Robert Leider*

Deciphering the "Armed Forces of the United States": A Cy Pres Reconstruction of the Modern Constitutional Armies and Militia

ABSTRACT: The Constitution provides for two kinds of military land forces—armies and militia. Commentators and judges generally differentiate the armies from the militia based upon federalism. They consider the constitutional "armies" to be the federal land forces, and the constitutional "militia" to be state land forces—essentially state armies. And the general consensus is that the militia has largely disappeared as an institution because of twentieth-century reforms that brought state National Guards under the control of the federal Armed Forces.

This Article argues that the general consensus is wrong. At the Framing, the proper distinction between "armies" and "militia" had to do with professionalism, not federalism. Armies comprised soldiers for whom military service was their principal occupation, while the militia comprised individuals who were subject to military service only on a part-time or emergency basis. Put differently, the armies were the regular forces, while the militia was the citizen army. From these definitions, this article then provides a better translation of the Framing-era military system to the structure of the modern Armed Forces.

* Assistant Professor, George Mason University, Antonin Scalia Law School. My thanks to Will Baude, Caroline Cecot, Eric Claeys, Richard Kohn, Nelson Lund, Adam Mossoff, Lee Liberman Otis, Jeremy Rabkin, Paolo Saguato, Ilya Somin, Stephen Vladeck, and the participants of George Mason's Levy Workshop and Manne Forum. My thanks to Carolina Celnik, Jacob P. Meckler, Konnor P. Ternus, and Tyler W. Shannon for significant research assistance.

INTRODUCTION

Originalism is undergoing a resurgence in academia and the courts.[1] That resurgence has influenced many prominent areas of constitutional law. These include separation of powers,[2] the vesting of executive power,[3] and the exercise of fundamental rights enumerated in the Constitution.[4] But one area of constitutional law has evaded significant originalist scrutiny: the organization of the military.

The Constitution recognizes two distinct kinds of military land forces—armies and militia—and the Constitution provides for these forces differently. Yet, through creative lawmaking and lawyering, the federal government has used its power to raise and support armies to seize control of the militia from the states and to exercise power over the militia in excess of that granted to the federal government by the Constitution. These laws have received little critical judicial, political, or academic attention, particularly from those who profess adherence to originalism in constitutional interpretation.[5]

That the organization of the military has escaped a significant originalist critique is not surprising. Judges are loathe to intervene in military policy, so regulation of the military by the political branches receives the utmost deference from the courts.[6] Moreover, in political and academic circles, there is little push toward originalism in military organization. The Constitution awkwardly divided the military power between the federal and state governments and limited the federal government's ability to call forth the militia. This division of authority and the limitations on federal power led to systemic dysfunction, and efforts to evade these constitutional limitations reach back to the quasi-War with France.[7] There is little appetite to return to Framing-era practices, whether modern practice adheres to original design or not.

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[1] Lawrence B. Solum, *We Are All Originalists Now*, *in* CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 5–11 (2011).

[2] *See, e.g.*, INS v. Chadha, 462 U.S. 919 (1983) (invalidating the legislative veto).

[3] *See, e.g.*, Collins v. Yellen, 141 S. Ct. 1761 (2021 (invalidating for-cause removal protections for the Director of the Federal Housing Finance Agency); United States v. Arthrex, Inc., 141 S. Ct. 1970 (2021) (holding that the unrelievable authority of administrative patent judges was incompatible, under the Appointments Clause, with their appointment by the Secretary of Commerce to an inferior office); Seila Law LLC v. CFPB, 141 S. Ct. 2183 (2020) (invalidating for-cause removal protections for the CFPB director); Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477 (2010) (invalidating dual for-cause removal protections for members of the Public Company Accounting Oversight Board) ; Edmund v. United States, 520 U.S. 651 (1997) (holding, based in part on the original meaning of the Appointments Clause, that a judge of the Coast Guard Court of Criminal Appeals was an inferior officer).

[4] *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390 (2020) (requiring unanimous juries in state proceedings); District of Columbia v. Heller (holding, based on the original public meaning, that the Second Amendment recognizes an individual right to keep and bear arms); United States v. Jones, 565 U.S. 400 (2012) (using a trespass test to find that attaching a GPS device constitutes a "search" under the Fourth Amendment); Crawford v. Washington, 541 U.S. 36 (2004) (excluding out-of-court statements of an unavailable witness based on the Sixth Amendment's Confrontation Clause); Apprendi v. New Jersey, 530 U.S. 466 (2000) (requiring a jury to find all facts, other than the existence of a previous conviction, that increase a possible penalty for a crime).

[5] For some articles addressing these issues, see Stephen I. Vladeck, *The Calling Forth Clause and the Domestic Commander in Chief*, 29 CARDOZO L. REV. 1091 (2008); Marcus Armstrong, *The Militia: A Definition and Litmus* Test, 52 ST. MARY'S L.J. 1 (2020); S. T. Ansell, *Legal and Historical Aspects of the Militia*, 26 YALE L.J. 471 (1917).

[6] *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503, 507 (1986); Rostker v. Goldberg, 453 U.S. 57, 64–65 (1981); Gilligan v. Morgan, 413 U.S. 1, 8–12 (1973).

[7] *See infra* note 187, and accompanying text.

But the distinction between "armies" and "militia" is fundamental to how the Constitution governs military affairs. Some reserve state authority is tied to the military powers. While Article I, Section 8 reserves to the states some important powers over the militia, Article I, Section 10 prohibits states from maintaining "troops" in peacetime without Congress's consent.[8] Questions of state military power relate back to whether the state is organizing "militia" or raising "troops." Many fundamental constitutional rights also relate back to the military structure in some form. The Fifth and Sixth Amendments protect various criminal procedure rights, including requiring that a grand jury charge someone with a crime and a petit jury adjudicate guilt.[9] Yet, those provisions do not apply in cases "arising in the land or naval forces," nor do they apply in cases arising "in the Militia, when in actual service in time of War or public danger."[10] Properly distinguishing which individuals belong to the constitutional "armies" and the "militia" is necessary to determine when Congress may subject military personnel to the military criminal justice system. The Second Amendment, which protects "the right of the people to keep and bear arms,"[11] exists to "assure the continuation and render possible the effectiveness of [militia] forces."[12] At one time, the Supreme Court said that the Second Amendment "must be interpreted and applied with that end in view."[13] Given the text of the Second Amendment, the nature of the militia should influence how we think about the scope of the right to bear arms.

Now that Congress uses its Army Power to circumvent the Militia Clauses, we have lost our understanding of the distinction, and the other constitutional threads are unraveling. In 1990, the Supreme Court struggled to understand the limits of federal power over the militia in *Perpich v. Department of Defense*.[14] The oral argument left the Justices so utterly confused[15] that they largely ducked the difficult questions by relying on general cooperative federalism principles.[16] In *District of Columbia v. Heller*,[17] the entire Supreme Court struggled to connect the Second Amendment to the militia system. When determining the scope of the right, Justice Scalia's majority opinion heavily divorced its understanding of the Second Amendment's scope from the goal of preserving "[a] well regulated Militia."[18] Justice Stevens, who authored both the principal dissent in *Heller* and the unanimous opinion in *Perpich*, fared even worse. Across *Perpich*, his dissent in *Heller*, and his dissent in *McDonald v. City of Chicago* (which incorporated the Second Amendment against the States), Justice Stevens could not settle on a consistent and coherent understanding of the "militia" as an institution.[19]

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[8] *Compare* U.S. CONST. art I, § 8 cl.16, *with* U.S. CONST art. 1, § 10, cl. 3.
[9] U.S. CONST. amends. V, VI.
[10] U.S. CONST. amend V; United States v. Riesbeck, 77 M.J. 154, 162 (C.A.A.F. 2018) ("Courts-martial are not subject to the jury trial requirements of the Sixth Amendment."); *cf.* Ex Parte Milligan, 71 U.S. 2, 102 (1866).
[11] U.S. CONST. amend. II.
[12] United States v. Miller, 307 U.S. 174, 178 (1939).
[13] *Id.*
[14] Perpich v. Dep't of Defense, 496 U.S. 334 (1990).
[15] *See* Transcript of Oral Argument at 5-13, 31–34, 37–39, Perpich v. Dep't of Defense, 496 U.S. 334 (1990) (No. 89-542).
[16] *Perpich*, 496 U.S. at 351–52.
[17] 554 U.S. 570 (2008).
[18] *Id.* at 627–28 (explaining that weapons that may be necessary for a modern-day militia,"M-16 rifles and the like," may be prohibited despite weakening the relationship between the operative clause and the prefatory clause).
[19] Perpich v. Dep't of Defense, 496 U.S. 344, 347–49 (1990); District of Columbia v. Heller, 554 U.S. 570, 670–72, (2008) (Stevens, J., dissenting); McDonald v. City of Chicago, 561 U.S. 742, 897–90 (2010) (Stevens, J., dissenting).

Lower federal courts, likewise, have struggled to understand who falls within the "land or naval forces" and how to apply the distinctions between the "armies" and the "militia."[20] Particularly thorny are cases involving the scope of Congress's power to subject citizens to military justice. For example, Congress supposedly created the military reserves under its constitutional power to raise and support armies; yet, the resulting part-time forces operate more like an organized militia than a standing army. May Congress subject reservists to military law at all times, on duty or off duty? How about regular or reserve retirees?

Beyond the federal courts, the situation is little better. Many state constitutions recognize a right to bear arms both for self-defense and defense of the state.[21] Lack of understanding about the militia has caused state courts to ignore or deny the modern relevance of the right to bear arms for collective defense.[22] Tort plaintiffs are attempting to exploit this lack of knowledge about the right to bear arms for collective self-defense to claim that companies producing military-style products for the civilian market are engaged in wrongful activities.[23] Academic discussions about the Second Amendment frequently assume that the militia system is defunct.[24] As a result, academic debates about the Second Amendment often revolve around the Amendment's applicability to individual self-defense against crime or the contemporary relevance of whether citizens could (or should) have the power to revolt against tyrannical government.[25] There is very little discussion about how the Second Amendment otherwise furthers modern military purposes or collective defense.

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[20] United States v. Dinger, 77 M.J. 447 (C.A.A.F. 2018) (holding that a member of the active-duty retired list can be lawfully subjected to a court-martial even though Congress has not applied an analogous rule to members of the retired reserve); United States v. Larrabee, 78 M.J. 107, 107 (C.A.A.F. 2018) (same); *In re Sealed Case*, 551 U.S. 1047, 1049 (D.C. Cir. 2009) (Privacy Act case) (describing the National Guard's "dual federal-state status" as "murky and mystical") (quoting Bowen v. United States, 49 Fed. C. 673, 676 (2001)).

[21] *See* Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 193–217 (collecting state constitutional provisions).

[22] For example, the Vermont Supreme Court recently declared, in an opinion upholding a ban on large capacity magazines, that "the right to bear arms for the defense of the State is essentially obsolete." State v. Misch, 2021 Vt. 10, ¶ 23 (cleaned up); *see also* People v. Brown, 235 N.W. 245, 246 (Mich. 1931) (holding that the state constitution's right to bear arms provision guaranteed only a limited right to keep the kind of arms for individual self-defense and declaring that militia "is practically extinct and has been superseded by the National Guard and reserve organizations" who, if called to service, would have their arms "furnished by the state").

[23] *See, e.g.*, Soto v. Bushmaster Firearms Int'l, LLC, 202 A.3d 262, 284 (2019) (plaintiff brought claims that selling rifles designed for military use is an unfair trade practice under state law because such weapons lack purely civilian application); Complaint, Green v. Kyung Chang Industry USA, Inc., No. A-21-838762-C (D.C. Clark County, Nev.) (Aug. 1, 2021), at 4 (claiming that selling high-capacity magazines is a tort because such magazines have no civilian use for self-defense or hunting).

[24] *See infra* notes 311–316, and accompanying text.

[25] *See, e.g.*, Nelson Lund, *The Future of the Second Amendment in a Time of Lawless Violence*, 116 NW. L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3701185; Eric Ruben, *An Unstable Core: Self-Defense and the Second Amendment*, 108 CAL. L. REV. 63 (2020); Skylar Petitt, Comment, *Tyranny Prevention: A "Core" Purpose of the Second Amendment*, 44 S. ILL. U. L.J. 455 (2020); Alan Brownstein, *The Constitutionalization of Self-Defense in Tort and Criminal Law, Grammatically- Correct Originalism, and Other Second Amendment Musings*, 60 HASTINGS L.J. 1205 (2008); David B. Kopel, *The Natural Right of Self-Defense:* Heller*'s Lesson for the World*, 59 SYRACUSE L. REV. 235, 248 (2008); Nicholas J. Johnson, *Self-Defense?*, 2 J. L. ECON. & POL'Y 187 (2006); Nelson Lund, *A Constitutional Right to Self Defense?*, 2 J. L. ECON. & POL'Y 213 (2006); Charles J. Dunlap, *Revolt of the Masses: Armed Civilians and the Insurrectionary Theory of the Second Amendment*, 62 TENN. L. REV. 643 (1995).

The failure to understand the distinction between armies and militia has also altered academic debates about the constitutional allocation of the war powers. Most accept (or at least do not challenge) that Congress may raise part-time land forces, including the Army Reserve and the National Guard of the United States (a component of the Army Reserve), from its plenary power to raise and support armies.[26] Little attention is paid to other sources of military power, such as Congress's power to call forth the militia.[27] This has affected claims not only of federalism, but also of separation of powers. For example, scholars and judges mostly ignore the Militia Clauses, which, unlike the Armies Clause, includes a provision giving *Congress* explicit power to regulate the militia's deployment.[28] The failure to appreciate the distinction between the "armies" and the "militia" has shifted military power to the executive branch.[29]

When it comes to translating how the Framers' military system maps on to our contemporary military system,[30] we are lost. And as Will Baude has stated, "It is not always necessary to return to first principles, but when one is lost, sometimes it can be helpful to consult the map."[31] This paper charts that course by providing a more faithful translation of the how the Framers' understanding of "armies" and "militia" apply to the modern organization of the Armed Forces.

This paper argues that we are lost primarily because we have settled on an erroneous understanding of the distinction between "armies" and "militia," as those terms are used in the Constitution. Many commentators and judges frequently examine the militia through the eyes of federalism. They consider the "army" to be a federal military land force, while the "militia" is essentially a state army. This paper argues that this is the wrong distinction. At the Framing, the correct distinction between the army and the militia was in the nature of the service. Armies comprised professional soldiers—individuals whose primary occupation was military service. They stood in contrast to the "militia," which consisted of civilians who were liable to be called into military service on a part-time or emergency basis. In other words, the armies were the regular forces, while the militia was the citizen-army.[32] And similar to today, the historic militia was often divided between an active, volunteer component that regularly drilled and a less active common or general militia that rarely mustered if at all. Between these two constitutional paradigms of armies and militia was a *de facto* third kind of force,

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[26] *See, e.g.*, H. RICHARD UVILLER & WILLIAM G. MERKEL, THE MILITIA AND THE RIGHT TO ARMS 136–37 (2002); David B. Kopel, *Lyman Trumbull: Author of the Thirteenth Amendment, Author of the Civil Rights Act, and the First Second Amendment Lawyer*, 47 LOY. U. CHI. L.J. 1117, 1173 (2016); John G. Kester, *State Governors and the Federal National Guard*, 11 HARV. J.L. & PUB. POL'Y 177, 202 (1988); Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1, 25–26 (1996); JENNIFER ELSEA, CONG. RSCH. SERV., IF10535, DEFENSE PRIMER: CONGRESS'S CONSTITUTIONAL AUTHORITY WITH REGARD TO THE ARMED FORCES (2020).

[27] For a rare counterexample, see Vladeck, *supra* note 5.

[28] *Id.* at 1092–93.

[29] Robert Leider, *Federalism and the Military Power of the United States*, 73 VAND. L. REV. 989, 1060–62 (2020).

[30] On constitutional translation generally, including an attempt to translate the "militia" to modern-day practice, see Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1189–92, 1204–05 (1993).

[31] William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1513 (2020).

[32] For lack of a better phrase, I will use the term "citizen-army" and "citizen-soldiers" to designate those who are primarily civilians, but who perform military duties on a part-time or emergency basis. Despite this term's well-understood contemporary meaning, I recognize that the term is imprecise, as most contemporary professional soldiers are also citizens of the United States—in contrast, for example, to soldiers enrolled in the French Foreign Legion, who are generally not citizens of France.

the volunteers. Like the militia, the volunteers were called forth only for specific military emergencies; but like the armies, their service was not limited to defensive wars.

From these definitions, this paper then translates the Framing-era military system to our own. The modern "armies" are the full-time, standing components of the (non-naval) Armed Forces, including the regular army, the regular Air Force, and, now, the regular Space Force. The regular Marine Corps also likely falls within the constitutional armies, despite its bureaucratic placement in the Department of the Navy. The active Army Reserve and the National Guard approximate the Framers' system of volunteer militia and war volunteers. The inactive reserve forces and the Selective Service System operate as the modern general militia, providing up to the full military manpower of the country for wartime emergencies. Thus, modern military organizations such as the "U.S. Army" are a conglomeration of all three kinds of military systems recognized at the Framing—armies, militia, and volunteers—and a proper translation of Framing-era practice must examine our contemporary Armed Forces at the component level.

In providing this translation, I should sound a note of caution about the limits of my argument. I am not contending that the modern structure of the Armed Forces complies with all constitutional limits, as those limits were understood at the Framing. As an originalist matter, many likely do not, including federal basic training for National Guardsmen, de facto federal appointment of part-time reserve and National Guard officers, conscription into the national army, and even the existence of the Army Reserve.[33] My goal here is neither to defend nor impugn the original constitutional validity of the current system.

Instead, this paper is the first step in explaining the modern relevance of the militia and the Second Amendment's right to keep and bear arms for collective self-defense. Many have argued that changes in the legal regime surrounding the militia have obliterated the distinction between the militia and the standing army and vitiated the legal relevance of the Second Amendment.[34] Rather than accede to such nihilist impulses, this paper attempts a cy-pres (or "second best") reconstruction of how the modern structure of the Armed Forces approximates the original military system in several important respects. At the Framing, the crucial distinction (particularly in peacetime) between "armies" and "militia" was that the armies constituted regular forces, while the militia was the remaining population subject to part-time or emergency military service. Contrary to the general consensus, we maintain the Framers' dual military structure of armies and militia—of regular soldiers and citizen-soldiers. We no longer generally use the word "militia" to denote these forces. And the Framers' militia has been fragmented across different governmental organizations, such as the National Guard, Army Reserve, and the Selective Service System. But differences in contemporary terminology and bureaucratic organization should not obfuscate that the "militia," as the Framers understood it, now comprises the people in these entities. Nor should differences in terminology cause us to lose sight that Framing-era statements that "standing armies are dangerous to liberty"[35] have salience today in concerns about the

[33] For my argument that much of the current system is unconstitutional, see Leider, *supra* note 29.
[34] *See, e.g.*, UVILLER & MERKEL, *supra* note 26; Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5, 37–38 (1989); *see also* David Yassky, *The Second Amendment: Structure, History, Constitutional Change*, 99 MICH. L. REV. 588, 628–29 (2000) (rejecting the translation metaphor by arguing that the changes in the militia are too profound to accommodate any attempt at translation).
[35] *See, e.g.*, *infra* note 397, and accompanying text.

"civil-military gap," which principally refers to the gap between the civilian population and the professional, full-time military.[36] This paper defends that the institutional distinction between "armies" and "militia" retains much of its original vigor, despite some significant legal changes that have brought the militia under de facto federal control.

This paper has four parts. Part I looks at Anglo-American military history and custom, which divided land forces into two paradigm types: militia and armies. Section A describes the characteristics of the militia, including compulsory liability to service, part-time and/or emergency service limited to domestic defensive conflicts, and limited exposure to military law. Section B examines the army's characteristics, including enlistment by volunteering, full-time active service, ability to be deployed for offensive and overseas operations, and constant exposure to military law and discipline. Between these two paradigm categories also existed a de facto third category, the "war volunteers," who were a hybrid of the other two.

Part II then examines the conventional wisdom that the militia has become an archaic institution. Section A provides the historical background for this belief. Principally during the twentieth century, Congress sought to evade constitutional limitations relating to federal power over the militia. This is because the Constitution's original division of the militia between the federal and state governments led to a dysfunctional system in which the militia was largely ignored. Moreover, the federal government sought ways to use the militia for foreign, non-defensive conflicts. To address these problems, Congress decided to use its Army Power to wrest control over the militia. Two legal developments were especially effective: conscription directly into the national army, which bypassed the hybrid state-federal militia system in wartime, and "dual enlistment," in which members of the organized militia simultaneously enrolled in the federal army. Section B then explains the institutional and doctrinal confusion that has resulted from dual enlistment and conscription. The fiction that Congress could raise part-time and emergency forces using its Army Power has led to the erroneous belief that the militia, as an institution, is no longer relevant to modern times. And the fiction has had devastating doctrinal consequences as courts have struggled to apply constitutional provisions designed for the regular army to military organizations that operate like a militia (e.g., the Army Reserve).

Part III examines how the U.S. Constitution distinguishes the two traditional kind of military land forces. This Part argues that the critical distinction in the Constitution between "armies" and "militia" was whether the forces comprised regular troops or citizen-soldiers. This section explicitly rejects the alternative reading that armies comprised federal troops while militias comprised state troops.

Part IV then provides a translation from the Framers' military structure to our own. This Part argues that the current structure of the Armed Forces retains the Framers' dual structure of armies and militia—that is, it recognizes a role for professional soldiers and for citizenry who perform military service on a part-time or emergency basis. The early twentieth-century changes to the militia system simply expanded federal power over the militia at the expense of the states' responsibility for maintaining and training the militia and made the militia available outside the purposes enumerated in the Militia Clauses. But these legal innovations neither eliminated the militia system nor lessened

[36] *See generally* SOLDIERS AND CIVILIANS: THE CIVIL-MILITARY GAP AND AMERICAN NATIONAL SECURITY (Peter D. Feaver & Richard H. Kohn eds., 2001) (collecting essays debating the existence and scope of the civil-military gap).

