing why “the army cannot be employed against [the country’s] liberties,” the Philadelphia *Independent Gazetteer* wrote, “[R]egular troops, who are natives of a country . . . bred in the principles of republican liberty . . . cannot be so generally corrupted . . .”<sup>208</sup> Other examples abound of writers either directly asserting—or clearly assuming—that armies comprise regular troops.<sup>209</sup>

Similarly, other sources maintained the uniform distinction between regular troops and militia. Thomas Jefferson, writing to James Madison on the subject of including a Bill of Rights, wrote, “All facts put in issue before any judicature shall be tried by jury except . . . in cases cognizable before a court martial concerning only the regular officers & souldiers of the U. S. or members of the militia in actual service in time of war or insurrection . . .”<sup>210</sup> Early congressional debates distinguished the terms this way. In a debate over the Militia Act of 1792, Representative John Page stated, “Soldiers, not a militia, must be the proper tools for the Government that wishes to enforce its laws by arms.”<sup>211</sup>

Chief Justice Taney’s unpublished Civil War opinion on conscription also made the point when it stated, “The General

power to raise armies under the Constitution and the Articles of Confederation); THE FEDERALIST NOS. 24, 25 (Alexander Hamilton) (assuming “army” referred to a “regular and disciplined army”); THE FEDERALIST NOS. 26, 29 (Alexander Hamilton), NOS. 41, 46 (James Madison) (making similar assumptions).

206. Letter XVIII (Jan. 25, 1788), *supra* note 115, at 362 (ascribed to Richard Henry Lee).

207. *Id.*

208. Nicholas Collin, *A Foreign Spectator*, PHILA. INDEP. GAZETTEER (Sept. 21, 1787), *reprinted in* COLLEEN A. SHEEHAN, FRIENDS OF THE CONSTITUTION: WRITINGS OF THE “OTHER” FEDERALISTS, 1787-1788, at 44, 50–51 (Colleen A. Sheehan & Gary L. McDowell eds., 1998).

209. *See, e.g.*, Tench Coxe, *An American Citizen IV: On the Federal Government (Oct. 21, 1787)*, *in* 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 27, at 431, 435–36; *Cincinnatus IV: To James Wilson, Esquire*, N.Y.J., Nov. 22, 1787, *reprinted in* 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION DIGITAL EDITION, *supra* note 115, at 186–87.

210. Letter from Thomas Jefferson to James Madison (Aug. 29, 1789), *in* THE ORIGIN OF THE SECOND AMENDMENT, *supra* note 27, at 709, 709.

211. 3 ANNALS OF CONG. 576 (Joseph Gales ed., 1855) (1789).

government has no militia, it has only the Army and Navy—The militia force . . . belongs to the several States and may be called on in the emergencies mentioned to aid the land and naval forces of the United States.”<sup>212</sup> Members of the army are “a body of men separated from the general mass of citizen—subject to a different code of laws liable to be tried by Military Courts.”<sup>213</sup>

One cannot argue that the Framers and their contemporaries had no concept of a part-time voluntary soldier. They did, and the Antifederalists feared them as much as a standing army. Richard Henry Lee continued:

[T]he constitution ought to secure a genuine and guard against a select militia, by providing that the militia . . . include, according to the past and general usage of the states, all men capable of bearing arms; and that all regulations tending to render this general militia useless and defenceless, by establishing select corps of militia, or distinct bodies of military men, not having permanent interests and attachments in the community to be avoided.<sup>214</sup>

In fact, creating something akin to the U.S. Army Reserve was discussed—and rejected—during the Constitutional Convention. In the negotiations over which government would control the militia, George Mason proposed “the idea of a select militia [under exclusive federal authority]. He was led to think that would be in fact as much as the Genl. Govt could advantageously be charged with.”<sup>215</sup> Charles Pinckney and John Langdon thought the plan had some merit; both believed that the distrust of the federal government was unjustified and that difficulties would arise from splitting authority over the militia between the federal and state governments.<sup>216</sup> Oliver Ellsworth, Roger Sherman, and Elbridge Gerry opposed it. Ellsworth thought the plan “would be followed by a ruinous declension of the great body of the Militia.”<sup>217</sup> Sherman argued that the states needed organized military forces because they might have to repel invasions, suppress insurrections, or enforce their laws.<sup>218</sup> And Gerry asserted that the proposal gave too much power to the federal government.<sup>219</sup> Mason’s plan drew both

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212. Roger B. Taney, *Thoughts on the Conscription Law of the United States*, in *THE MILITARY DRAFT: SELECTED READINGS ON CONSCRIPTION* 209, 212 (Martin Anderson ed., 1982).

213. *Id.* at 211.

214. Letter XVIII (Jan. 25, 1788), *supra* note 115, at 362 (ascribed to Richard Henry Lee); *see also* Lund, *supra* note 200, at 22 (stating that the “select militia” was “generally considered [a] perversion[ ] of the true militia”).

215. 2 RECORDS, *supra* note 37, at 331.

216. *Id.*

217. *Id.* at 332. Ellsworth was right: the existence of the army reserve has placed much less emphasis on the federal government’s need to provide for the militia.

218. *Id.*

219. *Id.*

support and resistance.<sup>220</sup> Ultimately, Mason's proposal was sent to the Grand Committee, where it died in favor of the current Militia Clauses.<sup>221</sup> But had the Army Clause encompassed the power to raise part-time soldiers, the response to Mason's proposed federal select militia would have been that Congress already possessed the power to raise part-time soldiers under the Army Clause.<sup>222</sup>

If the term "army" could apply to part-time citizen-soldiers, many of the Framers' arguments about the federal balance of military power would not make any sense. In Federalist No. 46, Madison, responding to concerns about the army becoming a vehicle of oppression, writes:

Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the federal government: still it would not be going too far to say that the State governments with the people on their side would be able to repel the danger. The highest number to which, according to the best computation, a standing army can be carried in any country does not exceed one hundredth part of the whole number of souls; or one twenty-fifth part of the number able to bear arms.<sup>223</sup>

Madison's structural assumptions would be erroneous if the federal government had the power to create an army reserve. First, the federal government would have a rapid way of expanding the regular army without undergoing the significant expense of maintaining it at all times. This cuts against Madison's assumption that the expense of a standing army would be a safeguard against the federal government maintaining a large one—an assumption Hamilton shared.<sup>224</sup>

Second, numerous writings assumed that a well-regulated militia would render a standing army unnecessary.<sup>225</sup> But had eighteenth-century Americans contemplated a reserve force, apart from the militia, this also would have rendered a large proportion of permanent troops unnecessary. Such a force would not have had the expense of a full standing army, but it likely would be better disciplined than the militia generally.

Third, the Framers intended the militia to have the power to check the army. But if the federal government had the power to create military reserves, the federal government could fracture the militia as a counterbalancing force. The federal government would have (1) the regular army on its side and (2) a potentially large body of part-time

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220. *Id.* at 332–33.

221. *Id.* at 333.

222. For Mason's proposal, see *supra* note 215 and accompanying text.

223. THE FEDERALIST NO. 46 (James Madison), *supra* note 24, at 299.

224. THE FEDERALIST NO. 28 (Alexander Hamilton), *supra* note 24, at 178–79.

225. See, e.g., 2 RECORDS, *supra* note 37, at 388 (statement of James Madison); Coxe, *supra* note 209, at 435.

citizen-soldiers that report directly to it, rather than to state officers. The militia would comprise the remainder. Such an arrangement would have run contrary to the understanding of the Framers. As Noah Webster said, “The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretence, raised in the United States.”<sup>226</sup> Recognizing the power to create an army reserve destroys the check that the militia was supposed to provide against the standing army.

Ironically, a federal power to create a military reserve might have allayed some of the contemporary fears over standing armies.<sup>227</sup> Contemporary sentiment feared standing armies largely because armies comprised a class of military citizens, under military law, separate from the population generally. To quote Tench Coxe, being a soldier “is a profession that is liable to dangerous perversion.”<sup>228</sup> A reserve army would not have this problem to the same degree as a permanent force. Reservists would generally partake in the same liberty as other American citizens, except in cases of emergency. Thus, the arguments against a standing army would have taken a different character if the power to “raise and support Armies” included the creation of a part-time auxiliary under exclusive federal control.

Finally, combining the power to conscript with the power to create a reserve would make the constitutional limitations on the militia meaningless. If Congress could compel ordinary citizens to serve as part-time soldiers, this means that Congress could force the population to be available for national emergencies, while having none of the protections of the Militia Clauses. Part-time soldiers would not be governed by local officers, they could be forced to train anywhere in the world, and they could be subjected to military law at any time. These are all powers that were explicitly denied to the federal government at the Constitutional Convention.

One might object that the National Guard differs from the U.S. Army Reserve because the states train the National Guard and appoint the officers,<sup>229</sup> while federal officials train the U.S. Army Reserve and

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226. Noah Webster, *A Citizen of America* (Oct. 10, 1787), reprinted in *THE ORIGIN OF THE SECOND AMENDMENT*, *supra* note 27, at 38, 40.

227. Other fears would have remained, especially if the military reserve force did not involve universal service. See *supra* note 214 and accompanying text.

228. Tench Coxe, *An American Citizen IV* (Oct. 21, 1787), reprinted in *THE ORIGIN OF THE SECOND AMENDMENT*, *supra* note 27, at 54, 55; see also Tench Coxe, *Remarks on the First Part of the Amendments to the Federal Constitution, Moved on the 8th Instant in the House of Representatives*, PHILA. FED. GAZETTE, June 18, 1789, reprinted in *THE ORIGIN OF THE SECOND AMENDMENT*, *supra* note 27, at 670, 671.

229. 32 U.S.C. § 101(4) (2012).

appoint its officers. Under this view, whether an organization is part of the “Armies” or part of the “Militia” depends on whether the force is organized pursuant to the Armies Clause or the Militia Clauses.<sup>230</sup>

But classifying an armed force as an “army” or “militia” in this manner is a mistake because it confuses the *limitations* of the Militia Clauses with *constitutive conditions* for whether the military force is a “militia.” There is no evidence that the Framers understood the difference between “militia” and “armies” to consist in whether, for example, the officers were appointed by the states or the president. Instead, requiring the states to appoint militia officers was a restriction on federal authority over the militia. As David Currie said, “Congress cannot evade constitutional limitations simply by offending them.”<sup>231</sup>

Thus, Congress lacks any constitutional power to create the U.S. Army Reserve. A reserve force, by definition, is a militia. The Constitution requires that the federal government and the states share control of part-time forces and that such forces may only be called into active federal service to enforce the laws, suppress insurrections, or repel invasions. Just as states cannot generally keep regular troops, the federal government cannot maintain a militia vested in the federal government alone.

### *C. Dual Enlistment of Officers*

In Federalist No. 29 and Federalist No. 46, Hamilton and Madison made clear that the militia serves as a counterbalance for the federal army. This federalism-based check on the military powers had three components. First, the people had to form a distinct body from the army. Second, the people had to be armed. Third, the militia required leadership.<sup>232</sup> Only when an armed populace was competently led could it guarantee the “security of the free state.” The Framers sought to provide the militia with independent leadership—militia officers not beholden to the federal government or federal officeholders.

Dual enlistment destroys this independent leadership because a condition of federal recognition of state National Guard units is that officers maintain their national commissions. Since 1933, all officers who are commissioned into the National Guard of a state are

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230. National Guard officers, therefore, have to be commissioned under state law (as part of the organized militia) *and* under federal law (as part of the National Guard of the United States—a part of the U.S. Army Reserve).

231. 1 DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801*, 248 n.88 (1997).

232. See *THE FEDERALIST NO. 46*, *supra* note 24, at 299–300 (James Madison). But not even Madison, who initially drafted the Second Amendment, thought that an armed populace was independently sufficient to guarantee a free country.

simultaneously commissioned into the National Guard of the United States, a reserve component of the U.S. Armed Forces.<sup>233</sup> But only a limited class of people is eligible for federal recognition of their officer status.<sup>234</sup> And federal law allows for federal recognition to be withdrawn,<sup>235</sup> at which point the officer must be discharged by the state.<sup>236</sup> Failure to discharge the officer would place the state at risk to lose appropriations, equipment, and other federal benefits for its National Guard.<sup>237</sup> This dual-enlistment system destroys the separation that the Framers intended between militia officers and the federal government.

Dividing control over the militia received considerable attention during the Constitutional Convention. Everyone recognized that the militia underperformed during and after the Revolution, and incompetent leadership was part of the problem. Edmund Randolph blamed state legislators, whom he thought were too interested in courting popular opinion to impose appropriate militia discipline.<sup>238</sup> Remediating the poor state of militia discipline became a central focus of the Militia Clauses. Two issues received close attention: who would train the militia and who would appoint the officers.<sup>239</sup>

On August 21, 1787, a committee of eleven assigned to debate debts and the militia made the following proposal for congressional power:

To make laws for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the Officers, and the authority of training the militia according to the discipline prescribed by the United States.<sup>240</sup>

Debate on this proposal occurred on August 23, and a consensus emerged in its favor. The consensus was a compromise over several competing necessities: remediating the poor performance of the militia, having interoperability of the militia from different states when called into national service, the political reality that states would not give up total control over the militia, and the fact that the states may occasionally need their militia forces for internal security.<sup>241</sup>

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233. National Guard Act of 1933, ch. 87, §§ 5–6, 11, 48 Stat. 153, 155–58.

234. 32 U.S.C. §§ 305–10 (2012).

235. 32 U.S.C. § 323 (2012).

236. 32 U.S.C. § 324(a)(2) (2012).

237. See 32 U.S.C. § 108 (2012) (“If . . . a State fails to comply with a requirement of this title . . . the National Guard of that State is barred, in whole or in part, as the President may prescribe, from receiving money or any other aid, benefit, or privilege authorized by law.”).

238. See 2 RECORDS, *supra* note 37, at 387.

239. See *id.* at 330–33, 384–89.

240. *Id.* at 352.

241. See *id.* at 385–87.

The proposal nationalized control over basic defense policy. The federal government would determine how much training the militia would have, what weapons the militiamen would possess, and how the militia would be organized. But that is as far toward nationalization as the Constitutional Convention was willing to go. As I described above,<sup>242</sup> reserving to the states the appointment of officers was not up for serious discussion; the Convention even beat back Madison's modest proposal to allow the federal government to appoint the generals. Immediately after rejecting Madison's proposal, the Convention passed the proposal to reserve to the states the appointment of officers without dissent.<sup>243</sup> Before the vote, Randolph noted, "Leaving the appointment of officers to the States protects the people [against] every apprehension that could produce murmur."<sup>244</sup>

During the debates over ratification of the Constitution, the Federalists—including (ironically) Madison—emphasized the reservation of the appointment power to the states as a bulwark against federal tyranny. Three separate times in Federalist No. 46, Madison asserted that any attempt by the federal army to effect national oppression would fail, in part, because an armed populace would be led by militia officers who would have their loyalty to the local population and state government. Madison wrote:

[1] [Against a regular army] would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence. . . . [2] Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of. . . . [3] [Besides being armed] were the [European] people to possess the additional advantages of local governments chosen by themselves, who could collect the national will and direct the national force, and of officers appointed out of the militia by these governments and attached both to them and to the militia, it may be affirmed with the greatest assurance, that the throne of every tyranny in Europe would be speedily overturned in spite of the legions which surround it.<sup>245</sup>

Even Hamilton—who was in the minority by advocating for standing armies and select militias—likewise argued that the state appointment of militia officers should allay concerns over transferring to the federal government significant authority over the militia. He asked:

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242. See *supra* note 81 and accompanying text.

