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The Original Meaning of the Constitution’s Militia Clauses And Modern Implications

by

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Abstract

Overseas deployment of members of the National Guard—the institution the Constitution calls “the Militia”—has been the source of continued controversy, with some commentators arguing that overseas deployment is unconstitutional. Relying on historical and legal sources more extensive than any previously accessed, this Article deduces the precise meaning of the constitutional term “Militia.” It examines the constitutional limits on the federal government’s use of that institution and tests current National Guard legislation against those limits. The Article examines Supreme Court holdings on the subject and suggests a path forward.

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INTRODUCTION¹

¹*Bibliographical footnote*: This note collects sources, other than statutes and statutory collections, cited more than once.

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ROBERT HENLEY-ONGLEY (“A MEMBER OF PARLIAMENT”), AN ESSAY ON THE

To contemporary Americans, the phrase “National Guard” may be more familiar than the Constitution’s term “Militia,” but they refer to the same institution.² The word “Militia: appears in the Constitution six times: four times in

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T.W. WILLIAMS, *A COMPENDIOUS DIGEST OF STATUTE LAW* (London, 1787) [hereinafter WILLIAMS]

2 SEAN M. ZEIGLER, ALEXANDRA EVANS, GIAN GENTILE & BADREDDINE AHTCHI, *THE EVOLUTION OF U.S. MILITARY POLICY FROM THE CONSTITUTION TO THE PRESENT* (Rand Corp. 2020), *available at* https://www.rand.org/pubs/research_reports/RR1995z2.html [hereinafter *EVOLUTION*].

²The National Guard traces its existence to the formation of colonial militia

three clauses of the original document and twice in amendments. This Article addresses primarily the three clauses in the original document, which it refers to as the “Militia Clauses.” They are:

- the Calling Forth Clause,³ which itemizes the circumstances in which Congress may “provide for” the militia’s federal deployment;
- the Militia Organization Clause, which fixes the rules for organization, arming, discipline, and governance;⁴ and
- the Commander in Chief Clause, which provides that “The President shall be Commander in Chief . . . of the Militia of the several States, when called into the actual Service of the United States.”⁵

The other two appearances of the word “militia” are in the preamble to the Second Amendment⁶ and in an exception to the Fifth Amendment’s grand jury guarantee.⁷

regiments in 1636. National Guard, U.S. Government, <https://www.nationalguard.mil/Features/2021/385th-Birthday-The-National-Guard/>.

³U.S. CONST., art. I, § 8, cl. 15 (“The Congress shall have Power . . . To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.”).

⁴U.S. CONST., art. I, § 8, cl. 16 (“The Congress shall have Power . . . To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.”).

⁵U.S. CONST., art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . .”).

⁶U.S. CONST., amend ii (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”).

⁷U.S. CONST., amend v (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . .”).

As detailed below, the constitutional term “Militia” refers *exclusively* to a state-based, wholly-defensive, domestic, part-time force.⁸ It was not until the twentieth century that Congress renamed the militia the “National Guard,” seized almost complete control over it,⁹ and enabled Presidents to deploy it overseas offensive operations.¹⁰

As explained below, these developments upset the Constitution’s deliberate balance between state and federal military power.¹¹ Moreover, overseas deployment endangers personnel and interferes with their ability to perform critical state-level duties. And the availability of militia units for unrestricted deployment seems to have encouraged Presidents to launch offensive operations in faraway locations without prior national debate or congressional consent.¹²

For these reasons, federal control of state militias has been controversial. Despite the controversy, however, legal scholarship on the subject has been surprisingly sparse,¹³ the few published studies suffer from defects in interpretive and historical method.¹⁴

⁸*Infra* Part II-C.

⁹*Infra* Part IX-A

¹⁰*Infra* Part IX-C.

¹¹*Infra* Part IX-C.

¹²*Infra* Part IX-C.

¹³The principal studies are *Fields & Hardy*, *supra* note 1; *Hirsch*, *supra* note 1; *Leider, Federalism*, *supra* note 1; and *Leider, Militia*, *supra* note 1.

¹⁴For example, *Fields & Hardy*, *supra* note 1, features a useful historical discussion, but fails to identify the characteristics the Constitution-makers considered inherent in the word “Militia.” *Hirsch*, *supra* note 1, relies on an erroneous conclusion of fact to justify construing the Militia Clauses by an interpretive method unknown to the Founders. *Infra* notes ____ and accompanying text. None of the existing commentaries apply the rules of documentary construction under which the Constitution was written and adopted. *Infra* notes ____ and accompanying text.

Accordingly, this Article provides an accurate and comprehensive examination of the meaning of the Constitution's Militia Clauses, and the implications for modern practice. In composing it, we have employed the following methodology.

First: Although we summarize the text of the Militia Clauses early in this Article, we do not jump immediately into detailed textual analysis, as is common practice among constitutional commentators.¹⁵ Textual analysis usually is a good first step when interpreting a modern statute or document, but it is often poor way of approaching a document as old as the Constitution. Constitutional words and phrases frequently carry definitions, or arise from eighteenth-century understandings, quite unfamiliar to modern readers.

Accordingly, we begin by addressing the historical and legal background necessary for understanding the text. These include eighteenth-century concepts of defensive and offensive war, then-prevailing methods of documentary interpretation, defining characteristics of the Founding-era term "Militia," and the allocation of war powers under the Articles of Confederation and the Constitution.

After laying this foundation, we undertake our textual analysis, and we summarize our findings in a fictional eighteenth-century attorney's opinion letter.

We next describe the federal government's commandeering of state militias during the twentieth century and the militia's deployment overseas. We test those developments against the Constitution as adopted by the Founders.

We determine—based on voluminous, clear, and virtually uncontradicted evidence—that the practice of deploying the militia in overseas offensive operations

¹⁵*Compare* Sara Aronchick Solow & Barry Friedman, *How to Talk About the Constitution*, 25 YALE J.L. & HUMAN. 69, 79 (2013) ("Begin with the Constitution's text, as good interpreters should, and almost always do."); *Shizer & Calabresi, supra* note 1, at 1422 ("In our view, any analysis of congressional power—and, indeed, of any constitutional issue—must begin with the text of the Constitution.").

is unconstitutional. We also explain that the Supreme Court has never reviewed the constitutionality of this conduct in a thorough and definitive way. Instead, it has issued dicta seeming to approve of current practice, but without undertaking comprehensive review or issuing square holdings.

We conclude with a call for definitive Supreme Court review, greater state protection of the National Guard from unconstitutional commandeering, and, in areas of concurrent state and federal jurisdiction, more accommodation between the two levels of government.

I. BACKGROUND CONCEPTS

A. *Offensive and Defensive War*

Understanding the Constitution's Militia Clauses requires understanding the Founding-era distinction between defensive and offensive war.¹⁶ A sovereign fought *defensive war* in response to insurrection or to actual or imminent invasion. A sovereign fighting a defensive war usually did not initiate hostilities, but might strike first to forestall imminent invasion or if "often alarm'd and harass'd with sudden Incursions upon [it], the Enemy retiring always when [it] appears to oppose [it]."¹⁷ A sovereign conducted defensive war within or very near its national boundaries. Although a country embarking on defensive operations might formally declare war, a declaration was neither necessary nor customary.¹⁸

A sovereign initiated an *offensive war* to seek compensation for perceived injury, to deter anticipated injury, or to punish for injury inflicted. Offensive war

¹⁶The discussion in this Part I-A summarizes findings in *Natelson & Hyman, supra* note 1, at 5-7.

¹⁷*Natelson & Hyman, supra* note 1, at 6.

¹⁸*Natelson & Hyman, supra* note 1, at 7.

often entailed fighting overseas or otherwise far from national boundaries. A country embarking on offensive hostilities was expected to announce and justify its decision with a formal declaration of war.¹⁹

Defensive operations could be fought either by militias or by regular armies and navies. Offensive wars were fought exclusively by regular armies and navies.²⁰

B. The Founders' Interpretive Method

Competent parties adopting consequential legal instruments—and those categories certainly include, respectively, the Founders and the Constitution—craft their language in anticipation that it will be construed using interpretive methods prevailing at the time. For this reason, accurately deducing a document's meaning requires reading it in light of those methods. Modern commentators who apply new or unique modes of construction to the Constitution, may misunderstand the document.²¹

¹⁹*Natelson & Hyman, supra* note 1, at 7. President George Washington retained this view after the Constitution was ratified and after the Creek Nation initiated hostilities. Letter from President George Washington to William Moultrie, Aug. 28, 1793, FOUNDERS ONLINE, National Archives, <https://founders.archives.gov/documents/Washington/05-13-02-0381>. (“The Constitution vests the power of declaring War with Congress, therefore no offensive expedition of importance can be undertaken until after they shall have deliberated upon the subject, and authorised such a measure.”)

²⁰*Infra* Part II-C.

²¹Another way to make this point is to say that if the framers of the Constitution had anticipated that the Constitution would be interpreted by methods not then prevailing, they would have worded the document differently. For example, the list of powers granted to Congress in Article I, Section 8 must be read in light of the then-recognized rule of *inclusio unius est exclusio alterius*. If the framers had written in a world without that maxim, they surely would have worded Article I, Section 8 differently. *See generally Applying, supra* note 1.

Contemporaneous legal sources and the constitutional debates of 1787-1790 inform us of the interpretive methods prevailing at the time.²² The “lodestar” for construing most legal instruments was “the intent of the makers”—meaning the understanding or bargain of those who converted the document into law.²³

The identity of the “makers” depended on the kind of instrument being construed. The testator was the “maker” of a will. The contracting parties were the “makers” of a contract. The enacting legislators were the “makers” of a statute. The “makers” of a constitution were its ratifiers.

When feasible, Founding-era lawyers sought to recover the parties’ subjective understanding or bargain—their “meeting of the minds.”²⁴ If, as was often the case, evidence of subjective understanding was conflicting, insufficient, or otherwise unpersuasive, they relied on the objective meaning of the text. Today, we call those alternative methods “original understanding originalism” and “original meaning originalism.”²⁵ However, in most cases the evidence for original understanding and

²²See generally *Hermeneutic*, *supra* note 1; *Applying*, *supra* note 1.

²³See generally *Hermeneutic*, *supra* note 1.

²⁴See generally *Hermeneutic*, *supra* note 1.

²⁵Some writers have depicted originalism as a new doctrine. See, e.g., Jill Lepore, *How Originalism Killed the Constitution*, THE ATLANTIC, Sept. 10, 2025, <https://www.theatlantic.com/magazine/archive/2025/10/constitutional-originalism-amendment/683961/> (suggesting that “originalism” was first “put forward” in 1971). However, Paul Brest, the scholar who coined the term “originalism” and criticized the method, recognized it as a long-established interpretive procedure, Paul Brest, *The Misconceived Quest for Original Understanding*, 60 BOSTON U. L. REV. 204, 204 (1980).

In fact, it is far older and more universal than even Professor Brest acknowledged. See Robert G. Natelson, *Answering the Latest Anti-Originalism Narrative*, LAW & LIBERTY, Sept. 25, 2025, <https://lawliberty.org/answering-the-latest-anti-originalism-narrative/> (noting reliance on the intent of the lawmakers in the ancient Greco-Roman author Polybius and in the *Digest* of the Emperor Justinian, and its recognition as a general rule by Edmund Plowden, the sixteenth

original meaning are identical or overlap, and the results are the same.²⁶ Because this is true of the Militia Clauses, this Article does not distinguish between the two approaches.

Recovering the “intent of the makers” of a document more than two centuries old is a historical as well as a legal enterprise. It thus requires adhering to standards of historical scholarship. The following three standards are particularly important in this context:

First: As already observed, preliminary background research should precede detailed textual analysis.²⁷

Second: It is not sufficient to identify a term’s *possible* meaning. The goal is to deduce the ratifiers’ *actual or most probable* understanding.²⁸

Third: Different kinds of evidence have greater or less probative value. For example, uncontradicted statements generally are better evidence of common understanding than contradicted ones. Publicly-known circumstances (including the text of the document and interpretive statements about it) are better evidence than unknown or secret events. Statements by a proposal’s sponsors usually are stronger

century English jurist).

²⁶The views of a document’s *drafters* (today commonly labeled “original intent”) were relevant to the extent that they shed light on the original understanding of those who adopted the document or on original objective meaning. *Hermeneutic*, *supra* note 1, at 1289 n.281.

²⁷ *Supra* notes ___ and accompanying text.

²⁸For example, some writers point out that in the eighteenth century the word “commerce” could encompass all kinds of human intercourse: economic, social, and sexual. *E.g.*, Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1 (2010). But that clearly was not what “Commerce” meant in the context of the Constitution. *See* Robert G. Natelson, *The Meaning of “Regulate Commerce” to the Constitution’s Ratifiers*, 23 FEDERALIST SOC’Y REV. 307 (2022); Robert G. Natelson, *The Legal Meaning of “Commerce” In the Commerce Clause*, 80 ST. JOHN’S L. REV. 789 (2006).

evidence than charges by its opponents. Known circumstances contemporaneous with, or shortly before, ratification usually are more probative than known events occurring decades or centuries earlier. Least probative of all—and most likely to mislead—are events arising after the Constitution was fully ratified. This is because post-ratification events were necessarily unknown to the participants and could not have been a factor in their bargain.²⁹

C. *James Madison’s “Accustomed Requisites”*

The Constitution employs many words and phrases that designate pre-existing institutions. Among these are “Trial . . . by jury,”³⁰ “Legislatures,”³¹ “Post Offices,”³² “post Roads,”³³ “Armies,”³⁴ “Navy,”³⁵ and “Militia.”³⁶ Each of these terms encompasses certain defining characteristics—that is, characteristics the Founders considered essential to, or inherent in, that institution.

James Madison labeled these defining characteristics “accustomed requisites.” When discussing the guarantee of trial by jury in criminal cases, he listed as “accustomed requisites” the defendant’s right to challenge veniremen and the

²⁹ Legal writers frequently violate the third standard by relying on evidence arising long after the ratification. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 605-19 (2008) (construing the Second Amendment by relying, in part, on evidence arising decades after the Amendment was adopted).

³⁰ U.S. CONST., art. III, § 2, cl. 3.

³¹ *E.g.*, U.S. CONST., art. IV.

³² U.S. CONST., art. I, § 8, cl. 7.

³³ U.S. CONST., art. I, § 8, cl. 7.

³⁴ U.S. CONST., art. I, § 8, cl. 12.

³⁵ U.S. CONST., art. I, § 8, cl. 13.

³⁶ U.S. CONST., art. I, § 8, cls. 15 & 16; *id.*, art. II, § 2, cl. 1; amends. ii & v.

requirement of unanimity.³⁷ If he had been a lawyer, he might have said those were “inherent in” or “necessary incidents of”³⁸ jury trial.

Illustrating how the concept works is the 1920 Supreme Court case of *Hawke v. Smith*.³⁹ The issue before the Court was whether a state’s voters, operating through the referendum process, qualified as a “Legislature” within the meaning of the Constitution’s Article V amendment process.

The Court inquired into the meaning of “Legislature” when the Constitution was adopted, and concluded that “A Legislature was then the representative body which made the laws of the people.”⁴⁰ In Madisonian terms, the “accustomed requisites” of the Constitution’s term “legislature” were that it was (1) representative, (2) a “body”—i.e., an assembly, and (3) made laws. The Constitution’s use of the word “Legislature” thereby imported each of those characteristics into the amendment process. The justices concluded that because the electorate lacked the first two of those requisites, it did not qualify as a “Legislature” for purposes of the Constitution.⁴¹

³⁷1 ANNALS OF CONGRESS 452 (Jun. 8, 1789).

³⁸*See generally*, Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, in GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I. SEIDMAN, *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* 52 (2010) (discussing the doctrine of incidental powers).

³⁹253 U.S. 221, 227 (1920).

⁴⁰*Hawke v. Smith*, 253 U.S. 221, 227 (1920).

However, the court has interpreted the word “Legislature” in the Constitution’s election provisions differently. *E.g.*, *Arizona State Legislature v. Arizona Independent Redistricting Comm’n*, 576 U.S. 787 (2015) (construing U.S. CONST. Art. I, § 4, cl. 1). The Court explained that this because of differences between the ratification and lawmaking processes. *See also* Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 13-17 (2010).

⁴¹*Hawke v. Smith*, *supra*, 253 U.S. at 231.

This is not to say that the Constitution's use of a term to refer to an institution means that *all* of the then-prevailing facets of the institution are “trapped in amber.”⁴² Rather, the term carries with it only those facets the ratifiers considered necessary or inherent: the accustomed *requisites*.

Without the rule that “accustomed requisites” inhere in a constitutional term, courts and officials could manipulate language to create outcomes very different from those the Constitution actually mandates: They might alter trial by jury from an impartial panel of twelve to a biased panel of three. Or they might change Congress's power to “raise and support Armies” into a power to raise and support an armed secret police.

Determining whether or not a characteristic was “requisite” when the Constitution was ratified is a historical enterprise. If, before and during the ratification era, England and all American states fixed the membership of a common law criminal jury at twelve, that fact serves as evidence that twelve was “requisite.” But if the number varied from place to place or from time to time,⁴³ that fact is evidence to the contrary.

In the following pages, we examine the institution of the militia during the years leading up to and including the ratification era to determine whether the constitutional term “Militia” carried with it “accustomed requisites”—and, if so, what they were.⁴⁴

⁴²United States v. *Rahimi*, 602 U. S. 680, 691 (2024).

⁴³*Compare* James Madison to Edmund Pendleton, Sep. 23, 1789, FOUNDERS ONLINE, National Archives, <https://founders.archives.gov/documents/Madison/01-12-02-0268> (explaining that different state practices precluded the “locality of Juries” from qualifying as an accustomed requisite).

⁴⁴*Cf.* Marcus Armstrong, *A Definition and a Litmus Test*, 52 ST. MARY'S L.J. 1 (2020) (concluding that the defining characteristics of a militia are that it is a military force that cannot be deployed overseas and that is under the command of a state or

II. THE MEANING OF “MILITIA” AND ITS “ACCUSTOMED REQUISITES”

A. *The British Background*

In the original Latin, *militia* means merely military service, war, or warfare.⁴⁵ In the eighteenth century it could mean merely a body of soldiers or, more narrowly, a body of part-time soldiers.⁴⁶ But as noted earlier, it is not sufficient to determine what the word could mean, but what it actually meant in the Constitution, or at least in legal and constitutional contexts.⁴⁷

Most prior commentators have neglected the militia’s British background,⁴⁸ but a sufficient examination of the Constitution’s Militia Clauses must begin with a study of the institution in the mother country. This is because the British militia

territorial governor); *Leider, Militia*, *supra* note 1, at 977 (identifying as the only distinction between the militia and regular soldiers: professionalism). Our conclusions turned out to be different.

⁴⁵CHARLTON T. LEWIS, A LATIN DICTIONARY 1144 (1879) (defining *militia*).

⁴⁶ENCYCLOPAEDIA BRITANNICA, *supra* note 1, at 5053 (“MILITIA, in general, denotes the body of soldiers, or those who make profession of arms. In a more restrained sense, militia denotes the trained bands of a town or country, who arm themselves, upon short warning, for their own defense. So that, in this sense, militia is opposed to regular or stated troops.”)

⁴⁷*Supra* note ____ and accompanying text.

⁴⁸*E.g.*, Frederick Bernays Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 182 (1940) (“To trace the development of American militia from Cromwell’s trainbands would serve no purpose other than antiquarianism”); *Hirsch*, *supra* note 1, at 923 (beginning historical treatment with the American colonies); *Leider*, *Federalism*, *supra* note 1 (discussing the Constitution’s framing with little reference to prior British history); *Leider, Militia*, *supra* note 1 (same). *But see Fields & Hardy*, *supra* note 1, at 1-24 (providing a summary of British history); *Maggs & Leider*, *supra* note 1, at 219 (containing a very brief discussion) & *Leider & Maggs*, *supra* note 1, at 223 (same).

was the parent of the American colonial militias,⁴⁹ which in turn were the parents of the state militias as they existed when the Constitution was ratified. Most of the Founders were familiar with British institutions, since the Founders grew to maturity, and, in many cases, practiced law, while living under the British flag.⁵⁰

Parliament enacted various statutes governing the militia during the years prior to the American Founding. The most important were comprehensive bills adopted in 1662, 1757, and 1761. Reading and comparing them is a good first step in determining which characteristics of the Anglo-American militia were inherent or “requisite,” and which were merely optional.

1. The 1662 Act

In 1660, England ended its eleven-year experiment in republican government by recalling Charles II to the throne. The same year, Parliament also passed the Tenures Abolition Act, a reform that rendered it necessary to establish a reformed military structure.⁵¹ Accordingly, in 1662 Parliament adopted “An Act for ordering

⁴⁹*Leider & Maggs, supra* note 1, at 223 (stating that when settling the colonies, “they brought the militia system with them”).

