DECIPHERING THE "ARMED FORCES OF THE UNITED STATES"

Robert Leider[*]

The Constitution provides for two kinds of military land forces—armies and militia. Commentators and judges generally differentiate 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 state armies understanding of the militia is erroneous. At the Framing, the core distinction between armies and militia was 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 on a part-time or emergency basis. The armies were the regular forces, while the militia was the nonprofessional citizen-army.

From these definitions, this Article provides a better translation of the Framing-era military system to the structure of the modern Armed Forces of the United States. Today, the constitutional "armies" consist of the regular non-

---

* Assistant Professor, George Mason University, Antonin Scalia Law School. My thanks to Will Baude, Jud Campbell, Caroline Cecot, Eric Claeys, Richard H. Kohn, Nelson Lund, George A. Mocsary, Adam Mossoff, Mark C. Murphy, Lee Liberman Otis, Jeremy Rabkin, Paolo Saguato, Ilya Somin, Stephen Vladeck, and the participants of George Mason's Levy Workshop and Manne Forum and the participants of the Federalist Society Junior Scholars Colloquium. My thanks to Carolina Celnik, Jennifer Cascone Fauver, Catherine ("Kitty") E. Hanat, Madeline Lear, Jacob P. Meckler, Savanah K. Patterson, Konnor P. Ternus, and Tyler W. Shannon for significant research assistance. Kitty Hanat designed the charts used in this Article. Finally, I would like to extend my appreciation to the editors of the *Wake Forest Law Review*, particularly Tanner Henson, Danny Cundiff, Maryclaire Farrington, and Lane Wilson-Powell, for their excellent assistance.

naval forces, including the Regular Army and the Regular Air Force. The modern "militia" includes all other persons who perform, or could be called to perform, military service on a part-time or emergency basis. These include military reservists and National Guardsmen, all of whom form the modern volunteer militia, and the registrants of the Selective Service System, who form the modern general militia.

TABLE OF CONTENTS

INTRODUCTION

Confusion about the militia's basic definition and modern relevance abounds. This confusion derives from conflating the militia with a state (and not federal) land force or dismissing its existence altogether. Consider seemingly disparate cases about military vaccine mandates, the right to bear arms, and military criminal law jurisdiction.

When arguing that federal vaccine mandates did not apply to its National Guard, Oklahoma understood the militia to be a state army separate from the federal Armed Forces. In Fall 2021, the federal government required that all members of the Armed Forces receive a COVID-19 vaccine.[1] Oklahoma resisted the federal vaccine mandate as applied to its state National Guard.[2] The state argued that the federal government had no power to enforce a vaccine mandate against members of its organized militia until the federal government activated them as federal army troops, at which point the federal government could exercise plenary control over the forces.[3]

1. U.S. Army Public Affairs, *Army Announces Implementation of Mandatory Vaccines for Soldiers*, U.S. ARMY (Sept. 14, 2021), https://www.army.mil/article/250277/army_announces_implementation_of_mandatory_vaccines_for_soldiers.

2. *Oklahoma Bid for Guard Exception to Vaccine Mandate Denied*, ASSOCIATED PRESS (Nov. 29, 2021), https://www.usnews.com/news/health-news/articles/2021-11-29/austin-denies-oklahoma-bid-for-exception-to-vaccine-mandate.

3. *Id.* Oklahoma subsequently filed suit under the Administrative Procedure Act to enjoin enforcement of the vaccine requirement. Complaint at 4,

Essentially, Oklahoma viewed the militia as its state army, which it could control until its members became affiliated with the federal Armed Forces.

Courts continue to grapple with the relevance of the militia for the right to keep and bear arms, and the trend now is to divorce the right from the militia. In 2017, the U.S. Court of Appeals for the Fourth Circuit held that "weapons that are most useful in military service" are "among those arms that the Second Amendment does not shield."[4] Its decision failed to take seriously the Second Amendment's plain text, which connects a general right to bear arms with the desire to maintain a well-regulated militia.[5] Likewise, since 1777, the Vermont Constitution has provided that "the people have a right to bear arms for the defense of themselves and the State."[6] In 2021, the Vermont Supreme Court upheld a ban on large capacity magazines, declaring that "the right to bear arms for the defense of the State is essentially obsolete" because the state no longer has a militia.[7] These decisions assume the nonexistence of a modern general militia.

Federal courts appear to have an excessively broad view of Congress's power to subject individuals with a military affiliation to military law. These decisions result from failing to distinguish professional and nonprofessional troops. In 2022, the U.S. Court of Appeals for the District of Columbia Circuit reversed a district court decision granting a writ of habeas corpus to a military retiree of the regular forces court-martialed for conduct after he retired.[8] The Court of Appeals held that military retirees remain part of the land and naval forces, and thus, are amenable to military law at Congress's discretion.[9] In reaching this holding, the circuit court announced a rule that a person is a member of the "land and naval forces" amenable to military law "if he has a formal relationship with the armed forces that includes a duty to obey military orders."[10] Although the decision only applied to retirees of the regular forces, the rule it announced contained no limitation as to members of the reserve

---

8, Oklahoma v. Biden, 577 F. Supp. 3d 1245 (W.D. Okla. 2021) (No. 5:21-cv-01136-F). In its court complaint, however, Oklahoma did not include claims that the federal government lacked authority to impose a vaccine requirement on members of the militia while they were not federalized. *Id.* at 20–79.

4. Kolbe v. Hogan, 849 F.3d 114, 135 (4th Cir. 2017), *abrogated by* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).

5. U.S. CONST. amend. II.

6. VT. CONST. OF 1777, Ch. 1, art. 15, *amended by* VT. CONST. Ch. 1, art. 16.

7. State v. Misch, 256 A.3d 519, 532 (Vt. 2021).

8. Larrabee v. Del Toro, 45 F.4d 81, 83–94 (D.C. Cir. 2022).

9. *Id.* at 96.

10. *Id.*

components and reserve retirees.[11] The D.C. Circuit's decision was consistent with an earlier decision of the U.S. Court of Appeals for the Armed Forces.[12] Essentially, these decisions allow Congress plenary power to determine who constitutes part of the regular forces, even for former soldiers who do not remain in active service. Because the logic of these decisions contains no limitations for reserve soldiers, they open the door for Congress to subject part-time soldiers and retired reservists to military law when they are not in active service. These decisions, thus, ignore the traditional jurisdictional limits on military law; unlike their professional counterparts, who are subject to status-based military jurisdiction, nonprofessional soldiers may be subjected to military law only when in active service or in training.[13]

The confusion that permeates these examples stems from misunderstanding the separate military systems described in the Constitution. The Constitution recognizes two kinds of military land forces—armies and militia—and provides for them differently.[14] Yet, through creative lawmaking and lawyering, the federal government has used its constitutional power to raise and support armies to seize control of the militia from the states.[15]

Now that Congress uses its Army Power to circumvent the limitations on federal power set by the Militia Clauses, we have lost the essential distinction between the militia and the army.[16] Beneath this confusion rests two fundamental problems. First, Congress supposedly created a military reserve system under its constitutional power to raise and support armies; yet, the resulting part-time forces operate like an organized militia, not a standing army. Second, the effort to translate the Framers' military system to our own has spawned bad parallels, such as claims that the National Guard is the only contemporary analog to the militia or that none exists at all.[17]

---

11. *Id.* The district court had held that although military retirees retain their military affiliation, military retirees are not functionally members of the land or naval forces. As such, subjecting them to military law is unnecessary to maintain military discipline. *See* Larrabee v. Braithwaite, 502 F. Supp. 3d 322, 329–331 (D.D.C. 2020).

12. *See* United States v. Begani, 81 M.J. 273, 279–280 (C.A.A.F. 2021) (treating the scope of court-martial jurisdiction over retirees as a policy question for Congress).

13. *See* U.S. CONST. amend. V; *see infra* note 158 and accompanying text.

14. U.S. CONST. art. I, § 8, cl. 15, 16; U.S. CONST. art. I, § 8, cl. 11, 14.

15. *See* U.S. CONST. art. I, § 8, cl. 15; *infra* note 19.

16. Few academics seriously analyze the traditional distinction between armies and militia and whether legal provisions designed to regulate the militia have contemporary relevance. 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).

17. *See infra* notes 304–11 and accompanying text.

This failure to translate[18] how the Framers' sharp distinction between armies and militia maps onto our contemporary military system has, in turn, generated much confusion in cases involving separation of powers, federalism, the military justice system, torts involving guns, and the scope of the right to bear arms under the federal and state constitutions.[19]

This Article reexamines the modern military system through the lens of Framing-era distinctions between armies and militia. As William Baude stated, "[i]t is not always necessary to return to first principles, but when one is lost, sometimes it can be helpful to consult the map."[20] When it comes to the constitutional provisions governing the military, we have lost our way by settling on an erroneous understanding of "armies" and "militia," inconsistent with how those terms were used in the Constitution. Many judges and commentators consider the "army" to be a federal military land force and the "militia" to be essentially a state army. This distinction based on federalism is wrong.

At the Framing, the distinction between the army and the militia was in the nature of the service. The armies were the regular forces, while the militia was the citizen-army.[21] Armies comprised

---

18. 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).

19. *See supra* notes 7–12 and accompanying text; Perpich v. Dep't of Def., 496 U.S. 333, 351–52 (1990) (addressing confusion about whether states could maintain their own military forces); District of Columbia v. Heller, 554 U.S. 570, 627–28 (2008) (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 right to bear arms and the maintenance of a well-regulated militia); *id.* at 670–72 (Stevens, J., dissenting) (failing to provide a coherent understanding of the militia and equivocating on the distinction between the militia and the army); 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"); Soto v. Bushmaster Firearms Int'l, LLC, 202 A.3d 262, 284 (Conn. 2019) (summarizing plaintiff's theory that selling rifles designed for military use is an unfair trade practice under state law because such weapons lack purely civilian application); Complaint at *4, Green v. Kyung Chang Indus. USA, Inc., No. A-21-838762-C (D.C. Clark Cnty., Nev. Aug. 1, 2021) (claiming that selling high-capacity magazines is a tort because such magazines have no civilian use for self-defense or hunting); Robert Leider, *Federalism and the Military Power of the United States*, 73 VAND. L. REV. 989, 1060–62 (2020).

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

21. David Yassky, *The Second Amendment: Structure, History, Constitutional Change*, 99 MICH. L. REV. 588, 599 (2000). For lack of a better

professional soldiers—individuals whose primary occupation was military service.[22] In contrast, the militia consisted of civilians who were liable to be called into military service on a part-time or emergency basis for defensive wars only. Like today, the historic militia was often divided between an active, volunteer component that regularly drilled and a common (or general) militia that rarely, if ever, gathered.[23] Between these two constitutional paradigms of armies and militia was a de facto third kind of force—the war volunteers.[24] Like the militia, the war volunteers were called forth only for specific military emergencies; but like soldiers in the regular army, their service was not limited to defensive wars.[25]

Many have argued that changes in the legal regime surrounding the militia have obliterated the distinction between the militia and the standing army.[26] This argument is then used as the foundation for denying the contemporary legal relevance of the Second Amendment.[27] Rather than accede to such nihilistic impulses, this Article provides a *cy-pres* reconstruction of how the modern structure of the Armed Forces approximates the Framing-era military system.

To differentiate an "army" from a "militia," this translation looks to the nature of the service, not to state versus federal control. First, 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 (as it exists today) also might fall within the constitutional armies, despite its bureaucratic placement in the Department of the Navy. Second, the active Army Reserve and the National Guard approximate the Framers' system of volunteer militia and war volunteers. Third, the inactive reserve forces and the citizens

---

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.

22. *Id.*

23. *See, e.g.*, JOHN K. MAHON, HISTORY OF THE MILITIA AND THE NATIONAL GUARD 14 (1983); *infra* note 126.

24. MAHON, *supra* note 23, at 5, 32.

25. *Id.*

26. *See, e.g.*, *infra* note 311 and accompanying text; *see also* 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, 37–40 (1989); Yassky, *supra* note 21, at 626–28.

27. *See, e.g.*, H. Richard UVILLER & WILLIAM G. MERKEL, THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT 158 (2003); Ehrman & Henigan, *supra* note 26, at 37–38; *see also* Yassky, *supra* note 21, at 628–29 (rejecting the translation metaphor by arguing that the changes in the militia are too profound to accommodate any attempt at translation).

registered for the draft with the Selective Service System operate as the modern general militia, providing up to the full military manpower of the country for wartime emergencies.

Thus, the Framers' militia has been fragmented across different governmental organizations, such as the National Guard, Army Reserve, and the Selective Service System. Modern military branches such as the "U.S. Army" are a conglomeration of all three military systems recognized at the Framing—armies, militia, and volunteers.[28] A proper translation of Framing-era practice must examine our contemporary Armed Forces at the component level.

This Article has five parts. Part I argues that the critical distinction in the Constitution between "armies" and "militia" is whether the forces comprise regular troops or citizen-soldiers. This Part rejects the understanding that armies comprised federal troops while militias comprised state troops. Part II looks at Anglo-American military history and custom, which divided land forces into two paradigmatic types: militia and armies. Between these two categories also existed a de facto third category, the "war volunteers," who were a hybrid of the other two. Part III challenges the conventional wisdom that the militia has become an archaic institution and shows how this belief has warped legal doctrine. Part IV provides a more faithful translation from the Framers' military structure to our own. Finally, Part V raises and responds to objections to my translation.

I. PROPERLY FRAMING THE CONSTITUTIONAL DISTINCTION: PROFESSIONAL SOLDIERS AND CITIZEN-ARMIES

Today, the oft-repeated view is that the militia are state forces, while the armies are national forces.[29] Debates over the definition of the "militia" have occurred primarily in Second Amendment decisions and articles.[30] Collective-rights scholars and judges mostly treat the militia as a state land force.[31] In a famous *Parade* magazine interview in which he labeled the National Rifle Association's understanding of the Second Amendment as a "fraud," then-Chief Justice Burger called the militia the "state armies."[32] In *Silveira v. Lockyer*,[33] Judge Reinhardt concluded that a "militia" was "a state

28. *See About Our Forces*, U.S. DEP'T OF DEF., https://www.defense.gov/About/our-forces/ (last visited Sept. 11, 2022); *see also* SELECTIVE SERVICE SYSTEM, https://www.sss.gov/ (last visited Nov. 9, 2022).

29. *See, e.g.*, Ehrman & Henigan, *supra* note 26, at 23; *see also* Yassky, *supra* note 21, at 605–09.

30. *See, e.g.*, Yassky, *supra* note 21, at 628–29.

31. *See, e.g.*, Silveira v. Lockyer, 312 F.3d 1052, 1069 (9th Cir. 2002).

32. 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.

33. 312 F.3d 1052 (9th Cir. 2002).

military force to which the able-bodied citizens of the various states might be called into service."[34]

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."[35] 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.[36] In their view, the Second Amendment filled that gap by authorizing states to arm their military forces.[37]

This federalism-based distinction between the armies and militia is wrong. Examining constitutional text, structure, and history, this Part contends that the critical distinction between the armies and the militia is that the armies consist of regular soldiers—that is, those for whom being a soldier is their principal occupation—while the militia consists of able-bodied citizens subject to part-time or emergency military service. In other words, professionalism, not federalism, demarcates the correct distinction between "armies" and "militia."

A. Textual Meaning

The linguistic evidence is overwhelming that the proper distinction between armies and militia is one of professionalism. 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."[38] Later, in *Federalist No. 29*, Hamilton argues for excluding most of the "militia of the United States" from active military exercises.[39] He treats the militia as comprising "the great body of yeomanry and of the other

34. *See id.* at 1071; *see also* Ehrman & Henigan, *supra* note 26, at 24 ("[T]he militia was viewed as a state-organized, state-run body.").

35. McDonald v. City of Chicago, 561 U.S. 742, 897 (2010) (Stevens, J., dissenting) (citations omitted).

36. District of Columbia v. Heller, 554 U.S. 570, 655 (2008) (Stevens, J., dissenting) (citing 3 JONATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 379 (2d ed. 1863)); George A. Mocsary, Note, *Explaining Away the Obvious: The Infeasibility of Characterizing the Second Amendment as a Nonindividual Right*, 76 FORDHAM L. REV. 2113, 2149, 2154–55 (2008) (reconstructing and criticizing the modern collective rights argument).

37. Mocsary, *supra* note 36, at 2150, 2155.

38. THE FEDERALIST NO. 24, at 111 (Alexander Hamilton) (Dover Publ'ns 2014).

39. THE FEDERALIST NO. 29, at 129 (Alexander Hamilton) (Dover Publ'ns 2014) ("The project of disciplining all the militia of the United States is as futile as it would be injurious, if it were capable of being carried into execution.").

classes of the citizens," rather than denoting the organized, select units that he is proposing the government form.[40]

Hamilton's distinction between a professional army and a nonprofessional militia is shared throughout the debates over the Constitution's ratification. 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."[41] Several other *Federalist Papers*,[42] the *Antifederalist Papers*,[43] and contemporary newspapers[44] understood 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."[45] Gerry's view assumes a distinction between the militia and standing forces.

Aedanus Burke shared the same understanding. Just after Gerry's proposal was defeated, Burke proposed adding

> an amendment to the following effect: A standing army of regular troops in time of peace is dangerous to public liberty,

---

40. *Id.*

41. THE FEDERALIST NO. 46, at 214 (James Madison) (Dover Publ'ns 2014).

42. *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 NO. 25 (Alexander Hamilton) (assuming "army" referred to a "regular and disciplined army"); THE FEDERALIST NO. 26 (Alexander Hamilton), NO. 41 (James Madison) (making similar assumptions).

43. RICHARD HENRY LEE, LETTER XVIII (Jan. 25, 1788), *reprinted in* 17 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 362 (John P. Kaminski et al. eds., 1995) ("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.").

44. 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), *reprinted in* 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 431, 435–36 (John P. Kaminski et al. eds., 1981); *Cincinnatus IV: To James Wilson, Esquire*, N.Y.J. (Nov. 22, 1787), *reprinted in* 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 186, 187 (John P. Kaminski et al. eds., 1983).

45. 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1109 (Bernard Schwartz ed., 1971).

> 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 cases the military shall be subordinate to the civil authority.[46]

Thus, 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."[47] 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."[48] Blackstone explains that a standing army involves keeping "a standing body of troops" in peacetime and his illustration involves regular forces in Ireland.[49] A "perpetual standing soldier," he writes, is someone "bred up to no other profession than that of war."[50] 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."[51] The militia, in contrast, was only embodied "in case of imminent national danger or great emergency."[52]

B. Structure

The Constitution's structure confirms this linguistic usage by how it treats the militia differently from a professional army. Start with the *calling forth* power, which provides Congress with the authority "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections[,] and repel Invasions."[53] Judge Reinhardt contended that "[t]he fact that the militias may be 'called

---

46. *Id.*

47. 5 ADAM SMITH, WEALTH OF NATIONS, ch. 1, *55–56, at 754 (Edwin Cannan ed. 1944).

48. *Id.* at 753–54.

49. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *498.

50. *Id.* at *491.

51. 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 291 (1982) (8th ed. 1915) [hereinafter DICEY, Eighth Edition].

52. DICEY, Eighth Edition, *supra* note 51, at 285.

53. U.S. CONST. art. I, § 8, cl. 15.

forth' by the federal government only in appropriate circumstances underscores their status as state institutions."[54] This is incorrect. The limited calling forth power reflected the militia's status as a civilian institution not comprised of professional soldiers. By constraining the calling forth power to certain emergencies, the Framers restricted the circumstances in which the federal government could involuntarily deploy civilians 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 service outside Britain.[55]

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 the land or naval forces, or in the Militia, when in actual service in time of War or public danger."[56] Note the distinction between land and naval forces and militia. Based solely on their status as soldiers, professional forces are subject to military discipline at all times, on duty or off duty, whether or not their conduct relates to their service.[57] The militia, in contrast, is subject to military discipline only during actual service.[58] 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.[59] The Fifth

---

54. Silveira v. Lockyer, 312 F.3d 1052, 1070 (9th Cir. 2002).

55. Statute the Second (1326), 1 Edw. 3 c. 5 (Eng.); 1 BLACKSTONE, *supra* note 49, at *493; F.W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 277 (Cambridge Univ. Press 1920) (1908); *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).

56. U.S. CONST. amend. V.

57. 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, 272–73 (1969), *overruled by Solorio*, 483 U.S. at 436.