America's dependence on it. Quite the opposite, the twentieth-century changes expanded America's dependence on the militia by increasing the militia's availability for overseas and foreign conflicts.

I. Armies and Militia: Dual (Dueling) Land Forces

In the preface to the 1984 edition of his *History of the United States Army*, Russell F. Weigley wrote that "a history of the United States Army must be . . . a history of two armies."[37] The first army is "a Regular Army of professional soldiers," while the second is "a citizen army of various components variously known as militia, National Guards, Organized Reserves, selectees."[38] This dual military tradition formed in England long before the colonies united. War volunteers were a de facto third tradition and straddled the army-militia distinction.

A. Militia

The militia was the citizen-army, and its terms of service reflected the begrudging acceptance with which a free British people would accept compulsory military service. The principal traits of the militia system were universal and compulsory liability to serve, occasional (or nonexistent) peacetime service and wartime service limited to self-defense against invasion or preservation of domestic order, limited application of military law, and hybrid national-local organization.

1. Compulsory Liability to Serve

The militia system "embodied the ancient English principle of the citizen's duty to defend the realm."[39] As a result, liability for service was compulsory.[40] The Statute of Winchester, for example, required universal service for all able-bodied men between the ages of fifteen and sixty.[41] Correlative with this duty to perform military service, English law also imposed an obligation for residents to keep military arms. The requirement was progressive; the wealthier the resident, the more sophisticated the arms that he was expected to maintain.[42]

Although liability for militia service was universal and compulsory, actual service generally was not. For centuries, British subjects detested mandatory military service, and they widely resisted it.[43] It was not uncommon for the militia to fall into long periods of disuse, particularly during peacetime.[44] The militia received renewed interest when England faced possible invasion, but even here, problems remained in keeping it organized and trained. During the sixteenth century, for example, "[n]o penalties could prevent a vast deal of shirking" among the able-bodied men between sixteen and sixty summoned

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[37] RUSSELL F. WEIGLEY, A HISTORY OF THE UNITED STATES ARMY v (1984 enlarged ed.) (1967).
[38] *Id.*
[39] CORRELLI BARNETT, BRITAIN AND HER ARMY 1509–1970: A MILITARY, POLITICAL AND SOCIAL SURVEY 173 (1970).
[40] Michael Prestwich, *The English Medieval Army to 1485*, *in* THE OXFORD HISTORY OF THE BRITISH ARMY 1, 6 (David Chandler & Ian Beckett, eds. 1996) [hereinafter "OXFORD HISTORY"].
[41] 13 Edw. c. 6 (Eng.), *in* 1 THE STATUTES OF THE REALM 96, 97–98.
[42] Assize of Arms 1181, 27 Hen. 2, §§ 1–2 (Eng.); 13 Edw. c. 6 (Eng.), *in* 1 THE STATUTES OF THE REALM 96, 97–98; *see* F.W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 162 (Cambridge Univ. Press 1968) (1908).
[43] Prestwich, *supra* note 40, at 20; Ian Beckett, *The Amateur Military Tradition*, *in* OXFORD HISTORY, *supra* note 40, at 385, 387, 394.
[44] BARNETT, *supra* note 39, at 117, 174; *cf.* Beckett, *supra* note 43, at 391 ("Clearly, the constant threat of invasion, whether real or perceived, was a major factor in the establishment and survival of auxiliary forces.").

to summer militia musters.[45] As a result, the militia divided into the forerunner of what today would be called the "organized" and "unorganized" militia.[46] The organized units were initially known as the "trained bands."[47] They were raised by ballot—a selective service system—with those selected usually having the opportunity to pay for a willing substitute person or pay a fine.[48] So actual militia service (when it existed) often resulted from volunteering or bad lottery luck, even though the entire militia was technically obligated to serve if called.[49]

In the American colonies, a universal militia system—more stringent than that used by the British—took root, at least initially. A universal militia system has two principal advantages. First, by allowing for rapid expansion of military manpower, a universal militia system enables small powers to resist invasion by larger powers.[50] Second, a militia system provides a way for communities to defend themselves against "chronic, low-level security threats."[51] Seventeenth-century American colonies faced both kinds of security challenges. With respect to conflicts against great powers, the American colonies risked conflict with larger French and Spanish forces, whose countries had their own colonial ambitions.[52] The colonies also had "chronic, low-level security threats,"[53] facing repeated Native American incursions.[54]

Despite these threats, the colonies did not have the option of using professional soldiers to provide security. The colonies "were much too poor to permit a class of able-bodied men to devote themselves solely to war and preparation for war."[55] As a result, every colony (except initially Pennsylvania) modeled their defense forces on the English Assize of Arms,[56] which "implied the general obligation of all adult male inhabitants to possess arms, and, with certain exceptions, to cooperate in the work of defense."[57] These colonies, thus, maintained a paradigmatic militia: a "military force of armed civilians" rooted in the "universal obligation to military service" by able-bodied men.[58]

But as time went on, the American militia system increasingly resembled the British system. By the middle of the eighteenth century, the colonies' security situation had stabilized; they were no longer

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[45] BARNETT, *supra* note 39, at 34.
[46] *See* 10 U.S.C. § 246(b) (dividing the militia into an organized and unorganized component).
[47] BARNETT, *supra* note 39, at 34; Beckett, *supra* note 43, at 388.
[48] BARNETT, *supra* note 39, at 34, 172; Beckett, *supra* note 43, at 388; 1 WILLIAM BLACKSTONE, COMMENTARIES *412; MATTHEW MCCORMACK, EMBODYING THE MILITIA IN GEORGIAN ENGLAND 83 (2015).
[49] *See* MCCORMACK, *supra* note 48, at 84 ("The combination of ballot and substitution maintained the fiction of personal obligation, when in practice the militia operated a compromise between conventional enlistment and conscription . . . . ").
[50] ELIOT A. COHEN, CITIZENS AND SOLDIERS: THE DILEMMAS OF MILITARY SERVICE 27 (1985).
[51] *Id.*
[52] WEIGLEY, *supra* note 37, at 4.
[53] COHEN, *supra* note 50, at 27.
[54] WEIGLEY, *supra* note 37, at 4.
[55] *Id.*
[56] WEIGLEY, *supra* note 37, at 3–4.; *see also* JERRY COOPER, THE RISE OF THE NATIONAL GUARD: THE EVOLUTION OF THE AMERICAN MILITIA, 1865–1920, at 1 (1997) (explaining that Pennsylvania had a large population of pacifist Quakers, and thus, did not initially organize a universal militia system, s*ee id.*, but it capitulated following the French and Indian War); JOHN K. MAHON, HISTORY OF THE MILITIA AND THE NATIONAL GUARD 14 (1983).
[57] 1 HERBERT L. OSGOOD, THE AMERICAN COLONIES IN THE SEVENTEENTH CENTURY 499 (1904).
[58] WEIGLEY, *supra* note 37, at 4.

in constant imminent danger of invasion.[59] With the need for a universal militia no longer existing, the system fell into partial disuse. The colonies' militias essentially split into an organized "volunteer" militia and less organized "common" or "general" militia.[60] The volunteer militia became the first-line of defense, and it comprised elite soldiers with better training.[61] The famed Massachusetts Minutemen, for example, were part of the volunteer militia.[62] And Pennsylvania, because of its large proportion of Quakers, relied on the volunteer militia system, initially eschewing any form of mandatory military obligation.[63] Politically and philosophically, many Americans distrusted volunteer "select militias"—that is, unrepresentative militias formed from something less than the full military manpower.[64] And yet, because colonial Americans disliked performing military service, the colonies still heavily relied on them—much like Americans today value their right to trial by jury while they resent being called to jury service.

Thus, for the project in Part IV of translating the traditional militia to the present structure of the Armed Forces, we must distinguish between liability to serve and actual service. The militia system was based on universal liability to serve; if necessary, the entire able-bodied population *could* be called. In reality, however, universal service rarely happened. The militia was often divided into active and reserve components, and only the active component received any significant training. In most cases, the remaining militia remained dormant, but nevertheless still subject to the call for service.

2. Irregular Service

The most significant trait of the militia was that its members were not regular forces: "Militiamen were required, 'on a just Occasion, to perform the Business of a Soldier,' rather than to become one fully or permanently."[65] In peacetime, the militia undertook, at most, occasional military training; the bulk of militiamen's time, however, was spent as ordinary citizens pursuing their usual occupations. In wartime, no constitutional impediment prevented the militia from being called into full-time active service. But there were two significant limitations. First, as a constitutional rule, the militia was limited to defensive, domestic service. Second, although not a constitutional rule, other laws often required the militia to rotate in wartime, which proved inconvenient for sustained conflicted.

a. Peacetime Training

In peacetime, the British militia received only sporadic training—primarily when there was a threat of invasion.[66] In the sixteenth century, with Britain embroiled in domestic conflict and facing threats invasion from Spain, the militia (theoretically) attended summer musters.[67] From these musters, some men were selected for training—the trained bands—but even for this organized militia, "[t]raining

[59] COOPER, *supra* note 56, at 2.
[60] WEIGLEY, *supra* note 37, at 8.
[61] WEIGLEY, *supra* note 37, at 8.
[62] WEIGLEY, *supra* note 37, at 8; MAHON, *supra* note 56, at 36.
[63] WEIGLEY, *supra* note 37, at 7.
[64] On the distinction between the whole militia and the select militia, see Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 216 & nn. 51–52 (1983).
[65] MCCORMACK, *supra* note 48, at 103 (quoting Proposals for Amending the Militia Act So As To Establish a Strong and Well-Disciplined National Militia, at 40).
[66] Ian Roy, *Towards the Standing Army*, *in* OXFORD HISTORY, *supra* note 40, at 24, 36.
[67] BARNETT, *supra* note 39, at 34.

was intermittent in the extreme—a few days at a time during the year."[68] Towards the end of the century, when war with Spain was imminent, muster rolls "showed only 42,000 trained and 'furnished,' and another 55,000 untrained, although mustered and armed."[69] In the seventeenth century, the militia of several counties had not mustered for years.[70] After the British militia reforms in 1757, the active militia heavily consisted of volunteer substitutes.[71] And as peace arrived in Britain less than a decade later, the militia "survived hardly more than in name."[72] Thus, for much of British history, the general militia served as a reserve force of last resort; most militia underwent no training. Even among the active militia (when it existed), training was minimal, often no more than 12 days between company days and general musters.[73] And when peace reigned, "resuscitating the militia . . . was like trying to revive a dead carcass."[74]

The American colonial militia followed a similar trajectory; the militia's training regimen varied with the magnitude of the threat. For example, when Massachusetts was first settled and the colony in a precarious state, militia companies trained weekly. A generation later, with the state more secure, Massachusetts general militia companies met four times per year while regiments assembled once every one to three years.[75] North Carolina militia musters similarly ebbed and flowed. When North Carolina organized its militia in 1715 after the Tuscarora War, the militia law required musters "from time to time" and "musters were held periodically."[76] When the Tuscarora threat ended a few years later, the North Carolina militia became inactive for a generation.[77] In the 1740s, North Carolina reorganized the militia because of a war with Spain, prescribing four company militia musters per year and one regimental muster.[78] And in 1756, in response to the French and Indian War, North Carolina company militia musters increased to five, only to taper back down to four and then three following the war.[79] As training decreased, North Carolina steadily granted more exemptions from active militia training; in 1772, only about half of the general militia attended drills.[80] Similar stories played out in other colonies.[81] As with the British militia, the American militia primarily consisted of a small, active volunteer militia, and a reserve militia that trained little, if at all.

Instead of training the militia, general militia musters became significant for the organizational support they provided for the colony's military system. The militia muster provided an opportunity for colonial governments to get a census of its military age population.[82] And in a tradition that began in

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[68] *Id.*
[69] *Id.*
[70] *Id.* at 117; Alan J. Guy, *The Army of the Georges 1714–1783*, *in* OXFORD HISTORY, *supra* note 40, at 92, 97.
[71] MCCORMACK, *supra* note 48, at 84.
[72] BARNETT, *supra* note 39, at 174.
[73] MAITLAND, *supra* note 42, at 455.
[74] *Id.* at 60.
[75] MAHON, *supra* note 56, at 18.
[76] E. Milton Wheeler, *Development and Organization of the North Carolina Militia*, 41 N.C. HIST. REV. 307, 311 (1964).
[77] *Id.*
[78] *Id.* at 312.
[79] *Id.* at 316.
[80] *Id.* at 317.
[81] *See, e.g.*, WILLIAM L. SHEA, THE VIRGINIA MILITIA IN THE SEVENTEENTH CENTURY 133–35 (1983) (recounting the decline of the Virginia militia at the end of the seventeenth century).
[82] *Id.*

Britain[83] and would last in America until the twentieth century, militia musters served as a recruiting ground for temporary wartime military service. Colonial authorities would initially request volunteers, only drafting men into service if enough men did not come forward to meet their quotas.[84] The general militia rarely saw action.[85]

b. Wartime Service

In war, the British militia could be embodied for the conflict, but even here, there were significant limitations. The militia was only available for domestic, defensive conflicts. In the fourteenth century, the Crown sent the English militia on offensive operations against Scotland and France. But this use of the militia proved unpopular because it involved compelled military service and because the counties bore much of the costs for the militia.[86] In response to a petition from the commons, a 1326 statute prohibited sending the militia out of the county, except in cases of invasion.[87] The 1326 statute, although initially evaded,[88] would eventually harden into an eighteenth-century constitutional convention against sending the militia out of the county for non-defensive reasons. The convention was held seriously enough that the British rioted when a rumor circulated that the British government had proposed allowing compelled overseas service as part of its proposed militia reforms in 1757.[89] The limitation of involuntary militia service to domestic, defensive needs would be recognized by statute in Britain[90] and, in the United States, by the Constitution.[91]

Although no constitutional impediment existed against embodying the militia in wartime for the duration of the conflict, wartime militia service also was often temporary. In fifteenth-century Britain, for example, it was customary to limit active service to forty days.[92] In the United States, most militiamen were farmers, so an extended call to military service would severely disrupt their livelihood. As a result, militia laws and customs required the militia to rotate men,[93] usually to a period of three months' active duty.[94] During the Revolutionary War, the United States struggled to keep sufficient military forces in the field, and the American forces quickly lost the benefit of soldiers with battlefield experience.[95]

Thus, the militia was an irregular force. Its members had minimal or no training in peacetime. The force could be embodied during wartime, but only for domestic defensive wars. And wartime

[83] BARNETT, *supra* note 39, at 37.
[84] COOPER, *supra* note 56, at 2; WEIGLEY, *supra* note 37, at 8; MAHON, *supra* note 56, at 19–20
[85] *See* WEIGLEY, *supra* note 37, at 8; *infra* note 474, and accompanying text.
[86] Prestwich, *supra* note 40, at 20.
[87] Statute the Second 1326, 1 Edw. 3 c. 5 (Eng.); MAITLAND, *supra* note 42, at 277.
[88] MAITLAND, *supra* note 42, at 278.
[89] BARNETT, *supra* note 39, at 174.
[90] Militia Act 1776, 16 Geo. 3 c. 3 (Gr. Brit.) (prohibiting sending militia out of the county, except in cases of invasion or rebellion); *see also* MAITLAND, *supra* note 42, at 456 (discussing history)
[91] U.S. CONST. art. I, § 8, cl. 15 (authorizing the federal government to call forth the militia only to "execute the Laws of the Union, suppress Insurrections and repel Invasions").
[92] Roy, *supra* note 66, at 26.
[93] MAHON, *supra* note 56, at 38.
[94] *Id.* at 19.
[95] *Id.* at 39; WEIGLEY, *supra* note 37, at 33, 41–42.

service was often short and temporary, even though, in theory, it could extend for the duration of the conflict.

3. Military Discipline

Military "discipline" is a term of many meanings.[96] Here, I refer to two things: the training of the militia and the code of laws that bound militiamen.[97] In both cases, militiamen faced lighter burdens than the army.

The training discipline of the militia reflected its status as a citizen army, trying to balance traditional British freedom with the needs of military discipline.[98] The frequency of training was light—only a few days per year, at most.[99] So was the intensity. In the seventeenth century, an English militia muster might include little more than the inspection of arms.[100] As Blackstone recounted, the militia "are to be exercised at stated times: and their discipline in general is liberal and easy."[101]

By the middle of the eighteenth century, American militia trainings were equally lax. When the volunteer militia began providing principal defense, the colonies relieved the common militia of most military duties. Training of the general militia dropped precipitously, with the general militia meeting, at most, a few times per year.[102] During the musters, the common militia received only basic instruction in military affairs.[103]

Militiamen also faced limited exposure to military law, which was crucial to maintaining their usual status as free British subjects. The civilian legal system departs heavily from the military system both in purpose and substance. Civilian society is based on "atomization, pursuit of comfort, freedom of choice, equality, and readiness for discussion and compromise," which stands in "contrast with the military's emphasis on unity, endurance, obedience, hierarchy, and readiness for violence."[104] Blackstone described "the principal aim of society" as "protect[ing] individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature."[105] The goal of military discipline, in contrast, is to reinforce hierarchy of command and obedience to orders.[106] Criminal procedure is also different. Civilians are entitled to fundamental rights, including trial by jury. Such rights do not apply to military members in court-martial proceedings.[107]

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[96] MCCORMACK, *supra* note 48, at 103.
[97] *Id.*
[98] *Id.* at 102.
[99] *See supra* notes 66–74; MAITLAND, *supra* note 42, at 455 (explaining that the seventeenth-century militia could train up to 12 days).
[100] BARNETT, *supra* note 39, at 59–60.
[101] 1 BLACKSTONE, *supra* note 48, at *412.
[102] MAHON, *supra* note 56, at 18.
[103] COOPER, *supra* note 56, at 2.
[104] Bonnie M. Vest, *Finding Balance: Individuals, Agency, and Dual Belonging in the United States National Guard*, 73 HUMAN ORG. 106, 107 (2014).
[105] 1 BLACKSTONE, *supra* note 48, at *124.
[106] *In re* Grimley, 137 U.S. 147, 153 (1890).
[107] U.S. CONST. amend V; United States v. Riesbeck, 77 M.J. 154, 162 (C.A.A.F. 2018) ("Courts-martial are not subject to the jury trial requirements of the Sixth Amendment."); *cf.* Ex Parte Milligan, 71 U.S. 2, 102 (1866).

To balance military necessity with the need not undermine the very freedom being protected, British law heavily circumscribed the application of military law to members of the militia. As A.V. Dicey explained, an English militiaman is "subject to military law only when in training or when the force is embodied."[108] And the militia could only be embodied in "case of imminent national danger or of great emergency."[109] The result was a functional approach to military justice. Members of the militia were treated like citizens when they were acting in their capacity as ordinary citizens, and they were treated like members of the military during the limited times that they were called into active service as soldiers.

4. Hybrid National-Local Control

The final trait of the militia was its hybrid national-local organization. Maitland charactered the British militia as "[a] national force, organized by counties."[110] An analogous structure developed in the United States.

In many ways, the militia was a national institution. For centuries, the British government set militia requirements to meet the country's defense needs. National law, thus, prescribed who was liable to militia duty, how much training they should have, what weapons militiamen were required to possess, and when the militia could be called out.[111] In war, moreover, the militia was a part of the national forces under the control of the government.[112]

But operationally, peacetime executive control of the militia laid primarily with the counties, not with the Crown or Parliament. Beginning in the sixteenth century, the Lord-Lieutenant, a county official, "supervise[d] and command[ed] the militia."[113] Thus, each county took a census of its able-bodied men eligible for military service, conducted its own militia training, and paid for much of the peacetime cost

[108] DICEY, Third Edition, *supra* note 360, at 285.
[109] *Id.* at 285 (internal quotation marks omitted).
[110] MAITLAND, *supra* note 42, at 276. This also explains why Akhil Amar incorrectly views the Second Amendment's militia-related objectives as only applying in the several states. *See* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE By 160 (2012) ("To the extent this amendment merely protected official state-organized militias, it had no bite in a federal territory that lacked a state government to organize such a militia."); *see also* Parker v. Dist. of Columbia, 478 F.3d 370, 402 (2007) (Henderson, J., dissenting) (arguing that the Second Amendment only extends to the states, not to the federal district); Sandidge v. United States, 520 A.2d 1057, 1059 (D.C. 1987) (Nebeker, J., concurring) (same). Although organized at the state level, the militia was a national defense force consisting of the entire able-bodied male political community. The Second Amendment has "bite" in federal territories because those territories (and the federal government) still need citizen-soldiers in times of emergency. The preservation of the militia system in the territories diminishes the need for full-time, regular soldiers both for local and federal needs. Moreover, in a dire emergency, the preservation of the right to bear arms gives territorial inhabitants the same capacity to resist foreign invasions or illegal exertions of governmental power that residents of the states would have. Indeed, the right of territorial inhabitants to bear arms might be more important because they lack the protection of independent state governments.
[111] *See, e.g.*, 1 J.W. FORTESCUE, A HISTORY OF THE BRITISH ARMY 5 (1899) (detailing early Anglo-Saxon militia regulations); Assize of Arms, 1181, 27 Hen. 2 (Eng.) (reorganizing the militia system after the feudal system proved inadequate to meet military needs); FORTESCUE, *supra*, at 11-12 (providing the history of the Assize of Arms).
[112] MCCORMACK, *supra* note 48, at 81 (explaining that "only when embodied for service did [the militia] become the responsibility of the War Office").
[113] BARNETT, *supra* note 39, at 23.

related to the militia.[114] Moreover, British law prohibited involuntarily deploying militiamen outside their own county, except in cases of invasion or rebellion.[115] So Britain's "constitutional force," as it was often called, had a heavily local character.

As I have explained at length elsewhere,[116] the Constitution perpetuated a similar hybrid system for the American militia. The Constitution grants Congress the power "[t]o provide for organizing, arming, and disciplining, the Militia," thus giving the national government control over military policy.[117] Congress also has the power to call forth the militia "to execute the Laws of the Union, suppress Insurrections and repel Invasions,"[118] meaning that, during these emergencies, the militia are a part of the national military forces under the control of the federal government.[119] But the Constitution also makes the militia heavily a local force. Much like day-to-day control of the English militia was retained by the counties, usual control of the American militia was retained by the states.[120] The Constitution reserved to the states both the selection of militia officers and "the Authority of training the Militia according to the discipline prescribed by Congress."[121] Moreover, the militia would remain under operational control of the states, except for the three defensive purposes for which the federal government had the power to call forth the militia.[122]

B. Armies

An army's principal traits were that it consisted of regular forces, comprised in theory of volunteers. As regular forces, armies were subject to additional obligations and rules not applicable to citizens subject to part-time service in the militia.