243. 2 RECORDS, *supra* note 37, at 388.

244. *Id.* at 387.

245. THE FEDERALIST NO. 46, *supra* note 24, at 299–300 (James Madison).

What reasonable cause of apprehension can be inferred from a power in the Union to prescribe regulations for the militia and to command its services when necessary, while the particular States are to have the *sole and exclusive appointment of the officers*? If it were possible seriously to indulge a jealousy of the militia upon any conceivable establishment under the federal government, the circumstance of the officers being in the appointment of the States ought at once to extinguish it. There can be no doubt that this circumstance will always secure to them a preponderating influence over the militia.<sup>246</sup>

Although much of the Militia Power (like the Constitution's Elections Clause) has substantial areas where the federal government may require states to carry out federal mandates, the actual appointment of militia officers is not part of this concurrent authority. The Framers textually committed this power exclusively to state governments to provide for a second chain of command within the military forces. One military chain (the professional services) was beholden exclusively to the national government and national political leaders. The other chain (citizen-soldiers) owed its primary allegiance to the states and their local populace. This would help, first, to avoid national oppression (the prophylactic purpose). National political leaders would not command the personal loyalties of all military officers because they had no role in appointing militia officers. As a result, the authority of national leaders over the militia and militia officers would derive from the legitimacy of these political leaders' actions; it could not come from some sense of personal obligation that militia officers felt toward the national leaders who appointed them. And second, in the unlikely event national oppression did occur, militia officers would lead the militia against these federal officers (the remedial purpose). This would not be possible without providing some separation between militia officers and federal political leaders.

While it is true that the current National Guard system leaves the technical appointment of officers to state governments, the reservation of this formality does not satisfy the Militia Officer Clause. Through dual enlistment, the federal government has required the states to cede de facto control of their militia officer corps to the national government. Dual enlistment allows the federal government to federalize any militia officer at any time for any reason by simply exercising the Army Power.<sup>247</sup> And states lack any power to prevent their militia officers from being used for nonmilitia federal duties.<sup>248</sup> Thus, by requiring National Guard officers to maintain a simultaneous

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246. THE FEDERALIST NO. 29, *supra* note 24, at 186 (Alexander Hamilton).

247. See *Perpich v. Dep't of Def.*, 496 U.S. 334, 347–49 (1990) (stating that the congressional power to call forth the militia as a national army arises under the general Army Power of Congress).

248. See *id.* (holding that the governor of Minnesota could not prevent Congress from calling forth the National Guard for national purposes).

federal commission, the federal government has evaded its constitutional obligation to leave militia officers available for state duty outside the limited federalization authorized by the Militia Clauses.

The dual-enlistment system also violates the Militia Officer Clause by transferring effective control over the discharge of militia officers to the federal government. On penalty of losing federal funds, states must discharge any militia officer who loses his federal recognition.<sup>249</sup> Yet, in *Myers v. United States*, the Supreme Court recognized that “[t]he power of removal is incident to the power of appointment.”<sup>250</sup> And in *Bowsher v. Synar*, the Court held that “Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment” because “in practical terms, [it would] reserve in Congress control over the execution of the laws.”<sup>251</sup> Quoting the district court in *Bowsher*, the Supreme Court explained that “[o]nce an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey.”<sup>252</sup> Under the current National Guard system, the federal government has de facto independent removal power of militia officers, including those not in active federal service. Militia officers, thus, must “fear” and “obey” federal military and civilian executive officials, even when they are not in performance of federal functions. This is exactly the result the Framers sought to avoid when (to quote Hamilton) they committed to the states the “sole and exclusive appointment of the officers.”<sup>253</sup>

One might object that federal law does not *require* a state to maintain federal recognition. Federal recognition is merely a condition of receiving federal funds and equipment, to which states are not legally entitled. State governments may accept the federal funds—which curtails their authority over state officers—or they may decline the funds and exercise their power to the constitutional limit. In this sense, the dual-enlistment system is analogous to the National Minimum Drinking Age Act at issue in *South Dakota v. Dole*; that law required states to set twenty-one as the age to purchase or publicly possess alcohol, or they would lose five percent of their highway funds.<sup>254</sup>

The Court in *Dole* articulated four restrictions on Congress’s Spending Power. First, the spending must be “in pursuit of ‘the general

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249. 32 U.S.C. § 324(a)(2) (2012).

250. 272 U.S. 52, 122 (1926).

251. 478 U.S. 714, 726 (1986).

252. *Id.* (quoting *Synar v. United States*, 626 F. Supp. 1374, 1401 (D.D.C. 1986)).

253. THE FEDERALIST NO. 29, *supra* note 24, at 186 (Alexander Hamilton) (emphasis omitted).

254. 483 U.S. 203, 205 (1987).

welfare’ ” (or, in this case, “for the common defense”).<sup>255</sup> Second, the restriction must be unambiguous and, third, related to the federal program at issue.<sup>256</sup> Fourth, the spending condition may not run afoul of other constitutional provisions that may “provide an independent bar.”<sup>257</sup> The first three are not in serious consideration. Restricting National Guard funding to federally recognized units is in pursuit of the common defense, the restriction is unambiguous, and it is clearly related to providing more efficient, better trained military forces. The only question, then, is whether there is an independent constitutional bar.

My argument is that the Militia Officer Clause serves as that independent constitutional bar. Structural considerations may imply some restrictions on conditional federal funding, whether those conditions are coercive or not.<sup>258</sup> For example, Congress could not “condition federal funding to any degree on state authorities that themselves check or control federal authority, most notably state authority to select federal presidential electors or send two Senators to Congress.”<sup>259</sup> The Militia Officer Clause is a similar kind of provision. This reservation of state authority encompasses more than formally extending officers’ commissions. It also implies having an effective choice as to which officers are selected and the power to decide whether those officers should be removed. The Framers intended the states to have the ability to make meaningful officer choices, apart from federal interference, to ensure the loyalty of militia officers to state governments and the people.

Apart from these structural limitations on conditional federal funds, one could also object that granting the president power to withhold some or all federal funds from states that do not appoint and discharge militia officers as directed by federal authorities is unconstitutionally coercive.<sup>260</sup> As Lynn Baker has explained, when states turn down federal conditional spending, “[t]here is no competitor

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255. *Id.* at 207 (quoting *Helverig v. Davis*, 301 U.S. 619, 640–41 (1937)). Because the Constitution grants Congress explicit power over the militia, militia spending does not implicate the debate between Hamilton and Madison over the scope of the Spending Clause. Even under the more restrictive Madisonian view, Congress has power to appropriate money for the militia. My thanks to Nelson Lund for raising this point.

256. *Dole*, 483 U.S. at 207.

257. *Id.* at 208.

258. See Zachary S. Price, *Funding Restrictions and Separation of Powers*, 71 VAND. L. REV. 357, 400 (2018).

259. *Id.* (footnotes omitted).

260. See Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 580–85 (2012) (discussing whether congressional financial inducement qualifies as “so coercive as to pass the point at which pressure turns into compulsion”).

to the federal government to which these states might turn for substitute financial assistance”; and the states’ power to tax directly is limited to “the income and property remaining to their residents and property owners after the federal government has taken its yearly share [of taxes].”<sup>261</sup> The federal military budget approaches \$700 billion.<sup>262</sup> States likely could not impose sufficient taxes on their population to maintain independent militia forces if they forewent all or most federal funds. States likely have no choice but to accept the National Guard system and thereby cede control over their militia officers to the federal government.

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The federal government very much still relies on the militia system. We no longer call these forces “militia”; they are organized under names like “National Guard” and “U.S. Army Reserve.”<sup>263</sup> And the militia no longer serves as a check on the national army; it has been consolidated into the army. The Supreme Court has allowed the federal government to concentrate all of the national military forces in one government, a result the Framers strived to avoid.

### III. SWALLOWING THE MILITIA WHOLE

The Constitution gave Congress the power to raise an army. And the Constitution gave Congress the power to compel military service. This Part asks whether Congress can combine the two: May Congress compel military service in the army? I argue that Congress may not.

Although obligatory military service is as old as civilization, conscription into a national, professional army has a shorter historical pedigree. Historians treat Napoleonic France’s *levée en masse*, which began in 1793, as the beginning of national conscription.<sup>264</sup> The recent

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261. Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1936–37 (1995) (footnotes omitted).

262. Office of the Under Sec’y of Def. (Comptroller), *National Defense Budget Estimates for FY 2020*, DEP’T DEF. 1 (May 2019), [https://comptroller.defense.gov/Portals/45/Documents/defbudget/fy2020/FY20\\_Green\\_Book.pdf](https://comptroller.defense.gov/Portals/45/Documents/defbudget/fy2020/FY20_Green_Book.pdf) [<https://perma.cc/RW9W-UC4V>].

263. The present system is not unlike the trained bands of the Elizabethan era, which had a smaller organized force and a larger class of general citizens that, while largely going untrained, were nevertheless subject to military service. See BARNETT, *supra* note 29, at 34–35 (describing the system).

264. See AKHIL AMAR, *AMERICA’S UNWRITTEN CONSTITUTION* 90–91 (2012) (“In 1793, the world witnessed the first modern national draft—Revolutionary France’s *levee en masse*.”); Forrest Revere Black, *The Selective Draft Cases—A Judicial Milepost on the Road to Absolutism*, 11 B.U. L. REV. 37, 43 (1931); Harrop A. Freeman, *The Constitutionality of Peacetime Conscription*, 31 VA. L. REV. 40, 68 (1945).

origin of conscription should not come as a surprise. National armies require a strong central government to organize and maintain them.<sup>265</sup> Even today, in places where the central government is weak, local militia generally prevail over national armies.<sup>266</sup>

Historically, in England and in this country, the strength of the central government has determined whether the government has relied on armies or a militia. The early English militia was an organization bred from necessity, not from a philosophical preference for the militia. The central government was weak and could not afford to field an army in sufficient numbers.<sup>267</sup> The militia was inexpensive for the Crown: besides the fact that the militia members bought their own weapons, “only the Muster-Master in each county was a paid crown officer.”<sup>268</sup> The Assize of Arms, which reorganized the militia after the Norman Conquest, required English subjects to purchase military weapons and report for occasional military service.<sup>269</sup> The American militia system had similar roots, forming long before a strong central government would have enough power to raise an army.<sup>270</sup>

As explained in Part I, the Constitution organizes the American military into three bodies of forces. The federal government has plenary control over the professional services—the armies and navy—and with a few minor exceptions, the states have no role to play. The militia, in contrast, is organized by state with separate chains of command. The

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265. See, e.g., HUNTINGTON, *supra* note 27, at 32–33 (explaining that the professionalization of the military occurred with the development of the nation-state).

266. For a study on this phenomenon, see Ariel I. Ahran, *The Origins and Persistence of State-sponsored Militias: Path Dependent Processes in Third World Military Development*, 34 J. STRATEGIC STUD. 531 (2011).

267. BARNETT, *supra* note 29, at 36.

268. *Id.*

269. Assize of Arms 1181, 27 Hen. 2, §§ 1–2 (Eng.); see MAITLAND, *supra* note 32, at 162. For example, a person who had a knight's fee or a free man who had chattels or rents to the value of sixteen marks was required to obtain chainmail, a helmet, a sword, and a shield, whereas those free men who had property to the value of only ten marks had to possess a hauberk, iron cap, and a sword. Assize of Arms 1181, 27 Hen. 2. The Statute of Winchester, in 1285, updated the kinds of weapons militiamen were required to have, again regulated by their means: the statute divided the populace into five income groups and required universal service between ages sixteen and sixty. Statute of Winchester 1285, 13 Edw. c. 6 (Eng.); see MAITLAND, *supra* note 32, at 276. A later statute, during the reign of Philip and Mary, divided the country into ten classes. BARNETT, *supra* note 29, at 23.

270. WEIGLEY, *supra* note 41, at 4:

The American colonies in the seventeenth century were much too poor to permit a class of able-bodied men to devote themselves solely to war and preparation for war. Every colonist had to contribute all the energy he could to the economic survival of his colony, and no colony could afford to maintain professional soldiers.

Before the Revolution, the colonists' reliance on the militia would wax and wane depending on the colonies' defense needs and the volunteer manpower available. See LAWRENCE DELBERT CRESS, *CITIZENS IN ARMS: THE ARMY AND MILITIA IN AMERICAN SOCIETY TO THE WAR OF 1812*, at 5–8, 45–46 (1982).

federal government sets militia policy, and in emergencies, the federal government directly commands these forces, along with the professional army and navy. But outside these emergencies, the professional and nonprofessional services can serve as checks on each other.

The final major blow to the federalism-based check on federal power occurred when the federal government assumed the power to draft into the regular army. The power to conscript soldiers destroyed the separation between “militia” and “army.” In this Part, I will make two arguments. First, although I acknowledge that it is a close constitutional question, the power to use conscription to raise armies runs afoul of structural limitations on the federal government’s use of its power to raise armies, as those limitations were understood. Second, to the extent that a power of conscription is recognized at all, that power extends only to a draft into the regular army. The federal government has no power to draft into the army reserve.

#### *A. The Unconstitutionality of Conscription into the National Army*

Let me begin by providing the strongest argument in favor of conscription’s constitutionality. The Constitution provides that the Congress shall have the power “[t]o raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years.”<sup>271</sup> The text states nothing about how the armies are to be raised. Consequently, read in total isolation (and, a fortiori, in conjunction with the Necessary and Proper Clause), the provision appears to support either voluntary enlistment or a draft.

Debates during and after the Constitutional Convention give some meat to this argument: proposals to limit the Army Power were rejected consistently, including some with purely cautionary language.<sup>272</sup> The Constitutional Convention only passed two amendments to the power to “raise Armies.” One amendment added “support” after the power to “raise”—which expanded the Army Power.<sup>273</sup> The only amendment cabining the Army Power was the limitation that Congress could not appropriate funds for armies for more than two years.<sup>274</sup> After the state ratifying conventions, as

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271. U.S. CONST. art. I, § 8, cl. 12.

272. See 2 RECORDS, *supra* note 37, at 616–17 (rejecting George Mason’s attempt to inscribe in the Militia Clause “and that the liberties of the people may be better secured against the danger of standing armies in time of peace”).

273. *Id.* at 323.

274. *Id.* at 505. Elbridge Gerry unsuccessfully proposed limiting the number of men, while Charles Pinckney introduced language to prohibit keeping troops in time of peace except with the

proposals for the Bill of Rights were discussed, none of the proposals to limit the army (e.g., by requiring a supermajority of Congress) or to declare the army “dangerous to liberty” passed.<sup>275</sup>

Moreover, the contemporary commentary also discussed the breadth of this power. Speaking of the military powers (including the Army Power), Hamilton, in Federalist No. 23, wrote:

These powers ought to exist without limitation, because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. . . . [T]here can be no limitation of that authority which is to provide for the defense and protection of the community in any matter essential to its efficacy—that is, in any matter essential to the formation, direction, or support of the NATIONAL FORCES.<sup>276</sup>

One commentator, discussing Hamilton’s writing and the refusal of the Convention and Congress to limit the Army Power, has said that the limitations on the Army Power are procedural, not substantive.<sup>277</sup> Unlike the seventeenth-century Crown in England, the Constitution does not permit the executive to raise armies sua sponte; only Congress can do this.<sup>278</sup> Standing armies without Congress’s consent, therefore, are impossible.