⁵⁰Illustrative is John Dickinson, a prominent framer of the Constitution and a Federalist pamphleteer during the ratification debates. He received his legal training in England, served in the Delaware and Pennsylvania colonial legislatures, and became a prominent practicing lawyer during the period of British rule. *See generally*, Robert G. Natelson, *The Constitutional Contributions of John Dickinson*, 108 PENN. STATE L. REV. 415 (2003).

⁵¹1 WILLIAM BLACKSTONE COMMENTARIES *399 (“Soon after the restoration of king Charles the second, when military tenures were abolished, it was thought proper to ascertain the power of the militia, to recognize the sole right of the crown to govern and command them, and to put the whole into a more regular method of military subordination.”). *See also* CHAMBERS, CYCLOPAEDIA, *supra* note 1, article on “militia” (unpaginated; alphabetical by topic) (same); ENCYCLOPAEDIA BRITANNICA, *supra* note 1, at 5051 (same).

the Forces in the several Counties of this Kingdom.”⁵²

This measure designated the head of the executive branch—i.e., the king—as the commander-in-chief of the militia.⁵³ It authorized the king to appoint “lieutenants” (literally, deputies) for drafting and training companies of militiamen.⁵⁴ Drafting and training were carried out in individual geographic subdivisions—usually counties.⁵⁵ Militiamen were required to provide arms and horses, according to their financial ability.⁵⁶ The law imposed penalties for non-compliance.⁵⁷

Militia service was not universal. Men selected for duty could avoid it by finding acceptable substitutes.⁵⁸ The law also included exemptions for suppliers of horses and foot soldiers.⁵⁹ Except for units deployed to deal with emergencies, service was part time: There was a general muster once a year and musters for individual companies four times a year.⁶⁰

The only emergencies for which the militia could be deployed were instances of “Insurrection, Rebellion, or Invasion,”⁶¹—i.e., for defensive war.⁶² Reinforcing the

⁵²13-14 *Car. ii*, c. 3 (1662).

⁵³13-14 *Car. ii*, c. 3 (1662) §§ I & II.

⁵⁴13-14 *Car. ii*, c. 3 (1662) § II.

⁵⁵13-14 *Car. ii*, c. 3 (1662), § II.

⁵⁶13-14 *Car. ii*, c. 3 (1662), § III.

⁵⁷13-14 *Car. ii*, c. 3 (1662), § X.

⁵⁸13-14 *Car. ii*, c. 3 (1662), § XXV.

⁵⁹13-14 *Car. ii*, c. 3 (1662), § XXV.

⁶⁰13-14 *Car. ii*, c. 3 (1662), § XXI.

⁶¹13-14 *Car. ii*, c. 3 (1662), § II. *See also id.*, § VIII (permitting lieutenants and deputies to commandeer transportation “upon Occasion of Invasion, Insurrection, or Rebellion”) & § XXIII (permitting the king to raise money “in case of apparent Danger to the present Government”).

purely defensive duties of the militia were restrictions on where the militia could be sent. An ancient statute had provided that “no one shall be compelled to arm or go out of his shire, without necessity and sudden invasion,”⁶³ and the 1662 measure essentially confirmed this: It provided that “no Officer or Soldier shall be constrained to stay for above Four Days together from their respective Habitations”⁶⁴ nor forced to muster outside his own municipality.⁶⁵ During time of war, militiamen could be sent anywhere in England, but the statute absolutely forbade their transportation outside the kingdom.⁶⁶ This geographical restriction both ensured that militia duty was only part-time and prevented the king from employing militiamen in offensive operations.

2. The 1757 Act

Parliament adopted its next comprehensive statute in 1757.⁶⁷ This was during the Seven Years War, when a French invasion of Great Britain seemed possible.⁶⁸ This statute was more detailed than its 1662 predecessor. It required militiamen to

⁶²*Supra* notes ____ and accompanying text.

⁶³WILLIAMS, *supra* note 1, at 441

⁶⁴13-14 *Car. ii*, c. 3 (1662), § XXI.

⁶⁵13-14 *Car. ii*, c. 3 (1662), § XXXVIII.

⁶⁶13-14 *Car. ii*, c. 3 (1662), § XXXII (“Provided, That neither this Act, nor any Matter or Thing therein contained, shall be deemed, construed or taken to extend to the giving or declaring of any Power for the transporting of any the Subjects of the Realm, or any way compelling them to march out of this Kingdom, otherwise than by the Laws of *England* ought to be done”).

⁶⁷30 *Geo. ii.*, c. 25 (1757).

⁶⁸LETTER TO PITT, *supra* note 1, at 4-5 (taking the threat of invasion seriously and advocating improvement of the militia); SINCLAIR, *supra* note 1, at 17-18 (also taking the threat seriously, and similarly advocating a “well-regulated militia”).

take oaths,⁶⁹ specified the quota to be raised for each county and certain other geographic subdivisions,⁷⁰ and affirmed the right of commissioned officers to serve in Parliament.⁷¹ It authorized the government to provide arms to those serving, rather than relying solely on the men to equip themselves.⁷²

In other respects, the statute duplicated salient aspects of the 1662 law. The king remained the commander of the militia, and continued to function through lieutenants appointed to counties and to other local subdivisions.⁷³ However, the act qualified the commander-in-chief power by requiring that if the king decided to call out the militia, he must first notify Parliament, if in session, or, if not in session, the privy council.⁷⁴

Service remained non-universal, with an expanded list of exemptions. Those exempt from duty included peers (lords),⁷⁵ officers in the regular military, university faculty and students, clergymen, peace officers, clerks, apprentices, seamen and seafarers.⁷⁶ Quakers also were excused, but they were required to find or finance substitutes.⁷⁷ Further, only men between eighteen and fifty years of age could be drafted for militia duty.⁷⁸ To fill each county's quota of militiamen, draftees were

⁶⁹30 *Geo. ii.*, c. 25 (1757), § IX (requiring militiamen to take oaths).

⁷⁰30 *Geo. ii.*, c. 25 (1757), § XVI.

⁷¹30 *Geo. ii.*, c. 25 (1757), § XII.

⁷²*E.g.*, 30 *Geo. ii.*, c. 25 (1757), § XXXII (referring to arms provided to a company); § XLII (referring to "muskets delivered for the service of the militia").

⁷³30 *Geo. ii.*, c. 25 (1757), § XXI.

⁷⁴30 *Geo. ii.*, c. 25 (1757), § XLV.

⁷⁵30 *Geo. ii.*, c. 25 (1757), § XI.

⁷⁶30 *Geo. ii.*, c. 25 (1757), § XIX.

⁷⁷30 *Geo. ii.*, c. 25 (1757), § XXVI.

⁷⁸30 *Geo. ii.*, c. 25 (1757), § XIX.

chosen by lot.⁷⁹ No one was required to serve longer than three years.⁸⁰ If a man could find an acceptable substitute, he need not serve at all.⁸¹ Unless a man was deployed for an emergency, he served only part time.⁸²

The 1757 statute continued to limit militia service to defensive war: “Insurrection, Rebellion, or Invasion.”⁸³ It did, however, recognize—as the 1662 act had not—that defensive war also could include response to “imminent danger” of invasion.⁸⁴

⁷⁹30 *Geo. ii.*, c. 25 (1757), §§ XVI & XIX.

⁸⁰30 *Geo. ii.*, c. 25 (1757), § XIX

⁸¹30 *Geo. ii.*, c. 25 (1757), §§ XIX & XXIV.

⁸²30 *Geo. ii.*, c. 25 (1757), § XXXVII (setting forth days for exercise). *See also* § XXVII (four days in Whitsun week).

⁸³30 *Geo. ii.*, c. 25 (1757), § XLV provided:

[I]n case of actual invasion, or upon imminent danger thereof, or in case of rebellion, it may and shall be lawful for his Majesty . . . (the occasion being first communicated to parliament, if the parliament shall be then sitting, or declared in council, and notified by proclamation, if no parliament shall be then sitting or in being) to order and direct his lieutenants . . . with all convenient speed, to draw out and embody all the regiments and battalions of militia of their respective counties . . . herein appointed to be raised and trained, or so many of them as his Majesty . . . shall in his or their great wisdom judge necessary, in such manner as shall be best adopted to the circumstances of the danger; and to put the said forces under the command of such general officers as his Majesty . . . shall be pleased to appoint over them; and to direct them to be led by their respective offices into any parts of this kingdom, for the suppression of such invasion and rebellion

See also 30 *Geo. ii.*, c. 25 (1757), § V (men not otherwise qualified to be officers could become such “in case of actual invasion, or upon imminent danger thereof, or in case of rebellion”); § XXV (“in case of actual invasion, or upon imminent danger thereof, or in case of rebellion”); § XLIX (“in case of actual invasion, or upon imminent danger thereof, or in case of rebellion”).

⁸⁴*Supra* note ____ and accompanying text; *see also* HENLEY-ONGLEY, *supra* note 1, at 8 (criticizing this change).

Geographical restrictions were retained: Enlistees were to be trained only within the subdivisions from which they were selected,⁸⁵ and sometimes even more locally.⁸⁶ Even during wartime, a man could not be marched out of Great Britain.⁸⁷

3. The 1761 Act

The third great parliamentary codification of militia law was adopted in 1761, early in the reign of George III.⁸⁸ It began with a recital that foreshadowed the language of the Second Amendment: “WHEREAS, a well regulated militia has been found to be of great utility, and is of the utmost importance to the internal defence of this country.”⁸⁹ (To “regulate” a militia meant to organize and train it; in eighteenth century writings, the noun and verb were frequently conjoined.⁹⁰)

⁸⁵30 *Geo. ii.*, c. 25 (1757), § XXXVII (“at places of exercise to be appointed within the respective counties, ridings or places”).

⁸⁶30 *Geo. ii.*, c. 25 (1757), § XL (“where by reason of the distance from the appointed place of exercise, a whole company or half company of militia men cannot be got together, his Majesty’s lieutenant . . . shall order such smaller numbers to be trained . . . in such place or places as they shall think fit”).

⁸⁷30 *Geo. ii.*, c. 25 (1757), § LI; CHAMBERS, CYCLOPAEDIA, *supra* note 1, article on “militia” (unpaginated; alphabetical by topic) (similar wording). The 1662 statute forbade sending militia units out of the “kingdom”—meaning England. 13-14 *Car. ii.*, c. 3 (1662), § XXXII. Under the 1707 Act of Union, England and Scotland were united, resulting in the “kingdom” covering the entire island of Great Britain. Act of Union: Great Britain [1707], ENCYCLOPAEDIA BRITANNICA (Apr. 24, 2026), <https://www.britannica.com/event/Act-of-Union-Great-Britain-1707>.

⁸⁸2 *Geo. iii.*, c. 20 (1761).

⁸⁹2 *Geo. iii.*, c. 20 (1761), Preamble.

⁹⁰Henry J. Renk, *Heller Was Egregiously Wrong and Should Be Overruled*, 31 ROGER WMS. U. L. REV. 1, 7 n28 (2026), *available at* https://docs.rwu.edu/rwu_LR/vol31/iss1/2 (collecting examples). *See also* “A Democratic Federalist,” PA. HERALD, Oct. 17, 1787, in 13 DOCUMENTARY HISTORY, *supra* note 1, at 386, 390 (“Is not a well regulated militia sufficient for every purpose of internal defence?”); HENLEY-ONGLEY, *supra* note 1, at 22 (“a better regulated

The statute repeated some central provisions in earlier law. The king still commanded the militia, operating through lieutenants,⁹¹ and subject to the rule that he notify Parliament or the privy council before calling it out.⁹² Service remained non-universal; in fact, the number of exemptions was increased to include Quakers,⁹³ peers, regular soldiers, members of universities, clergymen, licensed teachers, peace officers, “articled clerk, apprentice, seaman, or seafaring man,” dockworkers, and poor men with three children born in wedlock.⁹⁴ Enlistees continued to be chosen by lot,⁹⁵ and retained the right to nominate substitutes. Service remained part time⁹⁶ and limited to three years.⁹⁷

The 1761 act reaffirmed that the militia could be employed for defensive war only,⁹⁸ and it contained geographic restrictions. Men were exercised within the

Militia”); *Letter to Pitt*, *supra* note 1, at 19 (“well-regulated militia”); SINCLAIR, *supra* note 1, at 18 (“well-regulated militia”); *infra* Part II-B (discussing American statutes conjoining “regulate” and “militia”).

⁹¹2 *Geo. iii*, c. 20 (1761), § V.

⁹²2 *Geo. iii*, c. 20 (1761), § CXVI.

⁹³2 *Geo. iii*, c. 20 (1761), §LXXXVII (stating that a Quaker may provide a substitute, or it may be provided for him, but his property may be seized to pay the expense).

⁹⁴2 *Geo. iii*, c. 20 (1761), § XLII.

⁹⁵2 *Geo. iii*, c. 20 (1761), § XLII.

⁹⁶2 *Geo. iii*, c. 20 (1761), § CIII (notice of times of exercise).

⁹⁷2 *Geo. iii*, c. 20 (1761), § LXXVIII.

⁹⁸2 *Geo. iii* c. 20 (1761), § CXVI:

[I]n case of actual invasion, or upon imminent danger thereof, or in case of rebellion, it may and shall be lawful for his Majesty, his heirs, and successors . . . to draw out and embody all the regiments and battalions of militia of their respective counties, ridings, or places, already raised, and not yet embodied, or herein appointed to be raised and trained, or so many of them as his Majesty, his heirs, and successors, shall, in his or their great wisdom, judge necessary, in such manner as shall be best adapted to the circumstances of the danger; and to put the said forces

subdivisions from which they had been enlisted.⁹⁹ In wartime, service continued to be restricted to the island of Great Britain.¹⁰⁰ The restriction to Great Britain was remarkable in view of the far-flung nature of the British empire. Yet even during the American Revolution, only regular troops were sent to America. The militia was employed only fill manpower gaps within Great Britain.¹⁰¹

4. Consistency in Statutes and Commentary—and “Militia” vs. “Army”

Although the principal parliamentary statutes varied in many details, they were consistent in these prominent respects:

First: The militia was commanded by the chief executive, acting through his chosen deputies. There were minor qualifications on his power of command.

Second: Although writers sometimes referred to the militia as “the whole body of the people,”¹⁰² service was never universal. It was limited by age, occupation, and

under the command of such general officers as his Majesty, his heirs, or successors, shall be pleased to appoint over them; and to direct them to be led by their respective officers into any parts of this kingdom for the suppression of such invasions and rebellions.

See also 2 *Geo. iii*, c. 20 (1761), § CXVII (repeating the limits of “actual Invasion, or upon imminent danger thereof, or in case of Rebellion”) & § XII (promotion due to military merit “in Time of actual Invasion or actual Rebellion”).

⁹⁹*E.g.*, 2 *Geo. iii*, c. 20 (1761), §§ XI, CXXXV & CXXXVII (specifying rules for particular places).

¹⁰⁰2 *Geo. iii*, c. 20 (1761), §CXXV (“neither the militia of this kingdom, nor any corps, detachment, or draught thereof, shall, on any account, be transported or carried out of the island of *Great Britain*) (emphasis in original).

¹⁰¹BACON, *supra* note 1, at “Soldiers,” ¶ 17; 16 *Geo. iii*, c. 3 (1776) (further authorizing royal use of the militia within Great Britain).

¹⁰²*E.g.*, HENLEY-ONGLEY, *supra* note 1, at 4 (“a Militia, according to the ancient Custom of *England* . . . never meant a perpetual standing Force, constantly in Arms,

the vagaries of the lottery. It also was limited as to term.¹⁰³

Third: Unless called forth to serve in an emergency, a militiaman's service was part time.

Fourth: The militia could be called forth only for domestic operations—that is, to respond to invasions or threatened invasions, and to maintain domestic peace. Offensive war was the province of the regular army and navy. Geographic limitations reinforced this restriction: A man was trained in the locality in which he resided, and when called forth to respond to an invasion or domestic disturbance, he could not be deployed outside the country.

Contemporaneous commentators made note of all these characteristics: command by the chief executive,¹⁰⁴ service limited to only a portion of the male population,¹⁰⁵ part-time service,¹⁰⁶ and (4) local¹⁰⁷ service only for defensive

but only a great occasional Force, consisting of the whole Body of the People.”).

¹⁰³Some defended this system of “rotation” as best inculcating “a sufficient knowledge of arms and military discipline through the whole body of a nation or people” and thereby minimizing the need for a standing army. GRANVILLE SHARP, TRACTS CONCERNING THE ANCIENT AND ONLY TRUE LEGAL MEANS OF NATIONAL DEFENCE, BY A FREE MILITIA 36 (1782).

¹⁰⁴1 WILLIAM BLACKSTONE COMMENTARIES *399 (referring to “the sole right of the crown to govern and command” the militia); BURN, *supra* note 1, at 142.

¹⁰⁵1 WILLIAM BLACKSTONE COMMENTARIES *399 (1765) (“the general scheme of which is to discipline a certain number of the inhabitants of every county, chosen by lot for three years”); PRINCIPLES, *supra* note 1, at 170 (stating that the militia consisted “of a certain number of inhabitants of each county, chosen by lot, for any time, not exceeding three years”); BURN, *supra* note 1, at 153-55 (specifying the quota for each county or other subdivision); *id.* at 159 (exemption for dissenting clergy); *id.* at 164 (exemption for men under 5 feet, 4 inches tall); *id.*, at 163-64 (choice of men by lot); *id.*, at 165 (nomination of substitutes).

¹⁰⁶BURN, *supra* note 1, at 177 (specifying times for training); HENLEY-ONGLEY, *supra* note 1, at 4 (“remaining peaceably occupied within their Dwellings, until legally called upon to march forth”); SAVILLE, *supra* note 1, at 5 (listing as one of several “principal and necessary characteristics of a Militia” that it be “temporary”);

purposes—i.e., response to invasions, insurrections, and, in some cases, law-breaking.¹⁰⁸

Furthermore, even though dictionary definitions of “militia” often seemed to

SINCLAIR, *supra* note 1, at 1 (“That [military] force must either be perpetually in arms, or disciplined only occasionally. The first is termed a standing army, the other a militia.”).

¹⁰⁷1 WILLIAM BLACKSTONE COMMENTARIES *399 (“They are not compellable to march out of their counties, unless in case of invasion or actual rebellion, nor in any case compellable to march out of the kingdom.”); BACON, *supra* note 1, “Soldiers” at ¶17 (same); WILLIAMS, *supra* note 1, at 449 (“are not to be ordered out of Great Britain”); BURN, *supra* note 1, at 112 (providing for place of service for a person with multiple residences); *id.*, at 193 (“Provided, that neither the militia of this kingdom, nor any corps, detachment or draught thereof shall, on any account, be transported or carried out of the island of *Great Britain*”); HENLEY-ONGLEY, *supra* note 1, at 2 (“none should be constrained to go out of their Counties, but only for Cause of Necessity of sudden coming of strange [i.e., foreign] Enemies into the Realm”) & 8 (stating that the 1662 statute “gave to the Crown the Power of marching the Militia out of their Counties, *in Cases of Rebellions and Insurrections*”) (italics in original).

¹⁰⁸See generally AN OFFICER (MICHAEL DORSET), AN ESSAY ON DEFENSIVE WAR AND A CONSTITUTIONAL MILITIA (1782); BURNS, *supra* note 1, at 192 (“In case of actual invasion, or upon imminent danger thereof; or in case of rebellion in this kingdom [and by 16 G. 3. c. 3 which is of force for seven years, in the case of rebellion within this kingdom or any of the territories or dominions thereto belonging]”); CHARLES SACKVILLE, A TREATISE CONCERNING THE MILITIA 15 (London, 2d ed., 1753) (claiming that with proper use of the militia, “An *Invasion* . . . will be impossible. There can be no Insurrections, nor Incursions, that will not be immediately stopt; and it seems to be the only Way to get rid of SMUGGLERS and *Highwaymen*.”); HENLEY-ONGLEY, *supra* note 1, at 1 (stating that the militia “was constituted on purpose to protect the Kingdom, against the sudden Invasion of a foreign Enemy”); SAVILLE, *supra* note 1, at 3 (prescribing a militia for “How a nation may best be rendered defensible against attacks from without, or secured from intestine rebellions”); PRINCIPLES, *supra* note 1, at 168 (referring to the use of militia “to prevent disorders, tumult, or the violence of faction”); *id.*, at 169 (“The maintenance of the public peace, and the national defence, ought to depend principally, if not entirely, on a potent navy, and a well regulated and well disciplined militia”) & 170 (“But the only effectual means, of maintaining domestic peace, and at the same time, for supporting liberty, is a well regulated and well disciplined militia”).

include standing armies,¹⁰⁹ British commentators distinguished sharply between “militias” and “armies.”¹¹⁰

B. American Militia Regulations

Also relevant for determining the “accustomed requisites” of the constitutional term “Militia” are rules adopted in Britain’s American colonies, in early state constitutions, and in state statutes enacted after Independence and before the Constitution was ratified. Not all of this material is readily available: Records were lost in fires and warfare, and some seem to be outside of our reach. But we have managed to collect a broad sample, including constitutions and statutes from Massachusetts, Connecticut, New Hampshire, New York, Rhode Island, Delaware, Pennsylvania, Virginia, North Carolina, and Georgia. We have supplemented this material with enactments from Vermont, which was not admitted to the Union until 1791, and Bermuda, which was settled by Britons but never became part of the United States.