1. Temporary War Armies and the Standing Army

In Britain, the term "army" could cover either wartime or peacetime land forces. Before the seventeenth century, there was no standing British army and no institution known as the "army."[123] Instead, Britain raised temporary armies to meet wartime needs. During the late medieval period, these armies were raised under a variety of methods. Much service was feudal; the requirement of military service existed incident to certain kinds of land ownership.[124] The Crown also hired domestic and foreign mercenaries.[125] Until Henry VII abolished the practice, the Crown could also request forces from the nobility, who could have their own private armies.[126] And the Crown maintained small numbers of

[114] BARNETT, *supra* note 39, at 34; MCCORMACK, *supra* note 48, at 81; Prestwich, *supra* note 40, at 20; MAITLAND, *supra* note 42, at 277.
[115] *See supra* notes 86–90, and accompanying text.
[116] Leider, *supra* note 29, at 1001–09.
[117] U.S. CONST. art. I, § 8, cl. 16; Leider, *supra* note 29, at 1009.
[118] U.S. CONST. art. I, § 8, cl. 15.
[119] Leider, *supra* note 29, at 1008.
[120] *See* AKHIL REED AMAR, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1496 (1987) (analogizing to property law).
[121] U.S. CONST. art. I, § 8, cl. 16.
[122] Leider, *supra* note 29, at 1006; Auth. of President to Send Militia into a Foreign Country, 29 Op. Att'y Gen. 322 (Feb. 17, 1912).
[123] JOHN CHILDS, *The Restoration Army 1660–1702 in* OXFORD HISTORY, *supra* note 40, at 46, 52; BARNETT, *supra* note 39, at 115.
[124] CHILDS, *supra* note 123, at 4–5
[125] *Id.* at 10–11.
[126] BARNETT, *supra* note 39, at 3; ROY, *supra* note 66, at 25–26.

regular troops, which served the royal household, protected the Crown, and guarded various garrisons.[127] In an emergency, the Crown could expect these guards through voluntary enlistment.[128] But these forces were not organized into a formal army of the kind seen on the European continent; because of its geographic separation and relative peace, Britain had no need for such an institution.[129]

Although Britain had had small numbers of regular soldiers guarding the Crown and manning garrisons for centuries, the British standing army, as an institution, would be traced to larger peacetime units that began to take shape in 1660 and 1661.[130] As the historian Correlli Barnett explained, "The British standing army, like the British Cabinet system, evolved gradually, unacknowledged as such until long after it existed in fact."[131] But even after the army had been firmly established, British law pretended that these forces were temporary; for two centuries, Parliament passed an annual Mutiny Act, which was necessary to subject British soldiers to military law.[132]

For constitutional purposes, a careful distinction must be drawn among the different kinds of armies. British and, later, American objections to the raising of armies were not aimed at the creation of temporary wartime armies. They were aimed, instead, at *standing* armies—armies that would continue to exist in peacetime and could be used by the executive to oppress the population.[133] The English Bill of Rights declared that one of the evils committed by King James II was "raising and keeping a standing army within this kingdom in time of peace without consent of Parliament."[134] Likewise, in the United States, the bitter disputes between the Federalists and the Anti-Federalists over Congress's power to raise and support armies concerned the existence and scope of standing armies in peacetime.[135] Anti-

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[127] *Id.*; BARNETT, *supra* note 39, at 20, 115.

[128] ROY, *supra* note 66, at 25–26.

[129] BARNETT, *supra* note 39, at 20.

[130] *Id.* at 115. By 1663, the country had about 3,600 men in regiments and nearly 5,000 guarding various garrisons. *Id.*

[131] *Id.*

[132] MAITLAND, *supra* note 42, at 328–29; CHILDS, *supra* note 123, at 4.

[133] MAITLAND, *supra* note 42, at 328; BARNETT, *supra* note 39, at 116; LAWRENCE DELBERT CRESS, CITIZENS IN ARMS: THE ARMY AND THE MILITIA IN AMERICAN SOCIETY TO THE WAR OF 1812, at 46 (1982).

[134] THE BILL OF RIGHTS, 1 W. & M., sess. 2, ch. 2 (1689).

[135] *See, e.g.*, 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 633 (Max Farrand ed., 1911) [hereinafter RECORDS] (statement of Elbridge Gerry) (objecting that the Constitution did not limit the number of troops that could be raised); *id.* at 329–30 (unsuccessful proposal by Gerry to limit the number of peacetime troops to 2–3,000); *id.* at 616–17 (statement of George Mason) (requesting cautionary language about the danger of peacetime armies); *Id.* at 322, 329, 341 (proposal of Charles Pinckney 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). 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) (objecting to 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"); 1 ANNALS OF CONG. 780–81 (Joseph Gales ed., 1834) (1789) (rejecting requiring Congress to approve a peacetime standing army by a two-thirds vote); 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

Federalists, fearful of standing armies, proposed limiting the number of federal troops, requiring approval of peacetime armies by two-thirds majority, and placing cautionary language in the Constitution about the dangers of standing armies.[136] The Federalists defeated all such qualifiers.[137] No similar attempts were made to limit Congress's power to raise temporary wartime armies.

2. Regular Forces, Without the Legal Protections Afforded the Militia

As I will defend in more detail below, the defining characteristic of "armies"—and particularly of standing armies—is that they constituted regular forces. The army and the militia "were regarded . . . as totally opposed conceptions" of how to constitute a military land force.[138] While the militia comprised ordinary citizens performing occasional military activities, an army results from the state "employing a certain number of citizens in the constant practice of military exercises," thereby making "the trade of a soldier a particular trade, separate and distinct from all others."[139]

Thus, for soldiers, the military was a career. Enlistment terms reflected this. British soldiers enlisted for life, and in the mid-nineteenth century, that term was reduced to twenty-one years.[140] This was a world apart from the militia, most of which performed no actual service and the organized units of which, in the eighteenth century, consisted of balloted individuals (or their substitutes) who performed three years of part-time service.[141]

As full-time career soldiers, Army regulars did not have the same legal protections as militiamen. Militiamen were protected against involuntarily deployment for offensive and overseas operations; the British, who detested compulsory military service, reluctantly acquiesced only to compulsory defensive service at home.[142] Regular soldiers, however, could be involuntarily deployed abroad.[143] And a deployment to a faraway colony could result in the soldier never returning to Britain.[144] Also, unlike militia who were subject to military law only when embodied for training or wartime service,[145] regular forces in Britain were subject to military law at all times: "A citizen on entering the army becomes liable

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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).

[136] *See* 2 RECORDS, *supra* note 135, at 329–30 (Elbridge Gerry) (attempting to limit the number of peacetime troops to two or three thousand); 2 RECORDS, *supra* note 135, at 616–17 (George Mason) (requesting cautionary language about the dangers of standing armies); *See* 2 RECORDS, *supra* note 135, at 323, 329, 341 (Charles Pinckney) (proposing 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); Christopher J. Deering, *Congress, the President, and Military Policy*, 499 ANN. AM. ACAD. POL. SCI. 136, 138 (1988); Leon Friedman, *Conscription and the Constitution: The Original Understanding*, 67 MICH. L. REV. 1493, 1515–16 (1969) (Constitutional Convention); *id.* at 1526–29 (state ratifying conventions).

[137] Leider, *supra* note 29, at 1000.

[138] BARNETT, *supra* note 39, at 116.

139 5 ADAM SMITH, WEALTH OF NATIONS, ch. 1, *55, at 698 (Oxford UP, 1971). For a more extended definitional discussion, see infra note 356–361, and accompanying text.

[140] BARNETT, *supra* note 39, at 280. During some recruiting shortfalls, shorter term enlistments were offered, including for three years in 1708. *Id.* at 141.

[141] *See* 1 BLACKSTONE, *supra* note 48, at *412 (discussing length of service).

142 BECKETT, supra note 43, at 391; BARNETT, supra note 39, at 41.

[143] BARNETT, *supra* note 39, at 196.

[144] *Id.*

[145] *See supra* notes 108–109, and accompanying text.

to special duties as being 'a person subject to military law," and he may "be tried and punished by a Court-martial."[146] A soldier, thus, "occupies a position totally different from that of a civilian; he has not the same freedom, and in addition to his duties as a citizen is subject to all the liabilities imposed by military law."[147]

Thus, unlike militiamen, members of the army were regular soldiers. As regular soldiers, they existed apart from civilian society: they lacked civilian occupations, and they were generally subject to military law, meaning that they were bound to obey orders and lacked the general freedom that British civilians had.

3. Raising Regular Forces

Since the end of feudal times, the "cherished principle" of raising a British army was that soldiers served voluntarily.[148] As mentioned above, in 1757, the mere rumor of compulsory overseas service resulted in draft riots.[149] In Britain, national conscription was derided as a French institution.[150] By the nineteenth century, "[l]ong historical process had . . . made conscription unthinkable in Britain, despite the chronic shortage of troops."[151] Britain would not impose conscription into the national army until late in World War I.[152]

The principle of voluntary enlistment was often honored in the breach. Although "every soldier was supposed to be a volunteer,"[153] the British sometimes resorted to impressment to fill the army when voluntarily recruiting fell short in wartime.[154] Impressment generally fell upon debtors, the poor, the unemployed, and criminals[155]—those people "least able to resist it."[156] Not only did regular soldiers lack connections to the civilian world—they had no ordinary civilian employment and they were subject to military law at all times—but the regular forces themselves "must have been largely composed of bad characters, insolvent debtors, criminals, [and] idle and disorderly persons."[157] The composition of the standing army further set that institution apart from the militia and the civilian world.

Despite the occasional use of impressment to fill the wartime ranks, "[s]traightforward impressment was normally illegal."[158] Usually, the British recognized two forms of military service. A person could be compelled to serve in the militia, in which case he would be limited to domestic defensive service and he would have all the rights of a British citizen, except when military law applied during training or wartime. Or a person could waive those rights by voluntarily enlisting for service in

[146] DICEY, Third Edition, *supra* note 360, at 282.
[147] *Id.*
[148] BARNETT, *supra* note 39, at 397.
[149] *See supra* note 89, and accompanying text.
[150] BARNETT, *supra* note 39, at 257.
[151] BARNETT, *supra* note 39, at 295.
[152] *Id.* at 397.
[153] GUY, *supra* note 70, at 97.
[154] MAITLAND, *supra* note 42, at 453.
[155] MAITLAND, *supra* note 42, at 453.
[156] BARNETT, *supra* note 39, at 41.
[157] MAITLAND, *supra* note 42, at 453
[158] BARNETT, *supra* note 39, at 140.

the army, in which case he would take on full-time military obligations for which he would be paid a regular salary.

4. Summarizing The Distinctions and Relationship between the Army and the Militia

In both Britain and early America, armies constituted a parallel, rivalrous land force from the militia.[159]

The army consisted of regular soldiers, raised by voluntarily enlistment (and sometimes by impressment). Soldiers were often bound to long terms of service, and they were subject to military law, which stressed discipline and obedience. Soldiers, thus, lacked the rights of English common law. Long stretches of full-time active service with military discipline meant that regular soldiers could dedicate themselves to learning the (increasingly sophisticated) art of war, which made them competent soldiers, unlike their militia counterparts.[160] But these traits also made professional soldiers dangerous for several reasons. First, they constituted a separate armed faction in society, with special interests that were not necessarily shared by the broader public.[161] That regular soldiers "were typically considered the dregs of society—men without land, homes, families, or principles"[162]—exacerbated the separate, armed faction problem. Second, regular soldiers could be used as tools by unprincipled executives to oppress the population.[163] This was aided by the fact that soldiers, although guarding the country's freedom, did not actually experience that freedom in their day-to-day lives.[164] Third, the raising and maintenance of full-time soldiers was expensive, and necessitated significant taxation on the population.[165]

In contrast, the militia was the entire able-bodied population under arms. As a result, it could not constitute an armed faction separate from the underlying civilian society; it *was* the underlying civilian society.[166] (This made the idea of a select militia—drawing the militia only from a subset of the population—potentially dangerous; like a standing army, a select militia would have separate interests apart from the community.[167]) And "being English society in arms," the militia "was not unquestioningly obedient to the King."[168] Moreover, compared with regular soldiers, the militia was inexpensive.[169]

Unlike the militia, the army had a strained relationship with the British and American societies. During the English civil wars, England came under the control of the army,[170] and distrust of standing armies had become an article of faith in Whiggish political theory.[171] In Britain, "[t]he army was never

[159] BARNETT, *supra* note 39, at 116.
[160] Yassky, supra note 34, at 604–05.
[161] DAVID C. WILLIAMS, THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC 27 (2003).
[162] AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 53 (1998).
[163] *Id.*; Yassky, *supra* note 34, at 602–03; BARNETT, *supra* note 39, at 36, 116.
[164] CRESS, *supra* note 133, at 46.
[165] BARNETT, *supra* note 39, at 116; Yassky, *supra* note 34, at 603.
[166] WILLIAMS, *supra* note 161, at 28.
[167] Don B. Kates, Jr., Handgun Prohibition and the Original Meaning of the Second Amendment, 82 Mich. L. Rev. 204, 216, 226 & nn. 51–52, 90 (1983).
[168] BARNETT, *supra* note 39, at 116.
[169] BARNETT, *supra* note 39, at 36.
[170] MAITLAND, *supra* note 42, at 326.
[171] COOPER, *supra* note 56, at 4.

popular; the soldiers, as a class, were despised."[172] Likewise, Americans disliked the presence of British regular forces in America. In addition to harboring British anti-army prejudices, Americans objected to the maintenance of regular troops because of the threat that Britain would use the army to implement unpopular and oppressive domestic policies (e.g., the raising of taxes in the colonies).[173]

The relationship between the two forces was complicated. Many features of the army and the militia produced tension and jealousy. Army officers often possessed more military knowledge than militia officers, but the militia officers generally held a higher social rank.[174] The army and the militia also often competed to enroll the same recruits.[175]

In America, the regular army and the militia frequently were in tension. During the French and Indian War, British officers had primary command, including over colonial forces, and they often resisted recognizing the rank of militia officers.[176] Both before and after the Revolution, regular army officers had significant problems coordinating separate state militias. State militias "were too different from each other to be interchangeable,"[177] and "contentious state militia officers squabbled with each other over relative rank and right of command."[178] The militia was ill-trained, and with three-month rotations, they provided no continuity of service, departing the battlefield as soon as they got experience.[179]

But the army and the militia also could serve as natural complements. Although they sometimes competed in recruitment, in wartime, the militia could serve as recruiting grounds for the regular forces[180] and the "pool of reservists from which expeditionary forces, *real* armies, were levied and assembled."[181] In the United States, during the Revolutionary War, the militia system performed three valuable services to supplement the regular Continental Army. First, when communities came under American rule, the militia held the territory. Second, the militia provided emergency manpower—often on short notice—for small periods of service. Third, the militia provided a nucleus of forces to keep an American army in the field, as regular Continental Army soldiers departed when their enlistment contracts expired.[182]

As described below, much of the twentieth-century military reforms that supposedly eliminated the militia did not actually do that. Instead, it took the regular and part-time forces and placed them under a more unified umbrella. Military reorganization did not eliminate all the tensions between regular forces and part-time troops, but it has turned the part-time troops into a more integrated force for augmenting the regular forces in an emergency.

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[172] MAITLAND, *supra* note 42, at 453.
[173] COOPER, *supra* note 56, at 4.
[174] MCCORMACK, *supra* note 48, at 109.
[175] BARNETT, *supra* note 39, at 174.
[176] WEIGLEY, *supra* note 37, at 16-17; MAHON, *supra* note 56, at 28–29.
[177] MAHON, *supra* note 56, at 36.
[178] COOPER, *supra* note 56, at 5.
[179] WEIGLEY, *supra* note 37, at 30-33. ; COOPER, *supra* note 56, at 5.
[180] Beckett, *supra* note 43, at 391.
[181] BARNETT, *supra* note 39, at 37.
[182] MAHON, *supra* note 56, at 44.

C. War Volunteers

In addition to the two paradigm traditions of a regular Army and a militia, a third military tradition developed in colonial America: war volunteers. The use of volunteers had developed in England, in which the militia was prohibited from service outside the country; although protected from compulsory foreign service, individuals could still volunteer for temporary wartime service abroad.[183] War volunteers operated halfway between militia and army. Like the militia, volunteers primarily served "for specific expeditions or purposes" during wartime emergencies.[184] Unlike, the militia, however, volunteer units "could engage in offensive operations" and were not otherwise subject to the same service limits as ordinary militia.[185] The volunteers, thus, functioned like a quasi-army.[186]

Even after the ratification of the Constitution, the volunteers remained a key part of the American military structure from the quasi-war with France in the 1790s[187] through World War I.[188] Until the Cold War, the United States maintained a small standing army in peace.[189] When the army needed expansion in wartime—especially for expeditionary missions, which the militia could not constitutionally perform[190]—the United States recruited volunteers, often from the militia and, later, from the National Guard.[191]

Despite America's long history of relying on volunteers, the volunteers would develop a dubious legal status.[192] As explained below, the Constitution only provided for armies,[193] a navy[194], and a militia[195]; it contained no provisions for the volunteers. The volunteers were like the militia insofar as they were citizen-soldiers enrolled for military service for specific emergencies. But they were like the army in that they consisted of voluntarily enlistments with the expectation that they would be used in an offensive capacity. Under the Constitution, the distinction between "armies' and "militia" has legal

[183] BARNETT, *supra* note 39, at 37, 41.
[184] MAHON, *supra* note 56, at 32.
[185] *Id.* at 2, 32.
[186] *Id.*
[187] An Act authorizing the President of the United States to raise a Provisional Army, ch. 47, § 3, 1 Stat. 558, 558 (1798)."... [I]n addition to the aforsesaid number of troops, the President is hereby empowered to accept at any time within three years of the passing of this act, if in his opinion the public interest shall require, to accept of any company or companies of volunteers. . ."
[188] CURRIE & CROSSLAND, *supra* note 248, at 8. (noting that, by the Mexican War, "few states retained an effective militia system"). National Defense Act of 1916, §§ 1, 3, 55.
[189] *See* WEIGLEY, *supra* note 37, at 486.
[190] 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).
[191] RICHARD H. KOHN, EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783–1802, at 137–38 (1975); COOPER, *supra* note 56, at 87, 97–98
[192] *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).
[193] U.S. CONST. art I, sec. 8, cl. 12.
[194] U.S. CONST. art I, sec. 8, cl. 13.
[195] U.S. CONST. art I, sec. 8, cl. 15.

significance. If the volunteers were part of the federal army, Congress had plenary power to raise and govern them and the federal government would appoint the officers.[196] But if, instead, they were subject to the limitations contained in the Militia Clauses, Congress had to allow the states to appoint the officers, and it could not use the volunteers in an expeditionary capacity.[197]

For much of the early American military history, the volunteers' halfway status between armies and militia engendered political and legal disputes over their status as either "troops" or "militia."[198] Congress vacillated on the question many times.[199] Regardless of how they were organized, however, the federal government utilized volunteer forces to provide for a quick expansion of the American army in wartime and often treated them as if they were a federal reserve force.[200] Although on a strict view of the legal merits I believe that the volunteers should have been classified as militia,[201] it was eventually accepted that Congress could raise temporary volunteer forces as part of its army power.[202]

Perhaps the enduring lesson of the volunteers is that many legal protections for the militia are individual rights that are waivable. Like an enlistee in the Army, the volunteers waived their rights against foreign deployment and shorter service, in exchange for pay or other benefits.

* * *

By the eighteenth century, both Britain and the American colonies maintained a layered defense system using armies and militia. Professional soldiers were used for offensive operations, during wartime, and for some peacetime defensive needs. Britain and the colonies maintained elite militia units for ordinary defense and frequently called upon volunteers for specific campaigns. And at its broadest, Britain and the colonies could call forth the common militia—their entire military manpower—during those rare emergencies that required full military exertion; but otherwise, the common militia received little or no training in peacetime.

II. The Supposed Collapse of the Militia

This Part explains the belief in the militia's extinction. Three facts have contributed to the view that the militia, as an institution, no longer exists. First, following the War of 1812, the United States abandoned any attempt to impose universal militia service, with active military training and musters on the entire able-bodied population. A volunteer militia system arose in its place that bore little resemblance to the Framing-era militia. That volunteer militia became the National Guard. The second and three facts involve the federal government using its Army Power to evade the traditional limitations

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[196] *See* U.S. CONST. art. 1, sec. 8, cls. 12–14.
[197] *See* U.S. CONST. art. 1, sec. 8, cls. 16.
[198] *See*, e.g., 8 ANNALS OF CONG. 1740 (Joseph Gales ed., 1851) (1798); 1 TUCKER, *supra* note 285, at app. D at 274–75.
[199] *See* 1 CURRIE, *supra* note 292, at 248–50; Leider, *supra* note 29, at 1055–56 (recounting debate).
[200] See, e.g. 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) (creating a system of volunteer units with state appointed officers); 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) (transferring the power to appoint officers to the President).
[201] Leider, *supra* note 29, at 1054.
[202] 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1187, at 75–76 (1833) (arguing that the question of the volunteers' status had liquidated in favor of their being part of the army); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 87 (2d ed. 1920) (similar).

on militia service. Second, through dual enlistment in the National Guard and Army Reserve, the federal government may now use citizens in part-time military service without obeying the constitutional limitations on calling forth the militia. Third, because of direct conscription into the national army, the federal government may now involuntarily call all citizens capable of bearing arms into emergency military service, again without obeying the constitutional limitations on calling forth the militia.

As a result, scholars and judges argue that the militia has effectively disappeared as an institution. And because the militia system has disappeared, they contend that legal provisions designed to regulate and preserve the militia have little contemporary relevance.