58. Johnson v. Sayre, 158 U.S. 109, 114–15 (1895).

59. *See, e.g.*, Maryland Ratifying Convention (1788), *reprinted in* 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 729, 734 (Bernard Schwartz ed., 1971) (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 (Herbert J. Storing ed., 1981) ("[T]he 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,*

Amendment's distinction between regular forces and militia reflects traditional English law, which likewise subjected regular soldiers to military jurisdiction at all times and the militia only when in training or in service.[60]

Most importantly, the definition of the militia as a state army cannot be reconciled with the war-powers limitations on states in the Constitution. While the Constitution reserves to the states the appointment of militia officers and the authority of training the militia,[61] it also prohibits states from "keep[ing] Troops, or Ships of War in time of Peace" without Congress's consent.[62] "[K]eep troops, or Ships of War" are the analogs of Congress's power to raise armies and a navy, respectively.[63] This provision thus prohibits states from having a peacetime professional force (a standing army or navy) without Congress's authorization.[64]

Moreover, the denial to the states of these powers sits in a constitutional section broadly denying states powers over war and peace.[65] 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.

The constitutional distinctions between armies and militia also had earlier analogs in the Articles of Confederation. The Articles both commanded states to "always keep up a well regulated and disciplined militia," while a separate provision generally banned states from maintaining "any body of forces" or "vessels of war."[66]

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 567, 569–70 (David E. Young ed., 1991) ("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.").

60. DICEY, Third Edition, *supra* note 51, at 282, 285; *infra* notes 149–53 and accompanying text.

61. U.S. CONST. art. I, § 8, cl. 16.

62. *Id.* § 10, cl. 3.

63. *See* 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA app. D at 311 (Phila., William Young Birch & Abraham Small 1803). The prohibition against "keep[ing] Troops" was likely a more complete prohibition than a prohibition against keeping "a standing army" because small numbers of professional soldiers might not have amounted to an army.

64. THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 89 (Bos., Little, Brown & Co. 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 63, at 311.

65. U.S. CONST. art. I, § 10, cl. 3.

66. ARTICLES OF CONFEDERATION of 1781, art. VI, para. 4.

When it came to the states' abilities to maintain military forces, these provisions again demonstrate that the Framing generation drew a distinction between professional forces (armies and navy) and nonprofessional forces (militia). The "militia" cannot be defined simply as a state army.

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.[67] In contrast, George Mason offered a more limited proposal to provide for a federal select militia.[68] 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.[69] The District is neither a state nor a separate sovereign from the federal government.[70] Whatever the District's quasi-state status is today by virtue of its home-rule authority, it certainly lacked such status in 1803.[71] If the militia were simply a state military organization, as distinguished from a federal one, the District could have no militia.[72] The force would be federal, and thus definitionally part of the army.

---

67. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 331–32 (Max Farrand ed., 1911) [hereinafter 2 RECORDS].

68. *Id.* at 331.

69. An Act, More Effectively to Provide for the Organization of the Militia of the District of Columbia, 2 Stat. 139, 139–40 (Mar. 3, 1803).

70. *See* District of Columbia v. Carter, 409 U.S. 418, 432 (1973).

71. Joan T. Thornell, Staff of House Comm. on the District of Columbia, 101st Cong., 2d Sess., Governance of the National's Capital: A Summary History of the Forms and Powers of Local Government for the District of Columbia, 1790 to 1973 at 40 (Comm. Print 1990) (describing powers of the local government for the City of Washington).

72. 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 n.67 (2d ed. 1920) (citation omitted). This is not a good construction of the Constitution's Militia Clauses. The District, like the states, has citizens capable of bearing arms who need to be organized and trained. In federal territories, the federal government assumes

Some early judicial decisions also recognize the professional/nonprofessional line. A few decades before Congress codified the modern National Guard system in federal law, many states separated their militia into an organized component, (often called the "National Guard") and an unorganized reserve militia.[73] 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.[74] Among the objections was that having an active militia violated the constitutional prohibition against states keeping troops in peacetime without Congress's consent.[75] 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 peace.'"[76] The Court then distinguished this from "troops," to 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."[77] The National Guard was an organized militia, not a state army.[78]

Likewise, the distinction between citizen-soldiers and regular forces is at the heart of *United States v. Miller*,[79] the Supreme Court's major pre-*Heller* decision on the Second Amendment.[80] According to collective-rights theorists and judges, *Miller* understood the Second Amendment as grounded in federalism, protecting the states' rights to organize military units.[81] They sometimes quote *Miller*'s

---

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 territories 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 courts. It would be an anomaly if District residents were exempt from military service because they were not located in the states. *See also* discussion *infra* note 168.

73. RUSSELL F. WEIGLEY, A HISTORY OF THE UNITED STATES ARMY 321 (1984 enlarged ed.) (1967); JERRY COOPER, THE RISE OF THE NATIONAL GUARD: THE EVOLUTION OF THE AMERICAN MILITIA, 1865–1920, 14–16 (1997).

74. Dunne v. People, 94 Ill. 120, 124, 141 (1879).

75. *Id.* at 138 (citing U.S. CONST. art. I, § 10).

76. *Id.*

77. *Id.*

78. *Id.* at 138–39.

79. 307 U.S. 174 (1939).

80. *See id.* at 178–79.

81. *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"); Don B.

statement that the Second Amendment's "obvious purpose" was "to assure the continuation and render possible the effectiveness of [state militias]."[82]

But this is all revisionist history. As the brackets around "state militias" evince, "state," as an adjective for militia, does not appear in *Miller*; yet, some decisions and scholars purporting to interpret *Miller* have added it.[83] *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.[84] *Miller*, in fact, contained nothing related to federalism at all.[85]

This is because the Court's *Miller* decision was about *professionalism*. *Miller* clarified 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.[86]

Note the contrast *Miller* drew 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."[87] Constitutional limitations aside, states—in theory—could maintain either type of force. There is nothing definitional requiring armies to be national land forces and the militia to be a state military force. To the contrary, *Miller* correctly distinguished the militia (a force consisting

---

Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 207 n.13 (1983) (collecting scholarly commentary).

82. *See, e.g.*, Silveira v. Lockyer, 312 F.3d 1052, 1061 (9th Cir. 2002); United States v. Oakes, 564 F.2d 384, 387 (10th Cir. 1977); UVILLER & MERKEL, *supra* note 27, 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).

83. *See, e.g.*, *Silveira*, 312 F.3d at 1061; *Oakes*, 564 F.2d at 387; UVILLER & MERKEL, *supra* note 27, at 19; *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, 1273 (11th Cir. 1997) ("[The Second Amendment] was designed to protect the state militias from federal legislation enacted to undermine the role of state militias.").

84. *Miller*'s only references to standing armies were the constitutional prohibition on states having standing armies and the quotation from Adam Smith conceptually distinguishing an army from a militia. Miller, 307 U.S. at 178–179.

85. *Id.*

86. *Id.*

87. *Id.*

of citizen-soldiers) from a standing army (a force composed of professional soldiers).[88]

The text, structure, and history demonstrate that "armies" comprise regular forces, while the militia comprises nonprofessional forces. In modern times, 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. The critical question when classifying these forces as "armies" or "militia" is the *nature* of the service—whether the service is professional or part-time/emergency only. 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 U.S. Armed Forces has nationalized the militia system, not abolished it.

II. ARMIES AND MILITIA: DUAL (DUELING) LAND FORCES

The professionalism distinction between armies and militia also accords with the traditional understanding in England and America. In 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."[89] 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."[90] This dual military tradition formed in England long before the colonies united.[91] The traditional differences between armies and militia in recruitment, training, service, and susceptibility to military law relate to this fundamental distinction between a regular, professional army and a temporary, nonprofessional army of citizens. In addition to these two paradigmatic kinds of land forces, war volunteers were a de facto third tradition, straddling the army/militia distinction.

A. Distinguishing the Militia From the Army

The army and the militia "were regarded . . . as totally opposed conceptions" of how to constitute a military land force.[92] Thus armies and militia differed in how the forces were raised, the type and length of military service, its members' exposure to military discipline, and the control the central government exercised over the forces.[93] These

88. *Id.*

89. WEIGLEY, *supra* note 73, at v.

90. *Id.*

91. CORRELLI BARNETT, BRITAIN AND HER ARMY 1509–1970: A MILITARY, POLITICAL AND SOCIAL SURVEY 168 (1970).

92. *Id.*

93. *See, e.g.*, Yassky, *supra* note 21, at 599 ("[T]he two institutions differed along a range of social and political dimensions.").

parallel legal regimes resulted from their fundamental difference: the army comprised professional soldiers while the militia comprised nonprofessionals—individuals who mostly lived as civilians.[94]

1. Peacetime Service

In England, the term "army" could cover either wartime or peacetime land forces.[95] Before the seventeenth century, there was no standing British army nor any institution known as the "army."[96] England raised temporary wartime armies through a variety of methods and maintained a small number of regular soldiers to guard the Crown and man garrisons.[97] The standing army, as an institution, traces back to larger peacetime units that began to take shape in 1660 and 1661.[98] As the historian Correlli Barnett explained, "[t]he British standing army, like the British Cabinet system, evolved gradually, unacknowledged as such until long after it existed in fact."[99]

For constitutional purposes, a careful distinction must be drawn among armies. British and, later, American objections to the raising of armies were not aimed at temporary wartime armies, but at *standing* armies—armies that continued to exist in peacetime and might be used to oppress the population.[100]

---

94. BARNETT, *supra* note 91, at 171–172.

95. John Childs, *The Restoration Army 1660–1702, in* THE OXFORD HISTORY OF THE BRITISH ARMY 46, 52 (David Chandler & Ian Beckett, eds., 1996) [hereinafter OXFORD HISTORY].

96. *Id.* at 52; BARNETT, *supra* note 91, at 115.

97. Ian Roy, *Towards the Standing Army*, *in* OXFORD HISTORY, *supra* note 95, at 24, 25–26; BARNETT, *supra* note 91, at 20, 115.

98. BARNETT, *supra* note 91, at 115. By 1663, the country had about 3,600 men in regiments and nearly 5,000 guarding various garrisons. *Id.*

99. *Id.*

100. MAITLAND, *supra* note 55, at 328; BARNETT, *supra* note 91, at 116; LAWRENCE DELBERT CRESS, CITIZENS IN ARMS: THE ARMY AND THE MILITIA IN AMERICAN SOCIETY TO THE WAR OF 1812, at 46 (1982); JOHN PHILLIP REID, IN DEFIANCE OF THE LAW: THE STANDING-ARMY CONTROVERSY, THE TWO CONSTITUTIONS, AND THE COMING OF THE AMERICAN REVOLUTION 80 (1981); *see, e.g.*, 2 RECORDS, *supra* note 67, at 329 (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 times of peace except with the legislature's consent and limiting the appropriations for "military land forces" for one year); Massachusetts Convention Debates (Feb. 7, 1788), *in* 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 44, at 1399–400 (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

The most significant distinction between soldiers and militiamen was their peacetime service.[101] For army soldiers, the military was a career; the usual enlistment period for soldiers was "for life[,] which in practice meant until the soldier was too old or infirm for active service."[102] Thus, the defining characteristic of standing armies was that they constituted regular, professional forces.[103]

The regular nature of army service was a world apart from the militia: "Militiamen were required, 'on a just Occasion, to perform the Business of a Soldier,' rather than to become one fully or permanently."[104] During times of peace, the British militia usually did not drill, and "resuscitating the militia . . . was like trying to revive a dead carcass."[105] Much like the modern American militia, the traditional English militia fell into long periods of disuse.[106]

In England, training occurred when there was a threat of invasion, and even then it was sporadic.[107] The English militia divided into the forerunner of what today would be called the

---

SECOND AMENDMENT, *supra* note 59, at 337 (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, *supra* note 59, at 735 ("That no standing army shall be kept up in time of peace, unless with the consent of two thirds of the members present of each branch of Congress."); New Hampshire Ratifying Convention, 1788, *reprinted in* 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, *supra* note 45, at 758, 761 (proposing a requirement that three-fourths of the legislature approve a peacetime army).

101. 5 SMITH, *supra* note 47, at 754.

102. H.C.B. ROGERS, THE BRITISH ARMY OF THE EIGHTEENTH CENTURY 59 (1977); *see also* BARNETT, *supra* note 91, at 280 (similar); H. ST. CLAIR FEILDEN, A SHORT CONSTITUTIONAL HISTORY OF ENGLAND 315 (3d ed., Bos., Ginn & Co. 1897) (similarly explaining that the enlistment term was originally for life). During some recruiting shortfalls, shorter term enlistments were offered, including for three years in 1708. BARNETT, at 141.

103. 5 SMITH, *supra* note 47, at 698. For an extended definitional discussion, see *supra* notes 39–44 and accompanying text.

104. MATTHEW MCCORMACK, EMBODYING THE MILITIA IN GEORGIAN ENGLAND 103 (2015) (quoting PROPOSALS FOR AMENDING THE MILITIA ACT SO AS TO ESTABLISH A STRONG AND WELL-DISCIPLINED NATIONAL MILITIA 40 (London, n.d. 1759)).

105. MAITLAND, *supra* note 55, at 60.

106. BARNETT, *supra* note 91, at 117, 174; *cf.* Ian Beckett, *The Amateur Military Tradition*, *in* OXFORD HISTORY, *supra* note 95, at 391 ("Clearly, the constant threat of invasion, whether real or perceived, was a major factor in the establishment and survival of auxiliary forces.").

107. OXFORD HISTORY, *supra* note 95, at 36.

"organized" and "unorganized" militia.[108] The organized units[109] were initially known as the "trained bands."[110] Only these trained bands received meaningful training, and it was often limited to no more than one or two weeks per year between company days and general musters.[111]

The intensity of training was equally light. In the seventeenth century, an English militia muster might include little more than the inspection of arms.[112] As Blackstone recounted, the militia "are to be exercised at stated times: and their discipline in general is liberal and easy."[113] The remaining militia (other able-bodied men between sixteen and sixty) underwent no significant training,[114] and when attempts were made to train them, "[n]o penalties could prevent a vast deal of shirking."[115]

In America, a universal militia system took root and, at least initially, that system had better organization and stricter training regimens than the peacetime British militia.[116] The colonies were in constant danger of invasion from competing European colonial powers and Native Americans; yet, despite the danger, they "were much too poor to permit a class of able-bodied men to devote

---

108. *See* 10 U.S.C. § 246(b) (dividing the militia into an organized and unorganized components).

109. The trained bands functioned as a select militia, and I treat "select militia" and "organized militia" as synonymous terms. A select militia was a specialized unit of part-time citizen soldiers, who were separate from the general militia (the entire able-bodied community capable of bearing arms). Because select militias were elite units separated from the general militia, they were unrepresentative of the political community. At the Framing, select militias were controversial because, being unrepresentative, they constituted armed factions with separate political interests from the political community as a whole. On the definition and concerns about select militias, see, for example, UVILLER & MERKEL, *supra* note 27, at 70–71; DAVID C. WILLIAMS, THE MYTHIC MEANINGS OF THE SECOND AMENDMENT 56–57 (2003); Mocsary, *supra* note 36, at 2113, 2117 n.37, 2126. In theory, the trained bands could have had a representative cross-section of the community because they were organized randomly by ballot. In practice, however, selected individuals found willing substitutes, making the trained bands unrepresentative of the population. *See infra* note 148 and accompanying text.

110. BARNETT, *supra* note 91, at 34; Beckett, *supra* note 106, at 388.

111. MAITLAND, *supra* note 55, at 455.

112. BARNETT, *supra* note 91, at 59–60.

113. 1 BLACKSTONE, *supra* note 49, at *412.

114. *See, e.g.*, BARNETT, *supra* note 91, at 34–35 (most militia were untrained even as war with Spain was imminent); *id.* at 117 (explaining that the militia of several counties had not mustered for years); *id.* at 174 (explaining that the militia "survived hardly more than in name" after peace arrived in the latter half of the eighteenth century).

115. *Id.* at 34.

116. Robert L. Goldich, *Historical Continuity in the U.S. Military Reserve System*, 7 ARMED FORCES & SOC'Y 88, 91–93 (1980).

themselves solely to war and preparation for war."[117] Unable to afford regular soldiers, every colony (except initially Pennsylvania) modeled their defense forces on the English Assize of Arms,[118] which "implied the general obligation of all adult male inhabitants to possess arms, and, with certain exceptions, to cooperate in the work of defense."[119]

By the middle of the eighteenth century, the colonies were no longer in constant danger of invasion.[120] With the need for a universal militia no longer existing, the system fell into partial disuse.[121] Resembling contemporary British practice, the colonies' militias split into an organized "volunteer" militia, comprising elite soldiers with better training, and a less organized "common" or "general" militia that served largely in a reserve role.[122]

As historian John Mahon has explained, the militia's "[f]requency of training fluctuated with the degree of danger."[123] For example, when Massachusetts was first settled and the colony was in a precarious state, militia companies trained weekly.[124] A generation later, with the colony more secure, general militia companies met four times per year while regiments assembled once every one to three years.[125] Other states followed a similar pattern: Militia training increased if war was imminent, but the militia went through long periods of complete or near-complete inactivity in stable periods of peace.[126] 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.[127]

When the militia was mustered, the common militia received, at most, only basic instruction in military affairs.[128] Instead of training the militia, general militia musters became significant for the

---

117. WEIGLEY, *supra* note 73, at 4.

118. *Id.* at 3–4; *see also* COOPER, *supra* note 73, at 1 (explaining that Pennsylvania had a large population of pacifist Quakers, and thus, did not initially organize a universal militia system); MAHON, *supra* note 23 (explaining that Pennsylvania eventually organized its militia following the French and Indian War).

119. 1 HERBERT L. OSGOOD, THE AMERICAN COLONIES IN THE SEVENTEENTH CENTURY 499 (1904).

120. COOPER, *supra* note 73, at 3.

121. *Id.*

122. WEIGLEY, *supra* note 73, at 8.

123. MAHON, *supra* note 23, at 18.

124. *Id.*

125. *Id.*

126. *See, e.g.*, E. Milton Wheeler, *Development and Organization of the North Carolina Militia*, 41 N.C. HIST. REV. 307, 311 (1964) (describing musters of the North Carolina militia after 1715); 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).

127. MAHON, *supra* note 23, at 18.

128. COOPER, *supra* note 73, at 2.

organizational support they provided the colony's military system.[129] The militia muster provided an opportunity for colonial governments to get a census of its military age population.[130] And in a tradition that began in England,[131] and would last in America until the twentieth century,[132] militia musters served as a recruiting ground for temporary wartime military service.[133] When colonial authorities needed manpower, they initially requested volunteers, only drafting men into service if they did not meet their quotas.[134] The general militia rarely saw action.[135]

This traditional system has its modern analogs.[136] The Framers' volunteer militia approximates the Army Reserve and National Guard, the volunteer organized militias of today. And the Selective Service System approximates the Framers' general militia: A large pool of draftable citizens, who perform no significant military service in peacetime, but remain available for serious military emergencies.

2. Raising the Forces: Compulsory Militia Service and Volunteer Army Service

The professionalism distinction between armies and militia influenced how the British government raised these forces. In the professional army, "every soldier was supposed to be a volunteer."[137] The British derided national conscription as a French institution.[138] By the nineteenth century, "[l]ong historical process had . . . made conscription unthinkable in Britain, despite the chronic shortage of troops."[139] Britain would not impose conscription into the national army until late in World War I.[140]

On rare occasions, England resorted to impressment to fill the army when voluntary recruiting fell short in wartime.[141] Wartime impressment fell upon debtors, the poor, the unemployed, and criminals[142]—members of the community who were "least able to

129. *Id.*
130. *Id.*
131. BARNETT, *supra* note 91, at 37.
132. *See infra* note 247 and accompanying text.
133. BARNETT, *supra* note 91, at 34.
134. COOPER, *supra* note 73, at 2; WEIGLEY, *supra* note 73, at 8; MAHON, *supra* note 23, at 19–20.
135. *See* WEIGLEY, *supra* note 73, at 8; *infra* note 448 and accompanying text.
136. *See infra* notes 445–48 and accompanying text.
137. Alan J. Guy, *The Army of the Georges 1714–1783*, *in* OXFORD HISTORY, *supra* note 95, at 92, 97. Earlier in feudal times, English law based military service on land ownership. *See* Michael Prestwich, *The English Medieval Army to 1485*, *in* OXFORD HISTORY, *supra* note 95, at 1, 4–5.
138. BARNETT, *supra* note 91, at 257.
139. *Id.* at 295.
140. *Id.* at 397.
141. MAITLAND, *supra* note 55, at 453.
142. *Id.*

resist it."[143] But while impressment of some vulnerable citizens happened in wartime, such events were rare and "[s]traightforward impressment was normally illegal."[144] The "cherished principle" of raising an English army was that soldiers served voluntarily.[145]

In contrast, liability to militia service was compulsory.[146] The militia system "embodied the ancient English principle of the citizen's duty to defend the realm."[147] The Statute of Winchester, for example, required universal service for all able-bodied men between the ages of fifteen and sixty.[148]

But a careful distinction must be drawn between liability to serve and actual service. Although liability for militia service was universal and compulsory, actual service generally was not.[149] English subjects detested mandatory military service, and for centuries they resisted it.[150] In theory, trained bands were raised by ballot; in practice, those selected had the opportunity to find a willing substitute person or pay a fine.[151] Thus actual militia service (when it existed) often resulted from volunteering, even though the entire militia was technically obligated to serve if called.[152]

3. Wartime Service

In war, both the militia and armies could be embodied for the conflict.[153] But even here there were significant differences. There

143. BARNETT, *supra* note 91, at 41.

144. *Id.* at 140; *see also* ROGERS, *supra* note 102, at 61 ("In spite of the difficulty obtaining recruits, any form of compulsion was rarely resorted to.").