These documents display variations from British practice and variations

¹⁰⁹*E.g.*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (3rd ed. 1786) (defining “army” as “a collection of armed men, obliged to obey one man” and “militia” as “The trainbands; the standing force of a nation”).

¹¹⁰*E.g.*, “A.M.” REFLECTIONS ON THE AMERICAN CONTEST 6 (1776) (“Since the present breach, they have formed an army distinct from the militia.”); 2 JAMES BURGH, POLITICAL DISQUISITIONS 345 (1774-75) (“Yet this very author prefers a militia to an army.”); ADAM FERGUSON, REFLECTIONS PREVIOUS TO THE ESTABLISHMENT OF A MILITIA 5 (London, 1756) (explaining that “our Ancestors were unacquainted with standing armies” but resorted to militias instead); 1 “Junius,” *Letter to Henry Woodfall*, Feb. 5, 1769, in JUNIUS, LETTERS 169 (London, 1812) (quoting a petition decrying “Wicked attempts to increase and establish a standing army by endeavouring to vest in the Crown an unlimited power over the militia”); 3 ADAM SMITH, THE WEALTH OF NATIONS 55-56 (London, 3d ed. 1784) (distinguishing between a militia and a standing army).

among each other. For example, they differ in the scope of exemptions from service, the extent to which militiamen had to provide their own equipment, the frequency of musters, and the scope of geographic restrictions. They also differed in the extent to which they checked the power of the militia commander-in-chief. But otherwise, they entirely recognized three of the the four “accustomed requisites” appearing in the parliamentary statutes, and, with considerable qualification, recognized the fourth as well.

1. Massachusetts

The 1780 Massachusetts constitution, written mostly by John Adams, addressed military matters at some length, covering not just the militia, but any future state army and navy.¹¹¹

In Britain, the chief executive’s power over the militia was limited in minor respects,¹¹² but in Massachusetts, it was qualified more: For the governor to call out the militia to suppress an uprising, the legislature first had to declare a rebellion.¹¹³ Captains and officers below the rank of captain were elected by the militiamen themselves,¹¹⁴ and the governor could not remove them. Removal required a resolution of both legislative houses or a fair trial by a court martial.¹¹⁵

To reinforce the general ban on offensive war, the governor’s power was restricted geographically:

¹¹¹MASS. CONST. (1780), Part the Second, Ch. 2, Section 1, Art. VII.

¹¹²*Supra* note ____ and accompanying text.

¹¹³MASS. CONST. (1780), Part the Second, Ch. 2, Section 1, Art. VII (“and in time of rebellion, declared by the legislature to exist”).

¹¹⁴MASS. CONST. (1780), Part the Second, Ch. 2, Section 1, Art. X.

¹¹⁵MASS. CONST. (1780), Part the Second, Ch. 2, Section 1, Art. X.

[The said governor shall not . . . transport any of the inhabitants of this commonwealth, or oblige them to march out of the limits of the same, without their free and voluntary consent, or the consent of the general court [i.e., the legislature]; except so far as may be necessary to march or transport them by land or water for the defence of such part of the State to which they cannot otherwise conveniently have access. ¹¹⁶

The reference to transportation out of state was a concession to geography: At that time, Maine was part of Massachusetts, and marching from one to another required transit through New Hampshire.

In 1784, the Massachusetts general court (legislature) adopted a militia act.¹¹⁷ Among other provisions, it—

- contained a lengthy list of exemptions: lawmakers and government officials, ministers, school teachers, officers and students of Harvard College, Quakers, and “negroes, Indians and mulatoes”¹¹⁸—except that Quakers had to pay their proportionate share of the cost of defense;¹¹⁹
- divided the remainder of the male population into a “train band” for men sixteen to forty years of age and an “alarm list” for men between forty-one and sixty;¹²⁰
- required only part-time service, with the train band mustered between four and six times per year for inspection and training, and the alarm list

¹¹⁶MASS. CONST. (1780), Part the Second, Ch. 2, Section 1, Art. VII.

¹¹⁷*An Act for Regulating and Governing the Militia for the Commonwealth of Massachusetts, and for Repealing All Laws Heretofore Made for that Purpose*, in ACTS AND RESOLVES OF MASSACHUSETTS 139 (1784-85) [hereinafter *1784 Mass. Law*]

¹¹⁸*1784 Mass. Law* at 152.

¹¹⁹*1784 Mass. Law* at 153.

¹²⁰*1784 Mass. Law* at 140.

mustered annually;¹²¹ and

- specified that the militia could be required to march “for the immediate defence of this or any of the United States of *America*.”¹²²

The statute’s extension of the zone of defense to include other American states was another concession to geography. Massachusetts, even including its dependency of Maine, was only half the size of Great Britain and, unlike Great Britain, it was not an island. Further, Massachusetts might have to send militiamen in obedience to the needs of Congress. That said, it is unclear whether militia defense of other American states was possible because of the limits imposed by the state constitution.¹²³

Thus, the Massachusetts militia embodied all four of the British “accustomed requisites:” executive command (although much qualified), a limited enlistment pool, part-time service, and employment only for defensive or other domestic service.

2. Connecticut

During the Founding era, Connecticut did not adopt a state constitution, but relied on a modified version of its colonial charter. However, in 1786, Connecticut did adopt “An Act for forming, regulating, and conducting the militia Force of this State.”¹²⁴ The preamble declared that “the Defence and Security of all free States depends (under God) on the Exertions of a well regulated and disciplined Militia . . .

¹²¹1784 *Mass. Law* at 143.

¹²²1784 *Mass. Law* at 153 (italics in original).

¹²³*Supra* note ____.

¹²⁴*An Act for forming, regulating, and conducting the militia Force of this State*, in ACTS AND LAWS OF THE STATE OF CONNECTICUT IN AMERICA 144 (1786) [hereinafter 1786 *Conn. Law*].

¹²⁵ The law required householders under age 55 to supply their own muskets and ammunition,¹²⁶ and it provided that the basic unit for enlistment was not the county (as in Britain), but the town.¹²⁷

The statute featured the four common characteristics of British and Massachusetts militia law. It provided that “the Governor of this State for the Time being, shall be the Captain-General and Commander in Chief”¹²⁸ This designation notwithstanding, the legislature appointed all commissioned officers.¹²⁹ As in the other statutes examined thus far, the Connecticut enactment sharply limited the pool of enlistees. There was a long list of exemptions¹³⁰ and the maximum age for service normally was 45, although men up to 55 had to “give their Attendance on Days appointed for viewing of Arms.”

Peacetime service was part time, generally four days per year,¹³¹ and in wartime was limited to defensive operations:

“[T]he Captain-General or Commander in Chief [i.e., the governor]. . . is hereby authorized and impowered, as he may judge necessary upon Occasion of Alarm, Invasion, or Notice of the Appearance of an Enemy, either by Sea or Land, to order the Whole or any Part of the military Force of this State to be enabled in martial Array, and put in warlike Posture, and the same lead, order, or employ for the assisting or relieving of any of the Inhabitants of this or neighbouring States

¹²⁵1786 *Conn. Law* at 144.

¹²⁶1786 *Conn. Law* at 150.

¹²⁷1786 *Conn. Law* at 145-46.

¹²⁸1786 *Conn. Law* at 147.

¹²⁹1786 *Conn. Law* at 147.

¹³⁰*Id.* at 144-45.

¹³¹*Id.*, at 151.

attacked by an Enemy, or in Danger thereof¹³²

The extension of the area of defense to include neighboring states was consistent with the state's small size.

3. New York

New York's colonial and state militia regime, established by statutes and the 1777 state constitution, also varied somewhat from those of other states. But it featured the four "accustomed requisites" found in militia regulations surveyed thus far.

The state constitution declared the governor to be the militia commander-in-chief.¹³³ It proclaimed the "duty of every man who enjoys the protection of society to be prepared and willing to defend it,"¹³⁴ but exempted Quakers if they paid money in lieu of personal service.¹³⁵ Statutes created many more exemptions. Thus, legislation adopted in 1737, 1762, and 1768 excluded firemen,¹³⁶ a 1772 statute excluded personnel working in a public hospital for the poor,¹³⁷ and a 1786 law included a very lengthy list of exemptions that included, but was not limited to, public officeholders, legislators, ferrymen, ministers, physicians, Columbia College

¹³²*Id.* at 147.

¹³³N.Y. CONST. (1777), art. XVIII. *See also An Act to regulate the Militia*, adopted Apr. 4, 1786, c. XXV, § II. in 1 LAWS OF THE STATE OF NEW-YORK 271 (1789) [hereinafter *N.Y. Militia Law (1786)*] (enabling the governor to call out as much of the militia as he deemed advisable in cases of "Invasion or other Emergency," without consultation or other check).

¹³⁴N.Y. CONST. (1777), art. XL.

¹³⁵N.Y. CONST. (1777), art. XL.

¹³⁶1 LAWS OF NEW YORK FROM THE YEAR 1691, TO 1773 INCLUSIVE 200 (reproducing 1737 law); *id.*, at 428 (1762 law); *id.*, at 533 (reproducing 1768 law).

¹³⁷1 LAWS OF NEW YORK FROM THE YEAR 1691, TO 1773 INCLUSIVE 668 (reproducing

personnel, post officers, stage drivers, firemen, and schoolmasters.¹³⁸

Age restrictions further limited the pool. The 1772 statute imposed service on males ranging from 16 to 50 years of age,¹³⁹ and provided that “all Persons above the Age of Fifty, and not exceeding sixty Years of Age, shall in Case of Alarm, Invasion or Insurrection, be obliged to appear under Arms under the Captain, or the commanding Officer of the District where they dwell or reside.”¹⁴⁰ The 1786 measure reduced the maximum age of service to 45.¹⁴¹

As in other jurisdictions surveyed, militia service normally was part time. Musters were twice a year under the 1772 law¹⁴² and four times a year under that of 1786.¹⁴³

The New York militia was employed solely for domestic purposes. Under the 1772 statute, the governor could call out men “in Case of any Alarm, Invasion, Insurrection or Rebellion,”¹⁴⁴ and under the 1786 enactment, he could deploy them “in Case of Invasion or other Emergency.”¹⁴⁵ The scope of “Alarm” and “Emergency” are uncertain, but their ordinary use does not seem to include offensive war.

The 1786 law imposed geographic restrictions: Normally, the governor could employ the militia only within the boundaries of the state. The sole exception was when the governor received a request from the executive of another state “on an

1772 law).

¹³⁸*N.Y. Militia Law (1786)*, *supra* note ___, § III.

¹³⁹*Supra* note ___, at 668, ch. MDXLI, § I.

¹⁴⁰*Id.*, at 674, ch. MDXLI, § XXI.

¹⁴¹*N.Y. Militia Law (1786)*, *supra* note ___, § I.

¹⁴²*Supra* note ___, at 669, § IV.

¹⁴³*N.Y. Militia Law (1786)*, *supra* note ___, § I

¹⁴⁴*Supra* note ___, at 672-73, § XVI.

¹⁴⁵*N.Y. Militia Law (1786)*, *supra* note ___, § II.

Invasion, or an Apprehension of an Invasion of such State.”¹⁴⁶ In that event, he could send up to a third of his force to the requesting state for a maximum of forty days.¹⁴⁷ However, the forty-day maximum effectively limited deployment only to adjoining states, because a militia sent any farther could not return in time.

4. Pennsylvania

The 1776 Pennsylvania constitution did not address the militia, other than to permit militia officers to sit in the legislature.¹⁴⁸ In 1780, the legislature adopted “An Act for the Regulation of the Militia of the Commonwealth of Pennsylvania.”¹⁴⁹ It provided that the state president was the commander in chief,¹⁵⁰ but it restricted his power: The rank and file rather than the president appointed field officers.¹⁵¹ A militia lieutenant in the city of Philadelphia and in each county was to be appointed not by the president alone, but by the “president in council.”¹⁵² Even the power of the president in council to call the militia into active service¹⁵³ was subject to considerable limitations:

Provided, That the part so called doth not exceed four classes of the militia of the county or counties so called out: And provided also, That such counties shall not be again called upon to furnish any more militia until an equal number of classes of the militia of the other counties

¹⁴⁶*N.Y. Militia Law (1786)*, *supra* note ___, § II.

¹⁴⁷*N.Y. Militia Law (1786)*, *supra* note ___, § II.

¹⁴⁸PA. CONST. (1776), § 7.

¹⁴⁹PA. STAT. 1780, ch. CMII.

¹⁵⁰PA. STAT. 1780, ch. CMII, § II.

¹⁵¹PA. STAT. 1780, ch. CMII, § XII.

¹⁵²PA. STAT. 1780, ch. CMII, § I.

¹⁵³PA. STAT. 1780, ch. CMII, § XXIV.

respectively be first called¹⁵⁴

Men subject to service were those between ages eighteen and fifty-three, with the usual list of exemptions: public officers, sheriffs, jailors, keepers of workhouses, ministers, university professors and teachers, postmasters and post-riders, servants of foreign diplomats and so forth.¹⁵⁵ Those liable for service could provide substitutes.¹⁵⁶ Absent an emergency, service was part-time.¹⁵⁷

The law recited the militia's defensive purpose: "whereas a well regulated militia is the only safe and constitutional method of defending a free state"¹⁵⁸ and limited its use to cases of rebellion or invasion.¹⁵⁹

Thus, Pennsylvania law also reflected the four British "accustomed requisites," while qualifying the first—executive command—to a considerable degree.

5. Virginia

Extant materials enable us to examine the Virginia colonial and state militias at times separated by a half century.

George Webb's *The Office and Authority of a Justice of [the] Peace* was published in 1736 in Williamsburg, Virginia.¹⁶⁰ It summarized the colony's militia law as it then stood.

¹⁵⁴PA. STAT. 1780, ch. CMII, § XXIV.

¹⁵⁵PA. STAT. 1780, ch. CMII, § III.

¹⁵⁶PA. STAT. 1780, ch. CMII, § XXXVII.

¹⁵⁷PA. STAT. 1780, ch. CMII, § XXI (setting forth the muster schedule).

¹⁵⁸PA. STAT. 1780, ch. CMII, Preamble.

¹⁵⁹PA. STAT. 1780, ch. CMII, § XXIV.

¹⁶⁰WEBB, *supra* note 1, at 224.

Webb reported that the Virginia militia was under the command of the governor.¹⁶¹ He also reported that the militia of the colony was estimated to be “upwards of 20,000 effective Men.”¹⁶² Virginia’s population likely was just short of 200,000 at the time,¹⁶³ so Webb’s figure suggests that service was far from universal. And, indeed, there was a long list of exemptions. They included, besides the keeper of the public jail,¹⁶⁴

every Minister of the Church of England; the President, Masters, Professors and Students of *William and Mary* College . . . every Overseer of four Slaves; Miller in actual Service; all Persons employed in any Mine; and all Free Negros, Mulattoes, and Indians, exempted from being listed¹⁶⁵

Service normally was part time, with exercises being required only quarterly—although they could be held more often than that.¹⁶⁶ Men had to supply their own arms and equipment.¹⁶⁷ Exercises apparently were held only in men’s

¹⁶¹WEBB, *supra* note 1, at 224.

¹⁶²WEBB, *supra* note 1, at 221.

¹⁶³Virginia’s population was estimated at 100,000 in 1717 and 284,000 in 1754—a growth of 184,000 in 37 years. U.S. Census Bureau, Population in the Colonial and Continental Periods 7, <https://www2.census.gov/library/publications/1909/decennial/century-population-growth-part02.pdf>. Webb’s publication date fell in the middle of that period: 19 years after the first date and 18 years before the second. If one makes the (admittedly risky) assumption of consistent growth over time, one arrives at an estimate of 194,000 in 1736.

¹⁶⁴WEBB, *supra* note 1, at 224.

¹⁶⁵WEBB, *supra* note 1, at 221-22 (*Italics in original*).

¹⁶⁶WEBB, *supra* note 1, at 222 (“The Chief Officer of very County shall hold a General Muster once a Year: and every Captain shall exercise his Troop or Company, Quarterly, or oftener if he thinks fit.”)

¹⁶⁷WEBB, *supra* note 1, at 222.

home counties,¹⁶⁸ and authority to call forth the militia did not include power to march them outside the colony.¹⁶⁹ As in other cases, the geographical restriction reinforced the rule that the militia was limited to defensive operations—specifically, to counter “any Invasion or Insurrection.”¹⁷⁰

The state constitution designated the governor as militia commander, but as in most states his authority was qualified.¹⁷¹ His command decisions were to be made “with the advice of the council,” and he also had to consult with the council before issuing militia commissions.¹⁷² The constitution provided that he “shall not command in person, except advised thereto by the Council, and then, only as long as they shall approve thereof.”¹⁷³ It reserved to the legislature the prerogative of selecting general officers and to the militiamen the power to select officers below that rank.¹⁷⁴

In 1785, Virginia adopted a comprehensive militia law.¹⁷⁵ As in most, but not

¹⁶⁸WEBB, *supra* note 1, at 222.

¹⁶⁹WEBB, *supra* note 1, at 224 (stating that in the event of invasion or insurrection the governor may “march them to any Part of this Colony”).

¹⁷⁰WEBB, *supra* note 1, at 224 (“Upon any Invasion or Insurrection, the Governor of this Dominion may raise the Militia . . . Upon Notice of any Invasion or Insurrection, given to any Officer of the Militia, he must immediately raise the Forces under his Command”). The militia section of the treatise was headed “Militia Invasions. Insurrections.” *Id.* at 221.

¹⁷¹This was consistent with the first Virginia constitution’s provision for a weak governorship. *See* VA. CONST. (1776), c.2, § 3.

¹⁷²VA. CONST. (1776), c. 2, §4.

¹⁷³VA. CONST. (1776), c. 2, § 18.

¹⁷⁴VA. CONST. (1776), arts. XLII (general officers) & V (colonels and commissioned officers below that rank).

¹⁷⁵*An act to amend and reduce into one act, the several laws for regulating and disciplining the militia, and guarding against invasions and insurrections*, 12 STATUTES AT LARGE, BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 9 (Wm. Waller Hening ed. 1823) [the act is hereinafter as *1785 Va. Law*].

all, other states, officers and soldiers were required to equip themselves. The law also contained the unusual feature of formally adopting Baron Von Steuben's plan for forming and disciplining U.S. troops.¹⁷⁶

The 1785 statute stated that all free male persons between the ages of eighteen and fifty years were subject to service,¹⁷⁷ but it also featured the customary extensive list of exceptions.¹⁷⁸ Service generally was part time,¹⁷⁹ and the militia's uses were entirely domestic. To be sure, the colonial rule limiting service to Virginia's boundaries did not appear in the 1785 statute.¹⁸⁰ However, the militia was to be deployed only "on . . . invasion or insurrection, or probable prospect thereof;"¹⁸¹ or for patrolling slave quarters to maintain order;¹⁸² or for suppressing groups that denied the legitimacy of the Commonwealth and obstructed execution of the laws.¹⁸³

Thus, except for the limitation on the power of the executive commander in chief, the Virginia militia regulations embodied all of the British "accustomed

¹⁷⁶1785 Va. Law at 15, § V.

¹⁷⁷1785 Va. Law at 10, § III.

¹⁷⁸1785 Va. Law. See also *id.*, at 34, § XII (confirming privileges for Quakers under prior law). A separate statute exempted certain ships' pilots. *Id.*, at 302, § IX.

¹⁷⁹1785 Va. Law at 11, § III ("There shall be a private muster of every company once in two months, except December and January . . . a muster of each regiment on some day in the month of March or April, in every year . . . and a general muster of the whole on some day in the month of October or November, in every year.").

¹⁸⁰One possible reason: The population density in the northern part of the state—adjacent to Maryland and very near Delaware—rendered it likely that a defensive war would cross state lines.

¹⁸¹1785 Va. Law at 14, § VI.

¹⁸²1785 Va. Law at 20, § VIII.

¹⁸³*An act punishing certain offenses and vesting the governor with certain powers*, in 12 STATUTES AT LARGE, BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 41-42 (Wm. Waller Hening ed. 1823).

requisites.”