The Supreme Court used a textual and selectively historical reading of the Army Power when it first upheld Congress’s power to conscript in the *Selective Draft Law Cases*.<sup>279</sup> During World War I, Congress passed an act authorizing the draft, only the second conscription act in U.S. history.<sup>280</sup> The appellants in these cases were convicted of refusing to register for the draft.<sup>281</sup> In defense, they argued, inter alia, that Congress lacked the power to institute a draft and that the power to draft interfered with operation of the Militia Clauses.<sup>282</sup>

legislature’s consent and limiting the appropriations for “military [l]and forces” for one year. *See id.* at 323 (stating that a proposed amendment to limit the number of men was unsuccessful); *id.* at 329 (discussing the Pinckney proposal); *id.* at 341 (“No grants of money shall be made by the Legislature for supporting military Land forces, for more than one year at a time.”).

275. *See supra* note 49 and accompanying text.

276. THE FEDERALIST NO. 23, *supra* note 24, at 153–54 (Alexander Hamilton).

277. Michael J. Malbin, *Conscription, the Constitution, and the Framers: An Historical Analysis*, 40 *FORDHAM L. REV.* 805, 814 (1972).

278. U.S. CONST. art. I, § 8, cl. 11; *id.* art. II.

279. *Arver v. United States (Selective Draft Law Cases)*, 245 U.S. 366, 376–78 (1918).

280. An Act to Authorize the President to Increase Temporarily the Military Establishment of the United States, Pub. L. No. 65-12, 40 Stat. 76. The first conscription act was passed by Congress during the Civil War and is discussed below since its validity was never ruled on by the federal courts. *See An Act for Enrolling and Calling Out the National Forces, and for Other Purposes*, ch. 75, 12 Stat. 731 (1863).

281. *Arver*, 245 U.S. at 376.

282. *Id.* at 376–77.

The Court unanimously—and somewhat perfunctorily—rejected these arguments. First, the Court argued that the Army Power would be useless if Congress could not compel military service.<sup>283</sup> Since an army must comprise soldiers, the Court argued, an Army Power that depended on citizens voluntarily enlisting for military service would be useless because citizens could nullify the Army Power by withholding their consent to enlist.<sup>284</sup> An Army Power that did not include the power to conscript would reduce the government to something less than a true sovereign, for the exercise of power sometimes requires compulsion.<sup>285</sup>

The Court then provided some historical and textual reasons to support Congress's power to conscript. The Court discussed briefly some history of required military service in Anglo-American law, from before the Norman Conquest to the American colonies.<sup>286</sup> (It is important to note that the Court ignores that these statutes regulated military service *in the militia*, not in the professional, standing army.) Textually, the Court noted that the Militia Power is separate from the Army Power.<sup>287</sup> According to the Court, the Militia Power grants additional authority to Congress to regulate military forces, but the Militia Power is not a limitation on the Army Power.<sup>288</sup> Thus, the Court held that Congress's exertion of the Army Power did not impede the Militia Power, despite Congress having drafted most of the militia into the federal army.<sup>289</sup>

The Court then bolstered its historical argument. It noted that President Madison and his Secretary of War James Monroe proposed a federal draft for the War of 1812. The Court did not seriously consider the opposition to the draft in 1812, saying that it “substantially rested upon the incompatibility of compulsory military service with free government” rather than on constitutional objections.<sup>290</sup> Finally, the Court examined the Civil War precedent.<sup>291</sup> It referenced that President Lincoln successfully instituted a draft in 1863, which was affirmed by the Pennsylvania Supreme Court in *Kneedler v. Lane*,<sup>292</sup> and that Confederate courts had likewise upheld the Confederate draft under their analogous constitutional provisions.<sup>293</sup>

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283. *Id.* at 377.

284. *Id.* at 377–78.

285. *Id.* at 378.

286. *Id.* at 378–79.

287. *Id.* at 382.

288. *Id.* at 382–84.

289. *Id.* at 377–78.

290. *Id.* at 385.

291. *Id.* at 386–88.

292. 45 Pa. 238 (1863).

293. *Arver*, 245 U.S. at 386.

The Court's first argument—that the Army Power would be useless without conscription—is quite weak. As Leon Friedman previously argued, the “necessity argument” could be applied to any federal power: the post office, the mint, even the federal judiciary.<sup>294</sup> But the need of a federal entity to have individuals to populate it does not imply that Congress possesses the power to compel individuals to serve in that entity.<sup>295</sup> For example, Congress is not thought to possess the power to draft postal carriers or federal judges.<sup>296</sup> The power to provide for a postal service most naturally confers on the federal government the authority to employ persons as postal carriers to transmit the mail. The government populates the post office by participating in the labor market and offering sufficient wages to attract postal employees. Similarly, the Army Power authorizes the federal government to raise an army by voluntary enlistment, which is the manner in which armies had theretofore been raised. Nor is this a trivial conferral of power, for the federal government arguably lacked any power to enlist professional soldiers in peacetime under the Articles of Confederation.

Moreover, the textual argument appears weaker when one looks across constitutional text, rather than just at the Army and Militia Clauses in isolation. The Fifth Amendment begins, “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . .”<sup>297</sup> Here, the Framers clearly differentiated the professional forces and the militia. The professional services are always subject to military law, whether or not they are in active service; a member of the army can be court-martialed for activities that occur off-duty with no nexus to his service.<sup>298</sup> But the authority over the militia is different: the government can only apply military law “when in actual service in time of War or public danger.”<sup>299</sup> This limitation on federal power over the militia resulted from the Framers' desire to secure against a potential loophole in constitutional criminal procedure rights. Because the militia encompasses all able-bodied men who are members of the political community, generally

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294. See Leon Friedman, *Conscription and the Constitution: The Original Understanding*, 67 MICH. L. REV. 1493, 1497–98 (1969).

295. *Id.*

296. See *id.* (“No one ever suggested before the *Arver* case that any other enumerated power included authority to compel service in the governmental organization involved.”).

297. U.S. CONST. amend V.

298. See *Solorio v. United States*, 483 U.S. 435, 436, 450–51 (1987).

299. U.S. CONST. amend V.

exempting the militia would have allowed the federal government to subject most of the political community to military law at all times. Men would only have had ordinary criminal procedure rights when they were infants or well within middle age.<sup>300</sup> The Fifth Amendment exemption was thus not a federalism provision that divided when state forces would be subject to federal discipline. Quite the contrary, it was a personal right to secure American able-bodied men against being subjected to federal military law, except when performing federal military duties. Recognizing a broad power to conscript undermines this protection.<sup>301</sup>

Interpreting the Army Clause as encompassing the power to conscript also unwinds the protection of the original Militia Clauses. Congress may call forth the militia only “to execute the Laws of the Union, suppress Insurrections and repel Invasions.”<sup>302</sup> And the Training Clause reserves to the states “the Authority of training the Militia according to the discipline prescribed by Congress.”<sup>303</sup> These constitutional limitations, which are similar to British limitations on the militia, protected American citizens from burdensome travel for military purposes, except in cases of national emergency.<sup>304</sup> Without

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300. See, e.g., Maryland Ratifying Convention, *supra* note 49, at 734 (remarking that “all other provisions in favor of the rights of men would be vain and nugatory, if the power of subjecting all men, able to bear arms, to martial law at any moment should remain vested in Congress”); Luther Martin, *Address No. 1*, MD. J., Mar. 18, 1788, in 11 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION DIGITAL EDITION, *supra* note 115, at 397, 401 (cautioning against federal militia conscription by likening conscription “contrary to the will of the state” to “martial law” and slavery); *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents*, PHILA. PACKET & DAILY ADVERTISER, Dec. 18, 1787, reprinted in 3 THE COMPLETE ANTI-FEDERALIST 145, 164, 201, 220 (Herbert J. Storing ed., 1981) (“The personal liberty of every man, probably from sixteen to sixty years of age, may be destroyed by the power Congress ha[s] in [the] organizing and governing of the militia.”); Foreign Spectator, *Remarks on the Amendments to the Federal Constitution, Proposed by the Conventions of Massachusetts, New-Hampshire, New-York, Virginia, South and North-Caroline, with the Minorities of Pennsylvania and Maryland, by a Foreign Spectator: Number VIII*, PHILA. FED. GAZETTE, Nov. 14, 1788, reprinted in THE ORIGIN OF THE SECOND AMENDMENT, *supra* note 27, at 567, 569–70 (“A citizen, as a militia man is to perform duties which are different from the usual transaction of civil society; and which consequently must be enforced by congenial laws and regulation.”).

301. This is especially true if the power to conscript includes the power to conscript into the army reserve. If the federal government can conscript part-time citizen-soldiers (a power I deny below), the Army and Militia Powers become totally coextensive, except that the federal government can avoid the constitutional limitations on the militia by purporting to raise the force using its Army Power.

302. U.S. CONST. art. I, § 8, cl. 15.

303. *Id.* art. I, § 8, cl. 16.

304. British law prohibited marching the militia out of one’s county, except in cases of invasion or rebellion—a law that ceased burdensome foreign militia deployments occurring during the reigns of King Edward II and King Edward III. Statute the Second 1326, 1 Edw. 3 c. 5 (Eng.); 1 BLACKSTONE, *supra* note 26, at \*398; MAITLAND, *supra* note 32, at 277; see also Militia Act 1776, 16 Geo. 3 c. 3 (Gr. Brit.) (prohibiting sending militia out of the county, except in cases of invasion

these limitations, many Antifederalists feared that the federal government would subject the militia to harsh punishments and other burdens, such as for travel, and these burdens would cause Americans to support raising a standing army in place of performing militia service.<sup>305</sup> Yet, through conscription, Congress can evade the limitations on its Militia Power by requiring citizens to perform military service in the army rather than in the militia.

Congress's modern use of the Army Power as a supplement to the Militia Power came about in the early 1900s precisely to avoid the limitations on the Militia Clauses.<sup>306</sup> During the early twentieth century, the United States engaged in military actions overseas.<sup>307</sup> Congress wanted to use state National Guards to supplement regular forces, but Attorney General George Wickersham opined that the militia could not generally be used beyond the country's borders.<sup>308</sup> By simultaneously enrolling citizens in both a state Guard and an army reserve unit, Congress sought to access these forces for international missions by calling them out as "armies" rather than as "militias."

Authorizing conscription thus unwinds the personal liberties the Framers placed in the original Constitution concerning military service. It leaves the general citizenry subject to military law at Congress's whim. Congress may send conscripted citizens to foreign countries to train and fight, and as long as Congress places an "army" label on them, the restrictions on the federal government calling forth the militia or selecting the officers no longer apply. Even if the power to raise armies, when read in isolation, would support a power to conscript soldiers, the power to conscript soldiers does violence to many other constitutional provisions when the Constitution is read more holistically.

To analogize to criminal prosecutions, it is as if Congress had passed a law providing, "Failure to pay taxes results in a civil penalty of life in prison," and then authorized a nonjury trial before an administrative officer. Congress cannot avoid the Bill of Rights by

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or rebellion); *cf.* U.S. CONST. art. I, § 8, cl. 15–16 (limiting the ability to call forth the militia and reserving to the states the authority of training the militia).

305. *See* Debates of the Virginia Convention (June 16, 1788), *supra* note 93, at 1300–01 (statement of Patrick Henry); *id.* at 1303–04 (statements of George Mason). The Court in *Perpich* seems to miss this point completely. *See* *Perpich v. Dep't of Def.*, 496 U.S. 334, 350–51 (1990) (failing to discuss the history behind the inclusion of the Training Clause).

306. CURRIE & CROSSLAND, *supra* note 163, at 23.

307. *See generally* WEIGLEY, *supra* note 41, at 295–341 (discussing sending U.S. forces abroad in the late nineteenth and early twentieth centuries, and the reorganization of the U.S. military to accommodate such endeavors).

308. Auth. of President to Send Militia into a Foreign Country, 29 Op. Att'y Gen. 322 (Feb. 17, 1912).

labeling a crime as a civil penalty.<sup>309</sup> Likewise, Congress cannot avoid the restrictions on the Militia Clauses by calling the militia an “army.”

Moreover, the historical record is not as favorable as the *Selective Draft Law Cases* suggest. Although England had impressment, it mainly affected the drunk and idle as punishment.<sup>310</sup> Conscription bills that were introduced in British Parliament in 1704 and 1707 were attacked as unconstitutional,<sup>311</sup> as was Madison and Monroe’s conscription proposal. The Court noted that Daniel Webster objected to conscription on general principles of free government—which he did. But he also objected to the plan as a violation of the Constitution because it sought to avoid the limitations on the Militia Clauses by relabeling the militia as an “army”:

But, Sir, there is another consideration. The services of the men to be raised under this act are not limited to those cases in which alone this Government is entitled to the aid of the militia of the States. These cases are particularly stated in the Constitution—“to repel invasion, suppress insurrection, or execute the laws.” But this bill has no limitation in this respect . . . .

This, then, Sir, is a bill for calling out the Militia not according to its existing organization, but by draft from new created classes;—not merely for the purpose of “repelling invasion, suppressing insurrection, or executing the laws,” but for the general objects of war—for defending ourselves, or invading others, as may be thought expedient;—not for a sudden emergency, or for a short time, but for long stated periods . . . . What is this, Sir, but raising a standing army out of the Militia by draft, & to be recruited by draft, in like manner, as often as occasion may require?<sup>312</sup>

Ultimately, the conscription bills died in Congress when the House and Senate could not resolve their differences over conscripts’ length of service.<sup>313</sup>

Conscription would not reemerge until the Civil War when Congress passed the Enrollment Act in 1863. The Act authorized the president to conscript, with some exceptions, citizens (and those intending to become citizens) between the ages of twenty and forty-five.<sup>314</sup> The Act was not a full conscription act since the draftee could

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309. See *Int’l Union, Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 828, 838 (1994) (holding that “the stated purposes of a contempt sanction alone cannot be determinative” in the context of a debate regarding whether it was sufficient to label a fine as a civil penalty in order to proceed with using process associated with civil proceedings); cf. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012) (finding that functions, not labels, determine whether a fee is a tax or a penalty).

310. BARNETT, *supra* note 29, at 41.

311. Freeman, *supra* note 264, at 68–69.

312. Daniel Webster, *An Unpublished Speech, in THE MILITARY DRAFT: SELECTED READINGS ON CONSCRIPTION*, *supra* note 212, at 633, 634–35 (December 9, 1814 speech on the conscription bill made on the floor of the House of Representatives).

313. See 1 CURRIE, *supra* note 231, at 157–58.

314. An Act for Enrolling and Calling Out the National Forces, and for Other Purposes, ch. 75, § 1, 12 Stat. 731 (1863).

hire a substitute at a cost of up to \$300, so it operated as a choice between compulsory military service or paying a fee.<sup>315</sup>

Like conscription during the War of 1812, the Enrollment Act was vigorously resisted. The Act resulted in riots in several cities, including New York City in July of 1863.<sup>316</sup> No federal court challenge made it to the Supreme Court. Anticipating a challenge, Chief Justice Taney prepared a draft opinion holding the Enrollment Act to be unconstitutional.<sup>317</sup> He approached the militia/army dichotomy from a different perspective than my argument above. In his view, the militia and the army were quite separate organizations under different sovereign authorities.<sup>318</sup> State governments were independent sovereigns—to the point where the Constitution did not authorize the federal government to quell internal rebellions against the state without a specific request from state authorities.<sup>319</sup> For Chief Justice Taney, the militia belonged to the states as their sovereign force.<sup>320</sup> The militia was a force over which “the general government can exercise no power in time of peace, and but a limited and specified power in time of war.”<sup>321</sup> The army, in contrast, comprised men separated from the general body of citizens and subjected to exclusive federal authority.<sup>322</sup> Recognizing the power to draft would destroy state governments and the state militia. Nothing would stop the federal government, for example, from drafting state judges and making them privates in the national army.<sup>323</sup> A power to draft, thus, would leave entire state governments at the mercy of federal legislation. The state would not have any real power over its militia because the federal government could draft the entire militia into the federal army. Given that the Constitution specifically laid out emergency federal military powers, including the power to use all the militia from every state, Chief Justice

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315. § 13, 12 Stat. at 733; *see also* AMAR, *supra* note 264, at 91 (“Because the 1863 law allowed individual draftees to buy their way out—by providing a substitute or paying a fee—many supporters claimed the law was technically a tax and not a system of direct conscription.”).