A. Channeling the Militia into the Army: Replacing Universal Militia Service with Volunteer Militia Units, Dual Enlistment, and Conscription

In theory, the Constitution envisions two kinds of military land forces. The first is the armies, over which the federal government exercises near plenary control. The second is the militia, the control over which the Constitution divides between the federal and state government. As part of this divided control, the Constitution explicitly and implicitly denies the federal government certain power over the militia. The Militia Clauses explicitly reserved to the states the power to appoint militia officers and to train the militia "according to the discipline prescribed by Congress."[203] The Fifth Amendment limits the federal government's ability to apply military law to the militia to times when the militia is "in actual service in time of War or public danger."[204] The Second Amendment connects the idea of "[a] well regulated Militia, being necessary to the security of a free State" with prohibiting the federal government from infringing "the right of the people to keep and bear Arms."[205] And the Constitution's grant of federal power to call forth the militia to execute the laws, suppress insurrections, and repel invasions has long been understood as a negation of Congress's power to call forth the militia for other purposes.[206]

In practice, the federal government has leveraged its broader constitutional power to raise armies to circumvent constitutional restrictions on its control over the militia. This effort to use the army power has three sources: the demise of an early attempt at a universal militia system including the failure of the states adequately to train the militia; the desire of the federal government to use the militia for offensive and overseas operations, which the Constitution prohibited in accordance with traditional Anglo-American practice; and the desire of the federal government to bypass the states when it came to raising military forces.

1. The Aborted Effort at Universal Militia Service and the Rise of Volunteer Militias

After the Constitution was ratified, Congress intended to create a universal militia with the Militia Act of 1792.[207] That act required the enrollment of all free white citizens between the ages of

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[203] U.S. CONST. art. I, § 8, cl. 16.
[204] U.S. CONST. amend. V.
[205] U.S. CONST. amend. II.
[206] *See* Auth. Of President to Send Militia into a Foreign Country, 29 Op. Att'ys Gen. 322 (Feb. 17, 1912); U.S. WAR DEP'T GEN. STAFF, REPORT ON THE ORGANIZATION OF THE LAND FORCES OF THE UNITED STATES 56–57 (1912).
[207] 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

eighteen and forty-five.[208] The act specified the particular weapons that militiamen were required to keep.[209] But the Militia Act imposed no particular training requirements on the militia, leaving that for the states.

The Militia Act failed to adequately provide for a capable military force. In the Militia Act, Congress appropriated no money for the militia, and the Act "was virtually ignored for more than a century."[210] With little money, poor training, and bad leadership, the militia did not perform well in the War of 1812.[211] Over the ensuing decades, the universal militia system (to the extent it ever really existed) largely died following the war.[212] The decline and failure of the early universal militia system had two enduring consequences.

First, both for domestic peacekeeping and national defense, the federal government increasingly relied on the regular army as a substitute for the militia. In 1792, Congress authorized the President to call forth the militia to suppress insurrections, repel invasions, and, in some cases, to enforce the laws.[213] The Constitution explicitly authorized use of the militia for these purposes,[214] but it was silent on domestic use of the professional military—perhaps reflecting the Framers' lack of consensus on such a touchy subject.[215] In 1807, however, Congress passed the Insurrection Act, which additionally authorized the President to use the regular army or navy to accomplish the same ends.[216] The United States also relied on the professional army to provide security for western settlements.[217] Local militia units were not organized, even for such local defensive duties.[218] And for national defense, after the poor performance of the militia in the War of 1812, Secretary of War John Calhoun proposed that citizens should augment regular army units in wartime; regular officers and soldiers, he thought, should provide a professional nucleus for expanded wartime forces.[219] Although not immediately adopted, Calhoun's proposal would heavily influence later military theorists, and the twentieth-century reforms of the Armed Forces reflected his approach.[220]

Second, in place of an active universal militia system, volunteer uniformed militia units arose.[221] These units "functioned like other fraternal societies," with exclusive memberships, their own bylaws,

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call forth the militia); *see also*, Militia Act of 1795, ch. 36, 1 Stat. 424; Militia Act of 1862, ch. 201, sec. 1, 12 Stat. 597; Militia Act of 1903 (Dick Act), ch. 196, 32 Stat. 775; Militia Act of 1908, ch. 204, § 4, 35 Stat. 400.

[208] Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271.

[209] *Id.*

[210] Perpich v. Dep't of Def., 496 U.S. 334 (1990).

39 *Id*.

[212] Frederick B. Wiener, *Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 188–93 (1940); MAHON, *supra* note 56, at 83

[213] Act of May 2, 1792, ch. 28, 1 Stat. 264; *see also* Militia Act of 1795, ch. 36, 1 Stat. 424 (superseding the 1792 Act, but granting a similar authority to the President).

[214] U.S. CONST. art. I, § 8, cl. 15.

[215] ROBERT W. COAKLEY, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1789–1878, at 90 (1988); Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 165 (2004). My thanks to Stephen Vladeck for alerting me to this point.

[216] Insurrection Act of 1807, ch. 39, 2 Stat. 443 (current version at 10 U.S.C. §§ 251–255).

[217] WEIGLEY, *supra* note 37, at 158–64.

[218] COOPER, *supra* note 56, at 13.

[219] *Id.* at 140–43.

[220] *Id.* at 142–43.

[221] COOPER, *supra* note 56, at 15.

and plenty of social activities.[222] This exclusivity undercut one of the core traits of the traditional militia, a military body that was broadly representative of the civilian community.[223]

The volunteer militia units would fight in many nineteenth century conflicts, with mixed results. Most Union troops during the Civil War belonged to volunteer state units.[224] Although volunteer state units largely disappeared after the Civil War,[225] they returned following the 1877 labor disputes, often under the name "National Guard."[226] These state National Guards had some domestic value in controlling late nineteenth-century labor unrest; but when used for military service during the Spanish-American War in 1898, National Guard soldiers performed badly.[227]

The National Guard's performance in the Spanish-American War demonstrated the inadequacies of the militia's archaic organization. Legally, the Militia Act of 1792 remained the principal federal law governing the militia. By the turn of the twentieth century, the law was a relic.[228] The 1792 militia law still required all able-bodied men to enroll in the militia and to arm themselves with, among other things, "a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, [and] a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock."[229] Yet, by 1900—two decades after the first practical machine gun was invented[230]—the provision to arm the militia with muskets and firelocks was obsolete. So was the provision for universal enrollment; for nearly a century, the United States had abandoned enrolling citizens into universal militia units and training them, replacing them with organized volunteer units.[231] When the federal army needed rapid expansion in wartime (e.g., for the Spanish American War), organized militia units often volunteered for federal army duty.[232] But with no federal training standards, the informal volunteer militia units had uneven organization, leadership, training, and capabilities,[233] leading to poor combat performance.[234]

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[222] *Id.* at 16.
[223] *Id.* at 15.
[224] WEIGLEY, *supra* note 37, at 210 (providing statistics on volunteers versus conscripts); *id.* at 216 ("In no small measure, the achievement derived from the historic citizens' militia, whose organized companies became the nucleus of the war armies."); MAHON, *supra* note 56, at 105–06 ("[T}he regiments and brigades on the Union side proudly bore state designations throughout the war."). *But see* Cooper, *supra* note 56, at 20 ("The development of the uniformed militia during the preceding two decades contributed only minimally to the Civil War mobilization.").
[225] COOPER, *supra* note 56, at 23–24.
[226] *Id.* at 44.
[227] *Id.* at 108.
[228] MAHON, *supra* note 56, at 138.
[229] 1 Stat. 271.
[230] Hiram Maxim invented the first practical fully automatic machine gun in 1884. JOHN ELLIS, THE SOCIAL HISTORY OF THE MACHINE GUN 33 (paperback ed. 1986) (1975).
[231] *See* H. RICHARD UVILLER & WILLIAM G. MERKEL, THE MILITIA AND THE RIGHT TO ARMS 125–32 (2002).
[232] COOPER, *supra* note 56, at 18–19 (Mexican War), 104 (Spanish-American War); MAHON, *supra* note 56, at 90–91 (Mexican War), 132 (Philippines). *See generally* GIAN GENTILE, A HISTORY OF U.S. MILITARY POLICY FROM THE CONSTITUTION TO THE PRESENT, RAND, https://www.rand.org/pubs/tools/TL238/tool.html (explaining how forces were raised during each major military conflict).
[233] COOPER, *supra* note 56, at 96–98, 104; MAHON, *supra* note 56, at 128–29; COOPER, *supra* note 56, at 17–19 (antebellum volunteer companies).
[234] *See supra* note 233.

Under President Theodore Roosevelt's prodding, Congress reorganized the militia. In 1903, Congress legally separated the militia into an organized militia known as the National Guard and an untrained reserve militia,[235] which had been the de facto militia organization for decades.[236] Congress then exchanged federal appropriations for federal control.[237] Congress appropriated money and arms for organized militia units that met federal standards. In exchange, Congress imposed inspection and training requirements for the organized militia,[238] and it detailed federal army officers to supervise militia training.[239] This reorganization helped remedy the incompetence that plagued National Guard officers and soldiers.[240] And it was a classic cooperative federalism contract: nothing required the states to maintain National Guard units; but if they did and those units met federal standards, the federal government would provide nearly all the money and arms.[241]

2. Evading the Constitutional Limitations on Militia Service

Although the 1903 reorganization improved the militia's performance, it failed to overcome the constitutional impediments to federal use of the militia for foreign conflicts. The Constitution authorized the federal government to use the militia as a home defense force—to enforce the laws, suppress insurrections, and repel invasions.[242] But by 1900, America needed more than a home defense force; it also needed a flexible reserve system to rapidly expand the army in wartime for offensive operations overseas.[243] American military conflicts around 1900 occurred primarily outside the United States, including in Cuba against Spain and in the Philippines.[244] The National Guard Association, the lobbying organization of National Guardsmen, advocated that the National Guard be given that role, and National Guardsmen who served in Congress were happy to oblige.[245] In 1908, Congress authorized the militia to conduct operations outside the United States.[246] But the Attorney General opined that the Act was unconstitutional because the Constitution only authorizes Congress to call forth the militia "to execute the Laws of the Union, suppress Insurrections and repel Invasions."[247] So while the Army needed a reserve force to expand regular troops for offensive operations outside the United States, the militia could not serve that purpose.

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[235] Militia Act of 1903 (Dick Act), ch. 196, 32 Stat. 775.
[236] WEIGLEY, *supra* note 37, at 321; COOPER, *supra* note 56, at 14–37.
[237] RAPHAEL S. COHEN, DEMYSTIFYING THE CITIZEN SOLDIER 18–19 (2015), https://www.rand.org/pubs/research_reports/RR1141.html.
[238] Militia Act of 1903, 32 Stat. 778.
[239] *Id.* § 19, 32 Stat. 778.
[240] COOPER, *supra* note 56, at 128–43.
[241] Kester, *supra* note 26, at 202.
[242] U.S. CONST. art. I, § 8, cl. 15.
[243] COOPER, *supra* note 56, at 108–09; MAHON, *supra* note 56, at 138–39.
[244] National Park Service, *Spanish-American War and the Philippine-American War*, 1898–1902, https://www.nps.gov/goga/learn/historyculture/spanish-american-war.htm (2015).
[245] MAHON, *supra* note 56, at 139.
[246] Militia Act of 1908, ch. 204, § 4, 35 Stat. 399, 400.
[247] U.S. CONST. art. I, § 8, cl. 15; Auth. Of President to Send Militia into a Foreign Country, 29 Op. Att'ys Gen. 322 (Feb. 17, 1912); U.S. War Dep't Gen. Staff, Report on the Organization of the Land Forces of the United States 56–57 (1912). The Army Judge Advocate General concurred in the Attorney General's opinion. *See* MAHON, *supra* note 56, at 143.

Around the time Congress was reorganizing the militia, it was also developing a purely federal reserve force that would not have these limitations. In 1908, Congress created a reserve component so that the army would have medical officers in wartime.[248] In 1912, Congress expanded the reserves with former regular soldiers; Congress authorized longer enlistment contracts in which soldiers, after completing active service, would serve three or four years in the reserves.[249] Then, in 1916—two years after World War I started in Europe—Congress created a "Regular Army Reserve" and the Reserve Officers Training Corps to provide the foundation for expanding the army in wartime.[250]

In 1920, Congress provided a new structure for the United States Army, which largely remains the basis of the army to this day. Congress continued the reserve forces beyond wartime; for the first time, the federal Army had its own permanent reserve of part-time soldiers.[251] The "Organized Reserves" consisted of the "Officers' Reserve Corps" and the "Enlisted Reserve Corps."[252] The law established that the federal organized reserve corps, unlike the militia, were purely federal forces.[253] Congress would later consolidate the Enlisted Reserve Corps and the Reserve Officers' Corps into a single "U.S. Army Reserve" in 1952.[254] The 1920 Act also deemed "the National Guard while in the service of the United States" to be part of the Army.[255]

As Congress was in the process of creating a purely federal army reserve, the National Guard Association continued to lobby Congress to take on the role as the primary federal reserve force.[256] The principal obstacles were the constitutional limitations on the use of the militia. Between 1910 and 1933, Congress gradually solved that problem by consolidating the militia into the federal army. The Volunteer Act of 1914, which authorized the President to enroll volunteer land forces during wartime, provided that the President had to first accept volunteers from the organized militia when at least three-fourths of a unit volunteered.[257] Two years later, the National Defense Act of 1916 authorized the president to draft National Guardsmen, as individuals, into the federal army.[258] But drafting soldiers as individuals had the disadvantage of breaking apart militia units.[259]

So, in 1933, Congress made the National Guard simultaneously an organized militia and a federal reserve force through a system of dual enlistment. The first organization was the "National Guard [of a state]," which continued as the organized militia of the state and became part of the federal army only when federalized.[260] The second organization, known as the "National Guard of the United States," was a component of the U.S. Army Reserve. National Guard officers, thus, received two

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[248] Act of Apr. 23, 1908, ch. 150, 35 Stat. 66; JAMES T. CURRIE & RICHARD B. CROSSLAND, TWICE THE CITIZEN: A HISTORY OF THE UNITED STATES ARMY RESERVE, 1908–1995, at 17 (2d ed. 1997).
[249] CURRIE & CROSSLAND, *supra* note 248, at 23.
[250] National Defense Act of 1916, Pub. L. No. 64-85, §§ 30–55, 39 Stat. 166, 187–97.
[251] National Defense Act of 1920, Pub. L. No. 66-242, 41 Stat. 759
[252] National Defense Act Amendments of 1920, Pub. L. 66-242, § 1, 41 Stat. 759, 759.
[253] *Id.* § 55a, 41 Stat. at 780.
[254] Armed Forces Reserve Act of 1952, § 202, Pub. L. 82-476, 66 Stat. 401, 403.
[255] National Defense Act Amendments of 1920, Pub. L. 66-242, § 1, 41 Stat. 759, 759.
[256] MAHON, *supra* note 56, at 147.
[257] Act of April 25, 1914, ch. 71, § 3, at 347. The Act also provided that militia officers would retain the same rank in the volunteer army. *Id.*
[258] National Defense Act of 1916, § 111, Pub. L. No. 64-85, 39 Stat. 166, 211.
[259] *Perpich*, 496 U.S. at 345.
[260] National Guard Act of 1933, ch. 87, §§ 5–6, 11, 48 Stat. 153, 155–58.

commissions: a state commission as a National Guard (militia) officer and a federal commission as an officer in the "National Guard of the United States," a U.S. Army Reserve component. Analogously, enlisted personnel would join both organizations. The 1933 Act also effectively made the dual enlistment system mandatory: for a state to receive federal funds for its National Guard units, all members of the National Guard had to enroll in the National Guard of the United States.[261]

By deputizing all organized militiamen as army soldiers, Congress claimed it could exercise its plenary constitutional Army Power over the entire organized militia. If the federal government wanted to use the National Guard for purposes beyond those enumerated in the Constitution's Militia Clauses (i.e., foreign conflicts), Congress could call out National Guard units in their capacity as units of the "National Guard of the United States," a federal reserve force.[262] For Frederick Wiener, dual enlistment "placed the final mark of inadequacy on the militia clause . . . and proved conclusively that a well-regulated militia . . . can be organized only by resort to the plenary and untrammeled powers under the army clause."[263]

With little analysis, the Supreme Court effectively approved the dual enlistment arrangement in *Perpich v. Department of Defense*.[264] The technical legal question in *Perpich* involved the ability of state governors to veto the federal government's order to send their National Guard abroad for training. President Ronald Reagan called up "12,000 National Guardsmen for active duty training in Central America . . . to intimidate the Sandinista government in Nicaragua."[265] Democratic governors in Minnesota and Massachusetts objected, and tried to withhold their National Guard units from participating.[266] The Armed Forces Reserve Act of 1952 authorized the federal government to call up reservists for training either with their consent or for up to fifteen days without their consent.[28] In either case, the Act provided that the relevant governor had to provide his consent before Guardsmen could participate in federal training.[267] In response to governors withholding their consent for training their National Guard units in Central America, Congress passed the Montgomery Amendment. That amendment provided, "The consent of a Governor . . . may not be withheld (in whole or in part) with regard to active duty outside the United States . . . because of any objection to the location, purpose, type, or schedule of such active duty."[268] In the Minnesota case, which came before the Supreme Court, the governor challenged the constitutionality of the Montgomery Amendment, arguing that the Constitution explicitly reserves to the states the "Authority of training the Militia according to the

[261] National Defense Act Amendments of 1933, ch. 87, §§ 5–6, 11, 48 Stat. 153, 155–58.
[262] *See* Kester, *supra* note 26, at 189 ("The purpose of the 1933 Act was to enable the federal government without a draft to order National Guard personnel into the active Army for purposes other than the three narrow instances that the Constitution listed as bases for calling the militia into federal service.").
[263] Frederick Bernays Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 209 (1940)
[264] *Perpich*, 496 U.S. at 345 (1990).
[265] Carl T. Bogus, *What Does the Second Amendment Restrict? A Collective Rights Analysis*, 18 CONST. COMMENT. 485, 503 (2001).
[266] *Id.* at 338; Dukakis v. Dep't of Defense, 686 F. Supp. 30, 31–35 (D. Mass. 1988), *aff'd*, 859 F.2d 1066 (1st Cir. 1988).
[267] Pub. L. No. 82-476, § 233(c)–(d), 66 Stat. 481, 490.
[268] National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99–661, § 522, 100 Stat. 3816, 3871 (1986).

discipline prescribed by Congress." But he did not challenge the validity of the dual enlistment system.[269]

The Court upheld the constitutionality of the Montgomery Amendment. Relying on the unchallenged validity of the dual enlistment system, the Court held that the federal government had ordered Minnesota National Guardsmen to training abroad in their capacity as members of the U.S. Army Reserve.[270] Because they were called forth as members of the Army, the Militia Clauses did not apply.[271] The Court also denied that its decision nullified the reserved powers of the state under the Militia Clauses. The Court explained that the Montgomery Amendment still allowed governors to veto training missions if those missions would interfere with the ability of state Guard units to respond to in-state emergencies.[272] Moreover, federal law authorized states to create defense forces that could not be called into the federal armed forces.[273] The defense force provision, the Court explained, vindicated whatever "constitutional entitlement" Minnesota had "to a separate militia of its own."[274] Traditional principles of cooperative federalism won the day: either states could take federal money for their militia units, and subject themselves to additional federal regulatory requirements including the requirement that their organized militia enroll in the federal army, or they could go it alone and organize their own defense forces.

The Court now treats both the Army and the Militia Clauses as separate grants of power-conferring rules. Congress may selectively invoke either or both its army or militia power over the same forces—whichever power provides the federal government with the broadest authority possible at that moment. A 2003 Amendment provides even more flexibility, allowing National Guard officers to serve as both part of the militia and the army at the same time.[275]

So while the original constitution may have divided the military power between the federal and state governments along traditional republican principles of providing checks and balances, today Congress treats the constitutional provisions as a veritable smorgasbord of authority providing maximum flexibility. Want to call the National Guard to serve in Iraq or Afghanistan? No problem. Even though the Constitution prohibits federal use of the militia, except to enforce the laws, repel invasions, and suppress insurrections,[276] the federal government can call Guardsmen up as members of the federal army. Need the National Guard to secure the Capitol? Again, no problem. Although the Posse Comitatus Act generally prohibits using the federal army for law enforcement,[277] it does not apply to the militia in a state status. So the Department of Defense can use the National Guard in their capacity as state Guard units. Want the federal government to train the National Guard? The federal government can train Guardsmen in their capacity as federal reservists and then have the states recognize the

[269] *Perpich*, 496 U.S. at 347 (1990); Transcript of Oral Argument at 13–14, Perpich v. Dep't of Defense, 496 U.S. 334 (1990) (No. 89-542).
[270] *Perpich*, 496 U.S. at 339–-40, 347–55.
[271] *Id.* at 347–48.
[272] *Id.* at 351.
[273] *Id.* at 351–52.
[274] *Id.* at 352.
[275] National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108–136, § 516 (2), 117 Stat. 1391, 1461 (2003).
[276] U.S. CONST. art. I, § 8, cl. 15.
[277] 18 U.S.C. § 1385.

federal training. Thus, enlisted National Guardsmen attend federal basic training,[278] as do many officers,[279] even though the Constitution expressly reserves militia training to the states.[280] Want the state to train the National Guard? Have them do it under the Militia Clauses. Want the federal government to control who gets appointed as a Militia Officer? Require states to commission only those who have federal approval.[281] Want the federal government to be able to fire state militia officers? Require states to dismiss officers who lose their federal recognition.[282]

As these examples show, dual enlistment has made a hash out of the limitations in the Constitution's militia clauses. Legally, this has led to several doctrinal puzzles. Let me briefly illustrate a few here.