6. North Carolina

North Carolina went beyond any state surveyed thus far in limiting the executive’s power over the militia. The state constitution proclaimed that the governor was “captain-general and commander in chief of the militia,” but he could call it into service only with the advice of the council of state, only in the recess of the legislature,¹⁸⁴ and “only for the public safety.”¹⁸⁵ Appointment of militia generals and field officers was vested in the legislature.¹⁸⁶

During 1777 and 1778, the North Carolina legislature adopted several militia bills, some of which supplemented or replaced others.¹⁸⁷ Two recited that “a well regulated militia is absolutely necessary for the Defending and securing the Liberties of a free State.”¹⁸⁸ In contrast to practice in most other places, these measures required the state to supply men with weapons, rather than mandating that they provide their own.¹⁸⁹

¹⁸⁴N.C. CONST. (1776), art. XVIII (“The Governor. for the time being, shall be captain-general and commander in chief of the militia; and, in the recess of the General Assembly, shall have power, by and with the advice of the Council of State, to embody the militia for the public safety.”).

¹⁸⁵N.C. CONST. (1776), art. XVIII.

¹⁸⁶N.C. CONST. (1776), art. XIV (“That the Senate and House of Commons shall have power to appoint the generals and field-officers of the militia, and all officers of the regular army of this State.”)

¹⁸⁷*An Act to Establish a Militia in this State*, § I, 24, in THE STATE RECORDS OF NORTH CAROLINA 1 (Walter Clark, ed. 1905) [hereinafter N.C. Records]; *An Act to amend an Act, intituled [sic], An Act to establish a Militia in this State*, *id.* at 113; *An Act to Regulate and Establish a Militia in this State*, *id.* at 190.

¹⁸⁸N.C. RECORDS, *supra* note ___, at 1 & 190.

¹⁸⁹N.C. RECORDS, *supra* note ___, at 2, 114 & 191.

Other than the severe limits on the executive power, North Carolina law retained the “accustomed requisites.” The enlistment pool was limited: The ages of service were between eighteen and fifty, with many exemptions, permission for substitutes,¹⁹⁰ and limits on how often someone could be drafted.¹⁹¹ Although there was no specific schedule as to when musters would occur, it was apparent that service was part time.¹⁹² The “public safety” requirement in the state constitution was defined to include only insurrections and invasions, or a request from the Continental Congress.¹⁹³

¹⁹⁰*E.g.*, N.C. RECORDS, *supra* note ___, at 3:

And be it further enacted, that all persons within the ages of sixteen and fifty shall be liable to be drafted . . . , and every person so drafted, obliged to serve or find an able bodied person in room [i.e., in place of]. Provided, that the Council of State, and Publick Secretary, and Justice of the Peace, Ministers of some Church regularly settled, and having the Cure of Souls, and Continental post masters, shall not be obliged to attend general or private Musters.”)

¹⁹¹N.C. RECORDS, *supra* note ___, at 5 (providing for rotation of divisions).

¹⁹²*E.g.*, N.C. RECORDS, *supra* note ___, at 2 & 114 (referring to “muster days”), 4 & 116 (referring to the “succeeding muster”) & 114 (“every Captain shall muster and train his Company, divided as before directed, once in every Month, and oftener if directed by the commanding Officer”) & 195 (changing the schedule to once every two months).

¹⁹³N.C. RECORDS, *supra* note ___, at 118:

[W]here any Invasion or Insurrection shall happen within this State, the nearest Militia Officer shall give immediate Notice thereof to his next superior Officer, who shall communicate the same to the next Superior, and so on to the Brigadier General, who shall convey the same to the Governor or Commander in Chief, and in the mean Time every such Officer shall use his utmost Endeavours to collect a Force sufficient to repel the Enemy, or suppress the Insurrection”

See also id., at 128 (reproducing a 1777 law) (“it shall and may be lawful for the Governor . . . upon the Request of Congress for that Purpose made, to detach from the Militia of this State an Aid, not exceeding Five Thousand Men”). Bounties were given for those in out-of-state service. 24 N.C. RECORDS, *supra* note ___, at 190

7. New Hampshire and Georgia

The 1783 New Hampshire constitution provided that “A well regulated militia is the proper, natural, and sure defence of a state.”¹⁹⁴ In 1786, the New Hampshire legislature adopted a law “for forming and regulating the militia within this state.”¹⁹⁵

In New Hampshire, the “accustomed requisites” found elsewhere were all present. The constitution provided that the state president was to be the commander in chief of all the state’s military forces, including the militia,¹⁹⁶ although he was to appoint militia officers in conjunction with the executive council, rather than alone.¹⁹⁷ Only a portion of the citizenry was subject to service: There were extensive exemptions both from the “training band”¹⁹⁸ and the “alarm list.”¹⁹⁹ Members of the training band mustered only four times a year,²⁰⁰ while members of the alarm list mustered twice.²⁰¹ Members could be called forth “for the immediate defence of this, or any of the United States,”²⁰² but the state constitution forbade the president from sending militiamen outside the state without the consent of the legislature.²⁰³

¹⁹⁴N.H. CONST. (1783), Part I, art. XXIII..

¹⁹⁵THE PERPETUAL LAW OF THE STATE OF NEW-HAMPSHIRE 114 (1789).

¹⁹⁶N.H. CONST. (1783), Part II (“Executive Power: President”).

¹⁹⁷N.H. CONST. (1783), Part II (“Executive Power: President”).

¹⁹⁸THE PERPETUAL LAW OF THE STATE OF NEW-HAMPSHIRE 115 (1789).

¹⁹⁹THE PERPETUAL LAW OF THE STATE OF NEW-HAMPSHIRE 116 (1789).

²⁰⁰THE PERPETUAL LAW OF THE STATE OF NEW-HAMPSHIRE 119 (1789).

²⁰¹THE PERPETUAL LAW OF THE STATE OF NEW-HAMPSHIRE 117 (1789).

²⁰²THE PERPETUAL LAW OF THE STATE OF NEW-HAMPSHIRE 121 (1789). *See also id.*, at 124 (“an actual invasion of this state”).

²⁰³N.H. CONST. (1783), Part II (“Executive Power: President”).

The 1777 Georgia constitution provided that the governor was commander-in-chief of the militia,²⁰⁴ but it limited the governor's power by providing that officer commissions in the militia "shall continue during good behavior."²⁰⁵ A 1784 militia law²⁰⁶ provided that he could call forth the militia only with the advice and consent of the executive council²⁰⁷ and that militiamen could elect their own officers.²⁰⁸

In theory, the Georgia militia included "all the Male free Inhabitants of this State, from the Age of Sixteen to fifty Years,"²⁰⁹ but, as usual, there was a long list of exemptions.²¹⁰ Service was part time: Battalions and Regiments were mustered twice a year²¹¹ and companies no more than six times a year.²¹² There were no geographic limitations on deployed militia,²¹³ but its defensive purposes can be deduced from its announced purpose: to serve "the safety peace And prosperity of the

²⁰⁴GA. CONST. (1777), art. XXXIII.

²⁰⁵GA. CONST. (1777), art. XXXIII.

²⁰⁶19 THE COLONIAL RECORDS OF THE STATE OF GEORGIA, PART II 348 (Allen D. Candler, ed. 1970), first printed 1904-16).

²⁰⁷19 THE COLONIAL RECORDS OF THE STATE OF GEORGIA, PART II 348 (Allen D. Candler, ed. 1970).

²⁰⁸19 THE COLONIAL RECORDS OF THE STATE OF GEORGIA, PART II 349 (Allen D. Candler, ed. 1970),

²⁰⁹19 THE COLONIAL RECORDS OF THE STATE OF GEORGIA, PART II 349 (Allen D. Candler, ed. 1970),

²¹⁰19 THE COLONIAL RECORDS OF THE STATE OF GEORGIA, PART II 359 (Allen D. Candler, ed. 1970).

²¹¹19 THE COLONIAL RECORDS OF THE STATE OF GEORGIA, PART II 350 (Allen D. Candler, ed. 1970),

²¹²19 THE COLONIAL RECORDS OF THE STATE OF GEORGIA, PART II 350-51 (Allen D. Candler, ed. 1970).

²¹³19 THE COLONIAL RECORDS OF THE STATE OF GEORGIA, PART II 348-49 (Allen D. Candler, ed. 1970).

State in Particular, and the Confederal Union in General.”²¹⁴

8. Comments on Delaware, New Jersey, and Rhode Island

We have not been able to locate complete militia statutes for Delaware, New Jersey, or Rhode Island, but the information we have collected is broadly similar to that previously outlined. The Delaware constitution provided that “The [state] president, with the advice and consent of the privy council, may embody the militia, and act as captain-general and commander-in-chief of them . . . ”²¹⁵ The 1776 New Jersey constitution provided that “the Governor . . . shall . . . act as captain-general and commander in chief of all the militias and other military force in this Colony,”²¹⁶ but added that “captains, and all other inferior officers of the militia, shall be chosen by the companies, in the respective counties; but field and general officers, by the Council and Assembly.”²¹⁷

A Rhode Island colonial statute permitted its governor to send militia to the aid of a sister colony if the sister colony was “invaded or attacked,”²¹⁸ but neither that statute nor any other militia law we have found contemplated service in offensive war or overseas.

9. Two Non-U.S. Jurisdictions: Vermont and Bermuda

²¹⁴19 THE COLONIAL RECORDS OF THE STATE OF GEORGIA, PART II 348 (Allen D. Candler, ed. 1970).

²¹⁵DEL. CONST. (1776), art. 9.

²¹⁶N.J. CONST. (1776), art. VIII.

²¹⁷N.J. CONST. (1776), art. X.

²¹⁸*An Act in addition to, and amendment of, an act, entitled, “An act regulating the militia of this colony,”* 7 R.I. RECORDS 269, 270 (1774).

Vermont remained an independent nation until it ratified the Constitution in early 1791, but it was settled by Anglo-Americans. Its 1779 militia law was entitled, “AN ACT for forming and regulating the militia; and for encouragement of military skill, for the better defence of this State.”²¹⁹ It provided that “the Governor of this State, for the time being, shall be Captain General and Commander in chief,”²²⁰ but officers were appointed by the militiamen.²²¹ They could be called forth only by the legislature or by the governor acting with the executive council.²²²

The law recited that “all male persons from sixteen years of age to fifty, shall bear arms,” but included many exemptions.²²³ The law divided the militia into regiments, and deployment was permissible “when any town or place in this State shall be assaulted, attacked, or set upon, by Indians, or any other enemy.” Each regiment’s commander was authorized,

upon any claim, invasion, or notice of the appearance of an enemy, either by water or land, to assemble in military array, and put in warlike posture, the whole militia of the regiment under his command, or such part of them as he shall think needful; and being so alarmed, to lead, conduct, and employ them as well within the regiment whereto they belong, as in any other adjacent place in this State, for the assisting, securing, and relieving, any of the subjects of the united and independent States of America²²⁴

This suggests that the militia could march to the defense of Vermonters or states in

²¹⁹VERMONT STATE PAPERS, 1779-1786 305 (1823).

²²⁰VERMONT STATE PAPERS, 1779-1786 305 (1823).

²²¹VERMONT STATE PAPERS, 1779-1786 306 (1823).

²²²VERMONT STATE PAPERS, 1779-1786 309 (1823).

²²³VERMONT STATE PAPERS, 1779-1786 307 (1823).

²²⁴VERMONT STATE PAPERS, 1779-1786 308 (1823).

the Articles of Confederation, but it could not leave the confines of Vermont. Although the statute did not make the part-time nature of service explicit, it was implied throughout.²²⁵

Like Vermont, Bermuda was settled by Britons. Its 1788 militia act provided that the governor served as commander in chief.²²⁶ Although the statute proclaimed that “every Inhabitant between the Ages of Fifteen and Sixty [is] obliged to serve in the Militia,”²²⁷ there was a typical list of exemptions.²²⁸ Musters were held only three or four times a year, except when “deemed necessary to the Public Security.”²²⁹

C. *Summary: Militia vs. Army*

The foregoing review clarifies the “accustomed requisites” that inhered in the American concept of a “militia”:

Qualified command by the chief executive. Under British practice, the militia was commanded by the king, although by 1757, Parliament had qualified his power somewhat. All American militia regulations similarly lodged at least nominal command in the governor or state president, but most limited executive power more than in Britain. Indeed, they modified it so much that we doubt that by the time the Constitution was adopted, the principle of unified command by the state’s single

²²⁵*E.g.*, VERMONT STATE PAPERS, 1779-1786 307 (1823). (referring to “muster or training days”).

²²⁶*An Act for the establishment and regulation of the militia of Bermuda*, Jun. 27, 1788, EIGHTEENTH CENTURY COLLECTIONS ONLINE, link.gale.com/apps/doc/CW0104974215/ECCO?u=mtlib_1_1195&sid=bookmark-ECCO, Art. XIV [hereinafter *1788 Bermuda Act*].

²²⁷*1788 Bermuda Act*, art. I.

²²⁸*1788 Bermuda Act*, art. XVI (exempting, among others, public officers, lawyers, physicians and surgeons, and the clergy).

²²⁹*1788 Bermuda Act*, art. X.

chief executive could be classed as inherent or as an “accustomed requisite.” Put another way, if a state had designated the speaker of its lower legislative chamber as its militia commander, Americans probably still would have recognized his force as the state “militia.”

Enlistment from only a subset of the population. The second British “accustomed requisite”—enlistment from only a subset of the population—fully survived the voyage to America. Women were, of course, not enlisted, and despite claims that the militia included all male citizens, this standard was *never* realized. Nor was it even aspired to. In all jurisdictions, only a fraction of the male population was subject to militia service.

Part time service during peace. This characteristic of British militia service also survived the voyage to America. Outside of emergencies calling for the militia to be “embodied,” service always remained part time.

Service only for domestic purposes. This rule of British militia law also was preserved in America. Militiamen could be called forth only to resist invasion, suppress insurrections, enforce the law, and other local emergencies. Most states reinforced this restriction on militia use by following the British precedent of imposing strict geographic limitations on service.²³⁰ But even laws without explicit geographical limits lacked authorization for deployment outside the United States.

For the founding generation of Americans, the qualities of limited enlistment, part-time service, and exclusively domestic service inhered in the very nature of a militia. Or, to state the logical obverse of that conclusion:²³¹ Founding-generation

²³⁰As the foregoing review has shown, however, it was not necessarily true, as stated in *Maggs & Leider*, *supra* note 1, at 219, that during the colonial era a militiaman could not be ordered out of his colony.

²³¹The logical obverse of a statement, formed by negating both the subject and the predicate, is necessarily equivalent to the statement. STEPHEN F. BARKER, *THE*

Americans would not have classified as “militia” any units that were raised by universal conscription, served full time, fought offensive wars, or were deployed far outside national boundaries.

Like the British, moreover, Americans clearly distinguished between a militia and an “army” or “standing army.” The militia consisted of part-time soldiers employed only for domestic operations.²³² An army consisted of full-time professional troops used for both offensive and defensive operations. This distinction appeared in at least *five* state constitutions.²³³ As Robert Leider has demonstrated,²³⁴ it was one of the most common tropes in American writing at the time—particularly during the constitutional debates of 1787-1790.²³⁵

ELEMENTS OF LOGIC 55-57 (1965).

²³²*Accord: Leider, Militia, supra* note 1, at 902 (“[M]ilitiamen were limited to serving in domestic wars”); *Maggs & Leider, supra* note 1, at 219 (“[M]ilitiamen were liable to serve only in defensive conflicts”).

²³³MASS. CONST. (1780), Part the Second, Ch. 2, Section 1, Art. VII (listing the army, navy, and militia separately); N.C. CONST. (1776), art. XIV (second part) (“generals and field-officers of the militia, and all officers of the regular army of this State”); S.C. Const. (1778), arts. VII & IX (permitting militia officers to hold political office, but disqualifying army officers from the privy council); VA. CONST. (1776), Declaration of Rights, § 13 (distinguishing the militia from standing armies); VT. CONST. (1786), ch. 1, art. XIX (“except those employed in the army, and the militia in actual service”).

²³⁴*Leider, Federalism, supra* note 1, at 1021-29 (providing copious examples).

²³⁵*E.g.* 1 FARRAND, *supra* note 1, at 346 (June 20, 1787) (Robert Yates) (quoting remarks by George Mason) (“Do you expect the militia will do it, or do you mean a standing army?”); 2 FARRAND, *supra* note 1, at 388 (Aug. 23, 1787) (Madison) (quoting remarks by Madison: “as the greatest danger to liberty is from large standing armies, it is best to prevent them by an effectual provision for a good Militia”). The authors of the *Federalist* seem always to have employed the term “army” to mean a standing army, as opposed to a militia. *E.g.*, FEDERALIST NO. 29 (Alexander Hamilton):

[I]t will be possible to have an excellent body of well-trained militia . . . This will not only lessen the call for military establishments, but if

III. THE MILITIA IN THE CONSTITUTIONAL CONVENTION

During the Constitutional Convention, the Articles of Confederation were in full effect. Under the Articles, the Confederation Congress had authority to conduct either offensive or defensive operations, and could enlist standing armies to do so. The states were limited to defensive operations and forbidden to maintain standing armies, but required to maintain militias.²³⁶

Just before the convention met, Charles Pinckney, a delegate from South Carolina, presented his “observations” on what he thought the Constitution should contain.²³⁷ He called for increasing central authority over the militia at the expense of the states: “The exclusive right of establishing regulations for the Government of the Militia of the United States, ought certainly to be ves[t]ed in the Federal Councils.”²³⁸ Because the constitutions of several states banned standing armies (and, he might have added, the Articles forbade states from maintaining them), the militia was “the only immediate aid and support that we can look up to, in case of necessity.” He added that, because the new plan of government would create a nation, there should be uniformity in discipline and regulation. He observed that the federal government might need to “coerce a refractory or negligent” state, requiring

circumstances should at any time oblige the government to form an army of any magnitude that army can never be formidable to the liberties of the people while there is a large body of citizens, little, if at all, inferior to them in discipline and the use of arms

Cf., FEDERALIST NO. 46 (James Madison) distinguishing the size of a militia from that of a federal army).

²³⁶ *Infra* Part VI-A.

²³⁷3 FARRAND, *supra* note 1, at 106.

²³⁸3 FARRAND, *supra* note 1, at 118.

that the government send soldiers from one part of the country to another.²³⁹

Early in the convention, Edmund Randolph proposed the “Virginia Plan.” It also proposed granting the central government more authority over the militia. It did so in two ways. First, it would empower the national legislature “to call forth the force of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof.”²⁴⁰ Second, it would have granted the national legislature authority to legislate “in all cases to which the separate States are incompetent.”²⁴¹

During debates over whether Congress should have a veto over state laws, however, it became evident that some delegates strongly favored preserving state control over their respective militias. For example, Elbridge Gerry of Massachusetts said that he had no quarrel with giving Congress a veto on measures such as state paper money, but objected to a “proposed negative [that] wd. extend to the regulations of the militia, a matter on which the existence of a State might depend. The Natl. Legislature with such a power,” he said, “may enslave the States.”²⁴²

On July 26, 1787, the convention adjourned to give its Committee of Detail time to prepare a draft constitution.²⁴³ The committee presented its draft on August 6. It replaced the Virginia Plan’s open-ended grant of authority to Congress with an enumeration of powers, one of which was that “The Legislature of the United States shall have the power . . . To call forth the aid of the militia, in order to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasions.”²⁴⁴

Subsequent floor debate on militia issues centered mostly on balancing state

²³⁹3 FARRAND, *supra* note 1, at 118.

²⁴⁰1 FARRAND, *supra* note 1, at 21 (May 29, 1787) (Madison)

²⁴¹1 FARRAND, *supra* note 1, at 21 (May 29, 1787) (Madison).

²⁴²1 FARRAND, *supra* note 1, at 165 (Jun. 8, 1787) (Madison).

²⁴³2 FARRAND, *supra* note 1, at 117 (Jul. 26, 1787) (official journal).

²⁴⁴2 FARRAND, *supra* note 1, at 182 (Aug. 6, 1787) (Madison)

and federal needs. On August 18, George Mason of Virginia offered a proposal that eventually evolved into the Militia Organization Clause. According to Madison's notes:

Mr Mason introduced the subject of regulating the militia.⁵ He thought such a power necessary to be given to the Genl. Government. He hoped there would be no standing army in time of peace, unless it might be for a few garrisons. The Militia ought therefore to be the more effectually prepared for the public defence. Thirteen States will never concur in any one system, if the disciplining of the Militia be left in their hands. .