316. *See* LESLIE M. HARRIS, IN THE SHADOW OF SLAVERY: AFRICAN AMERICANS IN NEW YORK CITY, 1626–1863, at 279–85 (2003); MAHON, *supra* note 160, at 103.

317. Taney, *supra* note 212, at 208–18.

318. *Id.* at 211–12.

319. *Id.* at 207, 217 (“For in the case of rebellion or insurrection against the State government, the United States is not allowed to interfere in it, to support the State authority, unless its assistance is applied for by the Legislature of the State or by the Executive where the Legislature cannot be convened . . .”).

320. *Id.*

321. *Id.* at 211.

322. *Id.* at 210–11.

323. *Id.* at 216.

Taney opined that recognizing the power to draft into the army would make the Constitution internally inconsistent.<sup>324</sup>

While the constitutionality of the Enrollment Act never made it to the federal Supreme Court, the Pennsylvania Supreme Court did have an opportunity to address its constitutionality in *Kneedler v. Lane*.<sup>325</sup> In that case, a heavily divided Pennsylvania Supreme Court originally held the federal draft to be unconstitutional by a 3-2 vote, only to reverse itself immediately.<sup>326</sup> Chief Justice Lowrie's original opinion—which would ultimately be reversed—relied on similar arguments to Chief Justice Taney's draft opinion. Chief Justice Lowrie argued that military necessity could not justify conscription. If the standing army was insufficient to put down the Confederate rebellion, he argued that the Constitution provided the means for more troops: calling forth the militia.<sup>327</sup> The contemporary disorganization of the militia, Lowrie thought, was irrelevant: Congress had the power to organize, arm, and discipline the militia, and, having long known of the problem, it could correct this situation by legislation.<sup>328</sup> And drafting the able-bodied male population into the army during a rebellion constituted a de facto calling forth of the militia—but done in a way that subverts the structural limitations placed within the Constitution.<sup>329</sup> Given that the Constitution specifically provided for how the able-bodied populace was to be called forth during such an emergency, Chief Justice Lowrie was loath to find this same power—but without the restrictions over the militia—in the Army Clause.<sup>330</sup>

Moreover, recognizing a general power to conscript would work enormous mischief to state governments. The army would have the power to totally consume the militia, thereby leaving the states defenseless to internal disturbances. Even militia officers—who were

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324. See *id.* at 212–13; see also Coxe, *supra* note 209, at 431, 435–36 (describing a militia-based check of the federal army); Noah Webster, *An Examination into the Leading Principles of the Federal Constitution (October 10, 1787)*, in THE ORIGIN OF THE SECOND AMENDMENT, *supra* note 27, at 38, 39 (“[Congress is not] at liberty to call out the militia at pleasure—but only, to execute the laws of the union, suppress insurrections, and repel invasions. For these purposes, government must always be armed with a military force . . .”).

325. 45 Pa. 238 (1863).

326. *Id.* at 240, 252, 274, 294–95.

327. *Id.* at 242.

328. *Id.*

329. See *id.* at 244–45 (stating that drafting all men from twenty to forty-five “exhausts [the militia] entirely” and creates an “unauthorized substitute for the militia of the states,” completely “annul[ling], for the time being, the remedy for insurrection provided by the constitution”).

330. *Id.* at 242–43. A fortiori, one could apply Chief Justice Lowrie's reasoning to the army reserve, which gives the federal government the same type of part-time force as a militia, without the restrictions contained in the Militia Clauses. See 10 U.S.C. § 10102 (2012) (describing the reserves' purpose to supplement the regular forces in an emergency).

supposed to be separate from the federal army—would be subject to a draft, thereby leaving the militia without leadership.<sup>331</sup> And nothing in the Constitution would prohibit drafting state officials, leaving the entire state government at the mercy of Congress's whims regarding who to conscript.<sup>332</sup>

The dissenters focused on the unqualified nature of the Army Clause; its only limitation is that appropriations not exceed two years.<sup>333</sup> They further argued that the federal government possesses the same attributes of sovereignty as any other nation, one of which is to compel military service of its citizens.<sup>334</sup> And service in the army—as opposed to the militia—may be required for the United States to defend its treaties and fulfill its foreign policy obligations.<sup>335</sup> Moreover, the dissenters noted, Britain practiced impressing soldiers and sailors, Parliament had debated conscription bills at various times in the eighteenth century, and the American colonies regularly required military service.<sup>336</sup>

Ultimately, the dissenters' opinion carried the day. Chief Justice Lowrie left the Pennsylvania Supreme Court shortly after the original decision was issued. The Pennsylvania Supreme Court immediately reversed itself and dissolved the injunction against the Enrollment Act.<sup>337</sup>

I have argued above for why the textual and structural arguments made by the original dissent are unpersuasive. But one further point in the *Kneedler* dissent must be addressed. As the dissenters correctly explain, the history of impressment poses a significant challenge to those arguing for the unconstitutionality of conscription.<sup>338</sup> Impressment became popular in Elizabethan England because the country was engaged in foreign wars, and the militia was

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331. *Kneedler*, 45 Pa. at 246.

332. *Id.* at 245–46.

333. *See id.* at 276 (Strong, J., dissenting) (“[I]n the clause conferring authority to raise armies, no limitation is imposed other than [the appropriation restriction], either upon the magnitude of the force which Congress is empowered to raise . . . or upon the mode in which the army may be raised.”).

334. *Id.* at 275.

335. *Id.* at 275–76.

336. *See id.* at 278–79 (recalling that Britain passed a law allowing all unemployed men to be conscripted and that states had used the draft as a last resort); *id.* at 290–91 (Read, J., dissenting) (responding to the majority's argument that the Framers contemplated voluntary enlistment because that was what Britain used and noting that Britain had long used impressment for both the British army and navy).

337. *See id.* at 295 (majority opinion of Strong, J.) (disclaiming the authority to issue the injunction in the first place and dissolving the injunction).

338. An impressed soldier or sailor is forcibly abducted into service under color of law (e.g., lawfully taken from the tavern and forced to serve), whereas a conscript is merely required to report for induction.

not liable to serve outside of the kingdom. With the inability to recruit sufficient numbers of enlistments, the Crown demanded specific numbers of troops by commissions of array, and lords-lieutenant filled the quota with impressment.<sup>339</sup>

The legality of impressment fell into a murky area. No statute ever authorized impressment of soldiers or sailors. At best, parliamentary statutes tacitly assumed the validity of the practice.<sup>340</sup> Those who were impressed were often unemployed, drunk, or petty criminals.<sup>341</sup> Impressment into the army also only occurred when Britain was involved in foreign wars; Britain did not maintain a standing army in peacetime.<sup>342</sup> Maitland further notes that the pressing of soldiers was far more controversial than the pressing of sailors; the former was the subject of several parliamentary petitions, while the latter escaped notice.<sup>343</sup> To the extent that impressment may be viewed as a historical antecedent to conscription, the legitimacy of conscription into the navy may stand on a firmer footing than conscription into the army.<sup>344</sup> But the precedent of impressment—which the Constitution does not explicitly ban—also illustrates why the constitutionality of the draft is a close and difficult question.

Some commentators, recognizing the problematic nature of the draft, have offered new justifications for its legitimacy. The first theory is from Akhil Amar. Amar looks to the history surrounding the adoption of the Fourteenth and Fifteenth Amendments.<sup>345</sup> These came about, first, because the Union Army—in part, a conscripted army—defeated the South. The militia system disintegrated during the Civil War, with Southern states defecting completely and Northern states unable to supply enough troops or training to deal with the crisis adequately.<sup>346</sup> Second, the Reconstruction Army (which was not conscripted) maintained republican government in the South after the Civil War.<sup>347</sup>

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339. See BARNETT, *supra* note 29, at 41.

340. See 1 BLACKSTONE, *supra* note 26, at \*418–19 (noting that a statute from 1378, 2 Rich. 2 c. 4, refers to “mariners being arrested and retained for the king’s service”); MAITLAND, *supra* note 32, at 278 (writing that a 1557 act, 4 & 5 Phil. & M. c. 3, “speaks of mustering and levying men to serve in the wards as a recognized legal practice”); see also MALCOLM, *supra* note 34, at 3–5 (detailing that a tax helped pay for the king’s armies, which were organized by local magnates like lords-lieutenant).

341. BARNETT, *supra* note 29, at 41–42. Wealthier and otherwise virtuous citizens found ways to avoid impressment by providing substitutes or bribing justices of the peace. *Id.* at 42.

342. MAITLAND, *supra* note 32, at 279.

343. *Id.* at 280.

344. See, e.g., Taney, *supra* note 212, at 213–14 (considering this possibility).

345. AMAR, *supra* note 29, at 91.

346. *Id.* at 90–91. But see MAHON, *supra* note 160, at 103 (“[C]onscription swept in only 6 percent of the total Union force.”).

347. AMAR, *supra* note 29, at 91.

Given that nothing in the Constitution explicitly prohibits a draft—these are underlying structural interpretations of the Militia and Army Clauses—Amar argues that our understanding of how these clauses interact should change in light of the primacy of the Union Army in preserving “the security of a free State” during Reconstruction.<sup>348</sup> Amar concludes, “No longer could it be insisted that the localist militia was always America’s constitutionally preferred force structure to vindicate the Constitution’s deepest values and secure its most sacred principles.”<sup>349</sup>

A second, related theory is offered by David Yassky, who argues that the Fourteenth Amendment legitimized the draft.<sup>350</sup> The Amendment made national citizenship primary—and one of the duties of national citizenship is military service in the army. The militia, Yassky argues, was viewed as the defender of Southern slavery compared with the liberating Union Army.<sup>351</sup> Moreover, the Civil War changed which government citizens viewed as threatening liberty. Prior to the Civil War, citizens were mainly afraid of federal power. After the Civil War, citizens viewed state governments as more threatening.<sup>352</sup>

These arguments present numerous substantive and methodological difficulties, only some of which I will respond to here. First, I disagree with the premise that the “localist militia was always America’s constitutionally preferred force structure to vindicate the Constitution’s deepest values.”<sup>353</sup> This premise is partially true. Though there were some outliers (e.g., Alexander Hamilton), other things equal, most of the Framers preferred the militia system to a professional army. But many Framers realized that often other things were not equal (e.g., state governments being derelict in defense matters), which caused them to authorize a strong federal role in national defense. More pertinently, the Framers inscribed their distrust of state governments into the Constitution. Thus, Article IV grants the federal government the power to guarantee a “Republican Form of Government” to the states, which it can enforce using federal military power.<sup>354</sup> Article I, Section 10 prohibits states from having a professional army or navy in peacetime without Congress’s consent.<sup>355</sup> And the Constitution

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348. U.S. CONST. amend. II; AMAR, *supra* note 29, at 91–92 (arguing that a textualist approach to the Constitution does not capture developments that were necessary to the survival of the United States).

349. AMAR, *supra* note 264, at 91.

350. Yassky, *supra* note 98, at 638–47.

351. *Id.* at 647.

352. *Id.*

353. AMAR, *supra* note 264, at 91.

354. U.S. CONST. art. IV, § 4; *see* Luther v. Borden, 48 U.S. (7 How.) 1, 42–44 (1849).

355. U.S. CONST. art. I, § 10, cl. 3.

conferred on Congress the power to use federal and militia forces to defend federal authority.<sup>356</sup> The militia may “always have been preferred,” but the use of federal troops during Reconstruction was also in keeping with the spirit (and letter) of the original Constitution. The federalism-based checks on the military power were *reciprocal*, not one-sided: the Framers recognized that the states could also misuse their power. Viewed in this light, I disagree that Reconstruction marks the paradigm shift that Amar and Yassky argue.

A second difficulty is that Amar’s and Yassky’s conclusions do not follow from their premises. Two important differences between the Army Clause and Militia Clauses are that (1) the army is available for foreign wars, whereas the Militia Clauses apply only to domestic emergencies; and (2) the militia cannot be subjected to military law, except when in actual service. Whatever the lessons from the Civil War and Reconstruction, they do not seem relevant to making citizens liable to serve in foreign wars and to always be subject to military law. Allowing the federal government to exercise these powers does not follow from the reversal of seeing state governments—rather than the federal government—as the primary danger to civil liberties.

To conclude, conscription into the regular army is likely unconstitutional as an original matter, and the Fourteenth Amendment should not be construed to grant that power. Recognizing federal power to conscript into the army does immense violence to the limitations of the Militia Clauses and the personal rights of citizens available for temporary military duty. An unlimited power to conscript effectively gives the federal government a national militia without the constitutional restrictions. Moreover, if Congress can draft the entire militia into the army, the militia cannot serve as a counterbalance to the army. The result, again, is one body of troops, not the separate bodies envisioned by the constitution that provide checks on each other’s power.

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356. During the Pennsylvania Mutiny of 1783, Revolutionary War veterans marched on the Pennsylvania State House, causing Congress to flee to New Jersey. Congress tried, but failed, to secure the Pennsylvania militia to protect them. The event led the Framers to authorize both a federal city to host the seat of government and direct authority to use force to suppress insurrections against federal authority. See 3 STORY, *supra* note 140, § 1214; Kenneth R. Bowling, *New Light on the Philadelphia Mutiny of 1783: Federal-State Confrontation at the Close of the War for Independence*, 101 PA. MAG. HIST. & BIOGRAPHY 419, 420 (1977); David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791*, 61 U. CHI. L. REV. 775, 847 (1994).

*B. Conscription into the Reserves*

Those who have examined the constitutionality of the draft generally have considered two issues: first, whether the federal government has the power to conscript into the army or if, instead, the power to conscript is limited to the militia; and second, whether the power to institute a draft extends to peacetime—or, alternatively, to conflict in the absence of a declared war.<sup>357</sup> But there is a third, more nuanced issue: Assuming *arguendo* that Congress has some power to conscript into the army, does that power extend to conscription in the army reserve? Although resumption of the draft seems unlikely in the near term, occasional bills to reinstate the draft have proposed authorizing federal conscription into the reserve forces.<sup>358</sup> This Section argues that conscription into the reserves is patently unconstitutional and that, even accepting the legitimacy of the draft into the army, the Supreme Court would have strong reasons to limit Congress's conscription power to drafting citizens as full-time, regular soldiers.

The Supreme Court has not decided the precise scope of the federal government's conscription power. In the *Selective Draft Law Cases*, the Court upheld the World War I conscription law on the basis of the powers to declare war, raise armies, make rules for land forces, and make laws that are necessary and proper.<sup>359</sup> Draft opponents during Vietnam seized on this language and challenged the constitutionality of the draft in the absence of a declaration of war by Congress. Lower courts rejected these arguments, and the Supreme Court never granted certiorari to hear their claims.<sup>360</sup> The *Selective Draft Law Cases* had held that the Militia Clauses did not limit the federal draft power, and all cases since then have used broad language to describe Congress's power to raise forces using the Army Power. In *United States v. O'Brien*, Chief Justice Warren, writing for the Court,

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357. See *supra* notes 264 (examining a draft at peacetime), 277 (examining army conscription), & 294 (rebutting the "necessity argument" for conscription).