145. BARNETT, *supra* note 91, at 397.

146. Prestwich, *supra* note 137, at 7.

147. BARNETT, *supra* note 91, at 173.

148. Statute of Winchester, 13 Edw. I, ch. 9 (1285), *in* 1 THE STATUTES OF THE REALM 96, 97–98.

149. *Cf.* Beckett, *supra* note 106, at 387 ("The right to compel service was reserved but no one seriously believed it possible to implement it . . . .").

150. Prestwich, *supra* note 137, at 20; Beckett, *supra* note 106, at 385, 387, 394.

151. BARNETT, *supra* note 91, at 34, 172; Beckett, *supra* note 106, at 388; 1 BLACKSTONE, *supra* note 49, at *412; MCCORMACK, *supra* note 104, at 83.

152. *See* MCCORMACK, *supra* note 104, 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 . . . ."); FEILDEN, *supra* note 102, at 307 (explaining that the trained bands "were bodies of urban militia combining a large volunteer element with the principle of the fyrd").

153. On keeping the militia embodied during war, see *Ex parte* Coupland, 26 Tex. 386, 429 (1862) (Bell, J., dissenting in part) (interpreting the Confederate Constitution, but with reference to the same general law reflected in the U.S. Constitution) (explaining that the militia "may be kept in service as long as the necessities of the case may require"). Although no constitutional impediment

were no legal limitations on how the British government could use the professional army; regular soldiers could be deployed for offensive operations abroad.[154] In contrast, militiamen were protected against involuntary deployment for offensive and overseas operations.[155] The British, who detested compulsory military service, reluctantly acquiesced only to compulsory defensive service at home.[156]

4. Exposure to Military Law

The regular/part-time distinction between army soldiers and militiamen also meant that they had different susceptibility to military law. Regular forces in Britain were subject to military law at all times: "A citizen on entering the army becomes liable to special duties as being 'a person subject to military law,'" and he may "be tried and punished by a Court-martial."[157] 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."[158]

In contrast to regular soldiers who were subject to military law at all times, British law heavily circumscribed the application of military law to members of the militia.[159] As A.V. Dicey explained, an English militiaman is "subject to military law only when in training or when the force is embodied."[160] Further, the militia could only be embodied in "case of imminent national danger or of great emergency."[161] The result was a functional approach to military

existed against embodying the militia in wartime for the duration of the conflict, wartime militia service was often temporary. In fifteenth-century Britain, for example, it was customary to limit active service to forty days. OXFORD HISTORY, *supra* note 95, at 26. In the United States, militia laws and customs required the militia to rotate men, usually to a period of three months' active duty. *See* MAHON, *supra* note 23, at 19, 38.

154. *See* BARNETT, *supra* note 91, at 196; *see also* MAHON, *supra* note 23, at 2, 32 (explaining that volunteers were like army soldiers because they operated outside the legal restrictions on militia service).

155. BARNETT, *supra* note 91, at 41; DICEY, Third Edition, *supra* note 51, at 285.

156. BARNETT, *supra* note 91, at 41; 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* Beckett, *supra* note 106, at 391; MAITLAND, *supra* note 55, at 456 (discussing background militia history). In the United States, the Constitution similarly limits the federal government's ability to use the militia to domestic, defensive needs. *See* 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").

157. DICEY, Third Edition, *supra* note 51, at 282.

158. *Id.*

159. *Id.* at 285.

160. *Id.*

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

justice. Members of the militia were treated like civilians 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.[162] This system recognized military necessity while generally preserving the civil liberty of the arms-bearing population.

5. Hybrid Character of the Militia Versus a National Army

The final trait of the militia was its hybrid national-local organization. Operationally, peacetime executive control of the militia laid primarily with the counties, not with the Crown or Parliament.[163] However, in many ways, the militia was a national institution.[164] For centuries, the English government set militia requirements to meet the country's defense needs.[165] National law 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.[166] In war, moreover, the militia was a part of the national forces under the control of the government.[167] So, Britain's "constitutional force," as it was often called, was "[a] national force, organized by counties."[168]

The Constitution perpetuated a similar hybrid system for the American militia.[169] The Constitution grants Congress the power

---

162. *Id.*

163. MCCORMACK, *supra* note 104, at 81; Prestwich, *supra* note 137, at 20; MAITLAND, *supra* note 55, at 277; BARNETT, *supra* note 91, at 23, 34.

164. *See* MAITLAND, *supra* note 55, at 455–59.

165. *See id.*

166. *See, e.g.*, 1 J.W. FORTESCUE, A HISTORY OF THE BRITISH ARMY 5 (1910) (detailing early Anglo-Saxon militia regulations); Assize of Arms, 1181, 27 Hen. 2 (Eng.); FORTESCUE, *supra* note 166, at 12 (providing the history of the Assize of Arms).

167. MCCORMACK, *supra* note 104, at 81 ("[O]nly when embodied for service did [the militia] become the responsibility of the War Office.").

168. MAITLAND, *supra* note 55, at 276.

169. Leider, *supra* note 19, at 1001–09. 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. District of Columbia, 478 F.3d 370, 402, 409 (D.C. Cir. 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 political community. The Second Amendment has "bite" in federal territories because those territories (and the federal government) still

"[t]o provide for organizing, arming, and disciplining, the Militia," thus giving the national government control over military policy.[170] Congress also has the power to call forth the militia "to execute the Laws of the Union, suppress Insurrections and repel Invasions,"[171] meaning that, during these emergencies, the militia is a part of the national military forces under the control of the federal government.[172] But the Constitution also makes the militia partly a local force. Much like day-to-day control of the English militia was exercised by the counties, usual control of the American militia was retained by the states.[173] 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."[174] 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.[175]

Unlike the militia's hybrid character, armies were generally national. The British standing army was a completely national institution under the control of the Crown.[176] The U.S. Constitution similarly made the federal armies national: Congress raises the force and provides for its regulation, while the President commands it.[177] Neither Britain nor the United States divided control with the counties or states, respectively.[178]

Armies did not have to be national institutions. At a time when the Crown and central government were weak, the nobility in early

---

need citizen-soldiers in times of emergency. Leider, *supra* note 19, at 1008–09. The preservation of the militia system in the territories diminishes the need for full-time, regular soldiers both for local and federal needs. *Id.* 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. *See* U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make needful Rules and Regulations respecting the Territory.").

170. U.S. CONST. art. I, § 8, cl. 16; Leider, *supra* note 19, at 1009.

171. U.S. CONST. art. I, § 8, cl. 15.

172. Leider, *supra* note 19, at 1008.

173. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1496 (1987) (analogizing to property law).

174. U.S. CONST. art. I, § 8, cl. 16.

175. Leider, *supra* note 19, at 1005–06; Auth. of President to Send Militia into a Foreign Country, 29 Op. Att'ys Gen. 322 (1912).

176. *See* Barnett, *supra* note 91, at 116, 133–35.

177. U.S. CONST. art. I, § 8, cl. 12, 14; *id.* art. II, § 2, cl. 1.

178. MCCORMACK, *supra* note 104, at 81 (explaining that the militia was drawn from the county and governed by local government and policing from the county); U.S. CONST. art. I, § 8, cl. 16 (reserving militia organization to the states).

England had their own armies.[179] And in the United States, state governments have raised armies.[180] The U.S. Constitution contemplates that states may have troops in some circumstances.[181] But even here, the national government can exercise discretion about whether states may have standing armies.[182] Both in England and the United States, the central government has long controlled the ability of other entities to raise regular forces.[183]

6. Collecting the Distinctions and Examining the Relationship Between the Army and the Militia

In England, military service in the army was a different bargain from serving in the militia. Service in the professional army resulted from a voluntary enlistment contract. The army consisted of regular soldiers bound to long terms of service. As professionals, soldiers lacked the rights of English common law. At all times, they were subject to military law, which stressed discipline and obedience. 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, often unlike their militia counterparts.[184]

The militia, in contrast, was the product of the social contract. The terms of service reflected the begrudging acceptance with which a free British people acquiesced to compulsory military service.[185] The militia comprised the entire able-bodied population—everyone who could be called to military service.[186] The militia had long periods of complete dormancy.[187] When activated, the militia was usually split into an organized militia and a general militia. The organized component was heavily a volunteer force and trained several days per year, while the general militia trained rarely, if at all. In wartime, the general militia was reserved for the most extreme emergencies. When not training or embodied for war, militiamen lived regular

179. *See* BARNETT, *supra* note 91, at 3; OXFORD HISTORY, *supra* note 95, at 25–26.

180. *See, e.g.*, LEONARD L. RICHARDS, SHAYS'S REBELLION: THE AMERICAN REVOLUTION'S FINAL BATTLE 23–24 (2002) (describing raising of an army by the Governor of Massachusetts to suppress Shays's Rebellion); *see also* RICHARD H. KOHN, EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783–1802, at 55–60 (1975) (recounting that Congress repeatedly denied New York's attempts to raise a regular army).

181. *See* U.S. CONST. art. I, § 10, cl. 3; 1 TUCKER, *supra* note 63, at 271, 311.

182. *See* sources cited *supra* note 181.

183. *See* BARNETT, *supra* note 91, at 3 (explaining that the Crown eliminated the nobility's private armies).

184. Yassky, *supra* note 21, at 604–05.

185. *See* MAITLAND, *supra* note 55, at 459.

186. *Id.* at 456.

187. *See id.* at 457.

civilian lives, pursued civilian occupations, and were subject to civilian law—thus, retaining their full common-law rights.

The relationship between the two forces was complicated and rife with tension and jealousy. Army officers often possessed more military knowledge, but militia officers generally held a higher social rank.[188] Further, the army and the militia competed to enroll the same recruits.[189] But the army and the militia also complemented each other. In wartime, militia musters served as recruiting grounds for the regular forces.[190] On the battlefield, the militia frequently acted as a critical auxiliary to the regular army when extra forces were needed.[191]

B. War Volunteers

In addition to the two paradigmatic traditions of a regular Army and a nonprofessional militia, a third military tradition existed in England that made its way to colonial America—war volunteers. In England, the militia could not serve abroad, though individuals could still volunteer to go abroad for temporary wartime service.[192]

This use of volunteers also became a feature of the colonial American military system.[193] War volunteers functioned halfway between militiamen and regular soldiers. Like militiamen, volunteers primarily served "for specific expeditions or purposes" during wartime emergencies.[194] Unlike militiamen, volunteers "could engage in offensive operations" and were not otherwise subject to the same service limits as ordinary militiamen.[195] The volunteers, thus, functioned like a quasi-army.[196]

After the Constitution was ratified, the ambiguous nature of the volunteers engendered political and legal disputes over whether volunteers were regular army soldiers or militia.[197] For land forces, the Constitution only recognized "armies" and "militia."[198] It never specifically provided for the volunteers, which were a hybrid of

188. MCCORMACK, *supra* note 104, at 109.

189. BARNETT, *supra* note 91, at 174.

190. Beckett, *supra* note 106, at 393; *see also* BARNETT, *supra* note 91, at 37 (recounting that the militia often served as the "pool of reservists from which expeditionary forces, real armies, were levied and assembled").

191. *See, e.g.*, MAHON, *supra* note 23, at 44 (describing how the militia complemented the Continental Army during the revolutionary War).

192. BARNETT, *supra* note 91, at 41.

193. MAHON, *supra* note 23, at 32.

194. *Id.*

195. *Id.* at 2; *see also id.* at 5, 32 (similar).

196. *Id.* at 32.

197. *See, e.g.*, 8 ANNALS OF CONG. 1740 (1798) (Joseph Gales ed., 1851); 1 TUCKER, *supra* note 63, at 274–75.

198. U.S. CONST. art. I, § 8.

both.[199] In organizing the volunteers, Congress vacillated on whether they were properly part of the "armies" or "militia."[200] Justice Story and William Winthrop eventually claimed that the nation had ratified Congress's power to raise temporary volunteer forces as part of its Army Power.[201]

Regardless of whether the volunteers should have been deemed regular soldiers or militiamen, the federal government utilized volunteer forces to quickly expand the American army in wartime and often treated them as if they were a federal reserve force.[202] This is important when analogizing the modern National Guard and Army Reserve to the military system of the Framing generation. As explained in Part IV, the National Guard and Army Reserve operate halfway between an organized militia and the war volunteers.

Perhaps the enduring lesson of the war 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.[203]

The chart below summarizes the classification of land forces around the time of the Framing. The armies comprised the standing army—the permanent soldiers employed by the government in war and peace—and wartime enlistees. The militia comprised the volunteer militia and general militia. And the war volunteers occupied a halfway status between the two paradigm kinds of land forces.

---

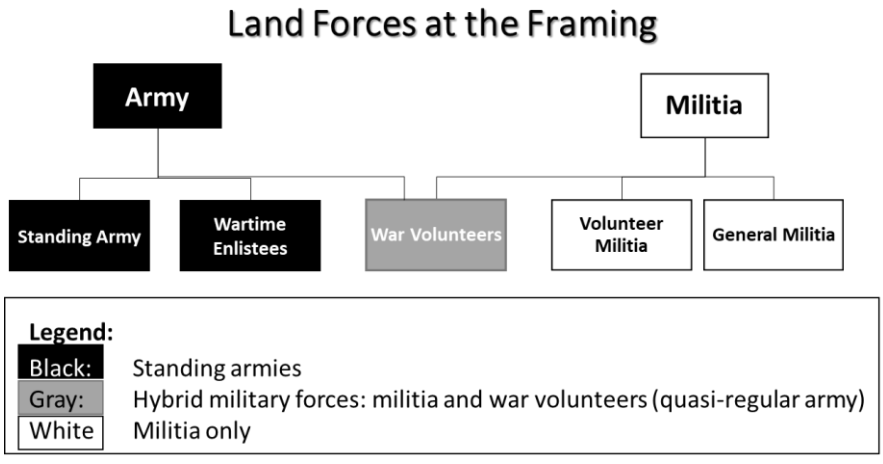
199. *Compare id.* art. I, § 8, cl. 12 (granting Congress the power to raise armies), *with* cl. 15 (calling forth the militia).

200. *See* 1 DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801, at 248–50 (1997); Leider, *supra* note 19, at 1055–56 (recounting debate).

201. 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). I have previously expressed doubts that the Army Power clearly liquidated to permit the volunteers. Leider, *supra* note 19, at 1055–56. Viewed *de novo*, I believe that the volunteers probably should have been classified as part of the militia because the volunteers remained ordinary citizens until the President called them out during wartime emergencies. *See id.* at 1053–54; 1 TUCKER, *supra* note 63, at 274–75.

202. *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).

203. MAHON, *supra* note 23, at 5, 32.



By the eighteenth century, both Britain and the American colonies maintained a layered defense system using armies and militia. Professional soldiers were used for fighting abroad 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.[204] At its broadest, Britain and the colonies could call forth the general militia—their entire military manpower—during rare emergencies that required full military exertion. Otherwise, the general militia received little or no training in peacetime.[205]

III. THE SUPPOSED COLLAPSE OF THE MILITIA

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

If the professionalism distinction between armies and militia was so well-known at the Framing, why is it lost today? The answer to this question lies in federal efforts to bypass the states when raising wartime military forces.

Three policies contributed to the view that the militia, as an institution, no longer exists. First, after the War of 1812, the United States abandoned attempts to impose universal militia service. A volunteer select militia system arose in its place. Second, in the early

204. *See* Leider, *supra* note 19, at 1051–52.

205. *See* JAMES T. CURRIE & RICHARD B. CROSSLAND, TWICE THE CITIZEN: A HISTORY OF THE UNITED STATES ARMY RESERVE, 1908–1995, at 2 (2d ed. 2018) (describing that the American colonies generally relied on volunteers while leaving the general militia "exempt from the militia call except under the most dire circumstances").

1900s, the federal government used its constitutional power to "raise and support Armies" to centralize control over part-time soldiers.[206] These part-time Army troops, which now include all National Guardsmen, have not been made subject to the constitutional limitations on calling forth the militia. Third, the federal government began conscripting soldiers directly into the national army, bypassing the state-based militia system. The federal government may now involuntarily call all citizens capable of bearing arms directly into federal military service, again without obeying the constitutional limitations on calling forth the militia. These developments profoundly altered the constitutional relationship of the federal government to the military.

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

After the Constitution was ratified, Congress tried to create a universal militia with the Militia Act of 1792.[207] That act required all free white citizens between eighteen and forty-five to enroll in the militia.[208] While the act delineated some practices like requiring militiamen to keep weapons, the act left the training of the militia to the states.[209]

The Militia Act failed to provide for a capable military force. Congress never appropriated adequate funds for the militia, and the Militia Act "was virtually ignored for more than a century."[210] With little money, poor training, and bad leadership, the militia performed poorly in the War of 1812.[211] Over the ensuing decades, the universal militia system (to the extent it ever really existed) largely died.[212] The failure of the early universal militia system had two enduring consequences: (1) increased federal reliance on the professional army; and (2) the rise, in the states, of volunteer militia units that contained a narrow and unrepresentative subset of the military-aged population.

First, the federal government increasingly relied on the regular army instead of the militia both for domestic peacekeeping and

206. U.S. CONST. art. I, § 8, cl. 12.

207. The Militia Act of 1792 comprises two separate laws. *See* Act of May 8, 1792, ch. 33, 1 Stat. 271 (repealed 1903) (organizing the militia); Act of May 2, 1792, ch. 28, 1 Stat. 264 (repealed 1795) (giving the president authority to call forth the militia); *see also* Militia Act of 1795, ch. 36, 1 Stat. 424 (repealed 1903); Militia Act of 1862, ch. 201, § 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 (repealed 1903).

209. *Id.*

210. Perpich v. Dep't of Def., 496 U.S. 334, 341 (1990).

211. Frederick B. Wiener, *Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 188–91 (1940); MAHON, *supra* note 23, at 81–82.

212. *See* sources cited *supra* note 211.

national defense. When Congress first comprehensively addressed the use of the military for domestic purposes in 1792, Congress, pursuant to its explicit constitutional authority,[213] had authorized use of the militia to suppress insurrections, repel invasions, and, in some cases, to enforce the laws.[214] In 1807, however, Congress passed the Insurrection Act, which authorized the president to use the regular army or navy for domestic peacekeeping.[215] Unlike with the militia, the Constitution was silent on domestic use of the professional military—perhaps reflecting the Framers' lack of consensus on such a touchy subject.[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 local defensive duties.[218]

Second, as the active universal militia system declined, volunteer uniformed militia units filled the void.[219] These units "functioned like other fraternal societies" with exclusive memberships, bylaws, and social activities.[220] This exclusivity undercut one of the core traits of the traditional militia, a military body that was broadly representative of the civilian community.[221]

The volunteer militia units fought in many nineteenth-century conflicts with mixed results.[222] Most Union troops during the Civil War belonged to volunteer state units.[223] Although volunteer state

---

213. U.S. CONST. art. I, § 8, cl. 15.

214. Act of May 2, 1792, ch. 28, 1 Stat. 264 (repealed 1795); *see also* Militia Act of 1795, ch. 36, 1 Stat. 424 (repealed 1903) (superseding the 1792 Act but granting a similar authority to the President).

215. Insurrection Act of 1807, ch. 39, 2 Stat. 443 (current version at 10 U.S.C. §§ 251–55).

216. 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.