.²⁴⁵

Shortly thereafter,

Mr. Mason moved as an additional power "to make laws for the regulation and discipline of the Militia of the several States reserving to the States the appointment of the Officers". He considered uniformity as necessary in the regulation of the Militia throughout the Union.²⁴⁶

The ensuing discussion flowed back and forth, as delegates weighed conflicting considerations. Charles Cotesworth Pinckney of South Carolina—Charles Pinckney's older cousin—emphasized the need for uniformity: During the Revolutionary War "a dissimilarity in the militia of different States had produced the most serious mischiefs."²⁴⁷ Oliver Ellsworth of Connecticut "was for going as far in submitting the militia to the Genl Government as might be necessary, but thought the motion of Mr. Mason went too far."²⁴⁸ He favored some federal uniformity, but

²⁴⁵2 FARRAND, *supra* note 1, at 326 (Aug. 18, 1787) (Madison).

²⁴⁶2 FARRAND, *supra* note 1, at 330 (Aug. 18, 1787) (Madison).

²⁴⁷2 FARRAND, *supra* note 1, at 330 (Aug. 18, 1787) (Madison).

²⁴⁸2 FARRAND, *supra* note 1, at 330 (Aug. 18, 1787) (Madison).

added that

The whole authority over the Militia ought by no means to be taken away from the States whose consequence would pine away to nothing after such a sacrifice of power. He thought the Genl Authority could not sufficiently pervade the Union for such a purpose, nor could it accommodate itself to the local genius of the people.²⁴⁹

John Dickinson of Delaware believed that “the States never would nor ought to give up all authority over the Militia.” He proposed to “restrain the general power to one fourth part at a time, which by rotation would discipline the whole Militia.”²⁵⁰ Yet Pierce Butler of South Carolina spoke for more centralization. He “urged the necessity of submitting the whole Militia to the general Authority, which had the care of the general defence.”²⁵¹

At this point, Mason withdrew his motion, substituting instead a proposed congressional power “to make laws for regulating and disciplining the militia, not exceeding one tenth part in any one year, and reserving the appointment of officers to the States.”²⁵² Charles Cotesworth Pinckney, however, renewed Mason’s original motion: “For a part to be under the genl. and a part under the State Govts. wd be an incurable evil. he saw no room for such distrust of the Genl Govt.”²⁵³ John Langdon of New Hampshire sided with him and seconded his renewal of Mason’s original motion.²⁵⁴

Madison agreed with C.C. Pinckney and Langdon. He “thought the regulation

²⁴⁹2 FARRAND, *supra* note 1, at 331 (Aug. 18, 1787) (Madison).

²⁵⁰2 FARRAND, *supra* note 1, at 331 (Aug. 18, 1787) (Madison).

²⁵¹2 FARRAND, *supra* note 1, at 331 (Aug. 18, 1787) (Madison).

²⁵²2 FARRAND, *supra* note 1, at 331 (Aug. 18, 1787) (Madison).

²⁵³2 FARRAND, *supra* note 1, at 331 (Aug. 18, 1787) (Madison).

²⁵⁴2 FARRAND, *supra* note 1, at 331 (Aug. 18, 1787) (Madison).

of the Militia naturally appertaining to the authority charged with the public defence. It did not seem in its nature to be divisible between two distinct authorities.”²⁵⁵ Ellsworth criticized Mason’s new “tenth part” motion as impractical.²⁵⁶ The younger Charles Pinckney supported his elder cousin and urged nationalization.²⁵⁷

Roger Sherman of Connecticut, “took notice that the States might want their Militia for defence agst invasions and insurrections, and for enforcing obedience to their laws. They will not give up this point.”²⁵⁸ Gerry agreed, and in very strong terms: Handing over complete militia power to the central government would give the Constitution “as black a mark as was set on Cain.”²⁵⁹

While listening to the debate, Mason gradually refined his views. He thought “there was great weight in the remarks of Mr. Sherman,” and he excepted from his “tenth part” motion “such part of the Militia as might be required by the States for their own use.”²⁶⁰ But George Read of Delaware “doubted the propriety of leaving the appointment of the Militia officers in the States. In some States they are elected by the legislatures; in others by the people themselves. He thought at least an appointment by the State Executives ought to be insisted on.”²⁶¹

The convention eventually voted to send the entire issue to a Committee of Eleven—a panel consisting of one delegate from each state then attending the

²⁵⁵2 FARRAND, *supra* note 1, at 332 (Aug. 18, 1787) (Madison).

²⁵⁶2 FARRAND, *supra* note 1, at 332 (Aug. 18, 1787) (Madison).

²⁵⁷2 FARRAND, *supra* note 1, at 332 (Aug. 18, 1787) (Madison).

²⁵⁸2 FARRAND, *supra* note 1, at 332 (Aug. 18, 1787) (Madison).

²⁵⁹2 FARRAND, *supra* note 1, at 332 (Aug. 18, 1787) (Madison).

²⁶⁰2 FARRAND, *supra* note 1, at 332-33 (Aug. 18, 1787) (Madison).

²⁶¹2 FARRAND, *supra* note 1, at 333 (Aug. 18, 1787) (Madison).

convention.²⁶² The committee's August 21 report carefully balanced federal and state interests: Congress would have power

To make laws for organizing arming and disciplining the Militia, and for governing such part of them as may be employed in the service of the U-- S reserving to the States respectively, the appointment of the officers, and the authority of training the Militia according to the discipline prescribed by the U. States²⁶³

Discussion on the Committee of Eleven's report began two days later. Roger Sherman said that the reservation to the states of training was unnecessary because "[t]he States will have this authority of course [i.e., as a matter of course] if not given up."²⁶⁴ Oliver Ellsworth countered that by Sherman's reasoning, they also could strike out the reservation to the states of appointing officers. Ellsworth implied that, in the interests of clarity, both reservations should be retained.

Ellsworth added "that the term discipline was of vast extent and might be so expounded as to include all power on the subject."²⁶⁵ In response, Rufus King of Massachusetts—who had served on the Committee of Eleven—explained that "disciplining" meant "prescribing the manual exercise evolutions &c.,"²⁶⁶ but also included "*laws* for disciplining, [which] must involve penalties and every thing necessary for enforcing penalties."²⁶⁷ King went on to say that "organizing" meant "proportioning the officers & men," which presumably included selecting enlistees,

²⁶²2 FARRAND, *supra* note 1, at 333 (Aug. 18, 1787) (Madison).

²⁶³2 FARRAND, *supra* note 1, at 356 (Aug. 21, 1787) (Madison).

²⁶⁴2 FARRAND, *supra* note 1, at 385 (Aug. 23, 1787) (Madison).

²⁶⁵2 FARRAND, *supra* note 1, at 385 (Aug. 23, 1787) (Madison).

²⁶⁶2 FARRAND, *supra* note 1, at 385 (Aug. 23, 1787) (Madison).

²⁶⁷2 FARRAND, *supra* note 1, at 385 (Aug. 23, 1787) (Madison) (*italics in original*).

distributing them into units, and grading them by rank.²⁶⁸ He defined “arming” as specifying “the kind size and caliber of arms . . . [and] included authority to regulate the modes of furnishing, either by the militia themselves, the State Governments, or the National Treasury.”²⁶⁹

After additional remonstrances from Gerry about the risks of putting the states at the mercy of the federal legislature,²⁷⁰ Sherman withdrew his motion to strike the reservation for training.²⁷¹

Jonathan Dayton of New Jersey offered his own proposal for a balance between state and federal authority, but it went nowhere.²⁷² Ellsworth and Sherman then offered a compromise, whose object was “to refer the plan for the Militia to the General Govt. but leave the execution of it to the State Govts.”²⁷³ Langdon and Gerry renewed arguments in favor of centralization and state power, respectively. After further contributions from Dayton, C. C. Pinckney, Madison, and Luther Martin of Maryland, Randolph counseled against too much state control. He said that federal power over the militia “is a power that cannot from its nature be abused, unless indeed the whole mass should be corrupted,” and that

He was for trammelling the Genl Govt. whenever there was danger. but here there could be none—He urged this as an essential point; observing that the Militia were every where neglected by the State Legislatures, the members of which courted popularity too much to enforce a proper discipline. Leaving the appointment of officers to the

²⁶⁸2 FARRAND, *supra* note 1, at 385 (Aug. 23, 1787) (Madison).

²⁶⁹2 FARRAND, *supra* note 1, at 385 (Aug. 23, 1787) (Madison).

²⁷⁰2 FARRAND, *supra* note 1, at 385 (Aug. 23, 1787) (Madison).

²⁷¹2 FARRAND, *supra* note 1, at 385 (Aug. 23, 1787) (Madison).

²⁷²2 FARRAND, *supra* note 1, at 385-86 (Aug. 23, 1787) (Madison).

²⁷³2 FARRAND, *supra* note 1, at 386 (Aug. 23, 1787) (Madison).

States protects the people [against] every apprehension that could produce murmur.²⁷⁴

The Ellsworth-Sherman compromise was then defeated,²⁷⁵ but the first part of the committee motion—the part before the reservation—was approved.²⁷⁶

Seeking to expand common ground, Madison “moved to amend the next part of the clause so as to read ‘reserving to the States respectively, the appointment of the officers, under the rank of General officers.’”²⁷⁷ Sherman “considered this as absolutely inadmissible.” In his view, the militia’s general officers should not be appointed by the central government. Gerry warned again against undue centralization, which, he said, could provoke civil war.²⁷⁸ Despite another plea from Madison, his motion was crushed, eight states to three. The convention then agreed unanimously to commit the appointment of *all* militia officers to the states and, by a margin of 7-4, to also commit to the states “the authority of training the Militia according to the discipline prescribed by the U. S”.²⁷⁹

The convention next did some cleanup work. It unanimously deleted, as redundant, enforcement of treaties as a reason to call forth the militia, because treaties were federal law and the proposal already authorized calling forth to enforce federal law.²⁸⁰ The convention also agreed unanimously to the slightly revised language proposed by Gouverneur Morris of Pennsylvania: “to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel

²⁷⁴2 FARRAND, *supra* note 1, at 387 (Aug. 23, 1787) (Madison).

²⁷⁵2 FARRAND, *supra* note 1, at 387 (Aug. 23, 1787) (Madison).

²⁷⁶2 FARRAND, *supra* note 1, at 387-88 (Aug. 23, 1787) (Madison).

²⁷⁷2 FARRAND, *supra* note 1, at 388 (Aug. 23, 1787) (Madison).

²⁷⁸2 FARRAND, *supra* note 1, at 388 (Aug. 23, 1787) (Madison).

²⁷⁹2 FARRAND, *supra* note 1, at 388 (Aug. 23, 1787) (Madison).

²⁸⁰2 FARRAND, *supra* note 1, at 388-89 (Aug. 23, 1787) (Madison).

invasions.”²⁸¹ Finally, on August 27, the convention approved Sherman’s motion to clarify that the President was commander-in-chief of the “militia of the several States” only “when called into the actual service of the United States.”²⁸²

We have set forth this discussion in detail because it demonstrates that the balance between federal and state militia powers was very carefully considered. The delegates recognized that uniformity of training, and sometimes uniformity of command, were necessary. But they also recognized that states needed the means to respond to domestic emergencies and to counterbalance federal military power.

On September 17, 1787, the convention released its proposed Constitution to the public. The three Militia Clauses read as follows:

The Congress shall have Power . . .

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

* * * *

The President shall be Commander in Chief . . . of the Militia of the several States, when called into the actual Service of the United States . . .

²⁸¹2 FARRAND, *supra* note 1, at 390 (Aug. 23, 1787) (Madison).

²⁸²2 FARRAND, *supra* note 1, at 422 (Aug. 27, 1787) (official journal).

IV. THE MILITIA IN THE PUBLIC DEBATES OVER RATIFICATION

After the federal convention adjourned, Luther Martin, who had represented Maryland, decided to oppose the Constitution's ratification. He published a series of articles under the penname *Genuine Information*.²⁸³ In his writings, Martin agreed that Congress should be able to authorize federal deployment of state militias. But he contended that the Constitution should have narrowed federal power more. Under the Constitution's scheme, he warned, the central government might subject personnel to abuse under martial law or send a state's militia to a remote part of the Union.²⁸⁴ Martin proposed requiring the consent of the state legislature before the central government could deploy more than a certain proportion of its militia to another state.²⁸⁵

Martin also opposed the uniform discipline requirement, claiming it was unnecessary and even undesirable, because in different states militiamen faced radically different potential enemies and conditions. The states, in his view, were best positioned to address such differences.²⁸⁶

Martin feared that granting the central government power to fix the rules of organizing, arming, and disciplining the militia would destroy its position as a state

²⁸³Luther Martin, *Genuine Information*, 3 FARRAND, *supra* note 1, at 172.

²⁸⁴3 FARRAND, *supra* note 1, at 208. This objection may have provoked the minority at the Maryland ratifying convention to demand an amendment providing "That the militia shall not be subject to martial law, except in time of war, invasion or rebellion." *Address of the Minority of the Maryland Convention*, ANNAPOLIS MD. GAZETTE, May 1, 1788, 17 DOCUMENTARY HISTORY, *supra* note 1, at 242, 244. This demand was met by the Fifth Amendment. U.S. CONST. amend. V.

²⁸⁵3 FARRAND, *supra* note 1, at 207-08. *Cf. Address of the Minority of the Maryland Convention*, ANNAPOLIS MD. GAZETTE, May 1, 1788, 17 DOCUMENTARY HISTORY, *supra* note 1, at 242, 244 ("That the militia, unless selected by lot or voluntarily enlisted, shall not be marched beyond the limits of an adjoining state, without the consent of their legislature or executive.").

²⁸⁶3 FARRAND, *supra* note 1, at 208.

institution and remove a vital barrier against national abuse and overreaching.²⁸⁷

The central government would have incentives for neglecting the militia, since a neglected militia would be a weaker obstacle to federal aggrandizement. Because the Constitution placed no limits on the size of national standing armies, neglecting the state militias could leave the states defenseless in the face of overwhelming central power.²⁸⁸

Martin's themes served as the basis for many other Antifederalist arguments. For example, George Mason, who during the Constitutional Convention advocated extensive federal authority over the militia, had become worried that the Constitution gave federal officials

almost unlimited Authority over the Militia of the several States; whereby, under Colour of regulating, they may disarm, or render useless the Militia, the more easily to govern by a standing Army; or they may harrass [*sic*] the Militia, by such rigid Regulations, and intollerable [*sic*] Burdens, as to make the People themselves desire it's [*sic*] Abolition.²⁸⁹

An essayist calling himself "An Old Whig" added:

The unlimited power of taxation will give [federal officials] the command of all the treasures of the continent; a standing army will be wholly at their devotion, and the authority which is given them over the militia, by virtue of which they may, if they please, change all the officers of the militia on the continent in one day, and put in new officers whom they can better trust; by which they can subject all the

²⁸⁷3 FARRAND, *supra* note 1, at 208.

²⁸⁸3 FARRAND, *supra* note 1, at 208-09.

²⁸⁹George Mason to Thomas Jefferson, May 26, 1788, 18 DOCUMENTARY HISTORY, *supra* note 1, at 79.

militia to strict military laws, and punish the disobedient with death, or otherwise, as they shall think right: by which they can march the militia back and forward from one end of the continent to the other. . . . Suppose a man alledges [*sic*] that he is conscientiously scrupulous of bearing Arms. . . . What is there in the new proposed constitution to prevent his being dragged like a Prussian soldier to the camp and there compelled to bear arms . . . Such flagrant oppressions as these I dare say will not happen at the beginning of the new government; probably not till the powers of government shall be firmly fixed; but it is a duty we owe to ourselves and our posterity if possible to prevent their [*sic*] ever happening.²⁹⁰

Aggravating the concern that state militias might be marched all over the country was the fear that they might be used for nefarious purposes such as imposing despotism or suppressing slave revolts.²⁹¹

²⁹⁰“An Old Whig,” PHILA. INDEP. GAZETTEER, Nov. 1, 1787, 13 DOCUMENTARY HISTORY, *supra* note 1, at 536, 540.

²⁹¹*E.g.*, “A Son of Liberty,” N.Y.J., Nov. 9, 1787, 13 DOCUMENTARY HISTORY, *supra* note 1, at 482 (“The militia of New-Hampshire, or Massachusetts, dragged to Georgia or South-Carolina, to assist in quelling an insurrection of Negroes in those states; and those of Georgia, to another distant quarter, to subdue their fellow citizens, who dare to rise against the despotism of government”); “Philadelphiensis,” *Letter II*, PHILA. FREEMAN’S J., Nov. 28, 1787, 14 DOCUMENTARY HISTORY, *supra* note 1, at 251, 253 (positing “that the negroes of Georgia, or some of the southern states, prompted by the love of sacred liberty, shall attempt to free themselves from cruel slavery, by a noble appeal to arms. In this case the Congress may order the militia of Pennsylvania to march off to quell this insurrection”); “Philadelphiensis,” *Letter IX*, PHILA. FREEMAN’S J., Feb. 6, 1788 16 DOCUMENTARY HISTORY, *supra* note 1, at 57, 58 (discussing possible abuse of militiamen under martial law); “Federal Farmer,” *Letter XVIII*, Jan. 25, 1788), DOCUMENTARY HISTORY, *supra* note 1, at 360, 363 (proposing that a state’s militia not remain in federal service beyond a given period without the consent of the state legislature).

See also “Centinel,” *Letter III*, PHILA. INDEP. GAZETTEER, Nov. 8, 1787, 14

Some opponents raised other arguments—such as the Constitution’s failure to prioritize civil law enforcement over militia use²⁹²—but most of the attacks followed Martin’s lead. They were effective: Even William Pierce, who also had served as a delegate to the Philadelphia convention and favored ratification of the Constitution, admitted that some of them had merit.²⁹³

In defense of the Militia Clauses, Federalists initially emphasized technical issues such as the need for uniform federal standards.²⁹⁴ Eventually, however, they were forced to respond to Antifederalist concerns about state prerogatives and individual rights. This meant persuading the public that the Constitution had

DOCUMENTARY HISTORY, *supra* note 1, at 55, 60:

[The Militia Clauses] will subject the citizens of these states to the most arbitrary military discipline, even death may be inflicted on the disobedient; in the character of militia, you may be dragged from your families and homes to any part of the continent and for any length of time, at the discretion of the future Congress; and as militia you may be made the unwilling instruments of oppression, under the direction of government; there is no exemption upon account of conscientious scruples of bearing arms; no equivalent to be received in lieu of personal services. The militia of Pennsylvania may be marched to Georgia or New-Hampshire however incompatible with their interests or consciences;—in short they may be made as meer [*sic*] machines as Prussian soldiers.

²⁹² *E.g.*, “Federal Farmer,” *Letter III*, Oct. 10, 1787, 14 DOCUMENTARY HISTORY, *supra* note 1, at 30, 39 (“the militia in general, or any select part of it, may be called out under military officers, instead of the sheriff to enforce an execution of federal laws, in the first instance and thereby introduce an entire military execution of the laws”).

²⁹³ William Pierce, *Extract of a Letter*, GAZETTE OF THE STATE OF GA., Mar. 20, 1788, 16 DOCUMENTARY HISTORY, *supra* note 1, at 442, 445-46 (stating that the federal government’s collective powers over the militia “forms such a power independent of the states as must eventually draw from them all their remaining sovereignty”).

²⁹⁴ *E.g.*, FEDERALIST NO. 4 (Jay), 13 DOCUMENTARY HISTORY, *supra* note 1, at 568, 570 (defending uniformity); FEDERALIST NO. 29 (Hamilton) in 15 DOCUMENTARY HISTORY, *supra* note 1, at 318 (same) Timothy Pickering to Charles Tillinghast, Dec. 24, 1787, 14 DOCUMENTARY HISTORY, *supra* note 1, at 193, 203 (same).

balanced federal and state interests properly, and that the militia would remain primarily under state control.²⁹⁵

An early example of this effort was Madison's FEDERALIST NO. 46, published on January 29, 1788. Madison portrayed the scenario of 25,000 to 30,000 regular troops serving an oppressive central government—but overwhelmed by nearly 500,000 militiamen “fighting for their common liberties, and united and conducted by [state] governments possessing their affections and confidence.”²⁹⁶ On the very next day, in one of his “Freeman” essays, Tench Coxe emphasized that “each state can appoint every officer of its own militia, and can train the same, by which it will be sure of a powerful military support . . .”²⁹⁷ Shortly thereafter, Maryland's Alexander Contee Hanson, under the pen name “Aristides,” issued a pamphlet arguing that state control of their respective militias would be a counterbalance to the central power.²⁹⁸ Hamilton's Federalist No. 69, published on March 14, assured

²⁹⁵Hamilton's FEDERALIST NO. 29 mocked the argument that the militia could be marched to remote locations, but did not otherwise address the federalism issues raised by the Constitution's opponents. *Id.* at 321.

²⁹⁶FEDERALIST NO. 46 (Madison), 15 DOCUMENTARY HISTORY, *supra* note 1, at 488, 492.

²⁹⁷“A Freeman” (Tench Coxe), *Letter II*, PA. GAZETTE, Jan. 30, 1788, 15 DOCUMENTARY HISTORY, *supra* note 1, at 508.