358. See, e.g., Universal National Service Act of 2003, H.R. 163, 108th Cong. § 2(b)(1) (proposing a mandatory two-year period of national service that could include service in the reserves).

359. *Arver v. United States (Selective Draft Law Cases)*, 245 U.S. 366, 377 (1918) (citing U.S. CONST. art. I, § 8).

360. See, e.g., *Holmes v. United States*, 391 U.S. 936, 936 (1968) (denying certiorari); *id.* at 936–49 (Douglas, J., dissenting) ("I think we owe to those who are being marched off to jail for maintaining that a declaration of war is essential for conscription an answer to this important undecided constitutional question."); see also *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, 265–66 (1934) (Cardozo, J., concurring) (noting that the Court had not decided peacetime draft limits).

said that “[t]he power of Congress to classify and conscript manpower for military service is ‘beyond question.’”<sup>361</sup>

Even if Congress undoubtedly has the power of conscription, it does not follow that this power extends to the army reserve. As the previous Section explains, whether the federal government had the power to conscript people into the regular army was a difficult question at the Framing. In contrast, early congressional debates demonstrate beyond peradventure that the federal government lacked the power to conscript citizens into a federal reserve force.

Although the concept of a permanent reserve corps dates from the early twentieth century, Congress created a temporary reserve-like force in 1799 during the undeclared war with France.<sup>362</sup> Congress authorized the president to create a provisional army, if the president deemed it necessary in the event of war, invasion, or imminent danger of invasion.<sup>363</sup> As part of that army, the president could accept voluntary associations of individuals who offered themselves as artillery, cavalry, or infantry units.<sup>364</sup> These individuals would arm and equip themselves, would have officers appointed by the president, and would be liable to serve “at any time the President shall judge proper” for a period of two years after the president accepted their willingness to serve.<sup>365</sup> These voluntary associations, only when in actual service, would be governed by the same rules and regulations as the army and would receive the same pay as regular soldiers.

While Congress ultimately enacted the provision without amendment, the authorization of volunteers triggered a heated—and heavily partisan—constitutional controversy. Democratic-Republicans in the House attacked the provision on two constitutional grounds: first, the provision violated the requirement that militia officers be appointed by the states, and second, the law authorized the president to call forth these volunteer forces outside of the purposes enumerated in the Militia Clauses.<sup>366</sup> If the volunteers constituted “militia,” then the Republicans correctly protested the provision. But if the volunteers were part of the army, then the Constitution vested the appointment in the president, who could command them outside the purposes enumerated in the

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361. 391 U.S. 367, 377 (1968) (quoting *Lichter v. United States*, 334 U.S. 742, 756 (1948)).

362. On the debate in Congress, see 1 CURRIE, *supra* note 231, at 248–50.

363. An Act authorizing the President of the United States to raise a Provisional Army, ch. 47, § 1, 1 Stat. 558, 558 (1798).

364. § 3, 1 Stat. at 558 (authorizing and regulating volunteers).

365. § 3, 1 Stat. at 558.

366. *See, e.g.*, 8 ANNALS OF CONG. 1740 (Joseph Gales ed., 1851) (1798) (statement of Rep. McDowell) (noting that the volunteers would not be constrained by the three purposes of calling forth the militia); *id.* at 1704 (statement of Rep. Sumter) (arguing that the provision violated the Militia Officer Clause); *id.* at 1703 (same).

Militia Clauses. The critical question, then, was whether these volunteers were constitutionally part of the “army” or the “militia.”

The Federalists argued that the volunteers constituted part of the army. Two arguments emerged in favor of this view. Representatives Samuel Dana, Robert Harper, and Harrison Gray Otis argued that the voluntariness of service marked the dividing line between a militiaman and a regular soldier: members of the militia were conscripted into service, whereas members of the army volunteered.<sup>367</sup> Here, the volunteers were not conscripted; they offered their services for a limited time, just like a regular enlistment contract. The only difference was that the volunteers’ service was more limited than the service of full-time soldiers, but this difference in amount of service did not trigger a difference in kind about whether these individuals still constituted army troops.<sup>368</sup> Representatives Samuel Sitgreaves and Robert Harper argued that because the volunteers were not subject to the limitations of the militia (e.g., they could be used for purposes beyond those authorized by the Militia Clauses), they were raised pursuant to the Army Power.<sup>369</sup>

The Democratic-Republicans, in contrast, asserted that the proper dividing line was in the nature of the service. Militiamen served part-time, whereas regular soldiers served full-time. Representative Joseph McDowell claimed that “[h]e knew only of two descriptions of soldiers, regulars and militia”<sup>370</sup> and “these men could not be considered any other than militia, until they were enlisted into the service of the United States.”<sup>371</sup>

Other Democratic-Republicans took a more nuanced view of the situation. Representative Nathaniel Macon referred to the volunteers as a “mongrel kind of army” and challenged the Federalists to find the constitutional authority to create such a hybrid force.<sup>372</sup> Albert Gallatin likewise thought that the proposed force straddled the line between army and militia. Several factors suggested classification as army. The men signed up voluntarily by enlistment, they had their officers appointed directly by the president, and, if summoned, they could be required to serve the full two years—whereas the 1792 and 1795 Militia Acts required militia to be rotated after serving three months on active

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367. *Id.* at 1704, 1705, 1733.

368. *Id.* at 1705–06 (statement of Rep. Harper) (arguing that the volunteers were creating a contract with the United States to serve in the army and follow its regulations).

369. *Id.* at 1705–06, 1730, 1765.

370. *Id.* at 1737.

371. *Id.* at 1705 (statement of Rep. McDowell).

372. *Id.* at 1756 (statement of Rep. Macon).

duty.<sup>373</sup> But like the militia, until called into actual service, volunteers remained as civilians with no army pay, and were subject neither to the rules governing the army nor the Articles of War.<sup>374</sup> The problem for Gallatin was that the Constitution only recognized two categories of soldiers—“army” and “militia”—and these were halfway between both. Gallatin feared that, if allowed to proceed, Congress could evade the restrictions on the militia by turning the militia into a standing army.<sup>375</sup>

Congress kept the provision for volunteers by a 56-37 vote.<sup>376</sup> The vote itself created some controversy, as at least one Democratic-Republican claimed he had voted in favor of keeping the provision on the condition that Congress would subsequently amend it to comply with the Militia Officer Clause.<sup>377</sup> But Congress refused to amend it, and the provision was adopted. Ultimately, while many volunteer companies offered themselves for service, only one was used to assist in suppressing Fries’s Rebellion.<sup>378</sup>

On the merits, the Democratic-Republicans had the better argument. Neither proposed line offered by the Federalists to distinguish army troops from militia had any sound historical basis. Representative Sitgreaves’s army/militia distinction fails for the same reason that the present-day National Guard system has constitutional difficulties: it confuses *limitations* with *constitutive conditions*.<sup>379</sup> Nor does the Dana-Harper-Otis conscription/volunteer line properly demarcate the army/militia distinction. This line belied a history of impressment and attempted conscription. When Britain needed to fill army quotas to fight in foreign wars, the Crown occasionally issued commissions of array authorizing impressment.<sup>380</sup> Moreover, Parliament had proposed conscription bills in 1704 and 1707,<sup>381</sup> George Washington requested a draft during the Revolution,<sup>382</sup> and Madison

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373. *Id.* at 1725–26 (statement of Rep. Gallatin).

374. *Id.* at 1725.

375. *See id.* at 1726 (“If the principle proposed to be adopted in this section be admitted, the consequence may be that all the regulations provided in the Constitution for securing a good militia may be evaded, and the whole of the militia be turned into a kind of Public Standing Army.”).

376. *Id.* at 1758.

377. *See id.* at 1759–60 (statement of Rep. McDowell) (arguing that further consideration of the volunteer provision was necessary to address whether or not the president should appoint the officers commanding the volunteers).

378. 1 CURRIE, *supra* note 231, at 250 n.102.

379. *See supra* note 231 and accompanying text (discussing the distinction between limitations and constitutive conditions).

380. *See supra* notes 339–344 and accompanying text.

381. *See supra* note 311 and accompanying text.

382. *See* Letter from George Washington to the Committee of Congress with the Army, in 10 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 42, at 362, 366.

proposed conscription during the War of 1812.<sup>383</sup> Parliament's and Madison's bills were attacked as being unconstitutional, and in Section III.A, I argued that conscription into the regular army presents a structural constitutional problem. The Dana-Harper-Otis argument, however, is conceptual. They claimed that an "army" consists of "voluntarily enlisted soldiers" by definition. But this is wrong. Although voluntary enlistment was the customary way of raising soldiers, England and the United States knew of other ways, even if those ways were viewed as being illegitimate or illegal. Conscription does not convert an "army" into a "militia."<sup>384</sup>

Conversely, both England and the United States long had volunteer militia units. "Trained bands" began appearing in England in the sixteenth century.<sup>385</sup> Volunteer militia also appeared in the seventeenth and eighteenth centuries and were widely known by the Framers.<sup>386</sup> Pennsylvania initially only used volunteers for the militia because the colony had a large population of Quakers.<sup>387</sup> Thus, the Dana-Harper-Otis argument is wrong on both counts: not only did "armies" sometimes have soldiers forced to serve, but militia units frequently had volunteers.

As understood at the Framing, what distinguished armies from the militia was that armies had full-time troops while the militia had part-time troops. Consequently, the Democratic-Republicans were right to object to the proposed volunteer force as sanctioning an unconstitutional federal select militia.<sup>388</sup>

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383. See *supra* notes 290, 312 and accompanying text.

384. And if a militia were, by definition, a conscripted land force, then that would be fatal for the constitutionality of conscription into the U.S. Army.

385. See BARNETT, *supra* note 29, at 34; MALCOLM, *supra* note 34, at 4.

386. See, e.g., COOPER, *supra* note 160, at 2; CURRIE & CROSSLAND, *supra* note 163, at 2 (describing that the American colonies generally relied on volunteers while leaving the general militia "exempt from the militia call except under the most dire circumstances"); James Biser Whisker, *The Citizen-Soldier Under Federal and State Law*, 94 W. VA. L. REV. 947, 955 (1992) ("Volunteers were formed in militia units who came under the command of professional, usually British, officers and served in regular military units."); see also WEIGLEY, *supra* note 41, at 8 (same).

387. See WEIGLEY, *supra* note 41, at 7–8.

388. See ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA app. D at 274–75 (Philadelphia, William Young Birch & Abraham Small 1803):

As these select corps were not called into actual service by those acts, but were only liable to be called upon at the pleasure of the president, it seems impossible to view them in any other light, than as a part of the militia of the states, separated by an unconstitutional act of congress, from the rest, for the purpose of giving to the president powers, which the constitution expressly denied him, and an influence the most dangerous that can be conceived, to the peace, liberty, and happiness of the United States.

That the House of Representatives, in a largely partisan action, approved volunteer army units in the heat of an undeclared war with France should not serve to liquidate the meaning of this constitutional provision.<sup>389</sup> As with the Sedition Act,<sup>390</sup> which was passed a few weeks later, Congress's actions were highly partisan, with the Federalists in favor of the constitutionality of the volunteers and the Democratic-Republicans opposed. The Federalists were frustrated with the Democratic-Republicans' refusal to provide for any meaningful defense, whether by army, navy, or a properly disciplined militia.<sup>391</sup> And the quasi-war with France exacerbated this frustration since they felt that the United States was vulnerable to invasion.<sup>392</sup> So the Federalists were especially motivated to resolve constitutional questions in favor of federal power.<sup>393</sup>

Nor did any settled practice emerge; later Congresses reversed themselves several times on whether the volunteers were part of the army or militia. In 1807, Congress passed legislation again authorizing volunteers, but this time the Democratic-Republicans, who now controlled Congress, required state appointment of officers.<sup>394</sup> Because Article II, Section 2 of the Constitution requires federal appointment of federal officers, this action was only proper if the volunteers were militia, not army.<sup>395</sup> But during the War of 1812, Madison requested—and Congress granted—authority for the president to again appoint the officers, an action only proper if the volunteers were part of the army.<sup>396</sup>

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389. On James Madison's theory of constitutional liquidation, see William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019). Madison argued that an indeterminate constitutional provision could become liquidated through a course of practice that was deliberate when that course of practice resulted in a meaning of the provision that was accepted by the public and acquiesced to by those holding dissenting views. See *id.* at 13–21.

390. Sedition Act, ch. 74, 1 Stat. 596 (1798).

391. See, e.g., 8 ANNALS OF CONG. 1732 (Joseph Gales ed., 1851) (1798) (statement of Rep. Sitgreaves) (expressing frustration with the Democratic-Republicans' "[un]willing[ness] to pay for a navy, nor an army, nor to trust the defence of the country to its own citizens").

392. *Id.* at 1734–35 (statement of Rep. Otis).

393. On the other hand, the Federalists did not dispense with all constitutional niceties. A bill authorizing the president to "call[ ] out 20,000 militia, at a time to be trained and disciplined" was defeated with only eleven votes in favor of it. *Id.* at 1701–02. Members referred to the Militia Clauses, which explicitly reserved training to the states. *Id.*

394. An Act Authorizing the President of the United States to Accept the Service of a Number of Volunteer Companies, Not Exceeding Thirty Thousand Men, ch. 15, § 2 Stat. 419, 419–20 (1807). Strangely, given the Democratic-Republicans' constitutional objections, the Act grandfathered in companies whose officers were appointed by the president. Moreover, the Act failed to limit the federalization of the volunteers to only those purposes allowed by the Militia Clauses, although the House sponsor provided assurances that the volunteers would only be used in case of insurrection or invasion. See 1 CURRIE, *supra* note 231, at 167–72.

395. 1 CURRIE, *supra* note 231, at 167.

396. An Act Supplementary to the Act Entitled "An Act Authorizing the President of the United States to Accept and Organize Certain Volunteer Military Corps," ch. 138, 2 Stat. 785 (1812). James Madison's support for federal appointment of officers might give credence to the

And during the Civil War, in a law reminiscent of Madison's failed militia proposal,<sup>397</sup> Congress authorized the president to commission generals in the volunteers, while leaving to the states the appointment of field, staff, and company officers.<sup>398</sup> The services provided by the Civil War volunteers, moreover, were primarily militia in character—"for the purpose of repelling invasion, suppressing insurrection, enforcing the laws, and preserving and protecting public property."<sup>399</sup> Thus, it is difficult to draw any conclusions from the congressional precedent, except to say that Congress, as an institution, had been undecided on this question and had often faced the issue during difficult wartime circumstances.<sup>400</sup>

Nevertheless, Congress's struggle to separate "militia" and "army" leaves no doubt about the illegitimacy of conscription for the reserves. The Federalists, in arguing for the legitimacy of the "volunteers," argued that the difference between a militiaman and an army soldier was that the militiaman was a conscript while the soldier was a volunteer.<sup>401</sup> The Democratic-Republicans countered (correctly, I believe) that the distinction between the two forces was whether they were part-time (militia) or full-time (army).<sup>402</sup> Regardless of which side was correct, it is clear that conscription in the army reserve would not be allowed. Either their conscription or their part-time status would make conscripted reservists members of the "militia."<sup>403</sup>

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view that the volunteers were army. But one must remember that Madison was highly partisan on this issue. Although a Democratic-Republican in 1812, Madison had been a staunch opponent of any state control over the army or militia since his days as a delegate at the Constitutional Convention. See *supra* notes 77–85 and accompanying text.