First, courts have struggled with the constitutional limits of Congress's power to subject citizens to military courts-martial jurisdiction. In recent years, the military has prosecuted some retirees for conduct that occurred after their retirement, such as the prosecution of a retired Marine sergeant for a sexual assault of a civilian at a Japanese bar.[283] Courts have debated whether active-duty retirees may be court-martialed and whether Congress may subject active-duty retirees to more expansive military criminal law jurisdiction than their counterparts who retired from the reserve forces.[284]

Because of dual enlistment and conscription, this doctrinal area remains clouded in uncertainty. The Fifth Amendment authorizes the application of military law to the "land and naval forces" in all circumstances, but only to the militia when in active service in wartime.[285] Understanding who falls within the "land and naval forces," and distinguishing these forces from the "Militia" and from civilians, are critical to determining when Congress may subject retirees, reservists, and private citizens to military law. As of now, the limits of Congress's power appear unclear. For example, could Congress conscript all able-bodied citizens into the Army Reserve and then subject them to the Uniform Code of Military Justice at all times, on duty or off duty? Currently, there is no doctrinal reason that Congress could not, even though it would completely vitiate the Fifth Amendment's protection of the militia.

Second, the distinction between armies and militia also has important federalism implications. The Constitution both reserves to states important power over the militia while denying them the power to keep troops in peacetime.[286] The Supreme Court's narrow *Perpich* opinion avoided difficult questions about whether Congress could prohibit states from having organized military forces other than the

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[278] *Army National Guard*, https://www.nationalguard.com/basic-combat-training?utm_campaign=nggpaidsearch&utm_source=89&utm_medium=bingbrand&utm_content=web&msclkid=27a749364214180494ec283b3c71382a&gclid=27a749364214180494ec283b3c71382a&gclsrc= 3p.ds (last visited AUG. 6, 2021).

[279] *Ohio Army National Guard*, https://ong.ohio.gov/join-the-guard/ong-officer-training-information.pdf (last visited AUG. 6, 2021) (explaining state and federal officer candidate school training options).

[280] U.S. CONST. art. I, § 8, cl. 16.

[281] 32 U.S.C. §§ 323–324.

[282] 32 U.S.C. § 324(a)(2); *see also* 32 U.S.C. § 2018 (allowing the President to withhold any federal aid, in whole or in part, if a state fails to discharge an officer that loses federal recognition).

[283] United States v. Larrabee, No. 201700075, 2017 WL 5712245, at *1 (N-M Ct. Crim. App. Nov. 28, 2017); *see also United States v. Begani*, No. 20-0217, 2021 WL 2639319, at *7 (C.A.A.F. June 24, 2021) (similar).

[284] *See Begani*, 2021 WL 2639319, at *7–8 (overturning determination that military criminal jurisdiction over active-duty retirees but not reserve retirees violates the Fifth Amendment's equal protection component).

[285] U.S. Const. amend. V.

[286] *Compare* U.S. CONST. art. 1, § 8, cl. 16 *with* U.S. CONST. art. 1, § 10, cl. 3.

National Guard. At oral argument, Solicitor General Ken Starr repeatedly denied that states had any inherent power to arm or organize their own militia units, contending that such actions would violate the Constitution's prohibition on states keeping troops in time of peace.[287] That argument set off a firestorm of controversy. For much of the argument, the conservative Justices viewed the National Guard system through an ordinary cooperative federalism lens: if states wanted organized militia units to have no federal army affiliation (and thus not be subject to plenary federal control), then the states could decline federal aid and organize their own militia units.[288] But if this option were not available, then the federal government would have completely circumvented the Militia Clauses by leaving states with two choices: having organized militia units, subject to complete federal control through the army power, or having no organized militia units.[289] In essence, the government's argument completely obliterated what little state power remained over the militia.

In its written opinion, the Court never decided whether the federal government could require all state organized militia units to join the federal army. Federal law authorized states to create state defense forces that could not be called into the federal armed forces.[290] The defense force provision, the Court explained, vindicated whatever "constitutional entitlement" Minnesota had "to a separate militia of its own."[291] The Court did not indicate whether this defense force provision was a congressional act of grace or a constitutional entitlement of the states. That question ultimately depends on the distinction, if any, between the "troops" mentioned in Article I, Section 10 and the "militia" of Article I, Section 8. Here, again, the failure of the Supreme Court to adequately distinguish the "armies" from the "militia" has resulted in a difficult doctrinal problem.

3. Conscription

In addition to dual enlistment, the Progressive Era saw another innovation that transformed army-militia relations: a workable system of conscription. Until the Civil War, the federal government only raised armies through voluntary enlistments; if the Army needed to expand, it sought volunteers to serve for the duration of the campaign.[292] But in the rare circumstances when the federal government needed the entire military manpower of the country, such as during the War of 1812, it called forth the militia.

During the Civil War, however, Congress first attempted direct conscription into the federal army. The Enrollment Act of 1863 authorized the president to conscript citizens between the ages of twenty and forty-five.[293] But the Act was vigorously resisted, resulting in draft riots and court

[287] Transcript of Oral Argument at 29–31, 37–38, Perpich v. Dep't of Defense, 496 U.S. 334 (1990) (No. 89-542).
[288] *Id.* at 7–8, 17–19.
[289] *Id.* at 31.
[290] 32 U.S.C. § 109(c).
[291] *Id.* at 352.
[292] *See* William G. Carleton, *Raising Armies Before the Civil War*, 54 Current History 327, 327 (1968). President James Madison proposed a draft for the War of 1812, but the bill faced constitutional objections. The bill died when the separate houses of Congress could not resolve their differences over the bill. *See* 1 DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801, 157–58 (1997); Arver v. United States (Selective Draft Law Cases), 245 U.S. 366, 384–85 (1918).
[293] An Act for Enrolling and Calling Out the National Forces, and for Other Purposes, ch. 75, § 1, 12 Stat. 731 (1863).

challenges.[294] Moreover, draftees could evade service by hiring a substitute or paying $300.[295] Ultimately, only 6% of Union soldiers comprised conscripts.[296] Most Union soldiers were still attached to state-based army units.[297]

World War I marked a sharp break with past tradition. In 1917, Congress passed the first Selective Service Act, initially authorizing the conscription of all men ages twenty-one through thirty (later expanded to all men twenty-one to forty-five).[298] Unlike the Civil War Enrollment Act, draftees could not hire a substitute or buy their way out of service.[299] The World War I draft was successful, supplying about two-thirds of the Army's manpower.[300] Although tweaking the system at the margins, Congress followed the Selective Service System approach during World War II, Korea, and Vietnam.[301] The architecture of the system remains in place today, even without a draft being authorized or foreseeable in the near future.[302] The Selective Service Acts, thus, provided the federal government with a way to expand the regular Army in wartime, bypassing the states and the constitutional restrictions on the militia system.

The Supreme Court upheld the constitutionality of the wartime draft in the *Selective Draft Law Cases*, against a challenge that the federal government's power to conscript for military service was limited to conscription only in the militia.[303] The Court explained that Congress's constitutional power to raise and support armies was textually separate from its power over the militia, and that the Framers intended the army power to constitute a complementary additional grant of authority to raise military forces.[304] In the Court's view, the militia power created a soft-power check against the full exercise of the federal army power. The Militia Clauses allowed Congress to prescribe military training for citizens of military age, and they allowed Congress to call forth the militia to meet some national emergencies.[305] By giving Congress these powers, the Court argued, the Framers "diminished the occasion for the exertion by Congress of its military power beyond the strict necessities for its exercise."[306] But the Court refused to construe the Army Clause in light of the limitations on federal power contained in the Militia Clauses. The Court's decision in the *Selective Draft Law* cases, combined with broad dicta in some nineteenth- and twentieth-century decisions and inaction against a peacetime

[294] *See* LESLIE M. HARRIS, IN THE SHADOW OF SLAVERY: AFRICAN AMERICANS IN NEW YORK CITY, 1626–1863, at 279–85 (2003); MAHON, *supra* note 56, at 103; Kneedler v. Lane, 45 Pa. 238 (1863).
[295] An Act for Enrolling and Calling Out the National Forces, and for Other Purposes, ch. 75, § 13, 12 Stat. 731, 733 (1863).
[296] WEIGLEY, *supra* note 37, at 357.
[297] *See supra* note 224.
[298] An Act to Authorize the President to Increase Temporarily the Military Establishment of the United States, Pub. L. No. 65-12, § 2, 40 Stat. 76, 77–78 (1917).
[299] *Id.* § 3.
[300] WEIGLEY, *supra* note 37, at 357.
[301] *See* KRISTY N. KAMARCK, CONG. RSCH. SERV., R 444452, THE SELECTIVE SERVICE SYSTEM AND DRAFT REGISTRATION 3–12 (2020).
[302] 50 U.S.C. ch. 49, §§ 3801–3820.
[303] *Arver*, 245 U.S. at 376–78.
[304] *Id.* at 382.
[305] *Id.* at 393.
[306] *Id.* at 393.

draft, has led to the modern view that Congress possesses plenary authority to conscript military manpower into the federal army.[307]

The recognition of Congress's plenary power to draft weakened the importance of the Militia Clauses. In its broadest sense, the "militia" consists of all able-bodied citizens subject by law to military service. The Constitution provided Congress the power to call forth the entire militia, if necessary, to execute the laws, suppress insurrections, and repel invasions. But by using a draft into the army, Congress now has access to the entire body of the militia without the constitutional limitations. Congress may now use the body of the militia to fight offensive wars outside the United States—beyond the three defensive purposes stated in the Constitution. Congress does not have to allow states to select the officers. Moreover, when the wartime emergency ends, Congress can end conscription and discharge the current conscripts back to civilian life, much as a militia would disembody following a conflict. Recognizing that Congress may conscript into the Army, thus, has diminished the practical importance of Congress's power to call forth the militia.

B. Theoretical and Institutional Consequences

If the federal government had used the Army Power merely to circumvent a few specific constitutional limitations on the militia, the unconstitutional power grab might not have been that significant, except for those who adhere strictly to the original meaning of the Constitution. But the military reforms described in the previous section have led to the false belief that the militia, as an institution, is largely irrelevant to the modern structure of the Armed Forces.

The prevailing view is that the militia known to the Framers has become anachronistic. Richard Uviller and William Merkel conceive of the Framers' militia as "all free white males between eighteen and forty-five" who were "at the call of local authority" and existed "as a viable alternative to the feared standing army."[308] They argue that that institution no longer exists. The modern National Guard is primarily under federal authority for training, command, arming, and deployment.[309] As a result, they argue, the National Guard is now "part of the standing army rather than an alternative to it."[310]

Similar statements to this effect abound. Keith Ehrman and Dennis Henigan contend that the modern National Guard system critically differs from the colonial militia because it is "an organized militia consisting of less than all able-bodied men," for which "the federal government assumed the obligation of supplying and arming the members."[311] Akhil Amar observes that "the semi-professional National Guard is not a general militia."[312] The Vermont Supreme Court, in a case involving a challenge to a gun control law, explained that "[a] state militia no longer exists," and "[a]lthough the National Guard is the closest living descendent of the colonial-era militias, it is a distant cousin at best because

[307] *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 377 (1968) ("The power of Congress to classify and conscript manpower for military service is beyond question."); Holmes v. United States, 391 U.S. 936, 941–45 (mem.) (Douglas, J., dissenting).
[308] UVILLER & MERKEL, *supra* note 231, at 157.
[309] *Id.* at 553.
[310] *Id.* at 553.
[311] Ehrman & Henigan, *supra* note 34, at 5, 37–38 (1989).
[312] Akhil R. Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889, 895 (2001).

the federal government controls its weapons and supplies."[313] And even some individual rights' scholars agree. Nelson Lund, for example, contends that, through National Guard dual enlistment, the federal government has "effectively . . . abolish[ed] the militia as a meaningful alternative to the standing army" by requiring Guard members "to join both their state organization and the federal standing army."[314]

Proponents of these views are usually making one of two claims. At their strongest, some contend that the Framing-era militia, as an institution, no longer exists. This is the essence of Uviller and Merkel's argument. Although we may call the "National Guard" an organized militia in the law, this is a misnomer; the National Guard is just another component of the army.[315] A weaker version of this claim is that even if the National Guard is a militia in some sense, its attributes are critically different from the Framers' institution. This is the Carl Bogus view, when he claims that "the militia is indisputably the National Guard" even if "it differs from an eighteenth-century model" of the militia.[316]

To evaluate whether these claims are true, we need to understand how to define "militia"; but previous attempts to define the "militia" leave much to be desired. A good definition provides the necessary and sufficient properties for the correct application of a term.[317] In the legal literature, many attempts to define the American "militia" do not do this. Instead, they are mere descriptions—aggregations of qualities. Uviller and Merkel's conception of the Framers' militia ("all free white males between eighteen and forty-five" who were "at the call of local authority" and existed "as a viable alternative to the feared standing army") is a description. Uviller and Merkel want to determine "whether the militia contemplated by the framers has changed so fundamentally as to alter the contemporary legal significance of the constitutional provision designed to protect that militia from undue federal encroachment."[318] But the problem with using descriptions is that descriptions have little meaning without understanding which qualities are essential and which are accidental. Under Uviller and Merkel's understanding, is our modern military system not a "militia" because it includes minorities? Or because the organized militia is primarily under federal control rather than local control? Or both? Or neither?

When many judges and theorists attempt to provide a proper definition of the "militia," the result is often less than satisfactory. In *Silveira v. Lockyer*, Judge Reinhardt defined the constitutional militia as "a state military force to which the able-bodied male citizens of the various states might be called to service."[319] This might be an accurate description of the colonial-era militia; but it is still not a proper definition, even limited to how the term "militia" is used in the Constitution. The definition is underinclusive; under Judge Reinhardt's definition, a state military force that included women would not be a "militia" by definition. And it is overinclusive. As I explain further below, the Constitution distinguished a state's militia from a state army. The Constitution both gave states significant control

[313] State v. Misch, No. 19-266, slip op. at 14–15 (Vt. Feb. 19, 2021).
[314] Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1, 25 (1996).
[315] *See also, e.g.*, Kopel, *supra* note at, 1173 ("During the twentieth century, [the National Guard] would seek federal support, which was granted, but which eventually led to the National Guard being eliminated as a militia.").
[316] Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3, 16 (2000).
[317] WAYNE A. DAVIS, AN INTRODUCTION TO LOGIC 441 (2007).
[318] H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate, 76* CHICAGO-KENT L. REV. 403, 511 (2007).
[319] Silveira v. Lockyer, 312 F.3d 1052, 1071 (9th Cir. 2002).

over militia forces, while prohibiting them from "keep[ing] Troops, or Ships of War in time of Peace."[320] Judge Reinhardt's definition leaves us unable to distinguish between a state militia, a state army, and a state navy.

Others claim that the modern militia is the National Guard. Carl Bogus claims that "'militia' is defined in the Constitution itself" as "what Congress decides it is,"[321] and Congress has decided that the modern militia is the National Guard.[322] Some federal court decisions also identify the National Guard as the modern militia.[323] These claims are wrong. The Constitution provides Congress with the power to *organize* the militia, not to create it. Much like the jury mentioned in Article III and the Sixth Amendment,[324] the militia is a body with a preexisting common-law heritage.[325] Whatever Congress's power to regulate federal juries by law, Congress could not deem a jury to be three federal district judges or nine Supreme Court justices. That would pervert the jury trial right. Likewise, the Constitution implies limits on Congress's power to define the militia.

* * *

The end result is that militia-related legal doctrine is somewhere between unclear and contradictory. The same courts will define the "militia" to be all people capable of bearing arms in a Second Amendment case,[326] only to turn around and call it the "National Guard" in a military case.[327] The Militia Clauses have largely fallen into desuetude, and they receive little academic attention today.[328] With the power to bring the National Guard into the army, the federal government simply uses its Army Power to bypass whatever constitutional restrictions exist on its use of the militia. And the converse is true, too: the federal government uses its militia power to bypass whatever statutory restrictions exist against the use of the federal army. Many academic articles also frequently erroneously translate the National Guard to be the modern militia or argue that there is no modern militia, leading them to diminish the importance of the Second Amendment.

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[320] U.S. CONST. art. I, sec. 10, cl. 3.

[321] Bogus, *supra* note 316, at 16. Michael Dorf agrees that Congress has plenary power to define the militia, although, unlike Bogus, he recognizes that it includes all able-bodied male citizens and female members of the National Guard. Michael C. Dorf, *What Does the Second Amendment Mean Today*, 76 CHI.-KENT L. REV. 291, 305–06 (2000).

[322] Bogus, *supra* note 316, at 16.

[323] Gilligan v. Morgan, 413 U.S. 1 (1973); *infra* note 327.

[324] U.S. CONST. art. III, § 2, cl. 3, amend. VI

[325] Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders*, 4 TEX. REV. L. & POL. 157, 166 (1999) ("The Constitution does not define the term 'militia.' Article I, however, assumed the militia's existence . . . .").

[326] United States v. Emerson, 270 F.3d 2013, 234–235 (5th Cir. 2001); Parker v. District of Columbia, 478 F.3d 370, 394 (D.C. Cir. 2007).

[327] *See* Ass'n of Civilian Technicians, Inc. v. United States, 603 F.3d 989, 992 (D.C. Cir. 2010) ("The Militia in this Clause is the National Guard . . . ."); Lipscomb v. Fed. Lab. Rels. Auth., 333 F.3d 611, 613 (5th Cir. 2003) ("We begin our consideration of this appeal with full recognition that the national guard is the militia, in modern-day form, that is reserved to the states by Art. I § 8, cls. 15, 16 of the Constitution.").

[328] Most articles use the Militia Clauses for evidence about the proper construction of other constitutional provisions, such as the domestic scope of the President's Commander-in-Chief power. *See, e.g.*, Vladeck, *supra* note 5.

In a previous article, I argued that Congress's use of the Army Power has unconstitutionally circumvented the limitations in the Militia Clauses.[329] Laying aside for the present moment the constitutional infirmities of the system, the reasons I gave for why Congress cannot constitutionally create an army reserve force are also relevant to rebut a different mistake: confusing the legal evasion of certain limitations on federal power in the Constitution's Militia Clauses with the idea that the militia, as an institution, no longer exists.[330] The remaining parts of this article will argue that we maintain a vibrant militia system, one that heavily resembles traditional Anglo-American practice in many important respects.

III. Properly Framing the Constitutional Distinction: Professional Soldiers and Citizen-Armies

To avoid any equivocation when translating the Framers' experience to our own, we need fixed definitions. The Constitution continued America's dual military tradition of having both an "army" and a "militia." But what separates the two kind of forces? Do their differences have to do with professionalism? Or is the army a federal force, while the militia is a state force? This Part provides that definition. The linguistic, historical, and contextual evidence establishes that the proper distinction at the Framing between armies and militia has to do with the type of service. Armies comprise regular soldiers—that is, those for whom being a soldier is their principal occupation. The militia is a force comprised of citizens temporarily called into military service.

The Constitution has several provisions governing the army. The Constitution provides Congress with power "[t]o raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two years.[331] Congress also has the power "[t]o make Rules for the Government and Regulation of the land . . . Forces,"[332] and the ordinary rules of criminal procedure (e.g., requirement to get an indictment) do not apply to "cases arising in the land . . . forces."[333] Article II makes the President "Commander in Chief of the Army . . . of the United States."[334] Finally, Article I, section 10 provides, "No State shall, without the Consent of Congress, . . . keep Troops . . . in time of Peace."[335]

The Constitution also splits control over the militia between the federal and the state governments. Congress has power "[t]o provide for organizing, arming, and disciplining, the Militia."[336] Congress may "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."[337] When called forth, Congress has power to "govern[] such Part of [the militia] as may be employed in the Service of the United States,"[338] and the President is Commander-in-Chief.[339] But Congress may not suspend civilian criminal procedure rights and subject the militia to military law, except when the militia is "in actual service in time of War or public

[329] Leider, *supra* note 29, at 1017–50.
[330] For arguments of this kind, see Darrell A.H. Miller, Institutions and the Second Amendment, 66 Duke L.J. 69, 79 (2016); UVILLER & MERKEL, *supra* note 231, at 157–58.
[331] U.S. CONST. art. I, § 8, cl. 12.
[332] *Id.* art. I, § 8, cl. 14.
[333] *Id.* amend. V.
[334] *Id.* art. II, § 2, cl. 1.
[335] *Id.* art. I, § 10, cl. 3.
[336] *Id.* art. 1, § 8, cl. 16.
[337] *Id.* art. I, § 8, cl. 15.
[338] *Id.* art. I, § 8, cl. 16.
[339] *Id.* art. II, § 2, cl. 1.

danger."[340] The Constitution also reserves important powers to the states, including "the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."[341] Finally, the Second Amendment provides, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[342]

Let's start with the fundamental question: What separates the constitutional militia from the armies? In Part I, I laid out several traditional differences. Among other things, the militia was comprised of civilians, service was part-time, liability for service was compulsory (although actual service was often voluntary), a militiaman's exposure to military law was limited to actual service, and the militia was organized as a hybrid national-local force. The army consisted of regular forces, service was voluntary (at least in theory—there were occasional impressments), a soldier's exposure to military law was constant, and the national government tended to control the armies. Given these traits, we still must determine which are the essential characteristics that demarcate the fundamental difference between armies and militia.

Here, the often-repeated view is that the militia were state forces, while the armies were national forces. Debates over the definition of the "militia" have occurred primarily in Second Amendment decisions and articles. Collective rights scholars and judges mostly treat the militia as a state land force. In a famous *Parade* magazine interview in which he labeled the National Rifle Association's understanding of the Second Amendment as a "fraud," Chief Justice Burger called the militia the "state armies."[343] In *Silveira v. Lockyer*, Judge Reinhardt concluded that a "militia" was "a state military force to which the able-bodied citizens of the various states might be called into service."[344]

For most collective rights' judges and scholars, the Second Amendment functions as "a federalism provision" that is "directed at preserving the autonomy of the sovereign states."[345] They trace the Second Amendment to comments made by George Mason during the Virginia Ratifying Convention that Congress's constitutional power to arm the militia was exclusive, and consequently, states would be powerless to arm the militia if Congress failed to do it.[346] In their view, the Second Amendment filled that gap by authorizing states to arm their military forces. Thus, they draw the distinction as one of federalism: the army is federal, while the militia is the state's military force.