²⁹⁸“Aristides” (Alexander Contee Hanson), *Remarks on the Proposed Plan of a Federal Government*, 15 DOCUMENTARY HISTORY, *supra* note 1, at 517, 533:

If indeed it be possible in the nature of things, that congress shall, at any future period, alarm us by an improper augmentation of troops, could we not, in that case, depend on the militia, which is ourselves. In such a case it would be ridiculous to urge, that the federal government is invested with a power over the whole militia of the union. Even when congress shall exercise this power, on the most proper occasions, it is provided in the constitution, that each state shall officer, and train its own militia.

readers that the President would have only “occasional command” of the militia.²⁹⁹

In July, Coxe wrote again to reassure Americans that the federal government would not be able to send militiamen overseas.³⁰⁰

V. THE MILITIA AT THE STATE RATIFYING CONVENTIONS

A. *Twelve States Other Than Virginia*

As public debate over the Constitution continued, state legislatures authorized the election of popular conventions to consider, and ratify or reject, the proposed Constitution. The state ratifying conventions were the entities that converted the Constitution into law, so they were the Constitution’s true “makers.” Thus, according to the interpretive canons of the time, the proceedings and conclusions of the state ratifying conventions generally provide the best evidence of the document’s actual meaning.³⁰¹

There is, unfortunately, no recorded discussion of the Militia Clauses in the ratifying conventions of Delaware (the first to approve the Constitution), New Jersey (third), Georgia (fourth), or Connecticut (fifth). Records from the Massachusetts conclave (sixth) contain little, but that little is quite important. According to notes taken by Justice Dwight, an Antifederalist delegate, on January 29, 1788, the question was posed of whether the federal government could order the militia into foreign service. Tristram Dalton and George Cabot, two prominent Federalist delegates, both denied this; Dalton, moreover, pointed out that the federal government would “have power to raise the militia only in invasions and

²⁹⁹FEDERALIST NO. 69, 16 DOCUMENTARY HISTORY, *supra* note 1, at 387, 389 (Hamilton).

³⁰⁰“A Friend to Society and Liberty” (Tench Coxe), PA. GAZETTE, July 23, 1788, 18 DOCUMENTARY HISTORY, *supra* note 1, at 277, 282.

³⁰¹*Supra* Part I-B; *accord*, Shizer & Calabrezi, *supra* note 1, at 1427-28.

insurrections.”³⁰²

The responses by Dalton and Cabot meshed well with the traditional understanding that the militia was purely a domestic and defensive institution. Because the representation came from some of the Constitution’s leading sponsors, it is particularly useful evidence of the document’s meaning. It also is consistent with a similar representation by Federalist Tench Coxe.³⁰³ These assurances disprove a modern commentator’s claim³⁰⁴ that the Founders did not consider the possibility of the federal government trying to employ the militia for foreign service. In fact, the Founders did consider it, and they assured the public that such a course would not be constitutional.

Among the first six states to ratify, the Militia Clauses proved controversial only in the second: Pennsylvania. Antifederalists complained that the Militia Clauses, when coupled with federal power to raise standing armies, granted too much authority to the central government and potentially disarmed the states.³⁰⁵ Antifederalists also predicted that, “The militia will be taken from home; and when the militia of one state has quelled insurrections and destroyed the liberties, the militia of the last state may, at another time, be employed in retaliating on the first.”³⁰⁶ They suggested that the federal government might raise a “select militia”—

³⁰²Notes of Justice Dwight (an Antifederalist delegate), 6 DOCUMENTARY HISTORY, *supra* note 1, at 1363-64 (Jan. 29, 1788) (reporting remarks of Tristram Dalton and George Cabot). Theophilus Parsons, another prominent Federalist, acknowledge that the government would be able to send “armies” out of the country. *Id.* at 1364. For the distinction between the militia and armies, see *supra* Part II-C.

³⁰³*Supra* note ____ and accompanying text.

³⁰⁴*Hirsch*, *supra* note 1, at 931 & 941 (relying on the Founders’ supposed lack of foresight to justify a novel interpretation of the Militia Clauses).

³⁰⁵2 DOCUMENTARY HISTORY, *supra* note 1, at 409 (Nov. 28, 1787) (reporting remarks of John Smilie).

³⁰⁶2 DOCUMENTARY HISTORY, *supra* note 1, at 509 (Dec. 6, 1787) (reporting remarks

one consisting only of picked men—designed to do its bidding, and that federal militia commanders would abuse the militiamen.³⁰⁷

The Federalist response was unsatisfactory. Thomas McKean told fellow delegates only that “[c]ommon sense must oppose the idea” that the federal government would order state militias to march to remote locations.³⁰⁸ James Wilson avoided answering these objections, focusing instead on the need for uniformity in arms and in discipline.³⁰⁹ After the convention had adjourned, the Pennsylvania Antifederalist minority published a manifesto in which they proposed several constitutional amendments, one of which provided that

the power of organizing, arming, and disciplining the militia . . . remain with the individual states, and that Congress shall not have authority to call or march any of the militia out of their own state, without the consent of such state, and for such length of time . . . as such state shall agree.³¹⁰

The Militia Clauses proved controversial at the seventh convention to ratify—that of Maryland. The future Supreme Court Justice Samuel Chase, then an Antifederalist, thought that the Militia Clauses would permit the federal

of William Findley).

³⁰⁷2 DOCUMENTARY HISTORY, *supra* note 1, at 509 (Dec. 6, 1787) (reporting remarks of John Smilie).

³⁰⁸2 DOCUMENTARY HISTORY, *supra* note 1, at 539 (Dec. 10, 1787) (reporting remarks of Thomas McKean).

³⁰⁹2 DOCUMENTARY HISTORY, *supra* note 1, at 577 (Dec. 11, 1787) (reporting remarks of James Wilson).

³¹⁰THE ADDRESS AND REASONS OF DISSENT OF THE MINORITY OF THE CONVENTION OF THE STATE OF PENNSYLVANIA TO THEIR CONSTITUENTS, 2 DOCUMENTARY HISTORY, *supra* note 1, at 618, 624.

government “to swallow up the State governments.”³¹¹ Antifederalist William Paca proposed an amendment providing that the militia be exempt from congressional rulemaking and from out-of-state service unless its state legislature agreed.³¹² Maryland Antifederalists also proposed amendments (1) prohibiting, without the consent of its legislature or executive, the use of a state militia outside the limits of an *adjoining* state,³¹³ and (2) specifying that the militia was not subject to martial law, except in time of war, invasion or rebellion.³¹⁴

The Maryland convention’s overwhelming Federalist majority ratified the Constitution, although as in some other states, they did not convincingly rebut their opponents’ arguments. We must not assume that the Federalists didn’t care about the militia being abused or marched around the country. More likely, they simply believed that the Constitution provided sufficient protection against this eventuality.

In South Carolina, the eighth state to ratify, the Federalist majority defeated an Antifederalist amendment providing that a state militia was not subject to congressional rules and could not be marched out of its state without the governor’s consent.³¹⁵ There was no reported discussion of the militia issue at the convention in New Hampshire, the ninth state to ratify.

The tenth state to approve the Constitution was Virginia, and it was at the Virginia conclave that we find the first thorough discussion of the Militia Clauses in the state ratifying conventions. Before examining the Virginia debates, however, let’s complete our summary of the other state conventions.

³¹¹Notes of Samuel Chase, 12 DOCUMENTARY HISTORY, *supra* note 1, at 637.

³¹²12 DOCUMENTARY HISTORY, *supra* note 1, at 650, 652 (Apr. 26, 1788) (reproducing proposed amendment).

³¹³12 DOCUMENTARY HISTORY, *supra* note 1, at 665 (May 1, 1788).

³¹⁴12 DOCUMENTARY HISTORY, *supra* note 1, at 655 (May 1, 1788).

³¹⁵27 DOCUMENTARY HISTORY, *supra* note 1, at 393 (May 23, 1788).

In New York (eleventh state to ratify), Antifederalist John Williams argued that the Constitution tipped the military balance too far in favor of the federal government, and that states might have to resort to arms to protect their rights:

But have they the means necessary for the purpose? Are they not deprived of the command of the purse and the sword of their citizens? Is not the power, both over taxation and the militia, wrested from their hands by this constitution, and bestowed upon the general government? Yes, Sir, it is³¹⁶

Antifederalist John Lansing, who had attended the Constitutional Convention until its direction became apparent, agreed: “Sir, if you do not give the state governments a power to protect themselves; If you leave them no other check upon Congress, than the power of appointing senators; they will certainly be overcome”³¹⁷

To these objections, the Federalists again failed to supply convincing answers. Accordingly, while the New York convention voted narrowly to ratify, it qualified its ratification with proposed amendments and understandings. One amendment provided “[t]hat the People have a right to keep and bear Arms; that a well regulated Militia, including the body of the People *capable of bearing Arms*, is the proper, natural and safe defence of a free State.”³¹⁸ Another amendment stated that “the Militia should not be subject to Martial Law, except in time of War, Rebellion or Insurrection.”³¹⁹ One of the “understandings” was that “until a Convention shall be called and convened for proposing Amendments to the said Constitution, the Militia

³¹⁶22 DOCUMENTARY HISTORY, *supra* note 1, at 1936 (June 27, 1788) (reporting remarks of John Williams).

³¹⁷22 DOCUMENTARY HISTORY, *supra* note 1, at 2001-01, June 28 (1788) (reporting remarks of John Lansing).

³¹⁸23 DOCUMENTARY HISTORY, *supra* note 1, at 2327 (July 26, 1788). (Italics in original.)

³¹⁹23 DOCUMENTARY HISTORY, *supra* note 1, at 2327 (July 26, 1788).

of this State will not be continued in Service out of this State for a longer term than six weeks without the Consent of the Legislature thereof”³²⁰

North Carolina held two ratifying conventions before it approved the Constitution. The surviving transcribed debate derives almost exclusively from the first. One Antifederalist worried about the federal government disarming the militia, thereby weakening a check on central power.³²¹ Another disagreed with the power of the President to call out the militia, and argued that Congress should have more power to check the President’s actions.³²² In response, Federalist James Iredell claimed that only Congress, not the President, could call out the militia³²³—although it would have been more accurate to say that Congress fixes the conditions under which the President may deploy it.³²⁴ Iredell’s ally, Richard Dobbs Spaight, emphasized the benefits of unified command and reminded his fellow delegates that

³²⁰23 DOCUMENTARY HISTORY, *supra* note 1, at 2327 (July 26, 1788).

³²¹30 DOCUMENTARY HISTORY, *supra* note 1, at 413 (Jul. 30, 1788) (reporting remarks of William Lenoir) (“When we consider the great powers of Congress, there is great cause of alarm. They can disarm the militia. If they were armed, they would be a resource against great oppressions.”).

³²²30 DOCUMENTARY HISTORY, *supra* note 1, at 331 (July 28, 1788) (reporting remarks of Robert Miller) (“He considered it as a defect in the Constitution, that it was not expressly provided that Congress should have the direction of the motions of the army.”).

³²³30 DOCUMENTARY HISTORY, *supra* note 1, at 326 (Jul. 28, 1788):

With regard to the militia, it must be observed, that though he [i.e., the President] has the command of them when called into the actual service of the United States, yet he has not the power of calling them out. The power of calling them out, is vested in Congress, for the purpose of executing the laws of the union. When the militia are called out for any purpose, some person must command them

³²⁴*Infra* Part VII (explaining that Congress itself does not call forth the militia, nor does it delegate that responsibility to the President).

a President abusing his trust could be impeached.³²⁵

These relatively weak Federalist responses did not satisfy the skeptics, and the convention proposed amendments curbing the federal government's militia authority.³²⁶ The Rhode Island convention similarly proposed amendments to address the risk that the federal government would misuse the militia.³²⁷

B. Virginia

The hard-fought Virginia ratifying convention was a clash of titans. Leading the Antifederalist charge was Patrick Henry, the greatest orator of the age. Allied with him was George Mason, the famed penman of the Virginia Declaration of Rights, who had represented his state at the Constitutional Convention, but refused to sign the final document. On the same team was William Grayson who subsequently served as one of Virginia's first two U.S. Senators.

Arrayed in favor of the Constitution were Governor Edmund Randolph, James Madison, Edmund Pendleton (Virginia's Chancellor and convention chairman), George Nicholas (who succeeded George Wythe to the law professorship at William and Mary College), and the future Chief Justice John Marshall. The debate over the Militia Clauses spanned four days.

³²⁵30 DOCUMENTARY HISTORY, *supra* note 1, at 331 (Jul. 28, 1788) (reporting remarks of Richard Dobbs Spaight).

³²⁶30 DOCUMENTARY HISTORY, *supra* note 1, at 456 (Aug. 1, 1788) (providing that states can organize, arm and discipline their own militia if Congress fails to do so; that the militia not be subject to martial law, except when in service during war, invasion or rebellion).

³²⁷26 DOCUMENTARY HISTORY, *supra* note 1, at 996, 997 (May 29, 1790) (affirming the right to keep and bear arms and the traditional militia role, banning martial law except in time of war, rebellion or insurrection; and inveighing against standing armies).

The Antifederalist arguments fell into two categories. The first category of arguments was based on the premise that the Constitution's grounds for deploying the militia were too broad.³²⁸ They included the following charges:

- Congressional authority to prescribe militia “discipline” authorized martial law—and therefore very harsh punishments—for militiamen, even in times of peace;³²⁹
- calling out the militia for federal law enforcement would displace enforcement by civil authorities;
- Georgia militiamen might be marched to New Hampshire, and vice-versa;³³⁰ and
- federal authorities might call forth militiamen from distant places to tyrannize over the local inhabitants.

Practices of this kind, the Antifederalists contended, would raise public disgust with the militia, swaying opinion in favor of a standing army.

The second category of Antifederalist arguments was based on a creative interpretation of the Militia Clauses: that the militia powers granted to the federal government were *exclusive*, rather than *concurrent* with reserved state powers.³³¹

³²⁸9 DOCUMENTARY HISTORY, *supra* note 1, at 958 (June 5, 1788) (reporting Henry as saying “By this, Sir, you see that their controul over our last and best defence, is unlimited [sic]”),

³²⁹10 DOCUMENTARY HISTORY, *supra* note 1, at 1289 (June 14, 1788) (reporting remarks by George Mason); 10 DOCUMENTARY HISTORY, *supra* note 1, at 1301 (June 14, 1788) (reporting remarks by Patrick Henry).

³³⁰*E.g.*, 10 DOCUMENTARY HISTORY, *supra* note 1, at 1269 (reporting remarks of George Mason); 10 DOCUMENTARY HISTORY, *supra* note 1, at 1273 (June 14, 1788) (reporting remarks by Green Clay).

³³¹*E.g.*, 9 DOCUMENTARY HISTORY, *supra* note 1, at 1066 (Jun. 9, 1788) (reporting remarks by Patrick Henry); 10 DOCUMENTARY HISTORY, *supra* note 1, at 1276 (Jun.

One basis for the “exclusivity” view was the belief that when a power was given, exclusivity was presumed.³³² Another was the nature of the powers themselves: Antifederalists said it would make no sense for both the federal government and the states to provide for organizing, arming, and disciplining the militia, because this might lead to contradictory rules.³³³ Indeed, the Constitutional Convention had opened the door to the “exclusivity” interpretation when it decided, over the objection of Roger Sherman, to enumerate some, but not all, reserved state militia powers.³³⁴ Henry asserted that the existence of enumerated exceptions implied that federal authority was exclusive wherever there were no enumerated exceptions.

From the premise that Congress’s militia powers were exclusive, Antifederalists concluded that if Congress failed to exercise its power to use the militia to suppress insurrections and repel invasions, the states could not do so themselves:³³⁵ “The States cannot now call them [out],” said Henry, “let an insurrection be ever so perilous, without an application to Congress.”³³⁶ Likewise, if Congress neglected to provide for organizing, arming, and disciplining the militia,

14, 1788) (same).

³³²10 DOCUMENTARY HISTORY, *supra* note 1, at 1309 (June 14, 1788) (reporting Patrick Henry as saying, “But the right interpretation ([and such as the nations of the earth had put upon the concession of power] was, that when power was given, it was given exclusively.”).

³³³10 DOCUMENTARY HISTORY, *supra* note 1, at 1310 (June 16, 1788) (reporting remarks by Patrick Henry); 10 DOCUMENTARY HISTORY, *supra* note 1, at 1305-06 (June 14, 1788) (reporting remarks by William Grayson).

³³⁴*Supra* note ____ and accompanying text.

³³⁵10 DOCUMENTARY HISTORY, *supra* note 1, at 1310 (June 14, 1788) (reporting remarks by Patrick Henry).

³³⁶10 DOCUMENTARY HISTORY, *supra* note 1, at 1310 (June 16, 1788) (reporting remarks by Patrick Henry).

then the states could not do so.³³⁷ In that event, cried Henry, “you have lost every thing.”³³⁸

And when Federalists noted that Article I, Section 10 specifically recognized state power to resist *invasion*, their adversaries countered that this implied that states had no power to suppress *insurrections*.³³⁹

Virginia Federalists defended the Militia Clauses by emphasizing the value of uniformity.³⁴⁰ They said that state-trained militias were not always reliable,³⁴¹ but a well-regulated militia could reduce reliance on a standing army³⁴² and allow most

³³⁷9 DOCUMENTARY HISTORY, *supra* note 1, at 957 (June 5, 1788) (reporting Patrick Henry as saying, “Of what service would militia be to you, when most probably you will not have a single musket in the State; for as arms are to be provided by Congress, they may or may not furnish them”); 10 DOCUMENTARY HISTORY, *supra* note 1, at 1270 (reporting remarks of George Mason).

³³⁸10 DOCUMENTARY HISTORY, *supra* note 1, at 1278 (June 16, 1788) (reporting Patrick Henry as saying, “If you have given up your militia, and Congress shall refuse to arm them, you have lost every thing”); 9 DOCUMENTARY HISTORY, *supra* note 1, at 954 (Jun. 5, 1788) (reporting Patrick Henry as saying, “Have we the means of resisting disciplined armies, when our only defence, the militia is put into the hands of Congress?”).

Accordingly, George Mason favored a constitutional amendment that was “an express declaration, that the State Governments might arm and discipline them.” 10 DOCUMENTARY HISTORY, *supra* note 1, at 1271 (Jun. 14, 1788).

³³⁹10 DOCUMENTARY HISTORY, *supra* note 1, at 1310 (June 16, 1788) (reporting remarks of Patrick Henry).

³⁴⁰9 DOCUMENTARY HISTORY, *supra* note 1, at 992 (Jun. 6, 1788) (reporting remarks of James Madison).

³⁴¹9 DOCUMENTARY HISTORY, *supra* note 1, at 981 (Jun. 6, 1788) (reporting Edmund Randolph as saying “In case of an attack, what defence can we make? Who are militia? Can we depend solely upon these?”).

³⁴²10 DOCUMENTARY HISTORY, *supra* note 1, at 1271 (June 14, 1788) (reporting remarks by James Madison); 10 DOCUMENTARY HISTORY, *supra* note 1, at 1301 (June 14, 1788) (reporting remarks by James Madison).

people to pursue their own occupations.³⁴³ They said that the three grounds for calling forth the militia were necessary for preserving the Union, but that those grounds were exclusive: Federal officials could not deploy the militia for any other reason.³⁴⁴ The Constitution's supporters also affirmed that "organizing" and "disciplining" had technical meanings that did not authorize martial law. Only "governing" authorized martial law, they said, and "governing" applied only when the militia was federally deployed.³⁴⁵

The Constitution's sponsors added that the power to call forth the militia to enforce federal law did not preclude civil law enforcement, which would remain the norm.³⁴⁶ But they said the federal power was necessary, because a criminal combination (such as a riot³⁴⁷ or smuggling ring)³⁴⁸ might not rise to the level of an "insurrection," but still overwhelm civil law enforcement. They maintained that nationwide defense against insurrections, invasions, and widespread lawbreaking should not depend on the approval of state officials,³⁴⁹ but that the scenario of militia

³⁴³9 DOCUMENTARY HISTORY, *supra* note 1, at 981 (Jun. 6, 1788) (reporting Edmund Randolph as saying, "The militia of our country will be wanted for agriculture"); *see also* 9 DOCUMENTARY HISTORY, *supra* note 1, at 1074 (Jun. 9, 1787) (reporting remarks of Henry Lee).

³⁴⁴10 DOCUMENTARY HISTORY, *supra* note 1, at 1280-81 (June 14, 1788) (reporting remarks by George Nicholas).

³⁴⁵10 DOCUMENTARY HISTORY, *supra* note 1, at 1288 (June 14, 1788) (reporting remarks by Edmund Randolph); 10 DOCUMENTARY HISTORY, *supra* note 1, at 1294 (June 14, 1788) (reporting remarks by Henry Lee).