217. WEIGLEY, *supra* note 73, at 158–61.

218. *See* COOPER, *supra* note 73, at 13–14.

219. *Id.* at 15.

220. *Id.* at 16.

221. *Id.* at 15–16.

222. Robert Reinders, *Militia and Public Order in Nineteenth-Century America*, 11 J. AM. STUD. 81, 89–92 (1977). This paragraph meshes the different volunteers together. For a more fine-grained description of different kind of volunteer forces, see 1 GIAN GENTILE ET AL., THE EVOLUTION OF U.S. MILITARY POLICY FROM THE CONSTITUTION TO THE PRESENT 31–32, (RAND 2019), https://www.rand.org/pubs/tools/TL238/tool.html.

223. WEIGLEY, *supra* note 73, 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 23, at 105–06 ("[T]he regiments and brigades on the Union side proudly bore state designations throughout the war."). *But see*

units largely disappeared after the Civil War,[224] they returned following the 1877 labor disputes, often under the name "National Guard."[225] 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.[226]

The National Guard's failures in the Spanish-American War showed the inadequacies of the militia's archaic organization.[227] Legally, the Militia Act of 1792 remained the principal federal law governing the militia.[228] By the turn of the twentieth century, the law was in desuetude.[229] The provision to arm the militia with muskets and firelocks[230] was obsolete, as was the provision for universal enrollment.[231] For nearly a century, the states replaced a universally trained militia with organized volunteer units.[232] When the federal army needed rapid expansion in wartime, organized militia units often volunteered for federal army duty.[233] But with no federal training standards, the volunteer militia units had uneven organization, leadership, training, and capabilities,[234] leading to poor combat performance.[235]

Under President Theodore Roosevelt's prodding, Congress reorganized the militia.[236] In 1903, Congress legally separated the militia into an organized militia known as the National Guard and an untrained reserve militia,[237] which had been the de facto militia organization for decades.[238] Congress then exchanged federal appropriations for federal control.[239] Congress appropriated money

---

COOPER, *supra* note 73, at 20 ("The development of the uniformed militia during the preceding two decades contributed only minimally to the Civil War mobilization.").

224. COOPER, *supra* note 73, at 23–24.

225. *Id.* at 44.

226. *Id.* at 108.

227. WEIGLEY, *supra* note 73, at 313.

228. MAHON, *supra* note 23, at 138.

229. *Id.*

230. Act of May 8, 1792, ch. 33, 1 Stat. 271 (repealed 1903).

231. *See* UVILLER & MERKEL, *supra* note 27, at 125–32.

232. *Id.*

233. COOPER, *supra* note 73, at 18–19 (Mexican War), 104 (Spanish-American War); MAHON, *supra* note 23, at 90–91 (Mexican War), 132 (Philippines). *See generally* 1 GIAN GENTILE ET AL., *supra* note 222, at 19–50 (explaining how forces were raised during each major military conflict).

234. COOPER, *supra* note 73, at 96–98, 104; MAHON, *supra* note 23, at 128–29; COOPER, at 17–19 (describing antebellum volunteer companies).

235. *Id.*

236. WEIGLEY, *supra* note 73, at 441.

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

238. WEIGLEY, *supra* note 73, at 321; COOPER, *supra* note 73, at 14–37.

239. RAPHAEL S. COHEN, DEMYSTIFYING THE CITIZEN SOLDIER 18–19 (2015) (ebook).

and arms for organized militia units.[240] In exchange, Congress set federal standards for training and demanded federal oversight over the organized militia.[241] This reorganization helped remedy the incompetence that plagued National Guard officers and soldiers.[242] 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.[243] As explained below, heavy federal assistance for the National Guard has effectively crowded out the ability of states to maintain robust organized militia units outside the National Guard system.[244]

2. Congress Evades the Constitutional Limits 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.[245] The Constitution authorized the federal government to use the militia as a home defense force—to enforce the laws, suppress insurrections, and repel invasions.[246] 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.[247] With support from the National Guard Association (the National Guardsmen's lobbying organization), Congress sought to authorize the National Guard for military conflicts abroad, notwithstanding the constitutional limits on federal use of the militia.[248]

Congress's initial attempt ran into difficulty. In 1908, Congress authorized the militia to conduct operations outside the United States.[249] 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

240. *Id.*

241. Militia Act of 1903 (Dick Act), § 19, 32 Stat. 778.

242. COOPER, *supra* note 73, at 128–43.

243. John G. Kester, *State Governors and the Federal National Guard*, 11 HARV. J.L. & PUB. POL'Y 177, 202 (1988).

244. *See infra* notes 275–76 and accompanying text. There have been occasional exceptions, most notably during World War II when much of the National Guard was mobilized abroad.

245. 2 GIAN GENTILE ET AL., THE EVOLUTION OF U.S. MILITARY POLICY FROM THE CONSTITUTION TO THE PRESENT 25–60 (2019) (ebook).

246. Militia Act of 1908, ch. 204, § 4, 35 Stat. 399, 400.

247. COOPER, *supra* note 73, at 108–09; MAHON, *supra* note 23, at 138–39.

248. MAHON, *supra* note 23, at 139.

249. Militia Act of 1908, ch. 204, § 4, 35 Stat. 399, 400.

Insurrections and repel Invasions."[250] 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.

Around the time Congress reorganized the militia, it developed a purely federal reserve force without these limitations—what ultimately became the U.S. Army Reserve.[251] Congress initially created a reserve component so that the Army would have medical officers in wartime.[252] But Congress soon expanded the reserves with former regular soldiers.[253] Then, in 1916 (just before the United States entered World War I), Congress created a "Regular Army Reserve" and the "Reserve Officers Training Corps" to provide the foundation for expanding the army in wartime.[254]

Following World War I, Congress provided a new structure for the United States Army, which largely remains intact to this day.[255] Congress continued the reserve forces after the war; for the first time, the federal Army had its own permanent reserve of part-time soldiers,[256] which eventually became the U.S. Army Reserve.[257] Unlike the militia, the law established that the federal organized reserve corps were purely federal forces.[258] The law also deemed "the National Guard while in the service of the United States" to be part of the Army.[259]

While Congress created a purely federal army reserve, the National Guard Association continued to lobby for the National Guard to have the role as the primary federal reserve force.[260] The principal obstacles were the constitutional limitations on the use of the militia. Between 1910 and 1933, Congress purported to solve that problem by consolidating the militia into the federal army.[261] The

---

250. U.S. CONST. art. I, § 8, cl. 15; Auth. Of President to Send Militia into a Foreign Country, 29 Op. Att'ys Gen. 322 (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 23, at 143.

251. Act of Apr. 23, 1908, ch. 150, 35 Stat. 66; CURRIE & CROSSLAND, *supra* note 205, at 14.

252. CURRIE & CROSSLAND, *supra* note 205, at 17.

253. *Id.* at 23.

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

255. CURRIE & CROSSLAND, *supra* note 205, at 34.

256. National Defense Act of 1920, Pub. L. No. 66–242, 41 Stat. 759.

257. Armed Forces Reserve Act of 1952, Pub. L. No. 82-476, § 201, 66 Stat. 481–83.

258. National Defense Act of 1920, Pub. L. No. 66–242, § 55a, 41 Stat. 780.

259. *Id.* § 1.

260. MAHON, *supra* note 23, at 147.

261. Even as Congress began employing its Army Power to reform the National Guard, there were contemporaneous concerns that Congress had

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.[262] Two years later, the National Defense Act of 1916 authorized the president to draft National Guardsmen, as individuals, into the federal army.[263] But drafting soldiers as individuals had the disadvantage of breaking apart militia units.[264]

So, in 1933, Congress simultaneously made the National Guard an organized militia and a federal reserve force through a system of dual enlistment.[265] The "National Guard" became two different organizations with coextensive membership. The first organization was the "National Guard [of a state]," which continued as the organized militia of the state.[266] The second organization, known as the "National Guard of the United States," was a component of the U.S. Army Reserve.[267] National Guard officers, thus, received two 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 component).[268] Enlisted personnel also joined both organizations.[269] The 1933 Act 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.[270]

By deputizing all organized militiamen as army soldiers, Congress claimed it could exercise its plenary constitutional Army Power over the entire organized militia.[271] 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 upon National Guard units in their capacity as units of the "National Guard of the United States," a federal reserve force.[272] For Frederick Wiener, dual enlistment

---

exceeded its authority. *See, e.g.*, S.T. Ansell, *Legal and Historical Aspects of the Militia*, 26 YALE L.J. 471, 480 (1917) ("The act is prickly with doubt . . . .").

262. Act of April 25, 1914, ch. 71, § 3, 38 Stat. 347. The Act also provided that militia officers would retain the same rank in the volunteer army. *Id.*

263. National Defense Act of 1916, Pub. L. No. 64–85, § 111, 39 Stat. 166, 211.

264. Perpich v. Dep't of Def., 496 U.S. 334, 345 (1990).

265. National Guard Act of 1933, Pub. L. No. 73–64, ch. 87, § 1, 48 Stat. 153.

266. *Id.* §§ 58, 72–73.

267. *Id.* § 58.

268. *Id.* § 73.

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

270. *See* Kester, *supra* note 243, at 202.

271. *See id.* at 181, 185–87.

272. *See id.* 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

"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."[273]

With little analysis, the Supreme Court effectively approved the constitutionality of dual enlistment in *Perpich v. Department of Defense*.[274] 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. The Constitution provides that the states, not the federal government, are to conduct the training of the militia.[275] But the Court upheld the federal government's power to order training of the National Guard abroad.[276] The Court held that the Militia Clauses did not apply because the Guardsmen were training as members of the U.S. Army Reserve.[277] The Court also denied that its decision nullified the reserved powers of the states under the Militia Clauses.[278] Among other things, the Court noted that federal law authorized states to create defense forces that could not be called into the federal Armed Forces.[279] The defense force provision, the Court explained, vindicated whatever "constitutional entitlement" a state had "to a separate militia of its own."[280] Traditional principles of cooperative federalism won the day. If states wanted federal aid for their militia units, they had to abide by the requirement that their organized militia enroll in the federal army. Or the states could go it alone and organize a militia with no federal assistance.

Thus, the traditional legal separation of the militia from the regular army has been impaired by the creation of federal military reserve forces and the dual-enlistment system in which members of the organized militia simultaneously entered federal military service. Today, the federal government provides nearly all funding and support for the National Guard system; in exchange, the states have consented to the federal government's use of the organized militia as a federal reserve force.[281] States, in contrast, lack the ability and money to provide a separate militia system that adheres to the original constitutional limits on federal power over the militia. The

---

Army for purposes other than the three narrow instances that the Constitution listed as bases for calling the militia into federal service.").

273. Wiener, *supra* note 211, at 209.

274. 496 U.S. 334, 345 (1990).

275. U.S. CONST. art. I, § 8, cl. 16. Congress may provide for the training regimen. *Id.*

276. *Perpich*, 496 U.S. at 348, 350.

277. *Id.* at 347–48.

278. *Id.* at 351.

279. *Id.* at 352.

280. *Id.*

281. *Id.* at 351.

result is complete federal domination over the organized militia system. Through its constitutional Army Power, the federal government exercises plenary authority over all organized part-time citizen-soldiers.

3. Conscription

In addition to dual enlistment, the Progressive Era saw another innovation that transformed army-militia relations: an effective system of conscription into the army. Much like dual enlistment, conscription has destroyed the legal separation between the militia and the regular army. Conscription directly into the national army has given the federal government access to the body of the militia without obeying the constitutional limitations on calling forth the militia.

Until the Civil War, the federal government only raised armies through voluntary enlistments.[282] When the Army needed to expand in wartime, it sought volunteers to serve for the duration of the campaign.[283] In the rare circumstances when the federal government needed more military power than the volunteers could provide, such as during the War of 1812, it called forth the militia.[284]

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.[285] But the act was vigorously resisted, resulting in draft riots and court challenges.[286] Moreover, draftees could evade service by hiring a substitute or paying $300.[287] Ultimately, only 6% of Union soldiers comprised conscripts.[288] Most Union soldiers were still attached to volunteer state-based army units.[289]

---

282. William G. Carleton, *Raising Armies Before the Civil War*, 54 CURRENT HIST. 327, 327 (1968).

283. *See id.* at 327–28. 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* CURRIE & CROSSLAND, *supra* note 205, at 157–58; Arver v. United States (*Selective Draft Law Cases*), 245 U.S. 366, 385 (1918).

284. Carleton, *supra* note 282, at 328. Small numbers of militia were used in other conflicts, including the Mexican War. *Id.*

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

286. *See* LESLIE M. HARRIS, IN THE SHADOW OF SLAVERY: AFRICAN AMERICANS IN NEW YORK CITY, 1626–1863, at 279–85 (2003); MAHON, *supra* note 23, at 103. *See generally* Kneedler v. Lane, 45 Pa. 238 (1863).

287. An Act for Enrolling and Calling Out the National Forces, and for Other Purposes, ch. 75, § 13, 12 Stat. 731, 733 (1863).

288. WEIGLEY, *supra* note 73, at 357.

289. *See supra* note 216 and accompanying text.

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).[290] Unlike the Civil War Enrollment Act, draftees could no longer hire a substitute or buy their way out of service.[291] The World War I draft was successful, supplying about two-thirds of the Army's manpower.[292] Although tweaking the system at the margins, Congress followed the Selective Service System approach during World War II, Korea, and Vietnam.[293] The architecture of the system remains in place today, even without a draft being authorized or foreseeable in the near future.[294] 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.[295] 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.[296] In the Court's view, the militia power created a soft-power check against the full exercise of the federal Army Power.[297] 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.[298] 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."[299] But the Court refused to construe the Army Clause in light of the limitations on federal power contained in the Militia Clauses.[300] The Court's decision in the *Selective Draft Law Cases*,

290. 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).

291. *Id.* § 3.

292. WEIGLEY, *supra* note 73, at 357.

293. *See* KRISTY N. KAMARCK, CONG. RSCH. SERV., R44452, THE SELECTIVE SERVICE SYSTEM AND DRAFT REGISTRATION 4–5, 8, 10 (2021).

294. 50 U.S.C. §§ 3801–3820.

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

296. *Id.* at 382.

297. *Id.* at 383.

298. *Id.*

299. *Id.*

300. *Id.* at 384.

combined with broad dicta in some nineteenth- and twentieth-century decisions and inaction against a peacetime draft, has led to the modern view that Congress possesses plenary authority to conscript military manpower into the federal army.[301]

The recognition of Congress's plenary power to draft all able-bodied citizens into the Army 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.[302] The Constitution provided Congress the power to call forth the entire militia, if necessary, to execute the laws, suppress insurrections, and repel invasions.[303] But by using a draft into the Army, Congress assumed 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.[304] Congress does not have to allow states to select the officers.[305] 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.[306] Recognizing that Congress may conscript into the Army, thus, has diminished the practical importance of Congress's power to call forth the militia.

B. Academic and Doctrinal Consequences of Failing to Recognize the Modern Militia System

The circumvention of the constitutional limitations on the militia by consolidating the militia into the federal military system has led us astray in three ways. First, it fostered the erroneous belief that the militia, as an institution, no longer exists in any recognizable form. Second, many also believe that the Framing-era distinctions between standing armies and the militia are largely irrelevant to the modern structure of the Armed Forces. Third, many scholars and judges contend that the right to bear arms recognized by the Second Amendment no longer has any relevance to the maintenance of a well-regulated militia. All three claims are wrong. This Part will focus on

---

301. *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." (internal quotation marks omitted)); Holmes v. United States, 391 U.S. 936, 941–45 (1968) (mem.) (Douglas, J., dissenting).

302. 10 U.S.C. § 246.

303. U.S. CONST. art. I, § 8.

304. *See Arver*, 245 U.S. at 386–88.

305. *See, e.g.*, An Act to Authorize the President to Increase Temporarily the Military Establishment of the United States, Pub. L. No. 65-12, 40 Stat. 76, 76 (1917) (World War I draft).

306. *Id.*

the first claim—that the militia no longer exists as an institution—while briefly explaining its effect on the other two.[307]

1. Facilitating False Beliefs About the Obsolescence of the Militia as an Institution

The prevailing view is that the militia—as it was 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 has disappeared.[309] The modern National Guard is primarily under federal authority for training, command, arming, and deployment.[310] As a result, they contend the National Guard is now "part of the standing army rather than an alternative to it."[311]

Similar statements abound. Keith Ehrman and Dennis Henigan argue that the modern National Guard system 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."[312] Akhil Amar observes that "the semi-professional National Guard is not a general militia."[313] 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 the federal government controls its weapons and supplies."[314]

Proponents of these views usually make one of two claims. For some, calling the "National Guard" an organized militia in the law is a misnomer; the National Guard is just another component of the army.[315] A second, weaker version is that even if the National Guard is a militia in some sense, its attributes are critically different from

307. Two future articles will analyze the second and third claims, respectively, in more depth.

308. UVILLER & MERKEL, *supra* note 27, at 157.

309. *Id.*

310. *Id.*

311. *Id.*

312. Ehrman & Henigan, *supra* note 26, at 37–38.

313. Akhil R. Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889, 895.

314. State v. Misch, 256 A.3d 519, 532 (Vt. 2021).

315. *See, e.g.*, 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) ("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.").

the Framers' institution. This is the view of Carl Bogus, who claims that "the militia is indisputably the National Guard[,]" even if "it differs from an eighteenth-century model" of the militia.[316] To evaluate these claims, we first need to understand how to define the "militia."

Yet, these scholars' attempts to define the "militia" leave much to be desired. Good definitions provide the necessary and sufficient properties for the correct application of terms. Many attempts to define the American "militia" in legal literature fail this task. 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.[317] 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 defining through description 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 National Guard 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?

Judges have fared no better in their attempts to define "militia." 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 result is underinclusive: under Judge Reinhardt's definition, a state military force that included women would not be a "militia."[320] It is also overinclusive: the definition leaves us unable to distinguish between a state militia, a state army, and a state navy.[321]

---

316. Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3, 16 (2000).

317. UVILLER & MERKEL, *supra* note 27, at 157.

318. H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 CHI.-KENT L. REV. 403, 511 (2000).

319. 312 F.3d 1052, 1071 (9th Cir. 2003).

320. *Id.*

321. This is significant because the Constitution governs these forces differently: Article I, Section 8 gave states control over militia forces, while

In contrast to these attempted historical definitions of militia, others claim that the modern militia is the National Guard. Carl Bogus reaches this conclusion because, according to him, "'militia' is defined in the Constitution itself" as "what Congress decides it is,"[322] and Congress has decided that the modern militia is the National Guard.[323] Some federal court decisions also identify the National Guard as the modern militia.[324] These claims are wrong. The Constitution provides Congress with the power to *organize* the militia, not to create it.[325] Much like the jury mentioned in Article III and the Sixth Amendment,[326] the militia is a body with a preexisting common-law heritage.[327] 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—such an action would pervert the jury trial right.[328] Likewise, the Constitution implies limits on Congress's power to define the militia.

2. Doctrinal Consequences for Federal Military Power, Military Criminal Law, and the Second Amendment

Doctrinally, the failure to understand the distinction between the militia and the armies has badly warped military law. Courts allow Congress to treat the Army and the Militia Clauses as separate grants of power-conferring rules.[329] Congress may selectively invoke either or both its army and militia powers over the same forces—whichever power provides the federal government with the broadest authority possible at that moment. A 2003 Amendment provides even

---

Article I, Section 10 prohibited them from "keep[ing] Troops, or Ships of War in time of Peace." *Compare* U.S. CONST. art. I, § 8, cl. 12–16 *with* U.S. CONST. art. I, § 10, cl. 3.

322. Bogus, *supra* note 316, at 15–16. 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).

323. Bogus, *supra* note 316, at 16.

324. Gilligan v. Morgan, 413 U.S. 1, 6 (1973); *infra* note 357.

325. District of Columbia v. Heller, 554 U.S. 570, 596 (2008).

326. U.S. CONST. art. III, § 2, cl. 3; *see also id.* amend. VI.

327. *Heller*, 554 U.S. at 596; Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders*, 4 TEX. REV. L. & POL'Y 157, 166 (1999) ("The Constitution does not define the term 'militia.' Article I, however, assumed the militia's existence . . . .").

328. *See* Taylor v. Louisiana, 419 U.S. 522, 528 (1975) (recognizing that "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to trial by jury").