This federalism-based distinction between the armies and militia is wrong. Examining constitutional text, structure, and history (including the history provided in Part I), I contend that the critical distinction between the armies and the militia is that the armies consisted of regular soldiers, while the militia consisted of able-bodied citizens subject to part-time or emergency military service. At the Framing, the distinction between armies and militia had its primary salience in peacetime: Army

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[340] *Id.* amend. V.
[341] *Id.* art. 1, § 8, cl. 16.
[342] *Id.* amend. II.
[343] Warren E. Burger, *The Right to Bear Arms: A distinguished citizen takes a stand on one of the most controversial issues in the nation*, PARADE, Jan. 14, 1990, at 4.
[344] *Silveira v. Lockyer*, 312 F.3d 1052, 1071 (2002); *see also* Ehrman & Henigan, *supra* note 34, at 24 ("[T]he militia was viewed as a state-organized, state-run body.")
[345] McDonald v. City of Chicago, 561 U.S. 742, 897 (2010) (Stevens, J., dissenting).
[346] District of Columbia v. Heller, 544 U.S. 655 (2008) (Stevens, J., dissenting) (citing 3 Elliot 379).

soldiers consisted of those land forces that continue their regular service, while the militia was the remaining population capable of bearing arms (some or all of which might actively drill on a part-time basis during peacetime).

A. Textual Meaning

Linguistically, the evidence is overwhelming that this is the proper distinction between armies and militia. For example, Alexander Hamilton stated in the *Federalist Papers* that peacetime garrisons "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."[347] Later, in *Federalist No. 29*, Hamilton argues for excluding most of the "militia of the United States" from active military exercises.[348] Here, he is treating the militia as comprising "the great body of yeomanry and of the other classes of the citizens," rather than using it simply to denote the organized, select units that he is proposing forming.[349] In *Federalist No. 46*, Madison also places the militia in contradistinction to regular troops; in a hypothetical discussion about the militia resisting an oppressive army, he states that "[i]t may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops."[350] Several other *Federalist Papers*,[351] the *Antifederalist Papers*,[352] and contemporary newspapers[353] treat armies as comprising regular forces and militia as comprising citizens who perform temporary military service.

A similar linguistic distinction was drawn during the debate over the Second Amendment. Elbridge Gerry complained that an early draft of the Amendment, which began, "A well regulated militia being the best security of a free State," left the impression that "a standing army was a secondary one."[354] So Gerry was distinguishing the militia from standing forces. Aedanus Burke had the same understanding. Just after Gerry's proposal was defeated, he proposed adding "an amendment to the following effect: A standing army of regular troops in time of peace is dangerous to public liberty, and such shall not be raised or kept up in time of peace but from necessity, and for the security of the people, nor then without the consent of two-thirds of the members present of both Houses; and in all

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[347] THE FEDERALIST NO. 24, at 161 (Alexander Hamilton) (Clinton Rossiter ed., 1961)..

[348] THE FEDERALIST NO. 29, *supra* note 347, at 152 ("The project of disciplining all the militia of the United States is as futile as it would be injurious . . . .").

[349] *Id.*

[350] THE FEDERALIST NO. 46, *supra* note *supra* note 347, at 296.

[351] *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 power to raise armies under the Constitution and the Articles of Confederation); THE FEDERALIST NOS. 25 (Alexander Hamilton) (assuming "army" referred to a "regular and disciplined army"); THE FEDERALIST NOS. 26 (Alexander Hamilton), NOS. 41 (James Madison) (making similar assumptions).

[352] Letter XVIII (Jan. 25, 1788), *reprinted in* 17 *The Documentary History of the Ratification of the Constitution*, *supra* note 135, at 362 (ascribed to Richard Henry Lee) ("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.").

[353] 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); 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 135, 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 135, at 186–87.

[354] 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1109 (Bernard Schwartz ed., 1971).

cases the military shall be subordinate to the civil authority."[355] So Burke also understood the militia in contrast to a professional, standing force

British usage of "militia" and "army" reflects the same distinction. Adam Smith defined a militia as composing individuals required "to join in some measure the trade of a soldier to whatever other trade or profession they may happen to carry on."[356] He distinguished this from a standing army, in which society "employ[ed] a certain number of citizens in the constant practice of military exercises" whereby they "render the trade of a soldier a particular trade, separate and distinct from all others."[357] Blackstone explains that a standing army involves keeping "a standing body of troops" in peacetime and his illustration involves regular forces in Ireland.[358] A "perpetual standing soldier," he writes, is someone "bred up to no other profession than that of war."[359] A century later, A.V. Dicey also described "regular forces" and "standing army" as synonymous terms, defining the standing army as "[a] permanent army of paid soldiers."[360] The militia, in contrast, was only embodied "in case of imminent national danger or great emergency."[361]

B. Structure

The Constitution's structure confirms this linguistic usage: differentiating between full-time and part-time forces—not between state and federal forces—is key for understanding how the Constitution treats armies differently from the militia. Start with the calling forth power. Judge Reinhardt contended that "[t]he fact that the militias may be 'called forth' by the federal government only in appropriate circumstances underscores their status as state institutions."[362] This is wrong. The limited calling forth power reflected the militia's status as an institution comprised ordinary citizens, not professional soldiers. By limiting the calling forth power to certain emergencies, the Framers restricted the circumstances in which the federal government could involuntarily deploy ordinary citizens for military purposes. This constitutional limitation derived from analogous British laws, which restricted the militia to service in one's own county, except in cases of invasion or rebellion, and prohibited in all cases service outside Britain.[363]

The Fifth Amendment's grand jury clause exception similarly relates to the nonprofessional nature of the militia. The Fifth Amendment exempts from the grand jury requirement "cases arising in

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[355] *Id.*

[356] 5 ADAM SMITH, WEALTH OF NATIONS, ch. 1, *55–56, at 698 (Oxford UP, 1971).

[357] *Id.*

[358] 1 BLACKSTONE, *supra* note 48, at *414.

[359] *Id.* at *408.

[360] A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 272–73 (3d ed. 1889) [hereinafter "DICEY, Third Edition"] ("The English army consists of the Standing (or Regular) army, and of the Militia."); *id.* (stating that legal textbooks "contain . . . comparatively little about the regular forces, or what we now call the "army"). The eighth edition, published in 1915, describes "the Standing Army . . . in technical language [as] the Regular Forces," although it notes that the militia and the volunteers had been combined into a new "Territorial Force." A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 188–89 (1982) (8th ed. 1915) [hereinafter "DICEY, Eighth Edition"].

[361] *Id.* at 285 (internal quotation marks omitted).

[362] Silveira v. Lockyer, 312 F.3d 1052, 1070 (2002).

[363] Statute the Second 1326, 1 Edw. 3 c. 5 (Eng.); 1 BLACKSTONE, *supra* note 48, at *398; MAITLAND, *supra* note 42, 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 or rebellion).

the land or naval forces, or in the Militia, when in actual service in time of War or public danger." Note the distinction between land and naval forces and militia. Based solely on their status as soldiers, professional soldiers are subject to military discipline at all times, on duty or off duty, whether or not their conduct relates to their service.[364] The militia, in contrast, is subject to military discipline only during actual wartime service. The more limited militia provision was a response to Anti-Federalist concerns that the federal government could apply military law at all times to citizens of military age simply because they were technically members of the militia.[365] Anti-Federalists, thus, wanted to close a possible constitutional loophole in Congress's power to regulate the militia. The Fifth Amendment's distinction between regular forces and militia reflected traditional English law.[366]

And perhaps most importantly, the state-army definitional claim cannot be reconciled with the war-powers limitations on states in either the Constitution or the Articles of Confederation. While the Constitution reserves to the states the appointment of militia officers and the authority of training the militia, another provision prohibits states from "keep[ing] Troops, or Ships of War in time of Peace" without Congress's consent. This provision prohibits states from having professional forces *sua sponte* in peacetime.[367] Keeping troops is the analogue of Congress's power to raise armies, and having ships of war the analogue of Congress's power to provide for a navy.[368] The denial to the states of these powers sits in a constitutional section broadly denying states powers over war and peace. If the militia were simply state military forces, the Constitution would internally conflict—both guaranteeing states important powers over the militia while denying to them any power to have a state military without the consent of Congress. Analogously, while the Articles of Confederation commanded states to "always keep up a well regulated and disciplined militia," a separate provision generally banned states from maintaining "any body of forces" or "vessels of war."[369] Again, the Framers drew a distinction between professional and non-professional land forces belonging to the state.

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[364] Solorio v. United States, 483 U.S. 435, 439, 447 (1987). From 1969 until 1987, the Court departed from this principle, requiring a service connection. O'Callahan v. Parker, 395 U.S. 258 (1969).

[365] *See, e.g.*, Maryland Ratifying Convention, *supra* note 135, 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"); *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 135, 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.").

[366] *See supra* note 108, and accompanying text.

[367] THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 89 (1880) ("By troops here are meant a standing force, in distinction to the militia which the States are expected to enroll, officer, equip, and instruct."); 1 TUCKER, *supra* note 285, at 311.

[368] *See* 1 TUCKER, *supra* note 285, at 311.

[369] ARTICLES OF CONFEDERATION of 1781, art. VI, para. 4.

C. History and Early Case Law

The state-army definitional claim is further belied by history. During the debate at the Constitutional Convention, James Madison and Pierce Butler believed that the federal government should exercise plenary control over the militia,[370] while George Mason offered a more limited proposal to provide for a federal select militia.[371] If a "militia" were a state military force *by definition*, these proposals for a national militia would have been a nonsensical English phrase—much like if they had referenced "married bachelors." Moreover, Mason's proposal would have been superfluous; if any federal land force were by definition an army, then Congress would have had plenary power to raise his proposed "select militia" under the Armies Clause, making an additional grant of power to form a federal select militia unnecessary.

The federalism-based definition is also inconsistent with Congress's usage of the term when organizing the militia of the District of Columbia in 1803.[372] The District is neither a state nor a separate sovereign from the federal government; and whatever its quasi-state status is today by virtue of its home-rule authority, it certainly lacked such status in 1803. If the militia were simply a state military organization as distinguished from a federal one, the District could have no militia.[373] The force would be federal, and thus, definitionally part of the army.

Some early judicial decisions also recognize the professional/non-professional line. A few decades before Congress codified the modern National Guard system in federal law, many states had separated their militia into an organized component, which they usually called the "National Guard," and an unorganized reserve militia.[374] In 1879, the Illinois Supreme Court upheld one such state law, against a challenge that forming the Illinois National Guard violated the Constitution and federal militia law.[375] Among the raised objections was that having an active militia violated the constitutional prohibition against states keeping troops in peacetime without Congress's consent.[376] But the Illinois Supreme Court rejected the argument. The court explained that "[l]exicographers and others define militia, and so the common understanding is, to be 'a body of armed citizens trained to military duty, who may be called out in certain cases, but may not be kept on service like standing armies, in time of

[370] 2 RECORDS, *supra* note 135, at 331–32.
[371] *Id.* at 331.
[372] An Act, More Effectively to Provide for the Organization of the Militia of the District of Columbia, 2 Stat. 215 (Mar. 3, 1803).
[373] William Winthrop contended that "the authority for and legal status of the District militia are not clear. It is no part of the militia referred to in the Constitution, which evidently contemplates a militia of the *States*. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 56 note (2d ed. 1920) (citation omitted). This is not a good construction of the Constitution's Militia Clauses. The District, like the states, have citizens capable of bearing arms who need to be organized and trained. In federal territories, the federal government assumes the power that the state legislatures would have exercised. In addition to its power under the Militia Clauses, the legal authority over the militia in federal enclaves comes from the District Clause or the Territories' Clause. *See* U.S. CONST. art. I, §8, cl. 17 (District); *id.* art. IV, § 3, cl.2 (territory). Congress's power here is no different from its power to provide for local legislatures and (non-Article) III local courts. It would be an anomaly if District residents were exempt from military service because they were not located in the states.
[374] *See supra* note 236, and accompanying text.
[375] Dunne v. People, 94 Ill. 120 (1879).
[376] *Id.* (citing U.S. CONST. art. I, § 10).

peace."[377] The court then distinguished this from "troops," which they said, "conveys to the mind the idea of an armed body of soldiers, whose sole occupation is war or service, answering to the regular army."[378] The National Guard was an organized militia, not a state army.[379]

Likewise, the distinction between citizen-soldiers and regular forces gets to the heart of the Supreme Court's decision in *United States v. Miller*, the Supreme Court's major pre-*Heller* decision on the Second Amendment.[380] Collective-rights theorists and judges have long claimed that *Miller* recognized that the Second Amendment was grounded in federalism, protecting the state's right to organize military units.[381] They sometimes quote *Miller*'s statement that the Second Amendment's "obvious purpose" was "to assure the continuation and render possible the effectiveness of [state militias]."[382]

But this is all revisionist history. Note the brackets around "*state* militias"; "state," as an adjective for militia, does not appear in *Miller*, though some decisions purporting to interpret *Miller* have added it.[383] *Miller* never said one word about the federal army, the Army Clause of the Constitution, or the need to maintain state forces as distinguished from federal forces. *Miller*, in fact, contained nothing related to federalism at all.

The Court's *Miller* decision was about professionalism, not federalism. *Miller* clarifies that "armies" and the "militia" are two different kinds of forces:

> "The Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without 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."[384]

Note the contrast *Miller* draws between the militia and *state* standing armies—the "[t]roops which they [i.e., the states] were forbidden to keep without the consent of Congress." Constitutional limitations aside, states in theory could maintain either type of force. There is nothing definitional requiring armies to be a national land force and the militia to be a state military force. *Miller*, thus, correctly

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[377] *Id.* at 138.
[378] *Id.*
[379] *Id.* at 138–39.
[380] 307 U.S. 174 (1939).
[381] *See, e.g.*, United States v. Tot, 131 F.2d 261, 266 (3d Cir. 1942) (explaining that the Second Amendment "was not adopted with individual rights in mind, but as a protection for the States in the maintenance of their militia organizations against possible encroachments by the federal power"); Kates, *supra* note 64, at 273 n.13 (collecting scholarly commentary).
[382] *See, e.g.*, Silveira v. Lockyer, 312 F.3d 1052, 1061 (9th Cir. 2002) (en banc); United States v. Oakes, 564 F.2d 384, 387 (10th Cir. 1977); UVILLER & MERKEL, *supra* note 231, at 19; Lee Epstein, David T. Konig, *The Strange Story of the Second Amendment in the Federal Courts, and Why It Matters*, 60 WASH. U. J.L. & POL'Y 147, 153 (2019)
[383] *E.g.*, *Silveira*, 312 F.3d at 1061; *Oakes*, 564 F.2d at 387; *see also* United States v. Hale, 978 F.2d 1016, 1019 (8th Cir. 1992) (interpreting the Second Amendment to protect "state militias" from federal interference); United States v. Wright, 117 F.3d 1265 (11th Cir. 1997) ("[The Second Amendment] was designed to protect the state militias from federal legislation enacted to undermine the role of state militias.").
[384] United States v. Miller, 307 U.S. 174 178–79 (1939)

distinguished the militia—the force consisting of citizen-soldiers—from state standing armies—forces composed of professional soldiers.[385]

D. Responding to Counterarguments

1. State versus Federal Military Forces

Many who advocate for the "militia as a state army" view contend that the Framers feared national military establishments, but not state ones. In an early influential article on the Second Amendment, Keith Ehrman and Dennis Henigan argue that the debate in the Constitutional Convention "reveal[s] no discussion of a fear of state governments. The states were repeatedly viewed as the protectors of the citizens' liberties . . . ."[386] In *Perpich* and *Heller*, Justice Stevens gestures in the same direction, implying that the Framers' fears had to do peculiarly with a "*national* standing army."[387]

These claims are wildly off the mark. They ignore a good portion of the Constitution, which was designed to limit state military power and to remove the causes for which states could go to war with each other. As mentioned, the Constitution severely restricts states' war powers; it prohibits states, without the consent of Congress, from "keep[ing] Troops, or Ships of War in time of peace," from engag[ing] in War, unless actually invaded, or in such imminent Danger as will not admit of delay."[388] The Constitution also provided that the federal government "shall guarantee to every State in this Union a Republican Form of Government," protecting the state inhabitants, in part, from domestic usurpations of power.[389] The guarantee also extended to protecting "each of them against Invasion," which included invasions of states by sister states.[390] And to protect against a repeat of Shays's Rebellion, where the local militia acted in sympathy with the insurgents, the Constitution allowed the federal government, on request of the state, to protect the state "against domestic Violence."[391] The Constitution also limited the casus belli between states. For disputes between states, which often involve land and water claims,[392] the Constitution authorized binding arbitration in the Supreme Court.[393] The Constitution, thus, reflects considerable fears about the military power of state governments.

Ehrman and Henigan are correct that the Constitutional Convention contains no discussion about restricting state military power. But that is simply because the proposition was uncontroversial.

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[385] 307 U.S. 178, 179.

[386] Ehrman & Henigan, *supra* note 34, at 24.

[387] Perpich v. Dep't of Defense, 496 U.S. 334, 340 (1990); District of Columbia v. Heller, 554 U.S. 570, 637 (Stevens, J., dissenting).

[388] U.S. Const. art. I, § 10, cl. 3.

[389] U.S. Const. art. IV, § 4.

[390] U.S. CONST. art. IV, § 4; *see also* Debates of the Virginia Convention (June 16, 1788), *in* 10 The Documentary History of the Ratification of the Constitution, *supra* note 135, 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 *supra* note 347, 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.").

[391] U.S. Const. art. IV, § 4; *see* Federalist No. 28.

[392] *See, e.g.*, Texas v. New Mexico, 141 S. Ct. 509 (2020).

[393] Art. III, § 2.

At the Constitutional Convention, Hamilton proposed that "[n]o state [shall] have any forces land or Naval,"[394] and the provision was adopted after some stylistic revision.[395] Even the more states-rights' Articles of Confederation had generally banned states from maintaining "vessels of war" or "any body of forces."[396] To the extent bitter debate ensued at the Constitutional Convention and in the state ratifying conventions over the Militia Clauses, it was not because the Anti-Federalists valued state armies. The debate over the militia was monumental because it involved whether states would have some military power or none at all, which would have left the states completely dependent upon the federal government to provide military support when needed. No one desired the states to maintain professional militaries.[397] The propositions that standing armies were dangerous to liberty and ought not be maintained (particularly in peacetime without legislative consent) applied with equal force to state governments, and those propositions were inscribed in many state constitutions.[398]

2. Distinctions between Armies and Militia in Wartime

A second objection contends, based on wartime service, that the distinction between armies and militia was murkier than I have articulated. This objection notes that service in the army did not necessarily mean service in the standing army. A person could enlist in the army only for the duration of a war. And the war volunteers exemplify this phenomenon of temporary, wartime service.[399]

At the outset, I concede that the distinction between militiamen and regular soldiers was murkier in wartime than in peacetime. The primary constitutional significance between "armies" and "militia" was a peacetime one, reflecting the danger that the continued maintenance of regular soldiers posed to democratic government.[400] Many distinctions between "armies" and "militia" became less relevant in wartime. In wartime, the militia could be required to serve on full-time active duty for the duration of the conflict, just as regular soldiers could.[401] If serving on full-time active duty, the militia would be subjected to military law, just like the regular army.[402] And if the army was a temporary wartime army rather than a standing army, both the militia and the army could disembody following the conflict.[403]

In wartime, the primary distinction between armies and militia existed along a different dimension: volunteerism versus potential compulsion. If necessary, the militia could be compelled to

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[394] 2 RECORDS, *supra* note 135, at 293.
[395] *See* Leider, *supra* note 29, at 1000–01.
[396] ARTICLES OF CONFEDERATION OF 1781, art. VI, para. 4.
[397] See Letter XVIII (Jan. 25, 1788), *reprinted in* 17 *The Documentary History of the Ratification of the Constitution*, *supra* note 135, at 364–65 (not complaining about the prohibition against state troops).
[398] *See, e.g.*, MASS. CONST. art. XVII; MD. CONST. OF 1776, Decl. of Rights, § 26; ME. CONST. art. 1, § 17 N.C. CONST. OF 1776, Decl. of Rights, § 17; PA. CONST. OF 1776, Decl. of Rights § 13; VA. CONST. Bill of Rights, § 13; VT. CONST., Ch. 1, 15
[399] My thanks to Nelson Lund and Saikrishna Prakash for pressing me on this issue.
[400] *See supra* note 133–136, and accompanying text.
[401] British and American statutes often limited wartime militia service to one to three months, requiring the militia to rotate men in wartime. *See supra* notes 92–94, and accompanying text. But there were no apparent constitutional limits on the duration of wartime militia service, *see, e.g.*, U.S. CONST. art. I, § 8, cl. 15; amend. V, and thus, nothing prevented the legislature from imposing full-time active service on the militia for the duration of a war.
[402] *See supra* notes 108–109, and accompanying text.
[403] *See supra* notes 133–137, and accompanying text.

serve, and as a result, their service was limited to domestic, defensive conflicts, such as cases of rebellion or invasion.[404] In principle,[405] individuals volunteered for service in the army; and because they volunteered, they could serve without restriction, including in offensive and overseas operations.[406] Functionally, a military enlistment contract waived the legal protections of a citizen involuntarily called into military service, for which the soldier would receive the remuneration in the contract.[407]

Conscription into the national army breached this bargain. Conscription gave the national government compulsory access to the entire militia without having to obey the traditional limits on militia service. In the United States, conscription was an end run around the constitutional limitations of the Militia Clauses.[408] For this reason, early attempts to legalize conscription into the army resulted in significant legal challenges, with courts sometimes divided on the judgment.[409] Opinions upholding conscription held that if the draft went into a body known as the "army," Congress did not have to obey the limitations on its use of the militia.[410] I have argued elsewhere that these decisions were wrongly decided. Although as a matter of pure semantic interpretation, the power to "raise" armies might include a draft, this was a poor legal construction of the Constitution, when examining all the military clauses as an integrated whole.[411] Following British practice, the Militia Clauses substantively limited federal military power over citizens involuntarily called into military service. And to quote David Currie, "Congress cannot evade constitutional limitations simply by offending them."[412]

Now that the precedent upholding conscription is unlikely to be overruled, another question arises: has conscription so blurred the line between armies and militia as to make any distinction between them meaningless? My response is that it has not. A temporary, wartime, conscripted citizen-army (e.g., "the Army of the United States" during World War II) is essentially a called forth militia, and it is a different kind of land force from a regular, standing army made up of long-service professionals (the

[404] *See supra* notes 86–91, and accompanying text.
[405] I say "in principle" because some might object that impressment, which sometimes occurred during wartime, provides a significant counterexample to this. In response, I would note that impressment into the army was normally illegal, and its use only against vulnerable groups reflected its dubious legitimacy. See *supra* notes 148–158, and accompanying text for the primary discussion; *see also* Kneedler v. Lane, 45 P.A. 235, 255 (1863) (opinion of Woodward, J.) ("[The Framers] knew that the British army had generally been recruited by voluntary enlistments, stimulated by wages and bounties, and that the few instances of impressment and forced conscription of land forces had met with the disfavour of the English nation, and had led to preventative statutes.").
[406] *See supra* notes 148–158, and accompanying text.
[407] *See supra* note 158, and accompanying text.
[408] Friedman, *supra* note 136; Leider, *supra* note 29, at 1035–1057.
[409] *See* Arver v. United States (Selective Draft Law Cases), 245 U.S. 366 (1918); Kneedler v. Lane, 45 Pa. 238 (1863). During the Civil War, comparable challenges against conscription took place, citing analogous provisions of the Confederate Constitution; and again, some courts were heavily divided. *See, e.g.*, *Ex parte* Hill, 38 Ala. 429 (1863); Jeffers v. Fair, 33 Ga. 347 (1862); Parker v. Kaughman, 34 Ga. 136 (1865); Simmons v. Miller, 40 Miss. 19 (1864); Gatlin v. Walton, 60 N.C. 325 (1864); *Ex parte* Coupland, 26 Tex. 386 (1862); Burroughs v. Peyton, 57 Va. 470 (1864).
[410] *See id.*
[411] Leider, *supra* note 29, at 1035–1057.
[412] 1 David P. Currie, The Constitution in Congress: The Federalist Period 1789–1801, 248 n.88 (1997).