³⁴⁶10 DOCUMENTARY HISTORY, *supra* note 1, at 1288 (Jun. 14, 1788) (reporting remarks of Edmund Randolph); 10 DOCUMENTARY HISTORY, *supra* note 1, at 1303 (June 14, 1788) (reporting remarks by James Madison).

³⁴⁷10 DOCUMENTARY HISTORY, *supra* note 1, at 1296 (June 14, 1788) (reporting remarks by James Madison).

³⁴⁸10 DOCUMENTARY HISTORY, *supra* note 1, at 1302 (Jun. 16, 1788) (reporting remarks by James Madison).

³⁴⁹10 DOCUMENTARY HISTORY, *supra* note 1, at 1279 (Jun. 14, 1788) (reporting

marching from Georgia to New Hampshire was preposterous.³⁵⁰

The Virginia Federalists' most valuable contribution was their clear and convincing exposition of the division between state and federal militia powers. They explained why the Constitution's grants of militia and defensive war powers to federal actors were *not* exclusive, but concurrent with reserved state authority. Federalists who spoke to this issue included Randolph,³⁵¹ Henry Lee,³⁵² Madison,³⁵³ Nicholas,³⁵⁴ Francis Corbin,³⁵⁵ Edmund Pendleton,³⁵⁶ and Zachariah Johnston.³⁵⁷ But the speaker most often quoted is John Marshall.

Marshall based his exposition largely on the Constitution's provision that "No State shall, without the Consent of Congress . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."³⁵⁸ The logical

remarks by George Nicholas).

³⁵⁰10 DOCUMENTARY HISTORY, *supra* note 1, at 1273-74 (Jun. 14, 1788) (reporting remarks by James Madison).

³⁵¹9 DOCUMENTARY HISTORY, *supra* note 1, at 1102 (Jun. 10, 1788) (reporting remarks of Edmund Randolph).

³⁵²*E.g.*, 9 DOCUMENTARY HISTORY, *supra* note 1, at 1074 (Jun. 9, 1788) (reporting remarks of Henry Lee).

³⁵³9 DOCUMENTARY HISTORY, *supra* note 1, at 992 (Jun. 6, 1788) (reporting remarks of James Madison); 10 DOCUMENTARY HISTORY, *supra* note 1, at 1273 (June 14, 1788) (reporting remarks by James Madison).

³⁵⁴10 DOCUMENTARY HISTORY, *supra* note 1, at 1280 (June 14, 1788) (reporting remarks by George Nicholas); 10 DOCUMENTARY HISTORY, *supra* note 1, at 1313-14 (June 14, 1788) (reporting remarks by George Nicholas).

³⁵⁵10 DOCUMENTARY HISTORY, *supra* note 1, at 1305 (June 16, 1788) (reporting remarks by Francis Corbin).

³⁵⁶10 DOCUMENTARY HISTORY, *supra* note 1, at 1324-25 (June 16, 1788) (reporting remarks by Edmund Pendleton).

³⁵⁷10 DOCUMENTARY HISTORY, *supra* note 1, at 1531 (June 25, 1788) (reporting remarks by Zachariah Johnston).

³⁵⁸U.S. CONST. art. I, § 10, cl. 3.

obverse of this provision is that “Any state may, without the Consent of Congress . . . engage in War if actually invaded, or in such imminent Danger as will not admit of delay.” Marshall argued as follows:

The State Governments did not derive their powers from the General Government. But each Government derived its powers from the people. . . . The State Legislatures had power to command and govern their militia before, and have it still, undeniably, unless there be something in this Constitution that takes it away. For Continental purposes Congress may call forth the militia; as to suppress insurrections and repel invasions. But the power given to the States by the people is not taken away. . . . The truth is, that when power is given to the General Legislature, if it was in the State Legislatures before, both shall exercise it; unless there be an incompatibility in the exercise by one, to that by the other; or negative words precluding the State Governments from it. But there are no negative words here. It rests therefore with the States. To me it appears then unquestionable, that the State Governments can call forth the militia, in case the Constitution should be adopted, in the same manner as they could have done, before its adoption. Gentlemen have said, that the States cannot defend themselves without an application to Congress, because Congress can interpose! . . . All the restraints intended to be laid on the State Governments (besides where an exclusive power is expressly given to Congress) are contained in the tenth section, of the first article. This power is not included in the restrictions in that section. But what excludes every possibility of doubt, is the last part of it.—That “no State shall engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.” When invaded, they can engage in war; as also when in imminent danger. This clearly proves, that the

States can use the militia when they find it necessary³⁵⁹

C. Conclusions from the Ratifying Convention Debates

The central militia-related lesson of the state ratification debates is this: The Constitution’s opponents feared that the Constitution would authorize the federal government to abuse and eventually destroy the militia, resulting in a federal monopoly of military power and a loss of protection for the states and the people. The Federalists showed that, under a correct reading of the Constitution, this could not happen. Any interpretation of the Constitution by which it could happen is, therefore, necessarily incorrect.

VI. ALLOCATION OF WAR POWERS BETWEEN STATES AND CENTRAL GOVERNMENT

A. Pre-Constitutional Background: Declaration of Independence and Articles of Confederation

The Declaration of Independence did not announce the birth of a single nation. It announced the creation of thirteen “Free and Independent States” with “full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and do all other Acts and Things which Independent States may of right do.”³⁶⁰ Each state became fully capable of waging either defensive or offensive war. Of course, the states effectively delegated some of this power to the Second Continental

³⁵⁹10 DOCUMENTARY HISTORY, *supra* note 1, at 1308 (June 16, 1788) (reporting remarks by John Marshall). Marshall also affirmed that the states could arm their militias if the federal government did not. 10 DOCUMENTARY HISTORY, *supra* note 1, at 1308 (June 16, 1788) (reporting remarks by John Marshall).

³⁶⁰DECLARATION OF INDEPENDENCE; GARRY WILLS, INVENTING AMERICA 332 (2d ed., 2002) (“Not one country, but thirteen separate ones, came into existence when the Declaration was at last made unanimous . . .”).

Congress.³⁶¹

On March 1, 1781, the Articles of Confederation became effective and the Second Continental Congress became the Confederation Congress. The Articles were not a constitution, nor was the Congress a government, in the modern sense. Rather, the confederation was a treaty organization, somewhat resembling the present North Atlantic Treaty Organization, with Congress occupying the position of NATO's North Atlantic Council.³⁶²

The Articles granted the Confederation Congress general authority to wage either defensive or offensive war on behalf of all the states. They also required each state to maintain defensive capacity by keeping up “a well-regulated and disciplined militia, sufficiently armed and accoutered.”³⁶³ However, the Articles limited the war powers of states in these ways:

- Congress could set a maximum on the number of naval vessels that states could maintain in time of peace;
- Congress could, upon review, limit the number of state vessels during a state war against pirates;
- states could grant commissions to ships and vessels of war and issue letters of marque and reprisal only after a congressional declaration of war and only against the declared enemy;
- states could not maintain “any body of forces” (necessarily referring to standing armies) in times of peace without congressional consent; and
- a state was not to engage in war unless “actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of

³⁶¹*Inherent*, *supra* note 1, at 362 (2023).

³⁶²*Natelson & Hyman*, *supra* note 1, at 12.

Indians to invade such State, and the danger is so imminent as not to admit of a delay till the United States in Congress assembled can be consulted.”³⁶⁴

This scheme severely limited the ability of states to wage offensive war, but aside from the restriction on non-Indian pre-emptive attacks, it left them with extensive authority to employ their militias in defensive land war.

B. Allocation of War Powers Under the Constitution

1. The States

In our experience, people are so used to hearing, or assuming, that the Constitution granted the federal government exclusive authority over war and foreign affairs, that they are stunned to learn that is not true. To be sure, the Constitution granted the federal government, within wide boundaries, *supreme* authority over war and foreign affairs. It also prohibited states from waging offensive war, at least without congressional consent. And just as the Articles prohibited the states from maintaining without congressional consent any peacetime “body of forces” (in contradistinction to the militia), the Constitution prohibited them from maintaining without congressional consent any peacetime “Troops” (in contradistinction to the militia).³⁶⁵

On the other hand, the Constitution preserved to the states concurrent power to prosecute defensive war.³⁶⁶ Indeed, the Constitution actually left the states with *more* war power than they had enjoyed under the Articles. It did so by:

³⁶³ARTS. CONFED. art. VI.

³⁶⁴ARTS. CONFED. art. VI; *Natelson & Hyman, supra* note 1, at 12-14.

³⁶⁵U.S. CONST. art. I, § 10, cl. 3.

³⁶⁶U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress . . . engage in War, unless actually invaded, or in such imminent Danger as will not

- not requiring a congressional declaration of war for states to build ships—merely war de facto, with no prerequisite that the war be one waged by the federal government;
- depriving Congress of its veto over state naval actions against invading pirates; and
- omitting the Articles’ restrictions on state preemptive strikes against imminent invasion.

The states’ only loss of war power was that they no longer could issue letters of marque or reprisal.³⁶⁷

Under the Constitution, the states also retained unmentioned prerogatives sometimes associated with war. States continued to have power to suspend the writ of habeas corpus, and (subject to some federal preemption before 1808 and more extensive preemption thereafter) could continue to control foreign immigration. The Constitution also reserved to the states the right to impose embargoes, although subject to federal preemption.³⁶⁸

2. The Federal Government

The Constitution granted Congress certain enumerated powers that provided the means of waging both offensive or defensive war. Congress could “raise and support Armies,”³⁶⁹ “provide and maintain a Navy,”³⁷⁰ and “make Rules for the

admit of delay.”); *Natelson & Hyman*, *supra* note 1, at 14-18.

³⁶⁷*Natelson & Hyman*, *supra* note 1, at 12-16.

³⁶⁸*Natelson & Hyman*, *supra* note 1, at 12-16.

³⁶⁹U.S. CONST., art. I, § 8, cl. 12.

³⁷⁰U.S. CONST., art. I, § 8, cl. 13.

Government and Regulation of the land and naval Forces”³⁷¹—all of which the President would command.³⁷² Primarily (but not exclusively) for offensive purposes, Congress could declare war³⁷³ and “grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.”³⁷⁴ Also relating to offensive conflict was a power to “define and punish Piracies and Felonies committed on the High Seas.”³⁷⁵ This authorized expeditions against pirates and any other nautical “enemies of the human race.”³⁷⁶

Relating to defense only was the power to suspend the writ of habeas corpus “in cases of Rebellion or Invasion”³⁷⁷ and to provide for calling forth the militia.³⁷⁸

In some circumstances, federal actors were *required* to wage defensive war. The Take Care Clause required the President to “take Care that the Laws be faithfully executed,” thereby obliging him to undertake operations to suppress rebellion and otherwise enforce federal law.³⁷⁹ The Guarantee Clause provided that “The United States . . . shall protect each [state] . . . against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be

³⁷¹U.S. CONST., art. I, § 8, cl. 14.

³⁷²U.S. CONST., art. II, § 2, cl. 1; *id.*, § 3.

³⁷³U.S. CONST., art. I, § 8, cl. 11.

³⁷⁴U.S. CONST., art. I, § 8, cl. 11.

³⁷⁵U.S. CONST., art. I, § 8, cl. 10.

³⁷⁶ *Natelson & Hyman*, *supra* note 1, at 9-10 (discussing the international law concept of *hostes humani generis*—enemies of the human race).

³⁷⁷This was a recognized incident of the war power. NATELSON, ORIGINAL CONSTITUTION, *supra* note 1, at 106. *See also* U.S. CONST., art. I, § 9, cl. 2.

³⁷⁸U.S. CONST., art. I, § 8, cl. 15. *See infra* Part VII (explaining that Congress does not call forth the militia, but specifies the conditions under which the President may do so).

³⁷⁹U.S. CONST., art. II, § 3.

convened) against domestic Violence.”³⁸⁰ Unlike the Take Care Clause, this mandate was addressed not to any particular officer or agency, but to the United States government as a whole.³⁸¹

VII. TEXTUAL ANALYSIS OF THE MILITIA CLAUSES

With that background established, let’s turn to the constitutional text, and in particular the text of the three Militia Clauses.

The Constitution adopts the Founding-era distinction between a “Militia”—a part-time force selected from the citizenry for defensive and domestic purposes only³⁸²—and an “Army,” which was a full-time professional force employable either in defensive or offensive war. Thus, it grants to Congress separate powers to “raise and support Armies”³⁸³ and for “calling forth the Militia.”³⁸⁴ If a militia were merely a kind of army, then only the former power would have been necessary. The Constitution also distinguishes between the two by designating the President as “Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States.”³⁸⁵

While recognizing the prerogative of states to maintain militias, the Constitution prohibits them from maintaining “Troops” in peacetime without congressional consent.³⁸⁶ This prohibition replaced the Articles of Confederation’s

³⁸⁰U.S. CONST., art. IV, § 4.

³⁸¹*Inherent*, *supra* note 1, at 357-58.

³⁸²*Supra* Part II-C.

³⁸³U.S. CONST. art. I, § 8, cl. 12.

³⁸⁴U.S. CONST. art. I, § 8, cl. 15.

³⁸⁵U.S. CONST. art. II, § 2, cl. 1.

³⁸⁶U.S. CONST. art. I, § 10, cl. 3. *Cf.* “Aristides” (Alexander Contee Hanson), *Remarks on the Proposed Plan of a Federal Government*, 15 DOCUMENTARY HISTORY, *supra*

ban on states maintaining “any body of forces” without congressional consent, although the Articles also required the states to maintain militias.³⁸⁷ Thus, both “Troops” and “body of forces” necessarily refer to standing armies.

The Militia Organization Clause reads as follows:

The Congress shall have Power . . . to provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.³⁸⁸

This provision mentions two powers reserved to the states: appointing officers in their respective militias and training their units “according to the discipline prescribed by Congress.” As Rufus King said at the Constitutional Convention, the term “discipline” has the specialized meanings of “rule of government,” “order,” or “military regulation”³⁸⁹—“prescribing the manual exercise evolutions &c,”³⁹⁰ and that “*laws* for disciplining, must involve penalties and every thing necessary for enforcing penalties.”³⁹¹

Congress, on the other hand, may “provide for organizing, arming, and disciplining, the Militia.” In eighteenth-century English, the verb “to provide” generally carried the future sense derived from its Latin forebear *providere*—to look

note 1, at 517, 533 (employing the distinction between “troops” and militiamen).

³⁸⁷ARTS. CONFED., ART. VI.

³⁸⁸U.S. CONST. art. I, § 8, cl. 16.

³⁸⁹SAMUEL JOHNSON, DICTIONARY (8th ed. 1786) (defining “discipline”).

³⁹⁰2 FARRAND, *supra* note 1, at 385 (Aug. 23, 1787) (Madison).

³⁹¹2 FARRAND, *supra* note 1, at 385 (Aug. 23, 1787) (Madison) (*italics in original*).

ahead. (The modern analogue is “to lay up provisions for.”³⁹²) Congress exercises legislative power by writing the rule book, and perhaps raising the money. The states are the executives: They appoint officers, organize the men into the congressionally-prescribed ranks and units, give them their equipment, and carry out their training.³⁹³

Congress may “provide for . . . governing such Part of [the militia] as may be employed in the Service of the United States.”³⁹⁴ “Governing” appears to be a more inclusive term than “organizing,” “arming,” or “training.” By way of illustration, it includes, as the ratification debates indicate, authority to impose martial law on

³⁹²Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1 15-16 (2003) (discussing the eighteenth-century meaning of the phrase, “to provide for,” and showing that the Taxation Clause did not authorize spending money for purposes other than tax collection). Despite the dicta in *United States v. Butler*, 297 U.S. 1 (1936) and the short dismissive holding in *Helvering v. Davis*, 301 U.S. 619 (1937), the constitutional text does not authorize spending for unenumerated purposes.

One might ask why the phrase “to provide for the . . . general Welfare” in U.S. CONST., art. I, § 8, cl. 1 (the Taxation Clause) did not authorize spending for the general welfare but “To provide for . . . arming” included spending for arms. The answer lies in the difference in wording between the two clauses. In the former the power granted is that of taxation, while paying debts and providing for the general welfare are statements of purposes and potential limitations. In the latter, the granted power is to provide for arming.

The actual power to pay pre-existing debts is in U.S. CONST., art. VI, § 1 (“All Debts contracted . . . shall be as valid against the United States under this Constitution as under the Confederation”) and the power to pay future debts is implicit in the power to borrow. *Id.*, art. I, § 8, cl. 2 (“The Congress shall have power . . . To borrow Money on the Credit of the United States”). The power to spend on enumerated purposes is implicit in each enumerated purpose. NATELSON, ORIGINAL CONSTITUTION, *supra* note 1, at 106.

³⁹³*Compare* U.S. CONST. art. I, § 8, cl. 13 (“to provide and maintain a Navy”). To “provide” has a future sense, i.e., to pass legislation arranging for its creation and for major changes. To “maintain” is to keep it going.

³⁹⁴ U.S. CONST. art. I, § 8, cl. 16.

militiamen.³⁹⁵ The Commander in Chief Clause specifies that “The President shall be Commander in Chief . . . of the Militia of the several States, when called into the actual Service of the United States,” which tells us that the person who governs the federalized militia is the President.

One might argue that the President’s governing authority is qualified by the reserved state powers to train militiamen and appoint officers—in other words, that states continue to officer and train their militias even during periods of federal deployment. This argument is supported some Founding-era evidence³⁹⁶ and by the fact that the Militia Organization Clause does not explicitly terminate those reserved powers during periods of federal service. On the other hand, this interpretation would permit a rebellious state to continue to train militiamen and appoint officers in units that had been federalized precisely to suppress the rebellious state. The better conclusion, therefore, is that the “governing” that takes place during periods of federal service includes training and the appointment of officers.

The Calling Forth Clause reads as follows:

The Congress shall have Power . . . to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and

³⁹⁵*E.g., supra* note ____ and accompanying text.

³⁹⁶“Aristides” (Alexander Contee Hanson), *Remarks on the Proposed Plan of a Federal Government*, 15 DOCUMENTARY HISTORY, *supra* note 1, at 517, 533:

. . . it would be ridiculous to urge, that the federal government is invested with a power over the whole militia of the union. Even when congress shall exercise this power, on the most proper occasions, it is provided in the constitution, that each state shall officer, and train its own militia.

repel Invasions.³⁹⁷

The future sense of the term “provide for” suggests, despite imprecise ratification-era statements to the contrary,³⁹⁸ that Congress itself does not call forth the militia. Nor does it delegate the power to call forth to the President, as sometimes claimed.³⁹⁹ Rather, Congress, within constitutional limits, *selects the conditions precedent* by which the President may call forth (embody, deploy) the militia. This interpretation is supported both by a 1789 letter from President George Washington⁴⁰⁰ and by careful analysis by one of America’s leading legal scholars.⁴⁰¹

The Calling Forth Clause grants Congress power to select among one, two, or three conditions precedent for federalizing the militia: (1) to execute federal law, (2) to suppress insurrections, and (3) to repel invasions. Because it need not exercise

³⁹⁷U.S. CONST. art. I, § 8, cl. 15.

³⁹⁸ *Supra* note ____ and accompanying text.

³⁹⁹*E.g.* Maggs & Leider, *supra* note 1, at 220 (stating “the Constitution explicitly grants deployment power to Congress” and referring to “the breadth of Congress’s delegation” under the 1792 Militia Act).

⁴⁰⁰Letter from President George Washington to the U.S. Senate, Sept. 16, 1789, 1 ANNALS OF CONGRESS 86 (Sept. 16, 1789) (“I think proper to suggest to your consideration the expediency of making some temporary provision for calling forth the militia . . .”). Thus, Washington did not ask Congress to actually call forth the militia, but merely to provide for it.

⁴⁰¹Richard A. Epstein, *Executive Power, the Commander in Chief, and the Militia Clause*, 34 HOFSTRA L. REV. 317, 321-22 (2005):

The use of the indirect verb construction (“provide for the calling forth”) makes it clear that Congress itself does not have the power to call forth the militia, but in fact must pass some statute which will decide how and when the militia shall be called into the United States. It would be odd if it could devolve that power onto itself, so the clear implication is that it can set by rules and regulations the conditions under which the President may, as commander in chief, call the militia into actual service.

this power to its fullest extent, it may limit any of those three.⁴⁰² But under the *inclusio unius* rule so often cited during the 1787-1790 constitutional debates,⁴⁰³ Congress is restricted to this list.⁴⁰⁴ Congress may not create other grounds for militia deployment⁴⁰⁵ nor may the President deploy it merely by virtue of his executive authority.⁴⁰⁶

All of the conditions precedent by which Congress may authorize the President to “call forth” the militia are phrases associated with defensive war, which is consistent with the defensive “accustomed requisite” inherent in the Founding-era understanding of the word “militia.” A force sent into offensive combat is, by the

⁴⁰²*See, e.g.*, 10 U.S.C. §12406 (permitting the President to call forth the National Guard in case of invasion or rebellion but to enforce federal law only if “the President is unable with the regular forces to execute the laws of the United States”).