329. *See, e.g.*, Perpich v. Dep't of Def., 496 U.S. 334, 336–45 (1990).

more flexibility, allowing National Guard officers to serve as both part of the militia and the army at the same time.[330]

So, while the Constitution originally divided the military power over the armies and militia between the federal and state governments, 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,[331] 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,[332] it does not apply to the militia in a state status. The federal government can use the National Guard in their capacity as state guard units.[333] 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 federal training.[334] Thus, enlisted National Guardsmen attend federal basic training,[335] as do many officers,[336] even though the Constitution expressly reserves militia training to the states.[337] Want the states 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.[338] Want the federal government to be able to fire state-

330. National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 516 (2), 117 Stat. 1391, 1461 (2003).

331. U.S. CONST. art. I, § 8, cl. 15.

332. 18 U.S.C. § 1385.

333. 32 U.S.C. § 502(f); *see* Kevin Winnie, *The National Guard in Title 32 Status: How the Executive's Power Becomes a City's Crisis*, 48 FORDHAM URB. L.J. 1287, 1301–04 (2021).

334. 32 U.S.C. § 501.

335. *Basic Combat Training*, ARMY NAT'L 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 Nov. 9, 2021).

336. *Ohio Army National Guard Commissioned Officer / Warrant Officer Programs*, OHIO ARMY NAT'L GUARD, https://ong.ohio.gov/join-the-guard/ong-officer-training-information.pdf (last visited Nov. 9, 2021) (explaining state and federal officer candidate school training options).

337. U.S. CONST. art. I, § 8, cl. 16.

338. 32 U.S.C. §§ 323–324.

appointed militia officers? Require states to dismiss officers who lose their federal recognition.[339]

As these examples show, the failure to understand the distinction between armies and militia has made a hash out of the Constitution's Militia Clauses. Legally, this has led to several doctrinal difficulties. Three such challenges that have befuddled the courts deserve elaboration.

First, the distinction between armies and militia 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. If a state organizes a peacetime military land force on its own authority, classifying the force as "army" or "militia" is necessary to determine whether the state has acted constitutionally.[340]

On this, the Supreme Court's doctrine is muddled. The Supreme Court's narrow *Perpich* opinion avoided difficult questions about whether Congress could prohibit states from having organized military forces other than the National Guard.[341] 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.[342] 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.[343] 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 at all.[344] Ultimately, the Supreme Court relied on the federal law authorizing state defense forces to evade the issue,[345] betraying that the Justices never reached a consensus about the states' reserved power to organize military forces.

---

339. 32 U.S.C. § 324(a)(2); *see also id.* § 323 (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).

340. Dunne v. People, 94 Ill. 120, 124, 141 (1879).

341. *See generally* Perpich v. Dep't of Def., 496 U.S. 334 (1990).

342. Transcript of Oral Argument at 29–31, 37–38, Perpich v. Dep't of Def., 496 U.S. 334 (1990) (No. 89-542).

343. *Id.* at 7–8, 17–19.

344. *Id.* at 31–32.

345. *Perpich*, 496 U.S. at 352.

Second, 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.[346] 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.[347]

Because of dual enlistment and conscription, this doctrinal area remains uncertain. The Fifth Amendment authorizes the application of military law to the "land and naval forces" in all circumstances, but to the militia only when in active service in wartime.[348] 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 vitiate the Fifth Amendment's protection of the militia when not in active service.

Third, the inability to properly define the militia or understand its contemporary relevance has made a mess of Second Amendment jurisprudence. In *Heller*, Justice Scalia offered no coherent picture of the contemporary militia or its relevance, and as a result, he struggled to explain the fit between an individual right to keep and bear arms and the maintenance of a well-regulated militia.[349] Justice Scalia defined the militia to include "all able-bodied men."[350] Later, in dicta, he explained that "dangerous and unusual weapons," including modern military rifles such as the M-16, may be banned from civilian possession.[351] But, as he recognized, this interpretation detached the right from the Second Amendment's stated purpose, to provide for a well-regulated militia.[352] Justice Scalia never resolved

346. Larrabee v. Del Toro, 45 F.4d 81, 83–85 (D.C. Cir. 2022); *see also* United States v. Begani, 81 M.J. 273, 275 (C.A.A.F. 2021) (similar).

347. *See Begani*, 81 M.J. at 281 (overturning determination that military criminal jurisdiction over active-duty retirees but not reserve retirees violates the Fifth Amendment's equal protection component).

348. U.S. CONST. amend. V, § 8.

349. *See* District of Columbia v. Heller, 554 U.S. 570, 599, 607, 620, 622 (2008).

350. *Id.* at 596.

351. *Id.* at 627.

352. *Id.*

the conflict, simply chalking it up to "modern developments."[353] The result has been to reorient the right to keep and bear arms around individual self-defense against crime, disregarding its purpose to preserve the militia.

State courts have taken a similar approach. Many states have evaluated the constitutionality of bans on automatic weapons, semiautomatic weapons designated as assault weapons, and ammunition magazines that hold more than 10 or 15 rounds under state constitutional provisions that guarantee the right to bear arms, at least in part, for the common defense or defense of the state.[354] These provisions are not applied today. In 1931, the Michigan Supreme Court held 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.[355] Although the Michigan Constitution stated, "[e]very person has a right to bear arms for the defense of himself and the state,"[356] the court explained that the 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."[357] The Vermont Supreme Court, in upholding the state's ban on large capacity magazines, declared that "the right to bear arms for the defense of the State is essentially obsolete."[358] Most state courts have not been this explicit; they simply ignore that part of their state constitutional right to bear arms, analyzing the right as if it only had relevance for individual self-defense.[359]

Justice Stevens's alternative understanding of the Second Amendment, expressed in his dissents in *Heller* and *McDonald*, demonstrated that he, too, could not settle on any understanding of the militia as an institution.[360] His opinions consistently equivocated on whether the militia was a *nonprofessional force*, in contrast to the regular standing army, or a *state force*, which counterbalanced the

353. *Id.* at 627–28.

354. *See, e.g.*, Robertson v. City & Cnty. of Denver, 874 P.2d 325, 334–35 (Colo. 1994); Rocky Mountain Gun Owners v. Polis, 467 P.3d 314, 331 (Colo. 2020).

355. People v. Brown, 235 N.W. 245, 246 (Mich. 1931).

356. MICH. CONST. art. I, § 6.

357. *Brown*, 235 N.W. at 246.

358. State v. Misch, 256 A.3d 519, 527 (Vt. 2021).

359. *See, e.g.*, *Robertson*, 874 P.2d at 332–33; Benjamin v. Bailey, 662 A.2d 1226, 1232–33 (Conn. 1995); Arnold v. City of Cleveland, 616 N.E.2d 163, 173 (Ohio 1993); *see also Rocky Mountain Gun Owners*, 467 P.3d at 318 n.3 (claiming that plaintiffs failed to preserve an argument that Colorado's magazine restriction violated the right to bear arms "in aid of the civil power when thereto legally summoned").

360. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 637–38 (2008) (Stevens, J., dissenting); McDonald v. City of Chicago, 561 U.S. 742, 911 (2010) (Stevens, J., dissenting).

federal army.[361] Justice Stevens selectively employed these two conceptions, sometimes relying on both in the same opinion.[362] Nor did Justice Stevens coherently explain why the Framers preferred a militia system. He alternatively claimed that the Framers' objected to standing armies because regular forces threatened individual liberty and because federal forces threatened the sovereignty of the states.[363]

The end result is that militia-related legal doctrine is somewhere between unclear and contradictory. The same courts define the "militia" to be all people capable of bearing arms in a Second Amendment case,[364] only to turn around and call it the National Guard in a military case.[365] The Militia Clauses have largely fallen into desuetude, and they receive little attention today.[366] With the

---

361. *Compare* Perpich v. Dep't of Def., 496 U.S. 334, 348 (1990) (defining militia as "a part-time, nonprofessional fighting force"), *with id.* at 349–50 (distinguishing on federalism grounds the National Guard's federal service as part of the United States Army from its "status as a state militia"). *See also Heller*, 554 U.S. at 653–54 (Stevens, J., dissenting) (equivocating on whether the Framers' fears of a federal army were geared to the national character of the army or the fact that the Constitution authorized a *standing* army (one that continued existing in peacetime)); *McDonald*, 561 U.S. at 897 (Stevens, J., dissenting) (treating the Second Amendment as a "federalism provision" designed to protect the militia *qua* state institution and adopted on the "immediate behalf" of state governments).

362. *See supra* note 361 and accompanying text.

363. *Compare Heller*, 554 U.S. at 645 (Stevens, J., dissenting) (claiming that "the ultimate purpose of the [Second] Amendment was to protect the States' share of the divided sovereignty created by the Constitution"), *with id.* at 653 (recognizing that a standing army threatened both "individual liberty" and "the sovereignty of the separate States"). Justice Stevens's final opinion on the subject, his dissent in *McDonald v. City of Chicago*, wholeheartedly subscribed to the state army theory of the militia, contending that the Second Amendment's right to bear arms "is a federalism provision . . . directed at preserving the autonomy of the sovereign states." *McDonald*, 561 U.S. at 897 (Stevens, J., dissenting) (internal quotation marks omitted). This is a world apart from his first definition of the militia in *Perpich* as "a part-time nonprofessional fighting force." *Perpich*, 496 U.S. at 348.

364. *See* United States v. Emerson, 270 F.3d 203, 234–235 (5th Cir. 2001); Parker v. District of Columbia, 478 F.3d 370, 394 (D.C. Cir. 2007).

365. *See* Ass'n of Civilian Technicians 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.").

366. 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. Benjamin Daus, Note, *The Militia Clauses and the Original War Powers*, 11 J. NAT'L. SEC. L. & POL'Y 489, 490 n.2 (2021); *see, e.g.*, Vladeck, *supra* note 16, at 1091–92.

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 academics and judges 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.

As a result, many now confuse 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.[367] The next Part of this Article will argue that we maintain a vibrant militia system, one that heavily resembles traditional Anglo-American practice in many important respects.

IV. TRANSLATING THE FRAMERS' SYSTEM TO THE MODERN ARMED FORCES OF THE UNITED STATES

This Part fits the modern structure of the Armed Forces into the Framers' traditional distinction between armies and militia. Borrowing from Lawrence Lessig, the metaphor here is translation, through which a person "determine[s] how to change one text into another text, while preserving the original text's meaning."[368] Good translations are not hyper-literal.[369] Instead, a translation requires some judgment from the translator. The translator must capture, in new language, a statement equivalent to the idea being translated, taking account of the context in which the statement was made.[370]

In providing this translation, this Article's goal is to engage in something like "*cy-pres* originalism." When examining what constitutes the "armies" or "militia" today, this Article looks to find something "'as near as possible' to the declared object."[371] Although the federal government now controls virtually all aspects of military service, this Article's goal is to provide the best approximation of the modern "armies" and "militia," without succumbing to the nihilism of

367. 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 27, at 157–58.

368. Lessig, *supra* note 18, at 1173.

369. *Id.* at 1196.

370. *Id.* at 1191–92, 1196.

371. Frances Howell Rudko, *The* Cy-Pres *Doctrine in the United States: From Extreme Reluctance to Affirmative Action*, 46 CLEV. ST. L. REV. 471, 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*." Lessig, *supra* note 18, at 1172–73 n.32 (citing Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 310–11 (1989)).

many who have tried before.[372] As during the Framing generation, the United States has different kinds of land forces, varying in their degree of professionalism.[373] Because sufficient continuities from Framing-era military practice to modern-day practice exist, a close translation is feasible.

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 statutory organizational framework, however, does not affect the constitutional character of the forces.

A note of caution: This Article does not aim to defend the original constitutional validity of all the particulars of the modern system. For originalists, it offers only a *cy-pres* or second-best originalist perspective. The federal government's successful evasion of certain legal limitations on the militia (e.g., the Constitution's requirements that state governments conduct the training and appoint the 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 nonprofessional citizen-armies and regular forces—have lost their practical significance.

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

There has been unfortunate confusion about how the "armies" described in the Constitution map onto the present structure of the U.S. Armed Forces. Many 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, Congress's decision to maintain an Air Force or Space Force is unconstitutional.[374] Put

372. *See* sources cited *supra* note 27.

373. WEIGLEY, *supra* note 73, at v.

374. 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*, THE ATLANTIC (Oct. 25, 2020), https://www.theatlantic.com/ideas/archive/2020/10/originalism-barrett/616844/; Don Herzog, *A Ritual Stupidity*, LEFT2RIGHT (Oct. 3, 2005), https://left2right.typepad.com/main/2005/10/a_ritual_stupid.html (contending the Air Force is unconstitutional under originalist principles); Scott Bomboy, *The Space Force and the Constitution*, NAT'L CONST. CTR. (Aug. 22, 2018), https://constitutioncenter.org/blog/the-space-force-and-the-constitution; Michael Dorf, *Originalists in Space*, DORF ON L. (Aug. 15, 2018, 7:00 AM), 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 18, at 1203–04 (discussing the issue).

differently, these critics suggest that the only army contemplated by the Constitution is the modern military service labeled the "U.S. Army." Along with others,[375] I believe that this is a serious misreading of the Constitution.

By federal law, the "Army" now consists of several components, including "the Regular Army, the Army National Guard of the United States, the Army National Guard while in the service of the United States and the Army Reserve."[376] The military branch that federal law labels the "Army" is both overinclusive and underinclusive of the 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."[377] As argued in Part I, 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.[378] The reserves and National Guard, however, are different. These are part-time forces, not standing forces. As explained in the next section, these forces are organized components of the militia.[379] Thus, only the regular components have any claim to being part of the "armies" referred to in the Constitution.[380]

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.

---

375. *See, e.g.*, Ilya Somin, *Originalism's Final Frontier: Is Trump's Proposed Space Force Unconstitutional?*, REASON (Aug. 15, 2018, 11:27 PM), https://reason.com/volokh/2018/08/15/originalisms-final-frontier-is-trumps-sp/ [hereinafter Somin on Space Force]; Ilya Somin, *The Air Force and the Constitution*, THE VOLOKH CONSPIRACY (Jan. 28, 2007, 7:03 PM), http://volokh.com/posts/1170032632.shtml; 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.

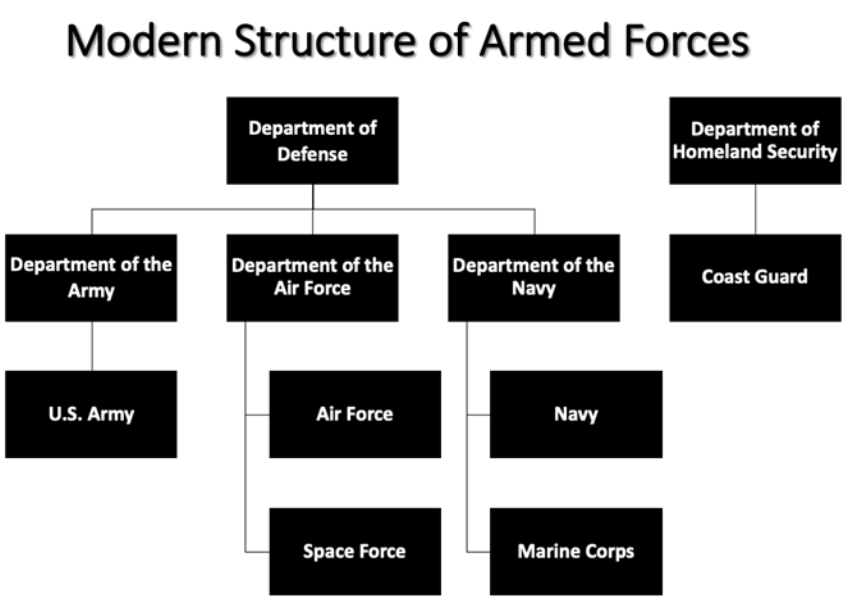
376. 10 U.S.C. § 7062(c)(1).

377. 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 19, at 1073–74.

378. *See supra* Parts I.A and I.B.

379. *See infra* Part IV.B.

380. *Id.*



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."[381] 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.[382] Nothing prevented the Army from maintaining an air component, just like the Navy has aviation.[383] Furthermore, the Constitution grants Congress the power to "raise and support *Armies*" (plural).[384] Nowhere does the Constitution require that Congress label all 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 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

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

382. *See* JEREMIAH GERTLER, CONG. RSCH. SERV., IF10547, DEFENSE PRIMER: THE UNITED STATES AIR FORCE 1–2 (2020); DOUGLAS CAMPBELL, THE WARTHOG AND THE CLOSE AIR SUPPORT DEBATE 31 (2003).

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

384. U.S. CONST. art. I, § 8.

bureaucratic department.[385] Indeed, federal law recognizes that the Air Force is part of the constitutional armies 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."[386]

This Article will not settle precisely which branches are 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.[387] 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.[388] The change in bureaucratic organization does not affect a change in substance. Finally, the active-duty Marine Corps—a branch that (at least today) principally fights on land[389]—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, the President commands, and their members are subject both to civilian and military law.[390] The Constitution's only special restriction is that appropriations for the armies cannot last longer than two years.[391] 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.[392] No such concerns were expressed against naval forces.[393] 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 much more so. Had the Framers conceived of the Air Force or Space Force, they might not have subjected them to the same constitutional limitations as the standing

385. National Security Act of 1947, Pub. L. 80-253, § 207, 61 Stat. 495, 503 (codified at 50 U.S.C. § 3004(c)).

386. 10 U.S.C. § 7001.

387. *See* National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116–92, §§ 951–61, 133 Stat. 1198, 1561–68 (2019).

388. *See* Somin on Space Force, *supra* note 375.

389. See *infra* notes 394–396 for a discussion about the evolution of the U.S. Marine Corps.

390. U.S. CONST. art. I, § 8, cl. 12–14; *id.* art. II, § 2, cl. 1; *id.* amend. V.

391. U.S. CONST. art. I, § 8, cl. 12.

392. AKHIL AMAR, THE CONSTITUTION: A BIOGRAPHY 45 (2005) ("Unlike navies, armies could be and were easily used not just to thwart invaders, but also to crush individual freedom and collective self-government.").

393. *Id.* ("A navy was a relatively defensive instrument that could not easily be turned upon Englishmen to impose domestic tyranny.").

army. As for the Marine Corps, it is a maritime land force—an almost contradiction in terms. A maritime land force straddles the paradigmatic army/navy divide. Bureaucratically, federal law organizes the Marine Corps within the Department of the Navy,[394] and federal law deems a Marine to be a "member of the naval service."[395] 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.[396]

For the most part, this question has little legal significance. It would only create a live legal question if Congress tried to appropriate money for these branches for more than two years. But Congress

394. 10 U.S.C. § 8061.

395. *Id.* § 8001(a)(2)–(3).

396. In private correspondence, Richard H. Kohn has tried to convince me that the Marine Corps is part of the navy and that the Framers understood it as such. He has been partially successful, and I have come away from our conversation believing that the constitutional status of the Marine Corps has fluctuated over time. For the Framers, the distinction between armies and the navy was constitutionally significant because armies, as a land force, created a risk of domestic oppression and usurpation of power. Sailors at sea did not create similar risks. *See supra* notes 384–85 and accompanying text. At the Framing, the Marine Corps' "primary combat role was close combat at sea." ALLAN R. MILLETT, SEMPER FIDELIS: THE HISTORY OF THE UNITED STATES MARINE CORPS 25 (rev. & expanded ed. 1991). The Corps also guarded ships and prevented mutinies. *Id.* These would be Marines' primary duties for the early part of the Corps's existence. *See id.* at 29 (stating that around 1800, the "marines' primary function" was to serve "as guard detachments on naval vessels"); *see also id.* at 104–05 (describing similar duties after the Civil War). That accords with the Corps' status as a service in the navy. Those duties, however, began to subside around the Spanish-American War, and Marines began transitioning to a more expeditionary role. *Id.* at 138–39, 148–49. The modern Marine Corps has heavily operated as a second land army, complete with tanks, artillery, and its own air force. Paul McLeary, *Marine Commandant: Less a Second Land Army, More Light Amphib Ships*, BREAKING DEF. (Apr. 3, 2020, 4:38 PM). https://breakingdefense.com/2020/04/marine-commandant-less-a-second-land-army-more-light-amphib-ships/. Because the Marine Corps, at present, is a land force capable of conquering territory, I believe it now falls within the constitutional armies. At the time this article was published, the federal government had begun to shift the Marine Corps back to being more of a naval service. *See id.*; Todd South, *Goodbye Tanks: How the Marine Corps Will Change, and What It Will Lose by Ditching Its Armor*, MARINE CORPS TIMES, Mar. 22, 2021, https://www.marinecorpstimes.com/news/your-marine-corps/2021/03/22/goodbye-tanks-how-the-marine-corps-will-change-and-what-it-will-lose-by-ditching-its-armor/. If this shift succeeds in transitioning the Marine Corps back to a primarily maritime force, it would again be permissible to regard them as part of the constitutional navy. More generally, I believe that the constitutional classification of a military branch as "armies" or "navy" depends on what the branch actually does, not how Congress labels it.

appropriates money for all branches on an annual basis,[397] 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,"[398] ordinarily housed within the Department of Homeland Security.[399] But federal law also provides that the Coast Guard "shall operate as a service in the Navy" during wartime.[400] 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. They also likely include the Regular Air Force and Space Force.[401] The Regular Marine Corps, as presently organized, also has a strong claim to being part of the constitutional armies, despite bureaucratically falling within the Department of the Navy.