"Regular Army").[413] This is why I will argue in the next Part that to translate the Framers' military structure to our own, we must examine the contemporary Armed Forces at the component level.

Moreover, that our present military system evades certain legal restrictions contained in the Constitution does not demonstrate that the militia as an institution no longer exists or that the entire legal regime related to the militia has become irrelevant. To give but one example, a broad right to keep and bear arms under the Second Amendment allows the entire body of the militia to train itself in peacetime. When ordinary citizens are called into temporary emergency military service, a citizen's ability to shoot straight is just as relevant whether he is inducted into the national army through conscription or enrolled in a state-based militia unit. The societal benefits conferred by the Second Amendment, thus, do not depend on whether a citizen army is principally organized through the state government or the federal government.

* * *

The text, structure, and history all demonstrate that "armies" comprise regular forces, while the militia comprises citizens liable to military service who serve in a part-time or emergency capacity only. The United States and the states have different labels for their land forces: Army, Army Reserve, National Guard, National Guard of the United States, state guard, and state defense force. When Part IV classifies these forces as constitutional "armies" or "militia," the critical question is the nature of the service—whether the service is regular or part-time/emergency. Equally important, the critical question is not whether the military is organized by the federal or the state government. Nothing definitionally precludes states from having armies or the federal government from having a militia. As Part IV will show, the contemporary structure of the American Armed Forces has nationalized the militia system, not abolished it.

IV. Translating the Framers' System to the Contemporary American Armed Forces

This Part now attempts to fit the modern structure of the Armed Forces into the Framers' traditional distinction between armies and militia. To borrow from Lawrence Lessig, the metaphor here is one of translation, when a person "determine[s] how to change one text into another text, while preserving the original text's meaning."[414] Good translations are not hyperliteral.[415] Instead, a translation requires some judgment from the translator to capture, in new language, a statement equivalent to the idea being translated, taking account of the context in which the statement was made.[416]

In providing this "translation," my goal is to engage in something like "cy pres originalism." When examining what constitutes the "armies" or "militia" today, I am searching to find something "'as near as possible' to the declared object."[417] Although the federal government controls virtually all

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[413] *See infra* Part IV.C.2.
[414] Lessig, *supra* note 30, at 1171.
[415] *Id.* at 1196.
[416] *Id.* at 1191–92, 1196.
[417] Frances Howell Rudko, *The Cy Pres Doctrine in the United States: From Extreme Relunctance to Affirmative Action*, 46 CLEVELAND ST. L. REV. 472, 473 (1998) (quoting GEORGE W. KEETON & LIONEL ASTOR SHERIDAN, THE MODERN LAW OF CHARITIES 135 (2d ed. 1971)). Lessig contends that "translation most directly patterns the doctrine of *cy pres*."

aspects of military service today, my goal is to provide the best approximation of the modern "armies" and "militia," without succumbing to the nihilism of many who have tried before.[418]

I now argue that, despite some differences, sufficient continuities from Framing-era military practice to modern-day practice exist that make a reasonably close translation feasible. As during the Framing generation, the United States relies on a layered defense system. At the core are the regular forces—professional soldiers analogous to the British and Continental armies. Moving outward, we have the Selected Reserve—the active drilling Army Reserve and National Guard—which operate analogously to the volunteer militia and the war volunteers of the Framing era. Continuing outward, the Armed Forces maintain inactive reserves, which are individuals who are enrolled in the military but perform no training or active service. They are nevertheless available for more serious emergencies, when America's war needs exceed those capable of being fulfilled by the Selected Reserve. The inactive reserve operates in a middle position between the war volunteers and the general militia. Finally, at the outer perimeter are those enrolled in the Selective Service System, which fulfills the function of the Framers' general militia—to supply the country's military forces with ordinary citizens, if necessary up to the entire able-bodied community, for the most serious military emergencies. The contemporary military organization continues to utilize a robust militia system that would have been recognizable to the Framers, with two significant modifications: near-exclusive federal control of most organized militia and the availability of the militia for offensive and overseas operations.

Along the way, this Part also clarifies the relationship between the modern branches of the Armed Forces and the constitutional authority to raise those forces. In translating the Framers' structure to our own, much confusion has arisen because the "armies" and "militia" described in the Constitution have been dispersed among several different governmental departments and agencies. This Part explains that that statutory organizational framework does not affect the constitutional significance of the forces.

Again, I preface this translation with a note of caution. My goal here is not to defend or rationalize the original constitutional validity of all the particulars of the modern system. For originalists, I offer only a cy-pres or second-best originalist perspective: The federal government's attempt to evade legal limitations on the militia, such as state training and state appointment of officers, does not mean that the militia, as an institution, no longer exists. Nor does it mean that the distinctions between the militia and the armies—between citizen-armies and regular forces—have lost their practical significance.

A. The Modern Constitutional "Armies" of the United States

Let me begin by tackling one matter that has been the source of unfortunate confusion. The constitutional armies described in Article I, Section 8 do not track any modern organization called the "Army." By federal law, the "Army" now consists of several components. Those include "the Regular Army, the Army National Guard of the United States, the Army National Guard while the service of the

See Lessig, *supra* note 30, at 1173 n. 32 (citing also Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 310–11 (1989).

[418] *See supra* note 34.

United States, and the Army Reserve."[419] The organization that federal law labels "the Army" is both overinclusive and underinclusive of the constitutional armies described in the Constitution.

The (federal law) Army is overinclusive of the constitutional armies because it includes both the regular army and the reserve forces and National Guard in active service. Federal law defines "the Regular Army," in part, to be "the component of the Army that consists of persons whose continuous service on active duty in both peace and war is contemplated by law."[420] As I argued in Part III, members of land forces in continuous active service are quintessentially members of the "armies" and "land forces," as those terms are used in the Constitution. The reserves and National Guard, however, are different. These are part-time forces, not standing forces. As I will explain in the next section, these forces are organized components of the militia. Thus, only the regular components have any claim to being part of the "armies" referred to in the Constitution.

The (federal law) "Army" is also underinclusive because other fighting forces come within the constitutional armies. The Armed Forces is currently comprised of six branches: the Army, Air Force, Navy, Marine Corps, Space Force, and Coast Guard. Some critics of originalism contend that because the Constitution only gives Congress the power to raise armies, to provide for a navy, and to organize the militia, that Congress's decision to maintain an Air Force or Space Force is somehow unconstitutional.[421] Along with others,[422] I think this is a serious misreading of the Constitution. Before the U.S. Air Force became a separate military branch in 1947, the Air Force was housed in various components of the U.S. Army, most notably the "United States Army Air Forces."[423] And a principal mission of the Air Force is to support the ground forces by maintaining air superiority, striking and bombing enemy targets, gathering reconnaissance, and providing close air support when the land forces are on the move.[424] Nothing prevented the Army from maintaining an air component, just like the Navy has aviation.[425] Furthermore, the Constitution grants Congress the power to "raise and support *armies*" (plural).

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[419] 10 U.S.C. § 7062(c)(1).

[420] 10 U.S.C. § 7075(a). The other part of the regular army includes the "retired members of the Regular Army." In a previous article, I expressed skepticism whether retirees properly fell within the constitutional armies. Leider, *supra* note 29, at 1073–74.

[421] RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 263 (1990). Angus King, Jr. & Heather Cox Richardson, *Amy Coney Barrett's Judicial Philosophy Doesn't Hold Up to Scrutiny*, Oct. 25, 2020, https://www.theatlantic.com/ideas/archive/2020/10/originalism-barrett/616844/; Don Herzog, *A Ritual Stupidity*, https://left2right.typepad.com/main/2005/10/a_ritual_stupid.html#more (contending the Air Force is unconstitutional under originalist principles); Is the Space Force Unconstitutional? https://constitutioncenter.org/blog/the-space-force-and-the-constitution; Michael Dorf, Originalists in Space, http://www.dorfonlaw.org/2018/08/originalists-in-space.html; *see also* Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution,"* 72 IOWA L. REV. 1177, 1232 (1987) (arguing that originalists have no historical basis to include the Air Force as part of the constitutional land forces); *see also* Lessig, *supra* note 30, at 1204 (1993) (discussing issue).

[422] *E.g.*, Ilya Somin, *Originalism's Final Frontier: Is Trump's Proposed Space Force Unconstitutional*, https://reason.com/volokh/2018/08/15/originalisms-final-frontier-is-trumps-sp/; Posting of Ilya Somin to The Volokh Conspiracy, http://volokh.com/posts/1170032632.shtml (Jan. 28, 2007, 19:03 EST); Michael Rappaport, *Is an Independent Air Force Constitutional?*, THE RIGHT COAST (Jan. 30, 2007), https://rightcoast.typepad.com/rightcoast/2007/01/is_an_independe.html.

[423] STEPHEN L. MCFARLAND, A CONCISE HISTORY OF THE U.S. AIR FORCE 20 (1997).

[424] *See* Jeremiah Gertler, *Defense Primer: The United State Air Force*, CONG. RESEARCH SERV., Updated Dec. 15, 2020; DOUGLAS CAMPBELL, THE WARTHOG AND THE CLOSE AIR SUPPORT DEBATE 31 (2003)

[425] *See generally* ROBERT L. LAWSON, THE HISTORY OF U.S. NAVAL AIR POWER (1985) (providing a history of Naval aviation).

Nowhere does the Constitution require that Congress label all of its constitutional armies as "the Army." It would be a silly formalism to contend that the "First Air Force" is unconstitutional, but the "First Army Air Force" is not. Nor does the Constitution require Congress to organize all of the federal armies in a bureaucratic department known as the "Department of the Army." The Air Force is no less part of the constitutional armies just because the National Security Act of 1947 separated it into its own bureaucratic department.[426] And federal law recognizes this when it defines the "Army" to mean "the Army or Armies referred to in the Constitution of the United States, less that part established by law as the Air Force."[427]

I will not settle precisely which branches are constitutionally part of the constitutional "armies." Just like the Air Force was separated from the Army after World War II, the Space Force has now been separated from the Air Force.[428] And I would contend that if the Air Force is part of the constitutional armies, the Space Force—once a component of the Air Force—remains part of those armies.[429] The change in bureaucratic organization does not affect a change in substance. Analogously, the active-duty Marine Corps—a branch that principally fights on land—is also likely part of the armies/land forces of the United States.

But these assertions are not beyond peradventure. For nearly all purposes, the Constitution treats the branches of the professional military the same. Congress authorizes them, the President commands them, and their members are subject both to civilian and military law.[430] The Constitution's only special restriction is that appropriations for the armies cannot last longer than two years.[431] The Framers added that provision so Congress would have to periodically debate reauthorizing the land forces because of the concern that standing armies could become oppressive.[432] No such concerns were expressed against naval forces.[433] The concern that the Air Force may become an instrument of oppression seems more remote than the same concern over paradigmatic land forces—the critical distinction being that ground soldiers ultimately are necessary to control territory and exercise sovereignty. While the Air Force is somewhat removed from the traditional land forces, the Space Force is that much more so. Had the Framers conceived of the Air Force or Space Force, they might not have treated them as part of the armies. The Marine Corps is a maritime land force—an almost contradiction in terms—so it straddles the paradigmatic army/navy divide. Bureaucratically, federal law organizes the Marine Corps within the Department of the Navy,[434] and federal law deems a Marine to be a "member of the naval service."[435] Yet, the Marine Corps primarily fights on land, so the Marine Corps may have a stronger claim to being part of the "armies" than the Air Force and Space Force.

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[426] National Security Act of 1947, § 208, Pub. L. 80-253, 61 Stat. 495, 503.
[427] 10 U.S.C. § 7001.
[428] *See* National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116–92, §§ 951–61 133 Stat. 1198, 1561–68 (2019).
[429] *See* Somin, *supra* n 422.
[430] U.S. CONST. art. I, § 8, cl. 12.–14; art. II, §2, cl. 1; amend. V.
[431] U.S. CONST. art. I, § 8, cl. 12.
[432] AKHIL AMAR, THE CONSTITUTION: A BIOGRAPHY 45 (Unlike navies, armies could be and were easily used not just to thwart invaders, but also to crush individual freedom and collective self-government.").
[433] *Id.* ("A navy was a relatively defensive instrument that could not easily be turned upon Englishmen to impose domestic tyranny.").
[434] 10 U.S.C. § 8061.
[435] 10 U.S.C. § 8001(a)(2), (3).

For the most part, this question has little legal significance. It would ultimately create a live legal question only if Congress attempted to appropriate money for these branches for more than two years. But Congress appropriates money for all branches on an annual basis,[436] so there has been no need to settle these thorny questions.

At the other end of the spectrum, the Navy and Coast Guard, as maritime forces, fall within the constitutional navy. The Coast Guard example, again, illustrates that the modern bureaucratic organization of the Armed Forces does not track constitutional divisions. The Coast Guard is a separate "military service and branch of the armed forces,"[437] ordinarily housed within the Department of Homeland Security (and, before that, the Department of Transportation).[438] But federal law also provides that the Coast Guard "shall operate as a service in the Navy" during wartime.[439] Just like the constitutional armies are not housed in a single governmental department known as the "Army," the naval forces in peacetime are not housed in a single governmental department known as the "Navy." The modern bureaucratic structure of the Armed Forces is more complicated than the simple divisions of armies, navy, and militia described in the Constitution.

To summarize, the constitutional "armies" of the United States definitely include the regular army. And it also likely includes the regular Air Force and Space Force. The Marine Corps also has a strong claim to being part of the constitutional armies, despite bureaucratically falling within the Department of the Navy.

B. The Modern Volunteer Militia/War Volunteers: The Active Army Reserve and National Guard

The non-regular military consists of seven branches: the Army National Guard, the U.S. Army Reserve, the Air National Guard, the U.S. Air Force Reserve, the U.S. Navy Reserve, the U.S. Marine Corps Reserve, and the U.S. Coast Guard Reserve.[440] A Space Force Reserve and Space Guard have also been proposed but not enacted.[441] For simplicity, this section will focus on the U.S. Army. Depending on exactly which services fall within the constitutional "armies," the claims made in this section would also apply, *mutatis mutandis*, to the Air Force Reserve, Air National Guard, the Marine Corps Reserve,

[436] CONG. RESEARCH SERV., DEFENSE AUTHORIZATION AND APPROPRIATIONS BILLS: FY1961–FY2021, at 4 (updated July 12, 2021).
[437] 14 U.S.C. § 101
[438] 14 U.S.C. § 103(a) ("The Coast Guard shall be a service in the Department of Homeland Security, except when operating as a service in the Navy."); Department of Transportation Act, Pub. L. No. 89–670, § 6(b)(1), 80 Stat. 931, 938 (1966) (transferring the Coast Guard from the Department of the Treasury to the newly created Department of Transportation).
[439] 14 U.S.C. § 103(b).
[440] MICHAEL D. DOUBLER, I AM THE GUARD: A HISTORY OF THE ARMY NATIONAL GUARD, 1636-2000 at 2 (2001); 10 U.S.C. § 10101.
[441] Rachel S. Cohen, *Plan for Space Force Reserve Compenent is 'Fairly Close,' National Guard Boss Says*, DEFENSE NEWS (May 4, 2021), https://www.defensenews.com/news/your-air-force/2021/05/04/plan-for-space-force-reserve-component-is-fairly-close-national-guard-boss-says/; *see also* William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116–283 (2021) (prohibiting the Defense Department from establishing any reserve components of the Space Force until the Department submits a draft plan to the House and Senate Armed Services committees).

and the Space Force Reserve or Space Guard (if created). As maritime forces, the Navy Reserve and the Coast Guard Reserve likely fall outside the scope of "militia," as the Framers understood it.[442]

The Armed Forces Reserve's organizational structure is complex. The Reserve is composed of three components: the Ready Reserve, the Standby Reserve, and the Retired Reserve.[443] The Ready Reserve consists of "members of the Guard and Reserve who are liable for recall to active duty in time of war or national emergency."[444] The Standby Reserve, in contrast, "consists of personnel who maintain their military affiliation without being part of the Ready Reserve, who have been designated key civilian employees, or who have a temporary hardship or disability."[445] The retired reserve consists of all reservists "who receive retired pay on the basis of either active duty or reserve service" and those who will receive that pay when they turn sixty years old, the retirement age for reservists.[446] Except for National Guardsmen, all members of the Reserve are members of one of these three components.[447] Guardsmen are all members of the Ready Reserve.[448]

The Ready Reserve itself has three subcomponents: the Selected Reserve, the Individual Ready Reserve, and the Inactive National Guard.[449] The Selected Reserve's members are the soldiers who serve "one weekend a month, two weeks a year." The "National Guard of the United States"—the Army Reserve component of the National Guard—is housed within the Selected Reserve.

The "U.S. Army Reserve" and the "National Guard" have different missions. Although in its earlier days, the Army Reserve had combat divisions, those divisions were eliminated during the Cold War.[450] Today, the Army Reserve primarily provides combat support and combat service support,[451] with only a single remaining combat unit based in Hawaii.[452] The National Guard, in contrast, is more oriented towards direct fighting. Just over half of its personal are assigned to combat units, another two-fifths provide combat support and combat services support, and about ten percent serve in command and staff positions.[453]

The Army Reserve and National Guard also have a different structure. The Army Reserve is a purely federal force, with federally commissioned officers. The National Guard, in contrast, has a dual mission. As the "National Guard [of a state]," the Guard serves as a component of a state's organized militia. Except when called into federal service, this means that the Guard reports to state governors.

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[442] See Leider, *supra* note 29, at 1001 n.56. *But see* 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).
[443] DOUBLER, *supra* note 440, at 3; 10 U.S.C. § 10141(a).
[444] DOUBLER, *supra* note 440, at 3; *see* 10 U.S.C. § 10142(a).
[445] DOUBLER, *supra* note 440, at 4; *see* 10 U.S.C. § 10151.
[446] DOUBLER, *supra* note 440, at 5; see 10 U.S.C. § 10154.
[447] DOUBLER, *supra* note 440, at 3;
[448] *Id.*
[449] *Id.*; *see* 10 U.S.C. §§ 10142–10144.
[450] DOUBLER, *supra* note 440, at 77.
[451] *Id.* at 10.
[452] *Id.* at 10–11.
[453] *Id.* at 9.

And at least formally (if not in substance), the state commissions the officers.[454] As a state force, the National Guard is frequently called upon for a variety of missions, including disaster relief and law enforcement.[455] As the "National Guard of the United States," the National Guard serves a federal role as an Army Reserve component, capable of being deployed abroad.[456]

Congress developed the modern structure of the reserves in the early 1900s to remedy three problems caused by the limited power Congress could exercise over the militia under the Constitution.[457] Those were, first, the failure of states adequately to maintain the militia. Second, the failure of states to select competent militia officers. And third, the inability of the federal government to use the militia for overseas or offensive operations, leading Congress largely to ignore it.

If one were to transpose the Framing-generation's military system to today, the Selected Reserve (active National Guard and Army Reserve) functions somewhere between the volunteer militia and the war volunteers. For the most part, the Selected Reserve functions as a volunteer, select militia. The Selected Reserve comprises part-time citizen-soldiers who enter full-time active service during wartime emergencies. That part-time status is the very attribute that makes them "militia" and separates them from the "armies" and "troops," which are regular forces. Like the Framers' volunteer militia, Selected Reserve members undergo more intensive training than the general militia. And the Uniform Code of Military Justice all but recognizes that reservists are militiamen. When it comes to military justice, the traditional distinction between regular soldiers and militiamen is that regular soldiers are subject to military law at all times, whereas militiamen are subject to military law only during wartime emergencies and when in training.[458] With some minor exceptions not relevant here, federal law applies the Uniform Code of Military Justice only to federal reservists who are on active duty or who are conducting training and to National Guard members in a federal status.[459]

The major operational distinction between federal reserve forces and the Framers' militia is that the Army Reserve (including the National Guard of the United States) is available for offensive purposes outside the country. Traditionally, the militia was a home defense force, and the Constitution limited federal power to call forth the militia to enforcing the laws, suppressing insurrections, and repelling invasions. Beginning in the late 1790s during the quasi-War with France, the federal government made

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[454] Nathan Zezula, *The BRAC Act, the State Militia Charade, and the Disregard of Original Intent*, 27 PACE L. REV. 365, 368 (2007).