397. See *supra* notes 81–85 and accompanying text.

398. An Act to Authorize the Employment of Volunteers to Aid in Enforcing the Laws and Protecting Public Property, ch. 9, 12 Stat. 268 (1861). The law allowed the president to commission lower-ranking officers if states failed to make the appointment. § 4, 12 Stat. at 269. My thanks to Zachary Price for pointing this out.

399. § 1, 12 Stat. at 268.

400. During the Civil War, courts drew different dividing lines between armies and militia. The Indiana Supreme Court accepted the voluntary enlistment/conscription line. See *Kerr v. Jones*, 19 Ind. 351, 354 (1862) ("The army is raised by voluntary enlistments. The militia is called forth."). The Virginia Supreme Court of Appeals used the full-time/part-time distinction when deciding the legality of conscription under the Confederate Constitution. See *Burroughs v. Peyton*, 57 Va. (16 Gratt.) 470, 475 (1864) ("*An army* is a body of men whose business is war: *the militia* a body of men composed of citizens occupied ordinarily in the pursuits of civil life, but organized for discipline and drill, and called into . . . temporary military service when the exigencies of the country require it." (emphasis added)).

401. See *supra* note 368 and accompanying text.

402. See *supra* notes 370–375 and accompanying text.

403. The creation of the provisional army does raise another question of whether Congress can maintain an "inactive reserve." The inactive reserve is basically a pool of individuals who give the government an option contract—that is, they agree, if called, to enter full-time army service. I cannot fully answer that question here, but my inclination would be that such an inactive reserve

Accepting *arguendo* the legitimacy of the draft into the regular army, the Supreme Court would have good reasons to hold the line there. Recognizing the power to draft into the (regular) national army—while in tension with the limitations of the Militia Clauses—does not result in their total annihilation. Individuals and state governments would only lose their protections and reserved powers under the Militia Clauses when citizens were drafted into the professional forces. But if the federal government can have a conscripted “U.S. Army Reserve”—a militia in everything but name—the federal government has little reason to share control over the militia with the states. The federal government can just raise the same part-time forces using its Army Power without the inconvenience of the Militia Clauses’ limitations.

Moreover, recognizing the power to draft only into the regular army maintains soft-power limitations on the federal government’s ability to conscript outside the militia system. With a draft, the federal government is still bound to pay for regular troops. The cost of troops naturally serves to limit the size of the regular army and correspondingly diminishes Congress’s enthusiasm for a universal draft, especially in peacetime. Thus, even conceding the legitimacy of the draft, Congress should be limited to conscripting soldiers into the regular army.

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This Part has defended two claims. First, though it is a close and difficult question as an originalist matter, conscription into the national army is unconstitutional. Second, assuming the constitutionality of conscription, the federal government is limited to conscripting soldiers into the regular army. The abrogation of traditional limitations on federal military power have had a profound and continuing impact on the balance of military power between the president and Congress, between the federal government and the states, and between the federal government and the citizenry—issues to which I now turn.

#### IV. CONTEMPORARY ISSUES: WHY MILITARY FEDERALISM STILL MATTERS

This Part explains how the destruction of federalism-based checks on federal military power affects contemporary constitutional and political debates. Granting the federal government virtual plenary

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would be constitutional provided that (1) the individuals entered full-time army service if called and (2) the government did not regulate the individuals until they were called to serve.

authority over the military has helped with military readiness and political accountability. But the arrogation of power solely in the federal government presents new constitutional challenges. This Part will consider the effects of the demise of military federalism on (1) separation of powers, (2) the federal-state balance, and (3) Congress's power to impose military law on reserve and retired soldiers.

### *A. Separation of Powers*

One fiercely contested topic is the proper demarcation in responsibility between Congress and the president in authorizing and levying armed conflict. Since President Truman's unilateral commitment of troops to Korea, presidents have asserted increasingly strong preclusive authority to deploy military forces irrespective of Congress's inaction or contrary action.<sup>404</sup>

Some commentators argue that, except in cases of immediate self-defense, Congress is supposed to authorize war before the president can commit troops.<sup>405</sup> Others argue that the appropriations and impeachment powers give Congress the ability to check executive warmaking, but the president requires no advance congressional approval before committing troops.<sup>406</sup> This second position generally implies a broad inherent preclusive power of the president as commander in chief to commit troops and authoritatively determine the incidents of combat. And a third group does not take a sequential

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404. See, e.g., David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 1057–58 (2008). Barron and Lederman trace the history and note that presidents before Truman rarely defied Congress openly. *Id.* at 1055–56. Mostly, they acted in the absence of Congress or, when they defied Congress, did so under the theory that an emergency existed and Congress would later ratify their actions. *Id.* The concept of a true preclusive authority to engage in hostilities in open defiance of Congress began with President Truman and continues to the present day. *Id.* at 1098–99.

405. See, e.g., JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 5 (1993) (explaining that Congress was granted the power “to declare war” rather than “to make war” so as to ensure the president possessed tactical control over military forces and retained the ability to “repel sudden attacks” when necessary); Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 675 (1972) (explaining that while an early draft of the Constitution granted Congress the power to “make” war, James Madison and Elbridge Gerry supported replacing this text with the power “declare” war, leaving the executive the power to repel sudden attacks); William Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1, 6 (1972) (recounting discourse during the Constitutional Convention on the change).

406. See, e.g., John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 295 (1996) (“Contrary to the arguments by today’s scholars, the Declare War Clause does not add to Congress’ store of war powers at the expense of the President. Rather, the Clause gives Congress a judicial role in declaring that a state of war exists between the United States and another nation . . .”).

position, but argues for a strong role of Congress throughout the warmaking process and against an inherent preclusive power in the president.<sup>407</sup>

As John Yoo has recognized, this debate creates a role reversal in constitutional scholars' politics and theories of constitutional interpretation.<sup>408</sup> Liberals often marshal original constitutional debates to support their belief against executive power to initiate war. Conservatives, in contrast, focus on the evolving times, from the prior precedents of presidents unilaterally commencing wars to arguments that, in the nuclear age, the president must have significant authority to act without Congress's approval.<sup>409</sup> Neither camp is monolithic. Yoo's article, for example, gives a comprehensive originalist defense for why the president enjoys significant inherent constitutional authority to initiate hostilities.<sup>410</sup>

The destruction of military federalism offers a different kind of reply to originalist scholars who argue that the president enjoys significant inherent constitutional authority to initiate war. Military federalism provided many hard-power and soft-power checks on the president's ability to engage U.S. forces unilaterally, especially in foreign theaters of conflict.<sup>411</sup> With respect to formal constitutional checks, the federal government had limited access to the militia, which was the nation's intended military reserve force. The militia could only be used to enforce the laws, suppress insurrections, and repel invasions. The Constitution, moreover, grants *Congress*—not the president—the power to provide for calling out the militia for these purposes. Congress could exercise the power directly, as it did before 1792 when Congress examined President Washington's request for forces on an individual-conflict basis.<sup>412</sup> Or Congress could largely delegate this power to the president, as it did with the 1792 and 1795 Militia Acts and the 1807 Insurrection Act. But even when the power was delegated, the president was limited to calling on reserve military forces only for domestic law

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407. See, e.g., David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008) (arguing that Congress remains intimately involved with the warmaking process, even if the executive takes the lead on initiating hostilities); cf. Jules Lobel, *Conflicts Between the Commander in Chief and Congress: Concurrent Power over the Conduct of War*, 69 OHIO ST. L.J. 391 (2008) (examining the role of Congress during hostilities and arguing that Congress has significant concurrent power over operations).

408. Yoo, *supra* note 406, at 172.

409. *Id.*

410. *Id.* at 172–75.

411. My thanks to Alex Platt for making this point to me in private discussions.

412. See, e.g., Yoo, *supra* note 406, at 291 (explaining that Congress debated the merits of various campaigns when President Washington requested more troops and militia).

enforcement, to suppress an insurrection, or to repel an invasion. Thus, the president only possessed unilateral control over a small standing army and navy. These forces were insufficient to allow the president to unilaterally engage in significant foreign conflicts.

The dramatic increase in today's standing army and navy gives the president a greater capacity to engage in foreign conflicts. As of February 2020, the United States has approximately 1.38 million active duty personnel.<sup>413</sup> These forces allow the president to unilaterally engage in limited conflicts, such as those in Panama and Kosovo. But the true backbone of today's armed forces—what allows the president to sustain long foreign campaigns or engage unilaterally in total war with another country—is the U.S. Armed Forces Reserve. The United States maintains an additional 804,235 in the Selected Reserves (i.e., the active, drilling component).<sup>414</sup> Of these, approximately 524,000 reservists are in the U.S. Army Reserve and Army National Guard, and another approximately 147,000 are in the U.S. Air Force Reserve and the Air National Guard.<sup>415</sup> As I have argued in Part II, these forces are constitutionally part of the “militia.” This means that today's large standing army, comprising regular troops, has not obviated the federal government's need to maintain a large organized militia.

By organizing the militia outside of its intended constitutional limits, the federal government has destroyed many soft-power checks

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413. For active duty and reserve numbers, see *DoD Personnel, Workforce Reports & Publications*, DEF. MANPOWER DATA CTR., [https://www.dmdc.osd.mil/appj/dwp/dwp\\_reports.jsp](https://www.dmdc.osd.mil/appj/dwp/dwp_reports.jsp) (last visited May 7, 2020) [<https://perma.cc/KT5C-RF9E>] (compiling statistics). The manpower statistics cited are from the February 29, 2020 version of the Department of Defense reports. See *Armed Forces Strength Figures for February 29, 2020*, DEF. MANPOWER DATA CTR. (Feb. 29, 2020), [https://www.dmdc.osd.mil/appj/dwp/rest/download?fileName=ms0\\_2002.pdf&groupName=milTop](https://www.dmdc.osd.mil/appj/dwp/rest/download?fileName=ms0_2002.pdf&groupName=milTop) [<https://perma.cc/ABN4-Q3VL>]; *Active Duty Military Personnel by Rank/Grade*, DEF. MANPOWER DATA CTR. (Feb. 29, 2020), <https://www.dmdc.osd.mil/appj/dwp/rest/download?fileName=rg2002.pdf&groupName=milRankGrade> [<https://perma.cc/E4MC-WPJR>]. The figure includes the total manpower of all Armed Forces components, including the Coast Guard. For the maximum authorized strength for active duty, permanent active force, and Selected Reserves, see John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, §§ 401, 411, 412, 132 Stat. 1636, 1734–1736.

414. *Selected Reserves by Rank/Grade*, DEF. MANPOWER DATA CTR. (Feb. 29, 2020), [https://www.dmdc.osd.mil/appj/dwp/rest/download?fileName=DRS\\_42486\\_SelRes\\_202002.pdf&groupName=resRankGrade](https://www.dmdc.osd.mil/appj/dwp/rest/download?fileName=DRS_42486_SelRes_202002.pdf&groupName=resRankGrade) [<https://perma.cc/X2KM-MQFR>].

415. See *id.* Again, these numbers include only the Selected Reserve. For more severe emergencies, the federal government may call upon an additional 231,000 members of the Individual Ready Reserve and the Inactive National Guard. Lawrence Kapp, *Defense Primer: Reserve Forces*, CONG. RES. SERV. (Jan. 6, 2020), <https://fas.org/sgp/crs/natsec/IF10540.pdf> [<https://perma.cc/46MM-2TDG>] (statistics as of September 30, 2019). And if the federal government needs even more manpower, the United States may call up members of the Standby Reserve, 10 U.S.C. § 12301 (2012), as well as retirees from the active duty and reserve components, 10 U.S.C. § 688 (2012). See generally JOINT CHIEFS OF STAFF, DEP'T OF DEF., JOINT PUB. 4-05, JOINT MOBILIZATION PLANNING IV-7 (Oct. 23, 2018), [https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp4\\_05.pdf](https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp4_05.pdf) [<https://perma.cc/L9PV-XNF8>].

on the president's capacity to wage war unilaterally. Under the Constitution as originally understood, the president would have a difficult time initiating a foreign war. Because the militia was only available for domestic needs, waging a foreign war of any substance required the president to request from Congress an increase in the authorized strength of the professional services. Thus, the original constitutional system forced early presidential-congressional consultation. Today, in contrast, the president can call up substantial reserves without first consulting Congress about the need for more personnel.<sup>416</sup> And even if the president managed to convince Congress, he still would have to convince the potential future troops themselves. The accepted mode of raising regular troops was by enlistment—not conscription—so the federal government would have to entice sufficient soldiers to enlist for the war. Unpopular wars would likely command higher enlistment bounties, which would serve as an economic disincentive to initiate conflicts.

One might argue, as David Barron and Martin Lederman do, that extensive presidential-congressional consultations still take place.<sup>417</sup> Although the president might be able to call up the reserves and initiate a conflict, he could not sustain the conflict without congressional support. The need for increased appropriations to fight a war inevitably leads the president to coordinate with Congress. Indeed, for some like Yoo, the Appropriations Power is the core of Congress's check on the president's ability to wage war.<sup>418</sup> Yoo argues that

a failure of political will should not be confused with a constitutional defect. A congressional decision not to exercise its constitutional prerogatives does not translate into an executive branch violation of the Constitution. Certainly congressional timidity cannot justify rearranging the Constitution—either to restrict the President's war-making powers, or to push the federal courts into political question cases—without a constitutional amendment.<sup>419</sup>

But as a matter of political reality, relying solely on the Appropriations Power shifts the balance of power heavily toward the executive. Because the president would have to convince Congress to

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416. 10 U.S.C. § 12302 (2012) (Ready Reserve). The president, however, generally needs a congressional declaration of war or national emergency to call up members of the Standby and Retired Reserve. *See* 10 U.S.C. § 12301(a).

417. *See supra* notes 404, 407, and accompanying text.

418. *See* Yoo, *supra* note 406, at 295 (“Although the Constitution gives the President the initiative in war by virtue of his powers over foreign relations and the military, it also forces the President to seek money and support from Congress at every turn.”). Of course, another soft-power limitation on the federal government's ability to wage war was the limited taxing power of the original Constitution. Initiating war often required Congress to authorize borrowing. Today, in contrast, expanded revenue sources allow the president to initiate conflicts and only later go back to Congress to continue the funding. My thanks to Ian Ayres for raising this taxation point.

419. *Id.* at 299.

raise the necessary troops, the original constitutional system required close consultation before the president could initiate significant hostilities. Now, the system only requires consultation to continue combat that the executive can unilaterally start. Politically, the president has an easier time requesting extra funds when American troops are already fighting in harm's way than he does convincing Congress to raise the necessary troops to begin the conflict.<sup>420</sup> Thus, Yoo does not account for the fact that "congressional timidity" is an unintended byproduct of destroying constitutional limits on federal military power.<sup>421</sup> The destruction of military federalism is likely a substantial factor in Congress's abdication of its role to deliberate and authorize wars.

Because the destruction of federalism in military affairs has altered the separation-of-powers dynamic between Congress and the president, evaluating the constitutionality of congressional efforts to rebalance that power inherently involves "second-best" constitutional interpretation. For example, assume *arguendo* that the War Powers Act is unconstitutional as an original matter. This does not tell us whether we should recalibrate the system because the destruction of military federalism has given the president more power to initiate war than the Constitution originally intended. In this light, we might view the Act as a necessary legal restraint on the president's enhanced warmaking ability. Given that the federal government is already operating outside of its intended constitutional limits in military affairs, the real question we should be asking is: How do we redivide the military power that the federal government seized from the states among the legislative and executive branches? For originalists, these questions involve answering whether second-best doctrines should be employed to compensate for the failure to follow the original structure.