---

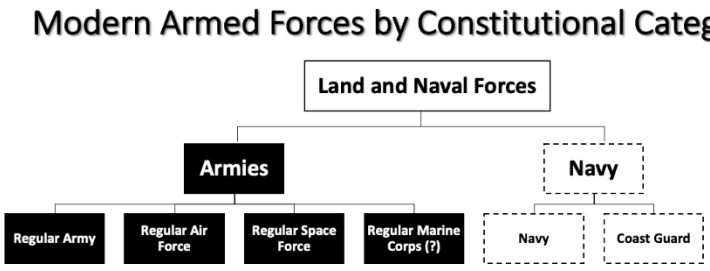
397. BARBARA SALAZAR TORREON & SOFIA PLAGAKIS, CONG. RSCH. SERV., 98-756, DEFENSE AUTHORIZATION AND APPROPRIATIONS BILLS: FY1961–FY2021, at 1 (2021).

398. 14 U.S.C. § 101.

399. *Id.* § 103(a) ("The Coast Guard shall be a service in the Department of Homeland Security, except when operating as a service in the Navy."). Before existing within the Department of Homeland Security, the Coast Guard was placed under the control of the Department of Transportation. *See* 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). This, again, shows that the constitutional navies do not have to be under a unified umbrella called the "U.S. Navy," nor do they all have to be housed within the Department of Defense.

400. 14 U.S.C. § 103(b).

401. *See* 10 U.S.C. §§ 9066 (Regular Air Force), 9085 (Regular Space Force) (both providing that they "consist[] of persons whose continuous service on active duty in both peace and war is contemplated by law").



B. The Structure of the Modern Armed Forces Reserve

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.[402] A Space Force Reserve and Space Guard have also been proposed but not yet enacted.[403] For simplicity, the remaining Parts 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, 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.[404]

The Armed Forces Reserve's organizational structure is complex. The Reserve is made up of three components: The Ready Reserve, the Standby Reserve, and the Retired Reserve.[405] 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."[406] The Standby Reserve, in contrast, "consists of personnel who maintain

402. MICHAEL D. DOUBLER, THE NATIONAL GUARD AND RESERVE: A REFERENCE HANDBOOK 2 (2008); 10 U.S.C. § 10101.

403. Rachel S. Cohen, *Plan for Space Force Reserve Component is 'Fairly Close,' National Guard Boss Says*, DEF. 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, § 931(b), 134 Stat. 3388, 3833 (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).

404. *See* Leider, *supra* note 19, at 1001 n.56. *But see* 10 U.S.C. §§ 246(b)(1) (defining the "organized militia" as the "National Guard" and the "Naval Militia"), 8904(1) (requiring 95% of naval militia members to be members of the U.S. Navy Reserve or U.S. Marine Corps Reserve to receive federal support).

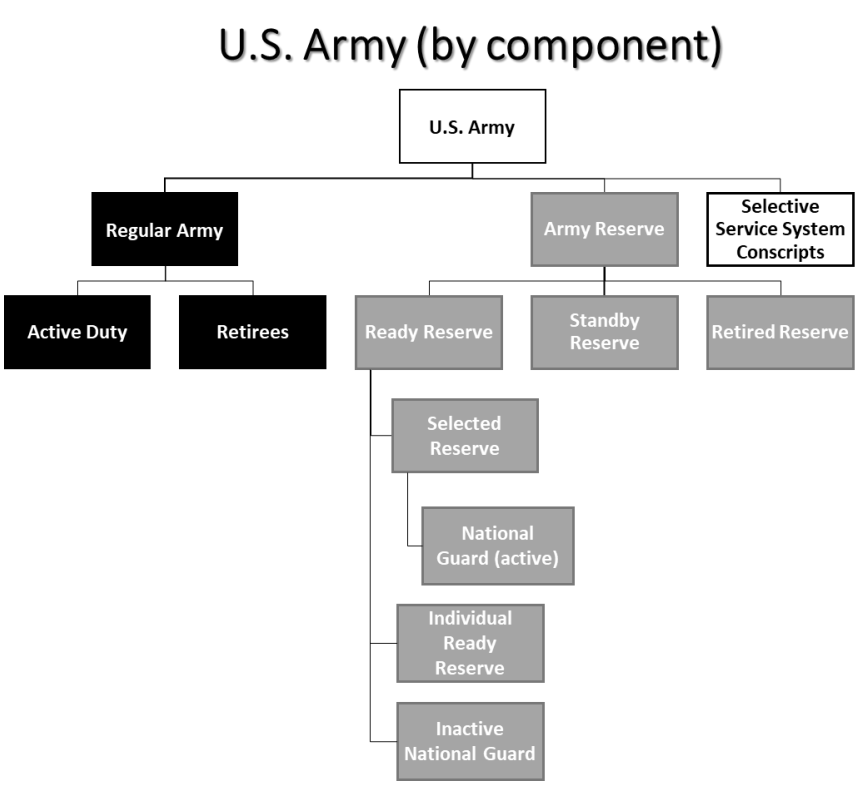
405. DOUBLER, *supra* note 402, at 3; 10 U.S.C. § 10141(a).

406. DOUBLER, *supra* note 402, at 3; *see* 10 U.S.C. § 10142(a).

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."[407] 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.[408] Except for National Guardsmen, all members of the Reserve are members of one of these three components.[409] Guardsmen are all members of the Ready Reserve.[410]

The Ready Reserve itself has three subcomponents: the Selected Reserve, the Individual Ready Reserve, and the inactive National Guard.[411] The Selected Reserve's members are the soldiers who serve "one weekend a month, two weeks a year."[412] The "National Guard of the United States"—the Army Reserve component of the National Guard—is housed within the Selected Reserve.[413]

407. DOUBLER, *supra* note 402, at 4–5; *see* 10 U.S.C. § 10151.
408. DOUBLER, *supra* note 402, at 5; *see* 10 U.S.C. § 10154.
409. DOUBLER, *supra* note 402, at 3.
410. *Id.*
411. *Id.*; *see* 10 U.S.C. §§ 10141–10144.
412. *Everything You Need to Know About Joining the Guard and Reserve*, MILITARY.COM, https://www.military.com/join-armed-forces/guard-and-reserve-faqs.html (last visited Nov. 9, 2022).
413. 38 C.F.R. § 21.7020 (2021).



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.[414] Today, the Army Reserve primarily provides combat support and combat service support,[415] with only a single remaining combat unit based in Hawaii.[416] The National Guard, in contrast, is oriented toward direct fighting.[417] Just over half of its personnel are assigned to combat units; another two-fifths provide combat support and combat services support; and about 10% serve in command and staff positions.[418]

The Army Reserve and National Guard also differ in structure. The Army Reserve is a purely federal force, with federally commissioned officers.[419] The National Guard, in contrast, has a dual

414. DOUBLER, *supra* note 402, at 77.
415. *Id.* at 10.
416. *Id.* at 10–11.
417. *Id.* at 9 ("The bulk of the [National Guard] is assigned to eight combat divisions, seventeen brigades, two Special Forces (SF) Groups, and hundreds of support units.").
418. *Id.*
419. *Supra* notes 251–53 and accompanying text.

mission.[420] As the "National Guard [of a state]," the Guard serves as a component of a state's organized militia.[421] Except when called into federal service, this means that the Guard reports to state governors.[422] And at least formally (if not in substance), the state commissions the officers.[423] As a state force, the National Guard is frequently called upon for a variety of missions, including disaster relief and law enforcement.[424] 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.[425]

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.[426] Those problems were: First, the failure of states adequately to maintain the militia; Second, the failure of states to select competent militia officers; Third, the inability of the federal government to use the militia for overseas operations, leading Congress largely to ignore it.[427] The legal theory behind having federal reserve forces was that if Congress raised these forces using its constitutional Army Power, then the federal government could exercise the same plenary authority over these citizen-soldiers that it exercises over the regular, professional forces.[428] Unlike the militia, the federal government would conduct the training and appoint reserve officers.[429] Also unlike the militia, federal reservists would not be limited to serving in defensive, domestic wars; the federal government could use reservists to supplement the Regular Army for offensive and overseas military conflicts.[430] The military reserve, thus, functioned as a body of nonprofessional citizen-soldiers that the federal government could use without the limitations that the Constitution imposes on the militia.

---

420. Nathan Zezula, *The BRAC Act, the State Militia Charade, and the Disregard of Original Intent*, 27 PACE L. REV. 365, 373 (2007).

421. *Id.*

422. *Id.*

423. *Id.* at 368.

424. Anshu Siripurapu, *A Unique Military Force: The U.S. National Guard*, COUNCIL ON FOREIGN RELS. (Jan. 15, 2021, 7:00 AM), https://www.cfr.org/backgrounder/unique-military-force-us-national-guard.

425. Perpich v. Dep't of Def., 496 U.S. 334, 347–49 (1990).

426. For these three deficiencies, see *supra* Part III.A.

427. *Id.*

428. *See supra* Part III.A.2.

429. *See* 2 GENTILE ET AL., *supra* note 245, at 96; *id.* at 11 (discussing early proposals).

430. *See* CURRIE & CROSSLAND, *supra* note 205, at 23; *see also* 2 GENTILE ET AL., *supra* note 245, at 47 ("Some from the professionalist school advocated for a peacetime establishment that could be rapidly expanded for war and that did not violate the constitutional limitations on the federal use of the militia."); DOUBLER, *supra* note 402, at 10.

C. The Modern Volunteer Militia/War Volunteers: The Selected Reserve

If one were to transpose the Framing-generation's military system to today, the Selected Reserve (active National Guard and Army Reserve) functions as a hybrid 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[,]" which are regular forces.[431] Like the Framers' volunteer militia, Selected Reserve members undergo more intensive training than the general militia.[432] 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 and when in training.[433] With minor exceptions, 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.[434]

---

431. For the reasons in this paragraph, I disagree with Uviller and Merkel's conception of the National Guard as identical with the standing army. *See* UVILLER & MERKEL, *supra* note 27, at 157 ("By the early twentieth century, they were 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 virtually all distinction from the regular army (1933), they were, by the middle of the twentieth century, nothing but a shadow of the Founders' dream."). They are correct that authority over citizen-soldiers shifted from the state to the federal government. They are incorrect that nonprofessional forces have lost "all distinction from the regular army." *Id.*

432. *Compare* 10 U.S.C. § 246 (providing for an unorganized militia with no formal training), *with* 10 U.S.C. §§ 10143, 10147(a)(1) (requiring Selected Reserve members to complete "48 scheduled drills or training periods during each year and serve on active duty for training of not less than 14 days (exclusive of travel time) during each year"). For the comparison with the eighteenth-century militia, see *supra* notes 122–135 and accompanying text.

433. *See supra* notes 155–60 and accompanying text.

434. 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 of a state. But this just reflects that federal reserve components are a national militia, not that the federal government is treating the federal reserve as if it were part of the regular forces. For the National Guard of a state, 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

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.[435] Beginning in the late 1790s, during the quasi-War with France, the federal government made calls for citizen volunteers when it needed to expand the army during wartime.[436] Much recruiting and volunteering took place at militia musters, and during the nineteenth century, volunteer militiamen frequently served as war volunteers.[437] 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.[438] 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 that the army needs expansion.[439] In recent years, the Selected Reserve has played a major role in fighting and supporting combat operations in Iraq and Afghanistan.[440] The

---

training or on state active duty. 32 U.S.C. § 326; *see, e.g.*, N.Y. Mil. Law § 130.2; 51 Pa.C.S. § 5103. For federal reserve forces, the federal government exercises both the traditional federal power to apply military justice to the militia during wartime emergencies (when the militia would have been in the active service of the United States) and the traditional state power to apply military justice during training or when otherwise on state active duty. *Id.* So, the functional scope of military law as applied to Reservists and Guardsmen is equivalent and reflects traditional militia principles.

435. U.S. CONST. art. I, § 8, cl. 15.

436. Leider, *supra* note 19, at 1051–56; CURRIE & CROSSLAND, *supra* note 205, at 8 (noting that, by the Mexican War, "few states retained an effective militia system"); National Defense Act of 1916, Pub. L. No. 64-85, §§ 1, 3, 55, 39 Stat. 166, 166, 195–96.

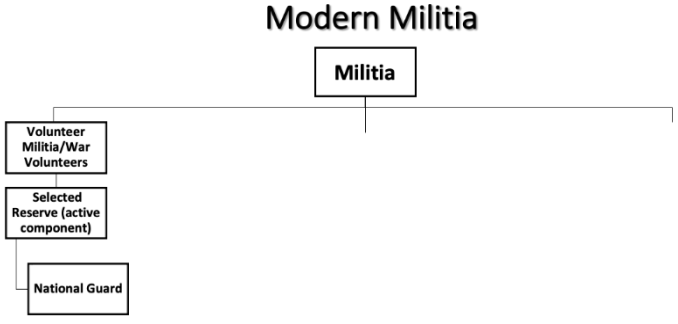
437. *See supra* notes 225–30 and accompanying text.

438. See MAHON, *supra* note 23, at 2, 5, 21, 32 (explaining the volunteer system); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 87 (2d ed. 1920).

439. *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").

440. MICHAEL WATERHOUSE & JOANNE O'BRYANT, CONG. RSCH. SERV., RS22451, NATIONAL GUARD PERSONNEL AND DEPLOYMENT FACT SHEET 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, 11:28 AM), https://www.cnn.com/2016/09/11/opinions/national-guard-critical-component-america-military-anderson/index.html (acknowledging that by 2011 every

Army Reserve and dual-enlistment National Guard systems largely derived from the federal government'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.[441]



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."[442] Others have made similar claims.[443] 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. A true apples-to-apples comparison would compare the Selected Reserve to similar components of the Framing generation's military system—that of the volunteer militia and the war volunteers.

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. 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 the Department of the Army. But we still must 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,

---

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).

441. *See Perpich*, 496 U.S. at 341 n.10 (quoting Theodore Roosevelt, First Annual Message to Congress, Dec. 3, 1901, *in* 14 Messages and Papers of the Presidents 6672).

442. UVILLER & MERKEL, *supra* note 27, at 141.

443. *See supra* notes 305–09 and accompanying text.

the presidency, the courts, and the bureaucracy. Simply because modern practice differs in some respects from Framing-era practice does not mean that those differences are material for all purposes. The Selected Reserve still consists of volunteer soldiers[444] 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.

D. 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."[445] Keith Ehrman and Dennis Henigan rhetorically ask, "Have you seen your militia lately?"[446] This Part 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 involuntary military service.[447] Although the colonies regularly drilled the entire militia in the early days,[448] volunteer militia and regular British forces took over routine security duties once the colonies' security stabilized. The general militia served in a reserve role.[449]

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.[450] 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.[451] From these pools, we request

444. Although dicta from judicial decisions have made sweeping claims about Congress's conscription power, *see* Arver v. United States (*Selective Draft Law Cases*), 245 U.S. 366, 376–78 (1918), these decisions have not considered whether Congress has the power to conscript soldiers into the Army Reserve. I have previously argued that Congress lacks this power because a land force comprised of conscripted part-time soldiers is unquestionably a "militia" under the Constitution. Leider, *supra* note 19, at 1056–57.

445. UVILLER & MERKEL, *supra* note 27, at 157.

446. Ehrman & Henigan, *supra* note 26, at 5 (emphasis removed).

447. WEIGLEY, *supra* note 73.

448. *Id.* at 6; MAHON, *supra* note 23, at 18.

449. WEIGLEY, *supra* note 73, at 8; COOPER, *supra* note 73, at 2.

450. DOUBLER, *supra* note 402, at 6.

451. *Id.*

volunteers before we resort to conscription or conscription-like measures.[452] And, in the rarest of emergencies, we call forth the remaining military manpower of the nation—the general militia.[453]

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 Framers' general militia. Within the Ready Reserve, the Individual Ready Reserve consists of those soldiers who have military service obligations, but who no longer serve on active duty or in a drilling reserve unit.[454] These individuals remain enrolled in the military, and they may voluntarily train or perform other assignments.[455] But they are not required to train or attend musters unless specially ordered;[456] their obligation, instead, is only to complete an annual screening form.[457] 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."[458] 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."[459]

In addition to operating like a general militia, all three non-Selected Reserve components also have a war volunteer flavor. All members initially volunteer for service; no reservist is presently conscripted.[460] Their enlistment contract includes no territorial limitation as to where they are deployed.[461] Little of our present military structure fits squarely within the Framers' system, and the inactive reserve system, too, is a hybrid.

---

452. *Id.* at 6–7.

453. *Id.* at 7.

454. *Id.* at 4.

455. *Id.*

456. *Individual Ready Reserve (IRR)*, U.S. ARMY RSRV., https://www.usar.army.mil/IRR/ (last visited Nov. 9, 2022).

457. *Id.* (providing minimal annual requirements for Individual Ready Reserve soldiers).

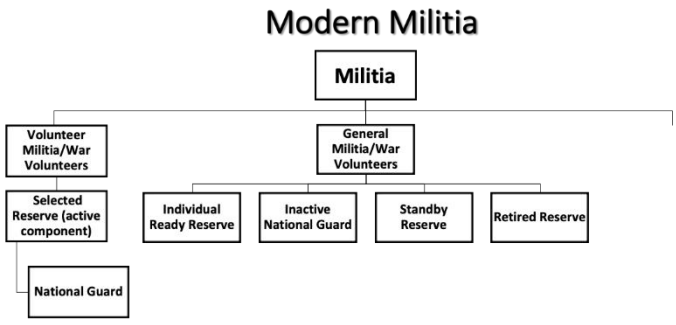
458. DOUBLER, *supra* note 402, at 5.

459. *Id.*

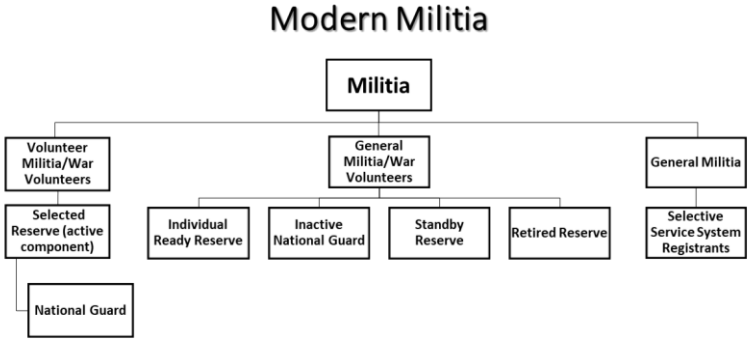
460. DOUBLER, *supra* note 402, at 39.

461. *Joining the Military as a Reservist: Eligibility, Obligation and Benefits*, MIL. ONESOURCE, https://www.militaryonesource.mil/military-life-cycle/separation-transition/guard-and-reserves-joining-the-military-reserves/ (last visited Nov. 9, 2022).

2. The Selective Service System



Finally, those citizens registered with the Selective Service System function as the bulk of America's modern general militia. The Selective Service System provides a method of conscripting private citizens into the federal army, thereby expanding military strength in wartime.[462] The federal government's use of conscription into the federal army has supplanted the traditional calling forth of the militia—as is by design. Using conscription into the national army, the federal government has evaded the constitutional limitations on calling forth the militia. But evading these legal limitations does not change the nature of the military force. An army comprised of ordinary citizens conscripted into temporary wartime military service largely mirrors the Framing-era general militia.



For much of the eighteenth century, general militia musters primarily served roles other than training the bulk of the militia.[463] Militia musters became important places where military forces were organized and raised.[464] At a muster, local officials might take a

462. *Why Is Selective Service Important?*, SELECTIVE SERV. SYS., https://www.sss.gov/register/why-is-selective-service-important/ (last visited Nov. 9, 2022).