[455] Anshu Siripurapu, *A Unique Military Force: The U.S. National Guard*, COUNCIL ON FOREIGN RELATIONS (updated July 15, 2021), https://www.cfr.org/backgrounder/unique-military-force-us-national-guard.

[456] Perpich v. Dep't. of Defense, 496 U.S. 334, 347–48 (1990).

[457] For these three deficiencies, see *supra* Part I.A.

[458] *See supra* notes 108–109, 146–147, and accompanying text.

[459] 10 U.S.C. § 802(a)(1), (3). As this paragraph indicates, the federal government exercises greater jurisdiction over federal reserve components than over the National Guard in a state capacity. But this just reflects that federal reserve components are a federal militia, not that the federal government is treating the federal reserve as if it were part of the regular forces. For the National Guard in a state status, the Uniform Code of Military Justice only applies when the Guard is federalized—which is within the restrictions allowed by the Fifth Amendment. States would apply military law to Guardsmen in a non-federal status, when training or on state active duty. For federal reserve forces, the federal government exercises both the traditional federal power to apply military justice during wartime emergencies and the traditional state power to apply military justice when on active duty during training. So the functional scope of military law as applied to Reservists and Guardsmen is equivalent and reflects traditional militia principles.

calls for citizen volunteers when the federal government needed to expand the army during wartime.[460] Much recruiting and volunteering took place at militia musters, and during the nineteenth century, volunteer militiamen frequently served as war volunteers.[461] When called, volunteers would serve on full-time active duty for the duration of their contract or the end of the conflict, and were then discharged.[462] In addition to their role as organized militia, the National Guard and Army Reserve also fulfill this war volunteer function. By virtue of their voluntary commissioning or enlistment, reservists agree to foreign deployment when the President determines the army needs expansion.[463] In recent years, the Selected Reserve has played a large role in fighting and supporting combat operations in Iraq and Afghanistan.[464] The Army Reserve and dual-enlistment National Guard systems largely derived from Congress's intent to create a stable system to expand the army without the difficulties of using a hasty, ad hoc approach to seeking war volunteers.

Uviller and Merkel contend that the "ever more federal, wholly army-trained, all volunteer National Guard of the Reagan years bore no familiar resemblance to the old, independent, universal state militia."[465] Others have made similar claims.[466] But these assertions result from a false analogy by trying to compare a subset of our modern militia system to the Framers' entire system. The Selected Reserve does not exhaust the contemporary methods of bringing citizens into the military for temporary service. With respect to universality, we still must account for the inactive reserves and the Selective Service System. If scholars wanted to make a true apples-to-apples comparison, they would compare the Selected Reserve to similar components of the Framing generation's military system—that of the volunteer militia and the war volunteers.

Now some may object that the Selected Reserve does not fully track the Framing system. For example, Uviller and Merkel are correct that the modern reserve system is more federally controlled than the Framers intended the militia system to be. And where the volunteer militia and war volunteers were separate (though the same personnel frequently participated in both), the National Guard and Army Reserve have fused them into one body. But we still have to distinguish between essential attributes of an institution and those that are merely accidental. The militia is not the only governmental institution to have undergone change. So has Congress, the Presidency, the courts, and the bureaucracy. Just because modern practice differs in some respects from Framing-era practice does

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[460] Leider, *supra* note 29, at 1051–56.
[461] *See supra* note 232.
[462] See MAHON, *supra* note 56, at 2, 5, 21, 32 (explaining volunteer system); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 87 (2d ed. 1920).
[463] 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").
[464] MICHAEL WATERHOUSE & JOANNE O'BRYANT, CONGR. RESEARCH SERV., RS22451, NATIONAL GUARD PERSONNEL & DEPLOYMENT FACT SHEET 1–5 (2008) (finding that between September 2001 and November 30, 2007, a total of 254,894 National Guard and 202, 113 Reserve personnel were deployed to Iraq and Afghanistan); Wendy Anderson, *Time to Update our view of National Guard*, CNN (Sept. 11, 2016), https://www.cnn.com/2016/09/11/opinions/national-guard-critical-component-america-military-anderson/index.html (acknowledging that by 2011 every National Guard brigade had deployed to Iraq or Afghanistan at least once, that more than 300,000 members of the Guard had deployed in total, and that, by 2005, the Army National Guard made up half of all combat brigades in Iraq).
[465] UVILLER & MERKEL, *supra* note 231, at 141.
[466] *See supra* notes 311–316, and accompanying text.

not mean that those differences are material for all purposes. The active Reserves still consist of volunteer soldiers who perform part-time service domestically or internationally and who train more thoroughly than the rest of the able-bodied community liable to military service. These characteristics make them fairly close to the volunteer militia and war volunteers of the Framing generation.

C. The Modern General Militia: Remaining Reserves and the Selective Service System

A major premise of the conventional view is that the general militia no longer exists. Uviller and Merkel contend that "there is no contemporary, evolved, descendent of the eighteenth-century 'militia' on today's landscape."[467] Keith Ehrman and Dennis Henigan rhetorically ask, "Have you seen your militia lately?"[468] This section argues that the general militia still exists; these authors have not searched in the right place.

At the Framing, the general militia consisted of the entire able-bodied community subject to military service. In the early colonial days, the colonies actively drilled the entire militia regularly because of the threats of invasion by hostile European colonial powers and Natives.[469] As those threats subsided—and as the colonies' population grew—volunteer militia and regular British forces took over routine security duties, with the general militia held in a deep reserve role.[470]

By the time of the Revolution, general militia musters primarily served roles other than training the militia. While militia musters provided some light military training, militia musters became important places where military forces were organized and raised.[471] At a muster, local officials could take a census of residents capable of bearing arms, and they could request volunteers for temporary military activities.[472] If enough people did not volunteer, those officials would then conscript or impress the necessary manpower from the general militia.[473] Until the Revolutionary War, "[f]ew occasions arose requiring the whole able-bodied manpower of a colony or district."[474]

The Framers' system of organizing military manpower is not that different from how the United States military operates in modern times. During times of peace and stability, we generally provide little or no training to the general militia, relying instead on regular and volunteer forces. Yet, we recognize the possibility that the active-duty and Selected Reserve forces may be insufficient to meet certain emergencies, so we maintain further pools of individuals to call into military service as needed. From these pools, we request volunteers before we resort to conscription or conscription-like measures. And in the rarest of emergencies, we call forth the entire military manpower of the nation—the entire general militia.

1. The Remaining Reserve Forces

Much like the constitutional armies have scattered over multiple governmental departments, so too has the general militia. Outside the Selected Reserve, all three reserve components function like the

[467] UVILLER & MERKEL, *supra* note 231, at 157.
[468] Ehrman & Henigan, *supra* note 34, at 5 (emphasis removed).
[469] WEIGLEY, *supra* note 37, at 6; MAHON, *supra* note 56, at 18.
[470] WEIGLEY, *supra* note 37, at 8; COOPER, *supra* note 56, at 2.
[471] COOPER, *supra* note 56, at 2.
[472] *Id.*
[473] WEIGLEY, *supra* note 37, at 8.
[474] *Id.*

Framers' general militia. Within the Ready Reserve, the Individual Ready Reserve consist of those soldiers who have military service obligations, but who no longer serve on active duty or in a drilling reserve unit.[475] These individuals remain enrolled in the military, and they may voluntarily train or perform other assignments.[476] But they are not required to train or attend musters unless specially ordered; their obligation, instead, is only to complete an annual screening form.[477] The standby Reserve "is a pool of trained individuals who could be mobilized, if necessary, to fill manpower needs in specific skills," but these soldiers also "are not required to undergo training or serve in units."[478] Last, the retired reserve is not "part of the total Reserve manpower as defined by statute," but the Department of Defense "has established plans and procedures for recalling them to active duty when necessary."[479]

In addition to operating like a general militia, all three non-Selected Reserve components also have a war volunteer flavor to them. All members initially volunteer for service; none is presently conscripted. And their enlistment contract includes no territorial limitation as to where they are deployed. Little of our present military structure fits squarely within the Framers' system, and the inactive reserve system, too, is a hybrid.

2. Selective Service System

Finally, at the outer perimeter of the American military system are those citizens registered with the Selective Service System, which essentially contains the bulk of America's modern general militia. Much like the general militia at the Framing, the Selective Service System provides a method of conscripting private citizens thereby expanding the military strength in wartime.[480]

Historically, one can trace the Selective Service System to the general militia.[481] Traditionally, Anglo-American governments only raised armies through voluntary enlistments. If the Army needed to expand, it sought volunteers to serve for the duration of the campaign.[482] In the United States, the federal government would call forth the militia in the rare circumstances when the country needed the entire military manpower of the country, such as during the War of 1812.

As I explained above, the federal government's use of conscription into the federal army has supplanted the traditional calling forth of the militia. Yet, in substance, the Selective Service System operates much how the Framers' organized and called forth the general militia. At the Framing, the common militia would attend musters so that local officials could take a census of the able-bodied population, request volunteers, and draft residents if required. Today, those functions are fulfilled when

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[475] DOUBLER, *supra* note 440, at 5.
[476] DOUBLER, *supra* note 440, at 4.
[477] https://www.usar.army.mil/IRR/.
[478] DOUBLER, *supra* note 440, at 5.
[479] *Id.*
[480] *Why Is Selective Service Important?*, SELECTIVE SERVICE SYSTEM, https://www.sss.gov/register/why-is-selective-service-important/.
[481] In fact, the Selective Service System traces its lineage back to the militia. *See* Selective Service System, *Prior to Civil War*, HISTORICAL TIMELINE, https://www.sss.gov/history-and-records/timeline/.
[482] *See, e.g.*, Arver v. United States, 245 U.S. 366, 385 (1918) (explaining that Congress relied on the militia and volunteers to fight the Mexican War). President James Madison proposed a draft for the War of 1812, but the bill faced constitutional objections. The bill died when the separate houses of Congress could not resolve their differences over the bill. *Id.*

young men fill out their draft registration. Like the militia, the Selective Service System uses local draft boards to mobilize military manpower.[483]

The body of registrants heavily resembles the general militia. At present, all men between eighteen and twenty-six are required to register, except those on full-time active duty with the military.[484] Those age ranges have expanded during wartime. In World War I, for example, all men between 21 and 45 were required to register. And in World War II, the Selective Service System applied to the entire general militia, with all able-bodied men between 18 and 64 required to register and those between 18 and 45 actually drafted.

When drafted, the resulting forces look more like a militia than a regular army.[485] During World War I and World War II, the draft included most or all of the general militia. In World War I, 72% of 3.5 million soldiers were draftees.[486] In World War II, 16 million individuals served in the Armed Forces, of whom over 10 million were conscripts.[487] Also like a militia, their service existed for the duration of the emergency, and these conscripts would mostly be discharged shortly after the cessation of hostilities.[488] And again like a militia, conscripts went into a military organization separate from the regular army called the "Army of the United States" ("AUS").[489] The more limited drafts for Korea and Vietnam included only a subset of the general militia.[490] But as with a militia, the service was compulsory and for a brief term—often two years, including training—which is two to four times shorter than a traditional enlistment contract for a regular soldier.[491] And in Vietnam, soldiers were rotated on short tours of duty—generally one year—much like the American militia rotated during the Revolution.[492]

The Selective Service System does not perfectly mirror a traditional militia system. When the military takes conscripts, it usually results in short duration full-time service rather than a long period of

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[483] *Agency Structure,* SELECTIVE SERVICE SYSTEM, https://www.sss.gov/about/agency-structure/.
[484] *Who Needs to Register*, SELECTIVE SERVICE SYSTEM, https://www.sss.gov/register/who-needs-to-register/#p5.
[485] For the reasons in this paragraph, I disagree with Uviller & Merkel's conception of the reserves as identical with the standing army. See UVILLER & MERKEL, *supra* note 231, at 157 ("By the early twentieth century, they were called by, trained by (1903), commanded by (1916), armed by (1903), called by (Act of 1795, as contemplated in Militia Clauses), and deployed by (always shared by state and U.S. command) federal authority. Losing all distinction from the regular army (1933), there were, by the middle of the twentieth century, nothing but a shadow of the Founders' dream."). They are correct that authority shifted from the state to the federal government. They are not correct that these forces have lost "all distinction from the regular army."
[486] DOUBLER, *supra* note 440, at 28
[487] *U.S. Army Divisions in World War II*, U.S. ARMY DIVISIONS, https://www.armydivs.com/; DOUBLER, *supra* note 440, at 32.
[488] Weigley, *supra* note 37, at 486.
[489]Michael Kern, *A Guide to the United States Military in Normandy,* 10–11 https://www.carlisleschools.org/common/pages/UserFile.aspx?fileId=1298064.
[490] Weigley, *supra* note 37, at 508 (Korea), 535 (Vietnam).
[491] For example, most Vietnam draftees spent two years in active military service. *See* Amy J. Rutenberg, *How the Draft Reshaped America*, N.Y. TIMES (Oct. 6, 2017), https://www.nytimes.com/2017/10/06/opinion/vietnam-draft.html. In contrast, the most recent armed forces Enlistment/Reenlistment Document (DD Form 4) states that if it is an initial enlistment, the enlistee must serve a total of eight years. Any part of that service not served on active duty must be served in a Reserve Component. *DD Form 4*, at 1 (May 2020), https://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd0004.pdf.
[492] WEIGLEY, *supra* note 37, at 37–38 (Revolutionary War tours of duty); CHRISTINE BRAGG, VIETNAM, KOREA AND US FOREIGN POLICY 136–37 (2005) (Vietnam tours of duty).

reserve service. But that feature is not unusual given the present state of American security. The militia system excels when small states need to resist invasion by larger states and when communities must defend themselves against persistent but low-level security threats.[493] Neither feature is present in America today, so there is no need to keep millions of Americans in an active reserve setting. But just because most Americans do not actively drill does not mean that they do not remain the reserve force of last resort. And looking back at the history of the militia in both in Britain and in America, the general militia went through long periods of dormancy when there were not imminent threats of invasion.[494]

Likewise, the Selective Service System does not perfectly mirror the Framers' militia insofar as the militia usually served as a home defense force. Through using conscription to expand the army, the federal government has been able to evade that traditional Anglo-American limitation on national use of the militia. But evading constitutional limitations does not alter the fundamental character of the force—a force comprised of civilians who take on temporary military service. The twentieth century did not render the citizen soldier obsolete. Quite the contrary, "World War I had demonstrated to even the most thoroughly professional of soldiers . . . the speed with which the American citizenry could be transformed into soldiers capable of facing any in the world," while World War II "confirmed the lesson of the First, that American citizen soldiers could be sent confidently onto any battlefield after a relatively brief, intensive training."[495] Conscription into the national army reorganized the general militia into a purely federal force. But whether attached to the state or the federal government, a large conscripted citizen-army brought into existence for a wartime emergency is the calling forth of the militia in everything but name.

D. Remnants of the Old System

Some vestiges of the older state-based militia system exist. I will just mention them briefly since they are largely obsolete and neglected.

Federal law continues to recognize that the militia consists of all able-bodied men between 17 and 45 and female citizens who are members of the National Guard.[496] The militia is then broken down into two classes: "(1) the organized militia, which consists of the National Guard and Naval Militia; and (2) the unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval Militia."[497] Federal law also seemingly allows the President to call forth the entire militia, whether organized or not,[498] to suppress insurrections,[499] enforce federal law,[500] and prevent violations of federal rights.[501]

These provisions see little use as applied to the unorganized militia. Practically, there is no mechanism or structure for the federal government to organize the unorganized component. If the federal government needed to call on the general militia, it will almost certainly use the Selective

[493] COHEN, *supra* note 50, at 27.
[494] *See infra* notes 66–81, and accompanying text.
[495] WEIGLEY, *supra* note 37, at 476.
[496] 10 U.S.C. § 246(a).
[497] 10 U.S.C. § 246(b).
[498] Perpich v. Dep't. of Def., 496 U.S. 334, 352 n.25 (1990).
[499] 10 U.S.C. § 251.
[500] 10 U.S.C. § 252.
[501] 10 U.S.C. § 253.

Service System. But if nothing else, the provisions for unorganized militia assert an important principle that the entire able-bodied population continues to constitute the reserve military manpower of the United States and the states.[502]

Like the federal government, states generally define the militia to include all able-bodied men between certain ages.[503] States divide their militia into organized militia—often the National Guard and a state guard or state defense force (discussed in a moment)—and the unorganized militia.[504] Many state laws also have provisions authorizing the governor, when necessary, to accept volunteers or conscript the unorganized militia into the organized militia.[505] Conscription into a state-organized militia unit has not occurred in generations and is unlikely to occur in the foreseeable future.

About half of state governments maintain state guards or state defense forces.[506] States often deem these forces to be part of their organized militia.[507] They act as an unarmed military auxiliary, which supplements the National Guard when the federal government calls Guardsmen abroad.[508] The last time states maintained significant state guard forces was in World War II, when the National Guard was fully mobilized.[509] Since then, these units have not had the personnel, equipment, funding, and leadership during normal times of peace— much like nineteenth-century state-based militia.[510] In fact, today most are not even allowed to bear arms.[511] States simply lack the capability and money to provide their own substantial military structures. And it is unlikely that these forces will be substantially reactivated, short of a massive extended deployment of the National Guard.

It is also not clear whether federal law considers these state defense forces to be state "armies" or part of the "militia." Some sections of federal law seem to treat these defense forces as state armies. The federal law providing for classes of militia recognizes only the National Guard and the Naval Militia as the "organized militia."[512] Federal law purports to "consent" to states maintaining defenses forces,[513] and this consent would only be necessary if members of the defense forces constituted "troops" under

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[502] WEIGLEY, *supra* note 37, at 321; *see also* Presser v. Illinois, 116 U.S. 252, 265 (1886).
[503] *See, e.g.*, ALA. CODE § 31-2-2 (2020); ALASKA STAT. § 26.05.010(a) (2020); CAL. MIL. & VET. CODE § 122 (West 2020); HAW. REV. STAT. §§ 121-1; N.M. Stat. Ann. §§ 20-2-2(B); N.Y MIL. LAW § 2 (McKinney 2020).
[504] *See, e.g.*, ALA. CODE § 31-2-3 (2020) (including the state guard within the organized militia of the state); 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).
[505] *See, e.g.*, ALASKA STAT. § 26.05.110 (2020); CAL. MIL. & VET. CODE § 128 (West 2020); HAW. REV. STAT. §§ 121-1 (2020).
[506] *See* James Carfano & Jessica Zuckerman, *The 21st Century Militia*, HERITAGE FOUNDATION (Oct. 8, 2010), https://www.heritage.org/homeland-security/report/the-21st-century-militia-state-defense-forces-and-homeland-security (last visited Aug. 4, 2021); Adam Freedman, *The Militia You've Never Heard Of: Underutilized State Guards Can Help with Homeland Defense*, CITY JOURNAL, Spring 2016, https://www.city-journal.org/html/militia-you%E2%80%99ve-never-heard-14339.html.
[507] *See supra* note 504.
[508] Carfano & Zuckerman, *supra* note 506.
[509] *Id*.
[510] *Id.*
[511] *See e.g. Texas State Guard F.A.Q.*, TEXAS MILITARY DEPARTMENT, https://tmd.texas.gov/texas-state-guard-faq (last visited Aug. 4, 2021); *see also, e.g.*, VA. CODE § 44.54.12 (prohibiting Virginia State Defense Force members from bearing arms when training or on active duty, except as specifically authorized by the Governor).
[512] 10 U.S.C. § 246(b).
[513] 32 U.S.C. § 109(c).

article I, section 10 of the Constitution.[514] On the other hand, state defense forces comprise part-time volunteers, not regular forces,[515] so they do not seem to meet the traditional definition of "troops." And although one section of federal law treated the National Guard as the only land organized militia, a different section of federal law defines the Army National Guard as "that part of the organized militia of the several States" that is, among other things federally armed and recognized.[516] This suggests that states may keep up other organized components of the militia.

Finally, federal law recognizes the naval militia as part of the organized militia.[517] I have argued elsewhere that, despite its name, the naval militia is probably not part of the constitutional militia described in Article I, Section 8. It is, instead, a separate state navy under Article 1, Section 10 of the Constitution.[518] Only a few states currently maintain such organizations,[519] and they are not a significant part of the U.S. military system.

As this digression confirms, I agree with the conventional view in one significant respect: the United States no longer uses a primarily state-based militia system. But that states no longer house the militia does not mean the militia system no longer exists or that the militia has died as an institution. The militia has simply been relocated within the federal military power, which is ironically the place where James Madison had wanted it all along.[520]

CONCLUSION

Mark Twain supposedly said that history does not repeat itself but it often rhymes.[521] The contemporary organization of the Armed Forces does not replicate the Framers' system in all its particulars. The federal government maintains its own organized militia. The organized militia it shares with the states is subject to more federal control. The federal government may call forth the militia for more purposes than the Constitution allows. And when the federal government conscripts citizens, it now does so directly rather than working through a state-based militia system.

But the broad structure of the Armed Forces heavily resembles the Framers' dual-army system. We have a professional regular army and a citizen-army, which expands the regular army in wartime. In extreme emergencies, we rely on the entire able-bodied population as a reserve force of last resort. Far from disappearing, the militia, now under federal control, remains a bulwark of our national military system.

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[514] U.S. CONST. art. I, § 10.
[515] Carfano & Zuckerman, *supra* note 506.
[516] 32 U.S.C. 101(4); *see also* 18 U.S.C. 1715 (allowing concealable firearms to be mailed by "officers of the National Guard or Militia of a State").
[517] 10 U.S.C. § 246(b)(1).
[518] Leider, *supra* note 29, at 1001 n.56.
[519] *See Naval Militia,* MILITARY LAWS (Dec. 23, 2019), https://military.laws.com/naval-militia (last visited Aug 4, 2021).
[520] 2 RECORDS, *supra* note 135, at 331.
[521] The quotation may be misattributed. *See History Does Not Repeat Itself, But It Rhymes,* QUOTE INVESTIGATOR, http://quoteinvestigator.com/2014/01/12/history-rhymes/ (last visited Mar. 28, 2017); *Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752, 778 (Del. Ch. 2016).