The destruction of military federalism also means that state political leaders have less influence on the president's use of military reserves. As Jessica Bulman-Pozen has explained, cooperative federalism causes the states to act as a check on broad executive discretion.<sup>422</sup> Under the constitutional militia system, state political leaders, to whom the militia were principally attached, could be

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420. See, e.g., *id.* at 298 (noting, in the context of the war in Bosnia, that "the House passed a resolution opposing President Clinton's policy, but supporting the troops").

421. *Id.* at 298–99.

422. See Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 491 (2012) ("[B]y giving two different actors some role in a statutory scheme . . . Congress bakes competition into the scheme. Each agent has the incentive and ability to monitor the other, and, when they disagree, to claim that it is the superior agent of Congress.").

expected to advocate on the militia's behalf.<sup>423</sup> The political dialogue involved in calling forth the militia—and the militia's resistance to such inconvenience except when necessary for defense of the country—would serve to curb the president's ability to employ military force without popular support. Except when in active service, militia leaders would not be under the president's chain of command, which would insulate them if they provided candid commentary about the burdens of national deployment. When the president exceeded his authority or abused his discretion, state leaders could appeal to Congress to curb that discretion since Congress had ultimate control over calling forth the militia. The original constitutional system diffused executive power over the military between the president and the states, and that division reinforced *Congress's* primacy in military affairs.

Military federalism thus placed significant hard- and soft-power safeguards against the exercise of the president's Commander-in-Chief Power. The destruction of military federalism has created a power vacuum, which has largely been filled by expanding unilateral presidential authority. Future debates over the proper demarcation of warmaking authority between Congress and the president must account for the changed federal-state balance in military affairs.

### *B. Federalism*

The destruction of military federalism has had some salutary effects. While the breakdown in military federalism has contributed to Congress's decline in deliberating and authorizing military conflicts, limiting state power over the militia has enhanced Congress's role in supervising the readiness of the armed forces and militia. Madison's desire for fully nationalized armed forces has been realized. For the military, the result has been largely positive: better prepared and equipped armed forces and the prevention of dangerous inefficiencies in the constitutional military regime.

Nevertheless, the destruction of military federalism has had profound implications for the federal-state balance of power. States now have little power over military affairs, including over their state's

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423. This is not to say that state governments would have a *veto*—only that state officers would lobby in favor of the militia if the burdens placed on the militia were too great. As Madison noted during the Virginia ratifying convention, “[i]f you put it in the power of the State Governments to refuse the militia, by requiring their consent, you destroy the General Government, and sacrifice particular States.” *Debates of the Virginia Convention (June 14, 1788)*, *supra* note 41, at 1272, 1274; *see also* *Perpich v. Dep’t of Def.*, 496 U.S. 334, 354–55 (1990) (rejecting the constitutional necessity of a training veto for National Guardsmen sent abroad); *cf.* *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 28 (1827) (holding that the president has sole and unreviewable authority to determine the exigency when calling forth the militia pursuant to an act of Congress).

militia. In times of war, this creates difficult problems for state leaders because they often lack access to military forces sometimes necessary to meet domestic needs. The militia's hybrid federal-state status provides a great case study of many contemporary federalism disputes.

### 1. Political Accountability

One major theme undergirding the rise of contemporary judicial federalism is the need to ensure political accountability.<sup>424</sup> In *United States v. Lopez*, Justice Kennedy argued that “citizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function.”<sup>425</sup> Without knowing which leaders to hold responsible, citizens might hold neither accountable, thereby leading to a failure of political responsibility. Likewise, the Supreme Court in *New York v. United States* and *Printz v. United States* justified the anticommandeering principle of state legislatures and executive officers on the grounds that Congress could insulate itself from unpopular political choices by forcing the states to shoulder them.<sup>426</sup>

The history of the militia system lends credence to Justice Kennedy's political accountability argument. The Militia Act of 1792 provided guidance on organizing and arming the militia. But Congress left many of the controversial details—such as compulsory training—to the states because Congress could not reach agreement on these issues.<sup>427</sup> Despite repeated exhortations from federal political leaders to correct the problem, neither federal nor state governments took ownership.<sup>428</sup> And a substantial reason why is that neither the federal government nor the states wanted to pay for the militia. The 1792 Militia Act did not appropriate any money for the militia; Congress refused to spend the \$400,000 necessary to train and equip it.<sup>429</sup> Since

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424. See, e.g., Todd E. Pettys, *Competing for the People's Affection: Federalism's Forgotten Marketplace*, 56 VAND. L. REV. 329, 360 (2003) (“If one sovereign is permitted to obscure its role in bringing about undesirable regulatory outcomes, or if political responsibility is otherwise veiled to such an extent that the people cannot accurately allocate blame and praise between the two governments, then the competition's chief purpose has been thwarted.”).

425. 514 U.S. 549, 576–77 (1995) (Kennedy, J., concurring).

426. *Printz v. United States*, 521 U.S. 898, 930 (1997) (state and local officers); *New York v. United States*, 505 U.S. 144, 169 (1992) (state legislatures).

427. See H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR HOW THE SECOND AMENDMENT FELL SILENT* 113 (2002) (“Congress simply laid out the organizational form of the nation's militia, dividing the force into divisions and battalions that were in turn subdivided into regiments and companies . . . and left to the states the problem of compelling citizens to fill out these units.”).

428. See HUNTINGTON, *supra* note 27, at 170; UVILLER & MERKEL, *supra* note 427, at 115 & n.29.

429. CURRIE & CROSSLAND, *supra* note 163, at 6.

the federal government maintained a small army, the Act effectively left the states funding national defense. An 1803 congressional act required the states to provide militiamen with weapons, ammunition, and equipment.<sup>430</sup> But Congress provided no funding, so the states largely ignored this mandate.<sup>431</sup> The original militia structure thus permitted the federal government to divorce the laudable goal (i.e., maintaining a militia over a standing army) from the politically unpopular necessary incidents (i.e., paying for the militia and compelling citizens to train), which led to dysfunction.

The situation only improved after the federal government effectively took control of the militia from the states with the Dick Act. Congress conditioned the receipt of federal funds on the National Guard's compliance with federal standards. The Dick Act required National Guard units to attend twenty-four drills per year and to meet the standards of the regular army, in addition to subjecting National Guard units to inspections by regular army officers.<sup>432</sup> As the federal government became the near-exclusive source of funds and equipment for the organized militia, the federal government concomitantly assumed control over the militia's supervision.

Today, responsibility for the National Guard's mission falls largely with the president and federal leaders. The public recognizes this fact.<sup>433</sup> And while not in keeping with original constitutional design, centralization of power has laudably created political accountability—federal leaders know that they are now responsible for the military's functioning. As a result, the National Guard is better trained and equipped than the nineteenth-century militia.

## 2. Overseas Deployment and Domestic Security

While transferring military authority entirely to the federal government has had beneficial effects on military readiness, the destruction of military federalism has had some negative consequences on the federal-state balance. The greatest disadvantage is the unavailability of state forces during foreign wars.

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430. An Act in Addition to an Act, Entitled "An Act More Effectually to Provide for the National Defense, by Establishing an Uniform Militia Throughout the United States," ch. 15, § 2, 2 Stat. 207, 207 (1803).

431. See 1 CURRIE, *supra* note 231, at 7 n.26.

432. Militia Act of 1903 (Dick Act), ch. 196, § 18, 32 Stat. 775 (1903).

433. Following Hurricane Katrina, for example, President George W. Bush—not state political leaders—took the brunt of the blame for the inadequate response to the disaster. See Eric Lipton, *Republicans' Report on Katrina Assails Administration Response*, N.Y. TIMES (Feb. 13, 2006), <http://www.nytimes.com/2006/02/13/politics/13katrina.html> [https://perma.cc/JP2E-CXTK].

The Constitution authorizes the federal government to federalize the militia only to enforce the laws, suppress insurrections, and repel invasions. Outside these circumstances, the militia remains under the command of the states. The delegates steadfastly refused Madison's attempts to nationalize the militia entirely. A number of reasons were given for allowing the states to retain some control. Some feared that having no available military force would doom the states to insignificance and obliterate the states' limited sovereignty.<sup>434</sup> Others gave practical arguments: states sometimes needed military forces to enforce their laws, suppress insurrections, or repel invasions before federal authority could be summoned.<sup>435</sup>

In recent times, states frequently have found their organized militia called into foreign wars under the Army Power. Many National Guardsmen have performed at least one tour of duty in Iraq or Afghanistan. These foreign deployments can interfere with the National Guard's ability to perform state functions back home.<sup>436</sup> The potential for National Guard deployments has caused many states to maintain their own military organizations, called "state guards" or "state defense forces."<sup>437</sup> These state organizations sit outside the national militia system, but Congress has consented to their existence.<sup>438</sup>

State defense forces have a murkier status than the militia. Many states consider state guards or state defense forces to be part of their organized militia.<sup>439</sup> Federal law, however, does not recognize them as such.<sup>440</sup> The federal government, moreover, does not provide for their organization, arming, or discipline. And state defense forces may not be "called, ordered, or drafted into the armed forces."<sup>441</sup>

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434. See *supra* note 72 and accompanying text.

435. See *supra* notes 73, 93 and accompanying text.

436. See, e.g., 32 U.S.C. § 325(a)(1) (2012) (relieving National Guard members called to active duty in the "National Guard of the United States" from their state militia duties).

437. See Arthur N. Tulak, Robert W. Kraft & Don Silbaugh, *State Defense Forces and Homeland Security*, 33 PARAMETERS 132, 132 (2003–2004), <https://sgaus.org/wp-content/uploads/2015/10/State-Defense-Force-and-Homeland-Security.pdf> [<https://perma.cc/J4SG-8FMV>].

438. See 32 U.S.C. § 109(c) (2012) (authorizing such forces).

439. See, e.g., ALA. CODE § 31-2-3 (2020) (stating that the organized militia of the state includes the state guard); ALASKA STAT. § 26.05.030 (2020) (same); CAL. MIL. & VET. CODE § 120 (West 2020) (same); HAW. REV. STAT. §§ 121-1, 122A-2 (2018) (same); N.M. STAT. ANN. §§ 20-2-2, 20-5-1 (2019) (same); N.Y. MIL. LAW § 44 (McKinney 2020) (same).

440. See 10 U.S.C. § 246(b)(1) (2012). Federal law may nevertheless imply their existence as organized militias. See, e.g., 32 U.S.C. § 101(4) (2012) (defining "Army National Guard" as a subset of the state's organized militia). *But see* 10 U.S.C. § 311(b) (2012) (defining "organized militia" to include only the National Guard and naval militia).

441. 32 U.S.C. § 109(c). Additionally, state defense force members may not be members of any U.S. Armed Forces reserve component. 32 U.S.C. § 109(e). Although state defense forces may not

Whether this last provision bans their federalization entirely, including for the purposes of the Militia Clauses, or simply prohibits their conscription into the federal professional services (i.e., in the same manner that National Guardsmen are part of the federal army reserve) remains an open question.<sup>442</sup> In dicta, the Supreme Court has suggested that state defense forces might be subject to federal militia duty pursuant to the federal government's statutory power to call forth the entire militia, including the unorganized militia.<sup>443</sup>

On the other hand, the Supreme Court has relied on the existence of state defense forces to justify the federal government's domination of the National Guard system. Because federal law authorizes states to have defense forces, the Court concluded that the ability of the federal government to call forth a state's entire National Guard for any reason (in their status as Army Reservists) is not constitutionally problematic.<sup>444</sup> The Court stated, "As long as that provision remains in effect, there is no basis for an argument that the federal statutory scheme deprives Minnesota of any constitutional entitlement to a separate militia of its own."<sup>445</sup>

The courts have never answered what entitlement states have, if any, to maintain organized militia units independent of federal authority. Before *Heller*, lower courts frequently held in gun control cases that the Second Amendment guaranteed state governments the right to maintain a militia.<sup>446</sup> But in military law cases such as *Perpich* and the *Selective Draft Law Cases*, federal courts steadfastly disclaimed any preclusive authority of the state to maintain a militia.<sup>447</sup> At most, it seems that a state has a concurrent power to organize additional militia units based on the Tenth Amendment but no preclusive power.<sup>448</sup>

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be drafted into the armed forces, state defense force members are not exempt from federal military duty in their individual capacities. 32 U.S.C. § 109(d).

442. See *Perpich v. Dep't of Def.*, 496 U.S. 334, 352 n.25 (1990).

443. See *id.*

444. *Id.* at 350–54.

445. *Id.* at 352.

446. See, e.g., *Silveria v. Lockyer*, 312 F.3d 1052, 1060–61 (9th Cir. 2002); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976). The Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570, 622, 628 (2008), that the Second Amendment protects the right of individuals, including those not presently enrolled in a state-organized militia, to possess handguns in their homes for private self-defense.

447. See, e.g., *Heath*, *supra* note 95, at 54, 61–64. Although it is sometimes said that a state has a *right* to have a militia, the federal government can conscript every able-bodied person. So even if states theoretically have a right to have a militia, this right is vacuous because the states have no preclusive power to have able-bodied persons available for militia service.

448. See discussion *supra* note 95 and accompanying text.

Regardless of what constitutional entitlement states have to their own militia units, states lack the money, training, leadership, and political will to organize these forces.<sup>449</sup> Consequently, these state defense forces are largely unable to replace the National Guard in providing for domestic security. If anything, the current state of these forces demonstrates why the Framers were wise not to leave the militia entirely in state hands.

The Framers intended the militia to be a cooperative federal institution. Now, two parallel militia systems have developed, one cooperative and one involving dual federalism. The federal government uses federal funding conditions to dominate the National Guard and control it beyond intended constitutional limits. If states want to escape the Guard system, they must develop state defense forces, which are largely kept outside of the national military structure. But the Framers largely disavowed dual federalism in military affairs; the Constitution intended a uniform militia serving as the backbone of national defense. The federal government had a large role in providing for the militia's organization and training. When the Guard is available—which it generally is—the states have access to well-trained militia units. But during prolonged wars or deployments, states risk losing access to competent military forces to perform state functions.

### 3. Preventing Illegal State Resistance to Federal Authority

By design, the original constitutional framework provided the states with the ability to resist federal authority. Madison explained in Federalist No. 46 that, in the event of a tyrannical exercise of federal power, the states could band together outside of the federal framework and resist.<sup>450</sup> Hamilton made a similar claim in Federalist No. 28.<sup>451</sup> The Constitution facilitated this by reserving substantial authority over the militia to state governments, including by allowing state governments to appoint militia officers and by securing to the people the right to bear arms.

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449. See, e.g., James Jay Carafano & Jessica Zuckerman, *The 21st-Century Militia: State Defense Forces and Homeland Security*, HERITAGE FOUND. 6–8 (Oct. 8, 2010), [http://thf\\_media.s3.amazonaws.com/2010/pdf/bg2474.pdf](http://thf_media.s3.amazonaws.com/2010/pdf/bg2474.pdf) [https://perma.cc/U6XQ-P36A] (surveying extant state defense forces and finding them underfunded, with few personnel, and not much public awareness of their existence or mission).

450. See THE FEDERALIST NO. 46, *supra* note 24, at 297–98 (James Madison) (“But ambitious encroachments of the federal government, on the authority of the State governments, would not excite the opposition of a single State, or of a few States only. They would be signals of general alarm. Every government would espouse the common cause.”).