463. COOPER, *supra* note 73, at 2.

464. *Id.*

census of residents capable of bearing arms, and they could request volunteers for temporary military activities.[465] If enough people did not volunteer, those officials would then conscript the necessary manpower from the general militia.[466] Thus, eighteenth-century militia service was more selective than universal.[467]

The Selective Service System operates much the same way.[468] The government maintains a list of military-age residents who are eligible for temporary service during war. When emergencies arise that exceed the capabilities of regular and volunteer forces, the Selective Service System, like the Framing-era militia, uses local draft boards to mobilize additional military manpower from available able-bodied civilians.[469] The mechanics of the modern draft differ slightly from the Framing-era militia. The Selective Service System is administered by the federal government. And instead of having local officials take a census at a militia muster, young men now fill out their draft registrations on their own. But these differences do not alter the fundamental character of the system—a system for classifying and conscripting able-bodied citizens for temporary wartime service.

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.[470] Those age ranges have expanded during wartime. In World War I, for example, all men ages eighteen through forty-five were required to register.[471] And in World War II, the Selective Service System applied to the entire general militia, with all able-bodied men between eighteen and sixty-four required to register and those between eighteen and forty-five actually drafted.[472]

When drafted, the resulting forces look more like a militia than a regular army. During World Wars I and II, the draft included

---

465. *Id.*

466. WEIGLEY, *supra* note 73, at 8.

467. *Id.* (explaining that, until the Revolutionary "War, "[f]ew occasions arose requiring the whole able-bodied manpower of a colony or district").

468. In fact, the Selective Service System traces its lineage back to the militia. *See Historical Timeline: Prior to Civil War*, SELECTIVE SERV. SYS., https://www.sss.gov/history-and-records/timeline/ (last visited Nov. 9, 2022).

469. *Agency Structure*, SELECTIVE SERV. SYS., https://www.sss.gov/about/agency-structure/ (last visited Nov. 9, 2022).

470. *Who Needs to Register*, SELECTIVE SERV. SYS., https://www.sss.gov/register/who-needs-to-register/#p5 (last visited Nov. 9, 2022).

471. Selective Service Act of 1917, ch. 15, § 5, Pub. L. 65-12, 40 Stat. 76, 80 (establishing registration for ages twenty-one through thirty); Selective Service Act Amendment, ch. 166, § 3, Pub. L. 65-210, 40 Stat. 955, 955 (1918) (expanding the age range for registration to eighteen through forty-five).

472. ALLAN R. MILLETT & PETER MASLOWSKI, FOR THE COMMON DEFENSE: A MILITARY HISTORY OF THE UNITED STATES OF AMERICA 408 (1984).

substantial portions of the general militia. In World War I, 72% of 3.5 million soldiers were draftees.[473] In World War II, sixteen million individuals served in the Armed Forces, of whom over ten million were conscripts.[474] These were large citizen-armies that included a fair cross-section of the community.[475] Also like a militia, conscripts served for the duration of the emergency, and most were discharged shortly after the cessation of hostilities.[476] And again like a militia, conscripts went into a military component separate from the Regular Army called the "Army of the United States" ("AUS").[477] The more limited drafts for Korea and Vietnam included a smaller subset of the general militia.[478] But as with a militia, the service was compulsory and for a brief term—often two years, including training—which is half to a quarter of the length of a traditional enlistment contract for a regular soldier.[479] In Vietnam, soldiers were rotated on short tours of duty—generally one year[480]—much like the American militia rotated during the Revolution.[481]

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 reserve service.[482] But that feature is not unusual given the present state of American security. The militia system excels when

---

473. DOUBLER, *supra* note 402, at 28.

474. *U.S. Army Divisions in World War II*, U.S. ARMY DIVS., https://www.armydivs.com/ (last visited Nov. 9, 2022); DOUBLER, *supra* note 402, at 32.

475. DOUBLER, *supra* note 402, at 32.

476. WEIGLEY, *supra* note 73, at 486.

477. Michael Kern, A Guide to the United States Military in Normandy 10–11 (unpublished manuscript), https://www.carlisleschools.org/common/pages/UserFile.aspx?fileId=1298064. If a draft were to occur today, conscripts would likely be deemed members of the "Army without component." *See* 10 U.S.C. § 3062(c)(2).

478. WEIGLEY, *supra* note 73, at 508 (noting the number of men drafted for the Korean Conflict was less than the number drafted in World War II), 535 (noting the less extensive draft for the Vietnam War).

479. 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. By 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.

480. CHRISTINE BRAGG, VIETNAM, KOREA AND US FOREIGN POLICY 136 (Martin Collier & Rosemary Rees eds., 2005).

481. WEIGLEY, *supra* note 73, at 37–38 (discussing Revolutionary War tours of duty); BRAGG, *supra* note 480, at 36–37 (discussing Vietnam tours of duty).

482. ELIOT A. COHEN, CITIZENS AND SOLDIERS: THE DILEMMAS OF MILITARY SERVICE 67 (1985).

small states need to resist invasion by larger states and when communities must defend themselves against persistent but low-level security threats.[483] Neither feature is present in America today,[484] so there is no need to keep millions of Americans in an active reserve setting. But even though most Americans do not actively drill, they remain the reserve force of last resort.[485] And looking back at the history of the militia both in Britain and in America, the general militia went through prolonged periods of dormancy during stable periods of peace.[486]

Likewise, the Selective Service System does not perfectly mirror the Framers' militia insofar as the militia served only as a home defense force. Through using conscription to expand the Regular 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 nonprofessional citizen-soldier obsolete.[487] Conscription into the national army reorganized the general militia into a purely national force. But whether attached to the state or the federal government, a large, conscripted citizen-army brought into temporary existence for a wartime emergency is the calling forth of the militia in everything but name.

Translating the Framing-era military system to the modern day is technical and complex. The chart below represents how the modern land forces correspond with their Framing-era analogs:

---

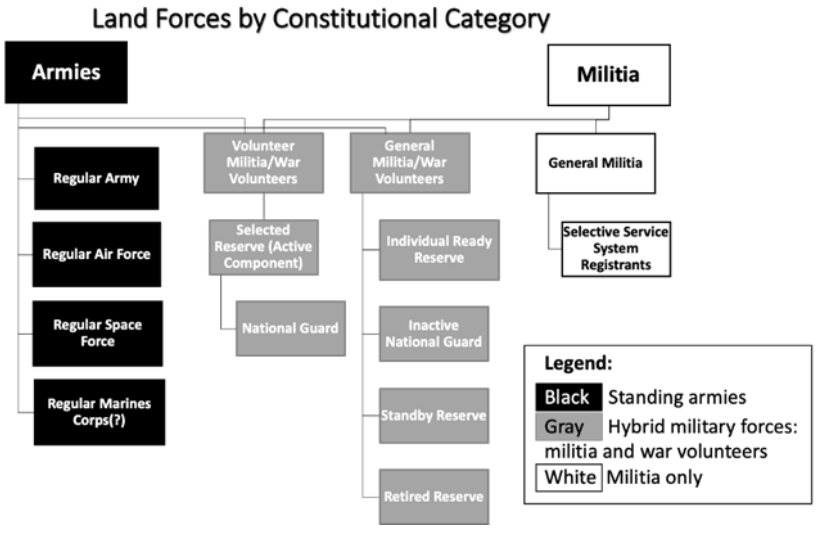
483. *Id.* at 27.

484. *Id.* at 30.

485. *Cf.* Presser v. Illinois, 116 U.S. 252, 265 (1886) ("It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the [S]tates . . . .").

486. *See supra* notes 102–24 and accompanying text.

487. *See* WEIGLEY, *supra* note 73, at 476 ("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.").



E. Remnants of the Old System

Some vestiges of the older state-based militia system exist on paper. This state-based system is largely obsolete and neglected.

Federal law continues to recognize that the militia consists of all able-bodied men between seventeen and forty-five and female citizens who are members of the National Guard.[488] The militia is then divided 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."[489] Federal law also seemingly allows the president to call forth the entire militia, whether organized or not,[490] to suppress insurrections,[491] enforce federal law,[492] and prevent violations of federal rights.[493]

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 would almost certainly use the Selective Service System. But, if nothing else, the provisions for unorganized militia reaffirm that the entire able-bodied

488. 10 U.S.C. § 246(a).
489. 10 U.S.C. § 246(b)(1)–(2).
490. Perpich v. Dep't. of Def., 496 U.S. 334, 352 n.25 (1990).
491. 10 U.S.C. § 251.
492. 10 U.S.C. § 252.
493. 10 U.S.C. § 253(2).

population continues to constitute the reserve military manpower of the United States and the states.[494]

Like the federal government, states generally define the militia to include all able-bodied men between certain ages.[495] States divide their militia into the organized militia—often the National Guard and a state guard or state defense force—and the unorganized militia.[496] Many state laws also have provisions authorizing the governor, when necessary, to accept volunteers or conscript the unorganized militia into the organized militia.[497] Conscription into a state-organized militia unit has not occurred in generations and is unlikely to occur in the foreseeable future.

Today, about half of state governments maintain active state guards or state defense forces.[498] In theory, state guards act as a state military auxiliary, which supplements the National Guard when the federal government calls Guardsmen abroad.[499] But the last time states maintained significant state guard forces was in World War II, when the National Guard was fully mobilized.[500]

Although many states classify a state guard or state defense force as part of their organized militia,[501] federal law equivocates on whether these forces are an organized militia or a state army. Some sections of federal law seem to treat these defense forces as separate state armies. The federal law providing for classes of militia recognizes only the National Guard and the Naval Militia as the "organized militia."[502] Federal law purports to "consent" to states maintaining defense forces,[503] and this consent would only be

494. WEIGLEY, *supra* note 73, at 321; *see also* Presser v. Illinois, 116 U.S. 252, 265 (1886).

495. *See, e.g.*, ALA. CODE § 31-2-2; ALASKA STAT. § 26.05.010(a); 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 2022).

496. *See, e.g.*, ALA. CODE § 31-2-3 (including the state guard within the organized militia of the state); ALASKA STAT. § 26.05.030(a)(1) (same); CAL. MIL. & VET. CODE § 120 (West 2020) (same); HAW. REV. STAT. §§ 121-1, 122A-2 (same); N.M. STAT. ANN. §§ 20-2-2, 20-5-1(A) (same); N.Y MIL. LAW § 44 (McKinney 2022) (same).

497. *See, e.g.*, ALASKA STAT. § 26.05.110; CAL. MIL. & VET. CODE § 128 (West 2020); HAW. REV. STAT. § 121-1.

498. *See* JAMES CARFANO & JESSICA ZUCKERMAN, THE 21ST CENTURY MILITIA: STATE DEFENSE FORCES AND HOMELAND SECURITY 1–2 (2010), http://thf_media.s3.amazonaws.com/2010/pdf/bg2474.pdf; Adam Freedman, *The Militia You've Never Heard Of: Underutilized State Guards Can Help with Homeland Defense*, CITY J. (2016), https://www.city-journal.org/html/militia-you%E2%80%99ve-never-heard-14339.html.

499. CARFANO & ZUCKERMAN, *supra* note 498, at 1.

500. *Id.*

501. *See, e.g.*, VA. CODE § 44-54.4.

502. 10 U.S.C. § 246(b).

503. 32 U.S.C. § 109(c).

necessary if members of the defense forces constituted "troops" under Article I, Section 10 of the Constitution.[504] On the other hand, state defense forces comprise part-time volunteers, not regular forces,[505] so they do not seem to meet the traditional definition of "troops."[506] And although one section of federal law treats the National Guard as the only land organized militia,[507] 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.[508] This suggests that states may have other parts of their organized militia that do not constitute the National Guard.

Much like the nineteenth-century militia, state guards have had little in the way of personnel, equipment, funding, and leadership during normal times of peace.[509] Many state guards have had scandals because of the poor quality of personnel who volunteer for duty.[510] An April 1993 U.S. Advisory Commission on Intergovernmental Relations on the National Guard explained that membership in many state guards "has included neo-Nazis, mercenaries, survivalists, and violent felons."[511] The Virginia legislature substantially reduced its state defense force because of "reports of a brigade saving money to buy a tank."[512] Unsurprisingly, today most state defense forces are not even allowed to bear arms.[513]

Because of the sheer cost alone, reconstituting meaningful state defense forces is a political nonstarter. In fall 2021, when Governor Ron DeSantis responded to the federal COVID-vaccine mandate by proposing that Florida reestablish its State Guard, he asked the

---

504. U.S. CONST. art. I, § 10.

505. CARFANO & ZUCKERMAN, *supra* note 498, at 7.

506. *See supra* notes 100–08; *supra* Part I; Dunne v. People, 94 Ill. 120, 138 (1879). For the reasons articulated in Part I and in *Dunne*, I believe that a state defense force comprised of part-time citizen-soldiers constitutes an organized militia, not "troops" or an "army."

507. 32 U.S.C. § 101(1)–(4)(A).

508. 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").

509. CARFANO & ZUCKERMAN, *supra* note 498, at 5.

510. U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELS., A-124, THE NATIONAL GUARD: DEFENDING THE NATION 38 (April 1993).

511. *Id.*

512. *Id.*

513. *See, e.g.*, *Texas State Guard FAQ*, TEX. MIL. DEP'T, https://tmd.texas.gov/texas-state-guard-faq (last visited Nov. 9, 2022); 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).

legislature for $3.5 million to train only 200 volunteers.[514] No doubt some of that is startup costs, but maintaining a substantial number of trained forces with specialized military equipment easily can run into the hundreds of millions of dollars. Florida's 12,000 National Guardsmen operate on nearly a half-billion-dollar budget.[515] If appropriated for a state guard, the money would likely fund a force that duplicates the function of the National Guard.[516] This leaves a political reality that states always accept federal funding—even with strings attached—rather than pursue their own forces. Consequently, it is unlikely that state defense forces will be substantially reactivated, short of a massive extended deployment of the National Guard that creates a necessity for their existence.

Finally, in addition to the National Guard and (arguably) a state defense force, federal law recognizes the naval militia as part of the organized militia.[517] 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 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]

V. RESPONDING TO COUNTERARGUMENTS

My argument significantly differs from the modern understanding that the general militia no longer exists and that the U.S. Army Reserve and National Guard are constitutive parts of the standing army. In this Part, I will raise and respond to anticipated objections of those who subscribe to these beliefs.

---

514. Steve Contorno, *DeSantis Proposes a New Civilian Military Force in Florida that He Would Control*, CNN (Dec. 3, 2021, 9:47 AM), https://www.cnn.com/2021/12/02/politics/florida-state-guard-desantis/index.html.

515. *About*, FLA. NAT'L GUARD (2016), https://fl.ng.mil/about/Pages/default.aspx (providing approximate budget).

516. U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELS., *supra* note 510, at 38.

517. *See* 10 U.S.C. § 246(b)(1).

518. Leider, *supra* note 19, at 1001 n.56.

519. *See Naval Militia*, MIL. L. (Dec. 23, 2019), https://military.laws.com/naval-militia.

520. 2 RECORDS, *supra* note 67, at 331–32.

A. Army Reserve Units are Not Organized Under the Militia Clauses

One might object that the U.S. Army Reserve is not a militia by claiming that it is not organized pursuant to the Militia Clauses. The Constitution requires that states conduct militia training and appoint militia officers.[521] But, for the Army Reserve, the federal government undertakes these tasks. Likewise, the Constitution forbids the federal government from using the militia except for three domestic defensive purposes;[522] but the federal government does not follow these limits for soldiers in the U.S. Army Reserve. Consequently, this argument goes, the U.S. Army Reserve must be organized pursuant to the Constitution's Armies Clause, not the Militia Clauses.[523]

This argument illegitimately converts legal limitations in the Militia Clauses into elements of a definition for whether the force is a militia.[524] To make this argument non-circular, proponents must establish why the legal restrictions in the Militia Clauses also form part of the definitional criteria for what a "militia" is. They have not done so.

To illustrate by analogy the question-begging nature of this legal reasoning, consider the Constitution's Appointments Clause. The Appointments Clause requires that all officers of the United States be nominated by the President and confirmed by the Senate.[525] But the Clause also permits Congress "by law [to] vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."[526] If we followed this kind of reasoning for the Appointments Clause, we would have to conclude that someone is automatically an inferior officer if Congress vests appointment power in someone other than the President and the Senate. But this is nonsense. While the Supreme Court has not "set forth an exclusive criterion for distinguishing between principal and inferior officers," the Court has "examined factors such as the nature, scope, and duration of an officer's duties" and whether "the officer's work is directed and

521. U.S. CONST. art. I, § 8, cl. 16.

522. *Id.* cl. 15.

523. This is essentially David T. Hardy's explanation for why the National Guard is not the "Militia" of the Constitution. *See* David T. Hardy, *The Janus-Faced Second Amendment: Looking Backward to the Renaissance, Forward to the Enlightenment*, 18 GEO. J.L. & PUB. POL'Y 421, 446–48 (2020). And this is the theory underpinning the modern dual enlistment system. *See* 32 U.S.C. § 101(4) (defining Army National Guard by reference to whether, among other things, states appoint the officers pursuant to the Militia Clauses).

524. Leider, *supra* note 19, at 1029.

525. U.S. CONST. art. II, § 2, cl. 2.

526. *Id.*

supervised by a principal officer."[527] If Congress permits the President alone to appoint an officer of the United States with great authority, it has not converted a principal officer into an inferior officer; it has violated the Constitution.[528]

The same is true for the militia. If my argument is correct, then whether a land force is an "army" or a "militia" depends on whether or not the force comprises regular soldiers. When Congress permits the federal government to appoint officers and conduct training of part-time land forces, it has not raised an army; it has simply organized a militia outside its legal authority.

B. State Versus Federal Military Forces

Many who consider the militia to be "a state army" 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.[529] The states were repeatedly viewed as the protectors of the citizens' liberties . . . ."[530] Justice Stevens gestured in the same direction in *Perpich* and *Heller* by implying that the Framers' fears had to do peculiarly with a "*national* standing army."[531]

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. The Constitution severely restricted states' war powers; it prohibited states, without the consent of Congress, from keeping standing armies and navies and from engaging in offensive war.[532] The Constitution also provided that the federal government "shall guarantee to every State in this Union a Republican Form of Government."[533] This assurance protected the state inhabitants, in part, from domestic usurpations of power. The guarantee also extended to protecting "each of them against Invasion," which included invasions of states by sister states.[534] And to protect against

527. Seila L., LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2199 n.3 (2020) (quoting Edmond v. United States, 520 U.S. 651, 661 (1997)) (internal quotation marks omitted).

528. *See id.* at 2199–201 (discussing in the context of the removal power).

529. Ehrman & Henigan, *supra* note 26, at 24.

530. *Id.*

531. Perpich v. Dep't of Def., 496 U.S. 334, 340 (1990) (emphasis added); District of Columbia v. Heller, 554 U.S. 570, 637 (2008) (Stevens, J., dissenting) (emphasis added).

532. U.S. CONST. art. I, § 10, cl. 3.

533. U.S. CONST. art. IV, § 4.

534. *Id.*; *see also Debates of the Virginia Convention* (June 16, 1788), *in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1299, 1311–12

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."[535] The Constitution also limited the *casus belli* between states. For disputes between states, which often involve land and water claims,[536] the Constitution authorized binding arbitration in the Supreme Court.[537] 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 because the proposition was uncontroversial. At the Constitutional Convention, Hamilton proposed that "[n]o state [shall] have any forces land or Naval,"[538] and the provision was adopted after some stylistic revision.[539] Even the Articles of Confederation had generally banned states from maintaining "vessels of war" or "any body of forces," despite providing for more robust state sovereignty than the Constitution would.[540] 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 advocated for the states to have professional militaries.[541] The propositions that standing armies were dangerous to liberty and ought not be maintained (particularly in peacetime without legislative consent) applied with

---

(John P. Kaminski et al. eds., 1993) (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, at 196 (James Madison) (Dover Publ'ns 2014) ("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.").

535. U.S. CONST. art. IV, § 4; *see* THE FEDERALIST NO. 43, at 196 (Dover Publ'ns 2014).

536. *See, e.g.*, Texas v. New Mexico, 141 S. Ct. 509, 511 (2020) (adjudicating a dispute over the Pecos River Compact after a tropical storm in 2014).

537. U.S. CONST. art. III, § 2.

538. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 293 (Max Farrand ed., 1911).

539. *See* Leider, *supra* note 19, at 1000–01.

540. ARTICLES OF CONFEDERATION of 1781, art. VI, para. 4.

541. *See* LEE, *supra* note 43, at 364–65 (not complaining about the prohibition against state troops).

equal force to state governments, and those propositions were inscribed in many state constitutions.[542]

C. Modern Part-Time Units are Unrepresentative of the General Population

A third objection questions whether the Army Reserve and National Guard are part of the Framers' conception of "militia." The Framers conceived of a proper militia as composed of the people themselves, so that there was not a significant distinction between the militia and the citizenry.[543] Today's organized militia units, however, are volunteer organizations that are not properly representative of the population.[544] Thus, this objection asserts that the Army Reserve and National Guard should be classified constitutionally as part of the standing army.[545]

I have two responses to this objection: First, as a matter of constitutional interpretation, we have strong evidence that the Framers did not consider an unrepresentative militia to be a standing army. For the linguistic reasons identified in Part I, the term "armies" in Article I, Section 8 included professional soldiers but not part-time forces, even if they were unrepresentative select militias.[546] Again, I point to the fact that the Constitutional Convention considered and rejected George Mason's proposal for the federal government to have a select militia, which strongly suggests that select militias were not part of the power to raise armies.[547] Moreover, it would be a strange construction of the Constitution's military clauses, viewed holistically. That construction would allow Congress to evade the remaining limitations in the Militia Clauses simply by creating an unrepresentative militia. But Congress does not act constitutionally by compounding one constitutional error with another.

Second, the view that an imperfectly constituted militia is *actually* a standing army elides significant nuances about why the Framers thought standing armies were dangerous. The Framing generation feared standing armies because soldiers were a specialized

---

542. *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, art. XV.

543. *See* Lawrence Delbert Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 22, 26 (1984).

544. *See* DEP'T OF DEF., 2019 DEMOGRAPHICS PROFILE OF THE MILITARY COMMUNITY 78–89 (2019), https://download.militaryonesource.mil/12038/MOS/Reports/2019-demographics-report.pdf (providing demographic data for the Selected Reserve).

545. My thanks to Jud Campbell for pressing me on this point.

546. *See* U.S. CONST. art. 1, § 8; *see supra* Part I.

547. *See supra* note 68 and accompanying text.

faction (and a heavily armed faction at that) which was withdrawn from civilian society and subjected to the rigors of military law.[548] Because they were subjected to military law, solders lacked the liberty that civilians possessed.[549] These traits made standing armies susceptible of undermining democracy either on their own authority or on behalf of unprincipled executives to whom they were immediately accountable.[550]

Select militias operate halfway—and only halfway—between a standing army and a general militia. Many of the Framing generation—particularly the Anti-Federalists—were outspoken in their fears of select militias because, like standing armies, select militias were an armed faction, unrepresentative of the broader society that they were protecting.[551] This could lead them to become tools of oppression against the broader population. But unlike regular soldiers, members of a select militia were not removed from civilian society; they were still subject to civilian law and had civilian rights, except when on duty. Alexander Hamilton, thus, questioned why the Anti-Federalists feared select militias, which comprised "men who are daily mingling with the rest of their countermen and who participate with them in the same feelings, sentiments, habits, and interests."[552]

The modern National Guard and Army Reserve approximate select militias of the Framing generation. These forces comprise volunteer units that are unrepresentative of the broader population. The National Guard and Army Reserve, thus, are not equivalent to the Framers' general militia. But the National Guard and Army Reserve are not standing armies, either; unlike regular forces, their members are not removed from civilian society and are not generally

548. To quote Samuel Adams, "A standing army . . . is always dangerous to the Liberties of the People" because "[s]oldiers are apt to consider themselves as a Body distinct from the rest of the Citizens," "[t]hey have their Arms always in their hands," and "[t]heir rules and their discipline is severe." Letter from Samuel Adams to James Warren (1776), http://www.samuel-adams-heritage.com/documents/samuel-adams-to-james-warren-1776.html; *see also* Roger B. Taney, *Thoughts on the Conscription Law of the United States*, *reprinted in* THE MILITARY DRAFT: SELECTED READINGS ON CONSCRIPTION 209, 211 (Martin Anderson ed., 1982) (defining the army as "a body of men separated from the general mass of citizen—subject to a different code of laws liable to be tried by Military Courts instead of the Civil.").

549. *See* BLACKSTONE, *supra* note 49, at *416 (describing a soldier's life as close to a slave's).

550. *See* REID, *supra* note 100, at 101–07; Simeon Howard, *A Sermon Preached to the Ancient and Honorable Artillery Company in Boston* (1773), *in* 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760–1805, at 185, 198–99 (1983).

551. WILLIAMS, *supra* note 109, at 56–57.

552. THE FEDERALIST NO. 29, at 152 (Alexander Hamilton) (Dover Publ'ns 2014).

subject to military law. Guardsmen and reservists perform only part-time military service.

So, the best understanding of the National Guard and Army Reserve is that they are not part of the constitutional armies because they are not regular forces. While the National Guard and Army Reserve may have *some* traits that make them like a standing army, they are still fundamentally nonprofessional forces. The best understanding of the National Guard and Army Reserve is that they are organized subsets of the broader militia system.

D. Distinctions Between Armies and Militia in Wartime

A fourth objection contends, based on wartime service, that the traditional Anglo-American 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.[553] And the war volunteers exemplify this phenomenon of temporary, wartime service.[554]

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.[555] 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.[556] If serving on full-time active duty, the militia would be subjected to military law, just like the regular army.[557] And if the army was a temporary wartime army rather than

553. 10 U.S.C. § 519; D. Stokes, *Family Tree Friday: Volunteer v. Regular Army service was documented differently*, NAT'L ARCHIVES (Jan. 1, 2010), https://narations.blogs.archives.gov/2010/01/01/family-tree-friday-volunteer-vs-regular-army-service-was-documented-differently/.

554. My thanks to Nelson Lund and Saikrishna Prakash for pressing me on this issue.

555. *See supra* note 98 and accompanying text.

556. *See* DICEY, Third Edition, *supra* note 51, at 285 ("Embodiment indeed converts the militia for the time being into a regular army, though an army which cannot be required to serve abroad."). As a policy matter, British and American statutes often limited wartime militia service to one to three months, requiring the militia to rotate men in wartime. *See supra* note 151 and accompanying text. But there were no apparent constitutional limits on the duration of wartime militia service, see, for example, U.S. CONST. art. I, § 8, cl. 15; *id.* amend. V, and thus, nothing prevented the legislature from imposing full-time active service on the militia for the duration of a defensive war.

557. *See supra* notes 57–58 and accompanying text.

a standing army, both the militia and the army could disembody following the conflict.[558]

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 serve, and as a result, their service was limited to domestic, defensive conflicts, such as cases of rebellion or invasion.[559] In principle,[560] individuals volunteered for service in the army; and because they volunteered, they could serve without restriction, including in offensive and overseas operations.[561] 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.[562]

Modern conscription into the national army has 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.[563] For this reason, early attempts to legalize conscription into the army resulted in significant legal challenges, with courts sometimes divided on the judgment.[564] 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

---

558. *See supra* notes 99–104 and accompanying text.

559. *See supra* notes 169–70 and accompanying text.

560. I say "in principle" because some might object that impressment provides a significant counterexample to this. In response, I would note that impressment into the army was normally illegal, its use was rare, and its use only against vulnerable groups reflected its dubious legitimacy. See *supra* notes 140–44 and accompanying text for the primary discussion; *see also* Kneedler v. Lane, 45 Pa. 235, 255 (1863) ("[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.").

561. *See supra* note 153 and accompanying text.

562. *See supra* text accompanying note 197.

563. *See* Leon Friedman, *Conscription and the Constitution: The Original Understanding*, 67 MICH. L. REV. 1493, 1494–97 (1969); Leider, *supra* note 19, at 1035–49.

564. *See* Arver v. United States (Selective Draft Law Cases), 245 U.S. 366, 376–77, 390 (1918); *Kneedler*, 45 Pa. at 255. 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, 433–44 (1863); Jeffers v. Fair, 33 Ga. 347, 349–50 (1862); Parker v. Kaughman, 34 Ga. 136, 142–43 (1865); Simmons v. Miller, 40 Miss. 19, 22–24 (1864); Gatlin v. Walton, 60 N.C. 325, 331–34 (1864); *Ex parte* Coupland, 26 Tex. 386, 392–94 (1862); Burroughs v. Peyton, 57 Va. (16 Gratt.) 470, 473–78 (1864).

militia.[565] 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.[566] 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."[567]

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 "Regular Army").[568]

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.[569] 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 nonprofessional citizen-army is principally organized through the state government or the federal government.

E. Inactive Officers and Soldiers

Finally, one might object to the professionalism distinction between armies and militia by pointing to various cases of officers and soldiers who were still deemed (or questionably deemed) part of land forces despite not being in active service. These include half-pay officers and furloughed soldiers.

In *Larrabee*, the D.C. Circuit provided half-pay officers as its primary example to show that individuals may be part of the land and naval forces even if they were not in active service.[570] In the

565. *See, e.g.*, *Arver*, 245 U.S. at 382–83.

566. Leider, *supra* note 19, at 1035–49.

567. 1 CURRIE, *supra* note 200, at 248 n.88.

568. *See supra* notes 92–98 and accompanying text.

569. *See, e.g.*, Andrews v. State, 50 Tenn. 165, 178 (1871); Hill v. State, 53 Ga. 472, 480 (1874).

570. *See* Larrabee v. Del Toro, 45 F.4d 81, 92 (D.C. Cir. 2022).

eighteenth century, the British Parliament provided former officers with half-pay.[571] The half-pay served as a kind of pension and, arguably, a retainer for future service.[572] Half-pay officers remained on the army and navy rolls as officers—but they lived as civilians and had no military obligation, except to report to duty if ordered.[573] An objector may claim that this example shows that I am wrong to define armies as comprising full-time regular soldiers because armies (not just militia) can have inactive and reserve soldiers, as well.

This is a challenging objection because the analytical distinctions between armies, militia, and civilians sometimes have been muddled by gray-area cases in real-world practice. At the risk of being overly theoretical, my response to this objection is going to borrow two facets from Aristotle's method of analysis. The first is the examination of concepts by reference to their central cases.[574] By initially dispensing with borderline cases in our analysis, we can better explore the general traits of concepts.[575] The second is to examine things by reference to their distinctive functions or characteristics.[576]

This information, then, helps us address the difficult cases—which are difficult because they lack the traits of central cases.[577] For example, a knife's distinctive function is to cut. Indeed, the modern definition of a "knife" is "a cutting instrument consisting of a sharp blade fastened to a handle."[578] But what if a knife's blade becomes so dull that it can no longer cut? Is it still a knife? The answer is yes, it may still be a knife in some sense—but it is also defective as a knife. This is because, while the dull knife has some traits of a knife (a handle and a blade, for example), a dull knife fails to perform the essential function that makes it a "knife" as opposed to something else.[579]

---

571. *See id.* (citing N.A.M. Rodger, *Commissioned Officers' Careers in the Royal Navy, 1690–1815*, 3 J. FOR MAR. RSCH. 85, 90–91 (2001)).

572. Rodger, *supra* note 572, at 90.

573. *Id.*

574. *See* MICHAEL V. WEDIN, *The Science and Axioms of Being, in* A COMPANION TO ARISTOTLE 125, 128–29 (Georgios Anagnostopoulos ed., 2009). My thanks to Eric Claeys for making this point.

575. JOHN FINNIS, NATURAL LAW & NATURAL RIGHTS 10 (2d ed. 2011). For a recent example of this central-case approach in jurisprudence, *see* FREDERICK SCHAUER, THE FORCE OF LAW 35–37 (2015) (arguing that while coercion may not be conceptually necessary for law, it is still important to the central cases of law and political authority as they exist in the real world).

576. *See, e.g.*, ARISTOTLE, NICOMACHEAN ETHICS, bk. 1, ch. 7, §§ 9–13, at 8–9 (Terrence Irwin, trans., Hackett Publ'g Co. 2d ed. 1999) (analyzing the function of a human being).

577. FINNIS, *supra* note 576, at 10–11.

578. *Knife*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/knife (last visited Nov. 9, 2022).

579. *See, e.g.*, MARK TIMMONS, MORAL THEORY: AN INTRODUCTION 74 (2d ed. 2013).

In jurisprudence, Mark Murphy uses this kind of analysis in his argument for natural law.[580] Scholars have long debated how to understand Augustine's natural law claim that "an unjust law is no law at all."[581] (Are unjust laws—such as antebellum state laws allowing slavery—not really "law" but something else?[582]) Murphy's understanding of natural law's core claim is not that an unjust law is not "law" in any sense of the term; rather, it is that an unjust law is defective as law because, in the central case of law, a law "is backed by decisive reasons for compliance."[583]

This central-case method has direct application here. A soldier is a person "engaged in military service."[584] If a person is not engaged in active military service, then one of two things are true: either he is not a soldier or his status as a soldier is defective in some way.[585] Half-pay officers might have been members of the land or naval forces in some sense; but their status as military officers was also defective. Half-pay officers lacked the key trait—active service—that made someone vocationally a member of the Army as opposed to a civilian. In Britain, their defective status as members of the military is evidenced by the tremendous legal, constitutional, and policy disputes about whether they were (or should be made) subject to military law for conduct that occurred when not on active duty.[586] If half-pay officers were unquestionably members of the land forces, there would have been no debate about their amenability to military law.

Just because real-world practice has some difficult gray zones is not a license for definitional nihilism. A three-legged horse may be defective as a horse; but it is still a horse. In contrast, an animal with rational capacity having two arms and two legs is not properly described as a defective horse; it is something different, a human being. Analogously, a military land force comprised of regular soldiers is still an army, even if it has a few inactive soldiers technically on the rolls. But a military land force comprised of

---

580. MARK C. MURPHY, NATURAL LAW IN JURISPRUDENCE AND POLITICS (2006).

581. AUGUSTINE, ON FREE CHOICE OF THE WILL bk. I, § 5, at 8 (Thomas Williams trans., Hackett Publ'g Co. 1993) (c. 400 AD); *see, e.g.*, Jules L. Coleman, *The Architecture of Jurisprudence*, 121 YALE L.J. 2, 11–13 (2011).

582. MURPHY, *supra* note 581, at 10–11.

583. *Id.* at 10.

584. *Soldier*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/soldier (last visited Nov. 9, 2022).

585. MURPHY, *supra* note 581, at 10–11 (making the same point using the example of a duck as a "skillful swimmer").

586. *See, e.g.,* 1 JOHN MCARTHUR, PRINCIPLES AND PRACTICE OF NAVAL AND MILITARY COURTS MARTIAL 186–201 (1813); 3 TOBIAS SMOLLETT, THE HISTORY OF ENGLAND 41, 43–44 (1836 ed.); 14 THE PARLIAMENTARY HISTORY OF ENGLAND 397, 462, 469, 473–74 484–490, 974 (1813); 2 THE HISTORY, DEBATES, AND PROCEEDINGS OF BOTH HOUSES OF PARLIAMENT OF GREAT BRITAIN 307 (1792); 22 THE PARLIAMENTARY REGISTER OR HISTORY OF THE PROCEEDINGS AND DEBATES OF THE HOUSE OF COMMONS 121–22 (1787).

nonprofessional citizen-soldiers who perform weekend drills and serve full-time only in war is a fully organized and functioning militia; it cannot be properly described as a regular army with some deviations from the central case.

The *Larrabee* majority's other major counterexample was furloughed soldiers during the Revolutionary War.[587] At the end of the war, there was a lag between when Britain surrendered and when a peace treaty was signed.[588] Consequently, Congress furloughed soldiers in the Continental Army, with the understanding that they would receive a full discharge once peace was declared.[589] These soldiers had no further military duties, but they were subject to recall if the peace negotiations collapsed and war resumed.[590] During the period of furlough, some soldiers mutinied against Congress, which had failed to pay them.[591] For the mutiny, they were court-martialed, not tried in civilian courts.[592] The *Larrabee* majority uses this as evidence that armies can comprise inactive soldiers.[593]

The *Larrabee* majority reads too much into this case. These soldiers were transitioning from active service to civilian life. Although the war had likely concluded, these soldiers had not been discharged because hostilities could have resumed. There will always be borderline cases of who is in active service. Even today, soldiers could commit misconduct after they wrap up their last military assignment but before they are formally discharged from the service.[594] The existence of borderline cases about who is still on active service does not support the categorical proposition that full-time, active service is not a standard component of service in the armies.

CONCLUSION

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

587. Larrabee v. Del Toro, 45 F.4d 81, 94 (D.C. Cir. 2022).

588. *See* WEIGLEY, *supra* note 73, at 78.

589. *Id.*

590. *Id.*

591. *Id.*

592. *Larrabee*, 45 F.4d at 94.

593. *Id.* at 93–94; *see also* WEIGLEY, *supra* note 73, at 78 (describing the incident).

594. *Cf.* 10 U.S.C. § 802(a)(1) (providing for court-martial jurisdiction over "[m]embers of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment").

militia officers and to train the militia "according to the discipline prescribed by Congress."[595] 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."[596] 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."[597] 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.[598]

The contemporary organization of the Armed Forces does not replicate the Framers' intended 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 into the national Armed Forces rather than working through a state-based militia system.

But the broad structure of the Armed Forces of the United States heavily resembles the Framers' dual-army system. We have a professional regular army and a nonprofessional 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.

Understanding that professionalism, not federalism, demarcates the critical distinction between the armies and militia has significant theoretical and doctrinal implications. For theoretical debates, awareness that the "armies" refers to the regular forces (rather than federal forces) helps translate Framing-era debates to modern times. Framing-era sentiments that "standing armies are dangerous to liberty" warned about the dangers of regular, professional troops.[599] Legal restrictions against domestic use of the military and contemporary debates about the civil-military gap and the

595. U.S. CONST. art. I, § 8, cl. 16.

596. U.S. CONST. amend. V.

597. U.S. CONST. amend. II.

598. *See* Auth. Of President to Send Militia into a Foreign Country, 29 Op. Att'ys Gen. 322 (1912); U.S. WAR DEP'T GEN. STAFF, REPORT ON THE ORGANIZATION OF THE LAND FORCES OF THE UNITED STATES 56–57 (1912).

599. This is why many eighteenth-century state constitutions contained warnings about the dangers of standing armies. *See supra* note 534. If the admonition had been about national armies, it would have been nonsensical to place warnings and restrictions on raising armies into state constitutions.

politicization of the Armed Forces demonstrate that these Framing-era concerns are not historical artifacts of some bygone time.

Distinguishing between "armies" and "militia" is fundamental to understanding how the Constitution governs military affairs. For example, the authority of states to keep land forces without congressional consent depends on whether the state is organizing a militia or raising an army.[600]

For military justice, the professionalism distinction explains why regular forces are subject to military law at all times, while federal military reservists are subject to military law only when on duty or in training. This distinction is not simply a policy choice of Congress. Rather, it also reflects a deeper constitutional tradition of imposing more extensive military-law jurisdiction over "armies" (regular, professional soldiers) compared with "militia" (civilians who perform military service on a part-time or emergency basis).

Finally, for the right to keep and bear arms, the professionalism distinction helps explain why the right continues to have relevance for maintaining the militia system. The Armed Forces actively train only the regular forces and the Selected Reserve. Most of the modern militia (the Individual Ready Reserve, the inactive National Guard, the Standby Reserve, the Retired Reserve, and the people registered with the Selective Service System) do not receive governmental training. The right to keep and bear arms ensures that these citizens can stay proficient with arms in peacetime so that they can use them effectively in wartime. Moreover, bearing private arms may be crucial in rare but extreme wartime emergencies that require an immediate expansion of the Armed Forces without time to retool civilian industry for wartime arms production. When the Supreme Court declared that the Second Amendment exists to "assure the continuation and render possible the effectiveness of [militia] forces,"[601] the Court meant that the Second Amendment preserved *citizen-armies*, not state armies. The Second Amendment "must be interpreted and applied with that end in view."[602]

Although the contemporary American standing army may be large by historical standards, the United States still does not maintain enough regular soldiers to meet every possible wartime contingency. The militia comprises the remaining able-bodied citizens who may be called into temporary military service. Some of these citizens may have preexisting relationships with a reserve force, while others may be drafted from the civilian community in wartime. In either case, nonprofessional citizen-soldiers remain a crucial component of our national military system.

---

600. *Compare* U.S. CONST. art I, § 8, cl.16 (militia), *with id.* art. 1, § 10, cl. 3 (troops).

601. United States v. Miller, 307 U.S. 174, 178 (1939).

602. *Id.*