451. See THE FEDERALIST NO. 28, *supra* note 24, at 181 (Alexander Hamilton) (“[T]he State governments will . . . afford complete security against invasions of the public liberty by the national authority.”).

There is little doubt that the states often abused their reservation of military power. During the War of 1812, many states refused to place their militia under federal command and interfered with the president's role as commander in chief.<sup>452</sup> Obstructing federal authority made the militia inadequate for national defense. Even more prominently, the Southern states unleashed their military power directly against the federal government during the Civil War.<sup>453</sup>

The consolidation of military power in the federal government has largely prevented such illegal state obstructions. State governors no longer possess the raw power to interfere with national military objectives, and the courts have supported the federal government when faced with state interference. The closest modern-day analogue to the state governor's refusal of the militia during the War of 1812 was some governors' refusals to allow the National Guard to go abroad for training. The governors objected that the federal government would use the Guardsmen to undermine foreign governments. In attempting to block the use of the National Guard, the governors placed their foreign policy preferences in conflict with the president's.<sup>454</sup> In *Perpich v. Department of Defense*, the Supreme Court held that state governors had no right to veto federal military policy by withholding Guard units.<sup>455</sup>

Nor can states effectively combat the federal government directly. When Governor Orval Faubus used the National Guard to prevent school integration, President Eisenhower federalized them and ordered them to report to their armories.<sup>456</sup> Because the National Guard's allegiance lays primarily with the federal government, President Eisenhower had no difficulty removing the National Guard from state command. This gave Governor Faubus no organized military power at his disposal to resist lawful federal authority.

Commentators often emphasize only the fact that the partial reservation of the militia to the states enabled the militia to resist the federal government.<sup>457</sup> While the Framers partially designed the militia

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452. See *supra* note 129 and accompanying text.

453. Weigley, *supra* note 35, at 222 (“[T]he Civil War would demonstrate that with their militia systems, the states retained sufficient sovereignty in a military sense to wage a large-scale war against the federal government.”).

454. See *supra* note 179 and accompanying text.

455. 496 U.S. 334 (1990).

456. Jack Raymond, *Soldiers Fly In*, N.Y. TIMES (Sept. 25, 1957), <https://timesmachine.nytimes.com/timesmachine/1957/09/25/84766280.pdf> [<https://perma.cc/6B2A-EYP5>].

457. Amar correctly points out this is not an insurrectionist theory. Instead, the reservation to the states and the people of the ability to resist the federal government was predicated on the

system to enable this, the checks on military power were reciprocal. The Constitution also vested the federal government with the power to overcome unlawful state resistance to federal authority. The demise of military federalism has eased the federal government's ability to overcome illegal state resistance to federal law.

#### 4. The Militia as the Final Check on Federal Oppression

As a corollary of the last point, the final way in which the destruction of military federalism matters for the federal-state balance is that the militia no longer serves as a meaningful check on the federal army's use of unlawful force. This function is one of the most widely touted purposes of military federalism, since the Framing generation worried about the potential of standing armies to oppress the citizenry. In contemporary times, however, checking the federal army is likely military federalism's least relevant purpose.

Military federalism was largely a concession to moderates and Antifederalists during the Framing era. Many of the Federalists, including James Madison, lobbied for fully nationalized armed forces and militia, not trusting the states to handle defense matters adequately. For them, there was no need to check the army; separation of powers and elections provided adequate safeguards against tyrannical use of the military.<sup>458</sup> Indeed, Madison labeled the Antifederalist argument that these safeguards could fail as "extravagant."<sup>459</sup>

But it is wrong to infer from this fact that having a militia system as a whole has no contemporary value. Although the militia system had a remedial purpose (to restore civilian control of government if political or military leaders failed to respect the rule of law), its main value was prophylactic: to prevent such a situation from developing in the first place.<sup>460</sup> Today, the militia system retains much of its prophylactic value. The Supreme Court has long recognized that "the military is, by necessity, a specialized society separate from civilian

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breakdown of ordinary legal institutions and the rule of law. See Amar, *supra* note 23, at 1499–1500.

458. THE FEDERALIST NO. 46, *supra* note 24, at 295 (James Madison).

459. *Id.* at 299.

460. See Amar, *supra* note 23, at 1500 ("[P]erhaps the strongest evidence of the effectiveness of the framers' system of military checks is two centuries of civilian supremacy that have made a military coup almost unthinkable."); Weigley, *supra* note 35, at 215–16 ("Through the early years of the Republic and throughout the nineteenth century, military forces were too small and too peripheral to American politics and society at large to be anything but compliant with civilian control, except possibly during the Civil War.").

society.”<sup>461</sup> A major fear of the Framers was that regular soldiers, who live in a separate, highly regulated, and disciplined community, would not value the freedom that they were tasked with defending since they did not experience that freedom in their daily life. Whatever their label (e.g., “reserves” or “National Guard”), part-time citizen-soldiers provide a forum to keep the military directly connected with the civilian community. These individuals have nonmilitary occupations and, except when in actual service, live apart from military discipline. Nevertheless, they give the government a rapid way of expanding the nation’s military forces in an emergency, thereby diminishing the number of regular soldiers needed by the federal government. The primary purpose of the militia was never to combat the federal government. Since its earliest days in England, the militia provided cost-effective defense for the community. Today’s organized militia, whether called the “U.S. Army Reserve” or the “National Guard,” continues that tradition.

That said, the destruction of state checks on federal military power remains significant. The abolition of the remedy of last resort places more emphasis on other methods of ensuring civilian control of the military. In a system that lacks state checks over federal power, it becomes more important to maintain balance in the federal system. This is done through respecting horizontal structure—that is, by maintaining separation of powers and having adequate checks and balances on the executive branch. And it is done by maintaining the professionalization of military personnel, including keeping the military politically neutral.<sup>462</sup>

### *C. The Limits of Military Criminal Jurisdiction*

Because the federal government has collapsed the militia into the army, a final issue concerns Congress’s power to subject military reservists to military criminal jurisdiction. The Framers limited application of military law to the members of the militia only when they were “in actual service in time of War or public danger.”<sup>463</sup> Otherwise, part-time citizen-soldiers received the same criminal procedure rights as other citizens. In contrast, the Constitution allows Congress to subject regular members of the armed forces to military law at all times

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

462. *See, e.g.*, BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 43–64 (2010) (describing the increasing politicization of the military); HUNTINGTON, *supra* note 27, at 80–97 (discussing how military professionalism can reinforce civilian control).

463. U.S. CONST. amend. V.

based solely on their status as members of the armed forces.<sup>464</sup> This includes cases when the crime has no service connection to the military other than its commission by a military member. This raises an important question: Are military reservists to be treated as “militia” or as professional military for the purposes of military criminal jurisdiction?

Federal law presently adopts an in-between approach. By statute, Congress has restricted application of the Uniform Code of Military Justice (“UCMJ”) to reservists. Generally, reservists are not subject to military law unless they are on active duty or are training during inactive duty<sup>465</sup>—essentially a militia-type approach. But there are statutory exemptions. For example, the UCMJ applies to retired regular personnel receiving pay and to retired reservists receiving hospitalization.<sup>466</sup>

As a result of this in-between approach, the military occasionally prosecutes inactive military members for conduct wholly disconnected from the military.<sup>467</sup> For example, in *United States v. Larrabee*, a retired Marine Corps sergeant working as the manager of a bar was court-martialed for sexually assaulting a bartender.<sup>468</sup> And in *United States v. Dinger*, another retired Marine Corps sergeant faced a court-martial for possession of child pornography.<sup>469</sup> A recent Navy corruption scandal also put significant numbers of retirees at risk for court-martial.<sup>470</sup>

The constitutionality of these prosecutions remains unclear. The U.S. Court of Appeals for the Armed Forces has affirmed convictions in *Larrabee* and *Dinger*, and the Supreme Court has denied certiorari in these cases.<sup>471</sup> In contrast, the Navy-Marine Corps Court of Criminal Appeals struck down a retiree’s prosecution under the equal protection component of the Fifth Amendment because Congress subjected active duty retirees to broader military criminal jurisdiction than reserve

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464. *Solorio v. United States*, 483 U.S. 435, 448–50 (1987).

465. Uniform Code of Military Justice, art. 2, 10 U.S.C. § 802(d)(2) (2012).

466. 10 U.S.C. § 802(a)(4)–(5).

467. *The Navy Times* reports that at least eight retirees have been charged under the UCMJ by the Air Force, Navy, and Marine Corps. The Army did not report its numbers. Geoff Ziezulewicz, *Court-Martialing Retirees? ‘Fat Leonard’ Cloud Still Looms for Many Current and Former Sailors*, NAVY TIMES (Nov. 20, 2017), <https://www.navytimes.com/news/your-navy/2017/11/20/court-martialing-retirees-fat-leonard-cloud-still-looms-over-hundreds/> [https://perma.cc/72YQ-82UW].

468. *United States v. Larrabee*, No. 201700075, 2017 WL 5712245, at \*1 (N-M. Ct. Crim. App. Nov. 28, 2017), *aff’d*, 78 M.J. 107 (C.A.A.F. 2018), *cert. denied*, 139 S. Ct. 1164 (2019).

469. *United States v. Dinger*, 77 M.J. 447, 448 (C.A.A.F.), *reconsideration denied*, 78 M.J. 91 (C.A.A.F. 2018), *cert. denied*, 139 S. Ct. 492 (2018).

470. See discussion *supra* note 467.

471. See sources cited *supra* note 468–469.

retirees.<sup>472</sup> Larrabee has also sought collateral relief from a U.S. District Court.<sup>473</sup>

For reservists, the status-based universal jurisdiction outlined in *Solorio v. United States* seems inappropriate as the constitutional ceiling.<sup>474</sup> Because the U.S. Army Reserve is a federally organized militia, military reservists have a strong argument that courts should apply the criminal procedure guarantees that apply to members of the militia. The Constitution clearly evidences an intent to exempt part-time soldiers from military law except when in actual service.<sup>475</sup> Why should permitting Congress to maintain a federally organized militia also allow Congress to subject federal militiamen to military law outside the jurisdictional restrictions imposed by the Fifth and Sixth Amendments? That compounds one constitutional error with another.

As applied to the issues in *Larrabee* and *Dinger*, this analysis suggests two conclusions. First, whether the federal government may court-martial retirees of a regular component depends on whether someone who is retired from active service still constitutes part of the *regular* forces. I am not sure of the answer to this issue. One answer might be that retirees are militia because, although they may be recalled to active duty, their primary occupation no longer consists of being a soldier. And treating retirees as active duty soldiers creates tension with fundamental constitutional rights.<sup>476</sup> History, however, may offer a different answer; there is authority for the proposition that retired members of the military remain in the regular forces despite

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472. *United States v. Begani*, No. 201800082, 2019 WL 3542910, \*9–10 (N-M. Ct. Crim. App. July 31, 2019).

473. Complaint for Declaratory and Injunctive Relief (Collateral Review of Unconstitutional Trial by Court-Martial) at 9, *Larrabee v. McPherson*, No. 1:19-cv-00654 (D.D.C. Mar. 7, 2019), <https://www.courtlistener.com/recap/gov.uscourts.dcd.204940/gov.uscourts.dcd.204940.1.0.pdf> [<https://perma.cc/F86Z-RR66>].

474. This argument is premised on accepting that the difference between a member of the “army” and the “militia” is whether person serves full-time or part-time. For those who believe that the dividing line between armies and militia is whether the forces are volunteers or conscripted, my argument against universal jurisdiction would apply to conscripts, *mutatis mutandis*.

475. *See, e.g.*, U.S. CONST. amend. V (“No person shall be held to answer for a . . . crime, unless on a presentment or indictment of a Grand Jury, except in cases arising . . . in the Militia, when in actual service in time of War or public danger.”). Federal statutory law recognizes that members of the armed forces who are not on active duty may constitute part of the militia. 10 U.S.C. § 247(a)(3) (2012).

476. For example, Article 88 of the UCMJ prohibits a commissioned officer from “us[ing] contemptuous words against the President, the Vice President, Congress, [and certain other officials].” 10 U.S.C. § 888 (2012). While this Article may be a reasonable disciplinary provision for active duty forces, this provision raises serious freedom of speech concerns when applied to retired members who have reentered civilian life and whose chance of serving on active duty again is almost purely hypothetical.

their lack of active service.<sup>477</sup> Second, contrary to the Navy-Marine Corps Court of Criminal Appeals' opinion, there may be a rational basis to distinguish active duty and reserve retirees. If retirees from regular components remain in the regular forces, then the narrower circumstances in which the federal government may subject retired reservists to military criminal jurisdiction may be compelled by the Fifth Amendment's narrower militia exception.<sup>478</sup>

Regardless of the status of active duty retirees, reserve retirees are undoubtedly militia. For the reasons explained in Section II.B, active reservists are militiamen because they are part-time soldiers. Moving from a drilling reserve member to a member of the retired reserve does not transform a reservist into a professional soldier. It moves the reservist in the opposite direction—toward being a full-time civilian.

Thus, again, we see that the departure from original constitutional design raises difficult doctrinal questions. In some cases, a court can only produce originalist judgments by compensating for previous deviations from original constitutional design. Here, it is unlikely that federal courts would ever broadly declare the army reserve in violation of the Militia Clauses. But if a court accepts the legitimacy of the army reserve while also applying the rule that Congress can extend plenary military criminal jurisdiction over all army members (active duty and reserve), then it will reach a result at odds with the plain text of the Fifth Amendment. That Amendment allows the federal government to apply military law to part-time soldiers only in narrow circumstances. Proper recognition of the army reserve as a constitutional "militia" suggests that courts may need to narrow the scope of Congress's power to apply military law to reservists. Only then would the scope of military criminal jurisdiction remain consistent with the Fifth Amendment's narrow militia exception.<sup>479</sup> More broadly, this suggests that courts need to be careful in how they approach constitutional construction when engaged in second-best originalism. Selective usage of originalism can produce judgments further at odds with the original meaning of the Constitution.

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477. 1 WINTHROP, *supra* note 127, at 87 n.27.

478. I do not mean to defend every particular of Article 2 of the UCMJ. If my argument is correct, then the provision permitting the federal government to court-martial reservists receiving hospitalization, 10 U.S.C. § 802(a)(5) (2012), may be unconstitutional to the extent that it authorizes such proceedings during peacetime. *See* U.S. CONST. amend. V.

479. *Cf.* United States v. Lane, 64 M.J. 1, 7 (C.A.A.F. 2006) (holding that Senator Lindsay Graham's appointment to the Air Force Court of Appeals violated the Incompatibility Clause, while refusing to rule more broadly on whether a member of Congress's commission in the military violated the Clause).

## CONCLUSION

The modern organization of the armed forces heavily deviates from how the Framers originally divided the military power of the United States between the federal government, the states, and the people. The federal government maintains large reserve forces, which are, in essence, an organized national militia. And through the draft, the federal government has immediate access to the entire manpower of the United States, without any role for state governments. In short, the current system concentrates enormous military power into the hands of the federal government without the original federalism-based checks on that power. And the increase of federal power at state expense has concentrated military power into the hands of the president and diminished the power of Congress over the armed forces.

But understanding the Framers' original division is important to many contemporary debates over how to apply the Constitution to questions involving the military. With the destruction of federalism-based checks on military power, the only checks and balances are provided by separation of powers. Understanding this may lead us to rebalance the division of power between the president and Congress to compensate for the additional power taken from the states. Moreover, many questions remain about the constitutional limits of the federal government to institute a draft and to govern reserve forces. By understanding the military system's changes over time, we may be able to better demarcate an appropriate modern limit to the federal government's power to raise and govern military forces.