⁴⁰³*E.g., Applying, supra* note 1, at 118-19.

⁴⁰⁴The same general policy of restriction appears in portion of the Fifth Amendment guaranteeing a right to a grand jury “except in cases . . . in the Militia, *when in actual service in time of War or public danger* . . .” U.S. CONST. amend. V.

⁴⁰⁵Alan Hirsch attempts to circumvent this rule by contending that the Founders did not consider the possibility of overseas operations and “[i]f confronted with the likely use of troops for non-defensive wars and other military operations abroad, they would have considered making the militia constitutionally available.” *Hirsch, supra* note 1, at 936. In fact, the Constitution’s supporters specifically denied that the militia could be used this way. *Supra* note ____ and accompanying text.

In any event, there is no justification for utilizing methods of re-interpretation unknown to those who crafted and adopted the document. *Supra* note ____ and accompanying text.

⁴⁰⁶*Cf.* Letter from President George Washington to the U.S. Senate, *supra* note ____ (asking for congressional provision). Claims that the President has unspecified executive authority by virtue of the so-called Executive Vesting Clause (U.S. CONST., art. II, § 1) are doubtful. *See generally*, Robert G. Natelson, *The Original Meaning of the Constitution’s “Executive Vesting Clause” – Evidence from Eighteenth-Century Drafting Practice*, 31 WHITTIER L. REV. 1 (2009) (summarizing the arguments pro and con, but demonstrating that construing the clause as a grant rather than as a mere declaration would violate then-prevailing drafting practice).

constitutional definition, not a militia.

The constitutional text imposes no time limits on the militia, and the Second Amendment—like many of the contemporaneous state constitutions—affirms that “A well regulated Militia” is “necessary to the security of a free State.”⁴⁰⁷ The Constitution, therefore, treats the militia as an enduring, rather than a temporary, institution.

Although it has been suggested that the Constitution’s “Militia” is essentially a federal or a mixed federal-state institution,⁴⁰⁸ textual analysis does not support this. The Constitution limits the occasions in which it can be called into federal service and specifically distinguishes it as a state institution: “The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia *of the several States*.”⁴⁰⁹ The conclusion from textual analysis is supported by its prior history as a state institution, and comments made during the constitutional debates of 1787-1790, including the speech by the future Chief Justice John Marshall partially reproduced above.⁴¹⁰

The conclusion that the militia is a state entity is not altered by the fact that the Constitution permits federal actors to impose rules and duties on it. It is fairly common for the Constitution to levy “federal functions” on state officers, legislatures, and conventions⁴¹¹ without converting them into agencies of the federal government.

⁴⁰⁷U.S. CONST. amend. ii.

⁴⁰⁸*E.g., Leider & Maggs, supra* note 1, at 224 (“The militia envisioned by the Constitution was federal in the literal sense with control divided among the national and state governments”). It is unclear how divided control makes the militia “federal in the literal sense.” At most, it is federal in a figurative sense.

⁴⁰⁹U.S. CONST. art. II, § 2, cl. 1 (*italics added*).

⁴¹⁰*Supra* Part V-B.

⁴¹¹Robert G. Natelson, *Federal Functions: Execution of Powers the Constitution Grants to Persons and Entities Outside the Federal Government*, 23 U. PENN. J.

VIII. SUMMARY OF THE CONSTITUTION'S MILITIA REGIME

If, shortly after ratification of the Bill of Rights, a layperson asked a judge or a lawyer to issue an objective legal opinion describing the Constitution's militia rules, the response likely would have been much like this:

December 27, 1791

Dear Mrs. Widgery:

I write to you, Madam, in answer to your request that I objectively summarize the new foederal Constitution's rules pertaining to state militias and present my conclusions in a formal Legal Opinion. After taking into consideration the Constitution's text, construed in light of militia history and the recent national constitutional debates, I have arrived at the following conclusions:

Each State may maintain her own military force—her militia—consisting of part-time soldiers selected from the citizenry. It is to be expected that most States will continue their practice of designating the governour as the commander-in-chief of this force, but each State may qualify the governour's power or even select a different commander.

Each State's militia is a branch of state government, and except as explained below, under State control. The State may employ it for any domestic purpose, including enforcement of the law, responding to local alarms, and defensive war. "Defensive war" encompasses combating insurrections, actual invasions, and immediately-pending invasions. However, the State may not employ the militia for offensive operations. In peacetime, the State may hire her own army troops or keep warships only with congressional approval.

If the new Federal Congress chooses to prescribe an organizational scheme for militias, State authorities must follow it. If Congress does not provide such a scheme, State authorities may adopt their own. If a congressional plan leaves lacunæ, State authorities may fill them. Whether or not Congress designates officer ranks and responsibilities, only State authorities may designate the individuals who serve as Officers.

Similarly, if Congress chooses to specify rules for equipping militiamen, State authorities must obey them. If Congress funds the purchase of designated equipment, State authorities must accept the monies and purchase that equipment. If Congress does not act or does so incompletely, States may fulfill their own equipment needs.

Except during periods of foederal service, training or “disciplining” the militia is a State responsibility. If Congress chooses to issue rules of discipline, State authorities must train militiamen in accordance with those rules. The State may not impose rules of martial law on militiamen in time of peace.

*Congress may prescribe the conditions under which the President may “call forth” (embody in martial array) a State’s militia. However, the conditions may be of only three kinds—*videlicet*, to enforce foederal law, suppress insurrections, or repel invasions. The militia is a State force, designed primarily for State needs, and the Foederal Government may not appropriate it for any other reason. Furthermore, Congress is not required to exercise its power to its constitutional limits; for example, Congress may authorize foederal embodiment of the militia to respond to invasions and suppress insurrections, but not to enforce foederal law. Such decisions do not prevent the States from employing their own militias for those purposes.*

Once a congressionally-prescribed condition is met, the President hath power to “call forth” state militia units into foederal service. While in foederal service, the President is their commander-in-chief, and the militia is governed entirely by foederal rules, including rules of martial

law. Once the congressional-prescribed condition expires, the militia must be returned to State service.

Two newly-ratified constitutional amendments affect this system. Partly to ensure a good pool of potential militiamen, the Second Amendment restricts the extent to which the Federal Government may disarm any citizen. The Fifth Amendment protects the right of militiamen accused of a foederal Offense to a grand jury, except when in foederal service "in time of War or public danger."

The men who framed and ratified the Constitution were of great diligence and consequence, and they crafted this system to balance carefully the respective powers of the new Foederal Government and the States. Any interpretation of the Constitution that upsets that balance is, perforce, incorrect, and should be declared void by the Courts.

With my Sincere Wishes for a Prosperous New Year,

I remain,

Your Servant,

Josiah P. Learned, Esq.

IX. THE FEDERAL CAPTURE OF STATE MILITIAS, SUPREME COURT RESPONSE, AND RESULTS

A. *Statutory Developments and “Dual Enlistment”*

For nearly 120 years after the inception of the federal government, the Constitution’s balance between state and federal military power generally was respected. In 1792, Congress enacted the first two federal militia laws. They complied fully with the “accustomed requisites” of British, colonial, and state militias. The initial statute authorized deployment only to repel invasions, quell insurrections, and enforce federal law,⁴¹² and it affirmed the part-time nature of militia service.⁴¹³ It reinforced the local nature of the militia with geographic limitations.⁴¹⁴ Only in cases of insurrection, after local state officials had requested help, could the President call forth out-of-state militia. The second statute limited militia service to a subset of the male population—specifically, white men between 18 and 45 years of age who were not exempt under state law and did not qualify for an additional list of federal exemptions.⁴¹⁵

The prevailing attitude in those years was reflected in a 1792 consultation of three cabinet members, in which the participants agreed that the militia was to be used only for defensive purposes and that offensive operations would require congressional consent.⁴¹⁶ During the War of 1812, it is true, President James

⁴¹² 1 STAT. 264, §§ 1 & 2 (1792).

⁴¹³ *Id.*, § 4 (limiting service to three months or less).

⁴¹⁴ 1 STAT. 264, § 1 (requiring the militia, in case of invasion, to be called from “the state or states most convenient to the place of danger or scene of action” and requiring for enforcement of federal law that the militia be called from the state in which disobedience occurred, or, if insufficient, from the “state or states most convenient thereto”).

⁴¹⁵ 1 STAT. 271, 272, § 2.

⁴¹⁶ Letter from Secretary of War Henry Knox to President George Washington, Oct. 9,

Madison (of all people) called out the militia to fight in offensive operations, but state resistance coupled with poor militia performance prevented a major constitutional shift.⁴¹⁷ Even the 1903 Dick Act,⁴¹⁸ which has been heralded as ushering in the militia's modern era, generally was consistent with tradition. It did drop previous geographical restrictions and applied the term "National Guard" to the militias of those states that opted to use it.⁴¹⁹ Moreover, it referred to the portion of the eligible population enrolled in companies as "the organized militia," denoting the remainder as the "reserve militia." It also imposed a nine-month limit on federal service⁴²⁰ and generally respected the militia's "accustomed requisites."

However, in 1908, Congress began to expand its power over state militias. It amended the Dick Act to repeal its nine-month limit on federal service.⁴²¹ It also attempted to authorize militia service outside the boundaries of the United States.⁴²² That effort was not immediately successful because, in 1912, Attorney General George Woodward Wickersham issued an opinion concluding that dispatching militiamen outside the country was unconstitutional.⁴²³ Wickersham cited the limits

1792, FOUNDERS ONLINE, National Archives, <https://founders.archives.gov/documents/Washington/05-11-02-0112>.

⁴¹⁷*E.g.*, A Letter from the Governor of the Commonwealth of Massachusetts, to the Justices of the Supreme Judicial Court, with the Answer of the Justices, 8 Mass. 548 (1812) (opining that the governor may refuse to provide militiamen on his finding that a valid reason for federalization does not exist). The governor at the time was Caleb Strong, a delegate to the Constitutional Convention, and the opinion was written by Theophilus Parsons, a leader of Federalist forces at the Massachusetts ratifying convention.

⁴¹⁸32 STAT. 775-80 (1903).

⁴¹⁹32 STAT. 775 (1903).

⁴²⁰32 STAT. 775, 776 (1903).

⁴²¹35 STAT. 399.

⁴²²35 STAT. 399, 400, § 4.

⁴²³29 OP. U.S. ATT'Y GEN. 322 (1912).

in the Calling Forth Clause, the inherently domestic nature of militia service, and the Constitution's clear distinction between the militia and an army.⁴²⁴

Most legal scholars shared Wickersham's views,⁴²⁵ but this fact only stalled temporarily the drive for central control. The National Defense Act of 1916 mandated that state militias employ the formerly-optional term "National Guard."⁴²⁶ The list of exemptions from service no longer incorporated state exemptions,⁴²⁷ and states were assigned quotas of enlistees.⁴²⁸ The National Defense Act further required state enlistees to take an oath acknowledging membership in the National Guard of the United States as well as in their state units, and promising to obey the President as well as their state governor.⁴²⁹ To prevent states from building their own independent forces, the law prohibited them from organizing military units other than the National Guard.⁴³⁰

In 1933, Congress amended the National Defense Act to provide that the National Guard of each state also was part of the National Guard of the United States, and that the National Guard of the United States was a reserve component of the U.S. Army.⁴³¹ The amendments gave the army chief of staff "the same supervision and control of the reserve components of the Army of the United States"

⁴²⁴29 OP. U.S. ATT'Y GEN. 322 (1912).

⁴²⁵EVOLUTION, *supra* note 1, at 25 ("By 1916 . . . [l]egal scholars generally agreed that the Constitution did not allow deployment of National Guard units, in their organized militia status, beyond U.S. borders").

⁴²⁶39 STAT. 166 (1916), § 58.

⁴²⁷39 STAT. 166 (1916), § 59.

⁴²⁸39 STAT. 166 (1916), § 62.

⁴²⁹39 STAT. 166 (1916), § 70.

⁴³⁰39 STAT. 166 (1916), § 61.

⁴³¹48 STAT. 153 (1933). *See also* EVOLUTION, *supra* note 1, at 98-103 (describing the effects of the 1933 enactment).

as over the Regular Army.⁴³² Enlistees in state national guards became enlistees in the National Guard, and therefore the Army reserve, as well.⁴³³ This system became known as “dual enlistment.”

These statutes, together with the Armed Forces Reserve Act of 1952,⁴³⁴ effectively converted state militias into agencies of the federal government, upon which Congress permitted states to exercise some influence. Eventually, Congress authorized states to maintain “other troops” in the form of state defense forces.⁴³⁵ But these forces exist by reason of congressional permission granted under Article I, § 10(3), and are unrelated to the constitutional militia.

B. The Supreme Court’s Non-Responsive Responses

Consider the following fact pattern:

The owner of a farm that includes a substantial wooded area leases the farm to a tenant for five years. Clause A in the lease permits the tenant to “harvest crops and other plants on the property, sell them, and retain the proceeds.” Clause B permits the tenant to “harvest no more than five percent of trees on the property in any one calendar year, sell the timber, and retain the proceeds.”

The tenant proposes to cut all the trees on the farm in a single year. He contends that Clause A authorizes him to do so, because trees are “plants” and commonly said to be “harvested.” Thus, Clause A permits him to do what Clause B forbids.

⁴³²48 STAT. 153 (1933), § 2.

⁴³³48 STAT. 153 (1933), §§ 4, 5, 7 & 8.

⁴³⁴66 STAT. 481 (1952).

⁴³⁵32 U.S.C. § 109.

Is the tenant correct?

Of course not. The rule of construction against surplusage tells us that we cannot construe Clause A in a way that renders Clause B superfluous. This rule applies with particular force in this case, because the tenant's reading of Clause A would not only nullify the power granted in Clause B but also void an important limitation.

Yet this is exactly what the Supreme Court did in its dicta in the five consolidated cases known collectively as the *Selective Draft Law Cases* (1918).⁴³⁶

The only issue directly before the court was whether the Constitution's grant to Congress of authority to "raise and support Armies"⁴³⁷ included power to impose military conscription. The court could have resolved this issue in a short opinion, because, as it recognized, when the Constitution was adopted, conscription was an acknowledged incident of a sovereign's power to raise armies.⁴³⁸ There was no reason to go beyond that. States apparently were not parties to the litigation, so there was no need to address their militia prerogatives.

Yet Chief Justice Edward Douglass White's opinion for the court included lengthy dicta asserting that the Army Clause granted the federal government "complete authority" over military matters, with the Militia Clauses to survive only "to the extent that such control was not taken away by the exercise of Congress of its power to raise armies."⁴³⁹ In other words, the Militia Clauses and their limitations were effective only until Congress, in the exercise of its Army Clause powers, decided to erase them.

⁴³⁶245 U.S. 366 (1918).

⁴³⁷U.S. CONST. art. I, § 8, cl. 12.

⁴³⁸245 U.S. at 378-81.

⁴³⁹245 U.S. at 382-83.

In reaching this conclusion, Chief Justice White overlooked both basic rules of construction⁴⁴⁰ and the constitutional debates of 1787-1790. His opinion also disregarded the Second Amendment's recital that the militia is "necessary to the security of a free State,"⁴⁴¹ which makes it clear that the militia is a permanent rather than a temporary feature of the constitutional landscape.

The court had an opportunity to correct itself several months later in *Cox v. Wood*.⁴⁴² Instead it followed the decision in the *Selective Draft Law Cases*, without further analysis.

In *Perpich v. Department of Defense* (1990),⁴⁴³ the Court's opinion, written by Justice John Paul Stevens, followed some of the same methodology adopted by the opinion in the *Selective Draft Law Cases*. Minnesota Governor Rudy Perpich challenged the power of the federal government to train his state's National Guard in foreign locations, but he did not challenge the dual enlistment system. So the case could have been decided—and in fact, really was decided—on the ground that during periods of federalization the government could train guardsmen anywhere it chose.⁴⁴⁴ Nevertheless, Justice Stevens inserted dicta approving federal control of the militia on constitutional grounds.

⁴⁴⁰This is not the only instance of the court acting in this manner. In *United States v. Butler*, 297 U.S. 1 (1936) and *Helvering v. Davis*, 301 U.S. 619 (1937), the court construed the Constitution's Taxation Clause, U.S. CONST. art. I, § 8, cl. 1, to grant Congress plenary spending power. Two reasons that this construction is untenable are (1) it eliminates the need for several other enumerated powers, and (2) deletes the two-year appropriation limit in the Armies Clause. U.S. CONST. art. I, § 8, cl. 12. It also betrays ignorance of the Founding-era meaning of the phrase "to provide for." *Supra* notes ___ and accompanying text.

⁴⁴¹U.S. CONST., amend. ii.

⁴⁴²247 U.S. 3 (1918).

⁴⁴³496 U.S. 334 (1990).

⁴⁴⁴ *Supra* note ___ and accompanying text (concluding that the federal government

Justice Stevens' opinion purported to apply the "plain language" of the Constitution.⁴⁴⁵ But in claiming that federal power over foreign and military affairs was exclusive rather than merely supreme,⁴⁴⁶ he disregarded Article I, Section 10.⁴⁴⁷ In endorsing the dicta in the *Selective Draft Law Cases* allowing Congress to use the Army Clause to erase the Militia Clauses,⁴⁴⁸ he disregarded standard rules of construction and the Second Amendment.⁴⁴⁹ In asserting that the federal government, under the guise of prescribing the course of training, could undertake the training itself,⁴⁵⁰ he disregarded the Constitution's specific reservation of training to the states.⁴⁵¹

The court's opinion also overlooked the "accustomed requisites" inherent in the constitutional term "Militia" and all but two snippets of the extensive Founding-era constitutional debates. It relegated those two snippets to footnotes.⁴⁵²

As of this writing, therefore, the Supreme Court still has not issued a forthright and credible decision on the constitutionality of the twentieth-century federal capture of state militias.

C. *Effects on the States of the Federal Capture of the Militia*

may train militiamen during periods of federal deployment).

⁴⁴⁵*Perpich, supra*, 496 U.S. at 339-40.

⁴⁴⁶*Perpich, supra*, 496 U.S. at 353. *Cf. supra* notes ____ and accompanying text.

⁴⁴⁷U.S. CONST. art. I, § 10, cl. 3 (acknowledging the right of states to conduct defensive war).

⁴⁴⁸*Perpich, supra*, 496 U.S. at 344.

⁴⁴⁹*Cf. supra* note ____ and accompanying text.

⁴⁵⁰*Perpich, supra*, 496 U.S. at 350.

⁴⁵¹U.S. CONST., art. I, § 8, cl. 16.

⁴⁵²*Perpich, supra*, 496 U.S. at 340.

Although the federal government has complied with its constitutional obligation to “provide for organizing, arming, and disciplining, the Militia”—and its funding has been generous⁴⁵³—its assumption of power has undercut the primary reasons behind the Militia Clauses. It has weakened the custom of enrolling citizens in local defense and acquainting them with the use of arms, and it has enervated the Constitution’s checks and balances by destroying the military security of the states within the federal system.⁴⁵⁴

The federal capture also has weakened the Constitution’s system of checks and balances by vastly increasing the power of the executive branch at the expense of Congress.⁴⁵⁵ In effect, state militias have become the President’s personal instruments, better enabling him to initiate offensive conflicts without public discussion or congressional consideration. By 2015, the National Guard has supplied approximately 45 percent of the military force in post-9/11 presidential wars, and incurred nearly 20 percent of the casualties.⁴⁵⁶

Guardsmen frequently find themselves on missions that have little or nothing to do with the defense of their own states. In 2022, Montana Guard units were sent to Syria for a year-long deployment, where they saw conflict with ISIS.⁴⁵⁷ The

⁴⁵³*Perpich, supra*, 496 U.S. at 351.

⁴⁵⁴*Leider, Federalism, supra* note 1, at 1070.

⁴⁵⁵*Leider, Federalism, supra* note 1, at 992.

⁴⁵⁶*National Guard: Service in the War on Terror*, MILITARY.COM, Dec. 12, 2015, <https://www.military.com/national-guard-birthday/national-guard-service-in-the-war-on-terror.html>.

⁴⁵⁷Max Hauptman, *Thousands of ISIS Fighters Surrender Following U.S. Strikes on Syria Prison Uprising*, TASK & PURPOSE, Jan. 26, 2022, <https://taskandpurpose.com/history/thousands-isis-fighters-surrender-u-s-airstrikes-syrian-prison/>; *189th Infantry Brigade, Facebook Post* (Mar. 19, 2022), <https://www.facebook.com/189CATB/posts/the-montana-national-guard-made-headlines-in-january-shortly-after-assuming-resp/5338822436169401/>.

following year, they were dispatched for a nine-month deployment in Operation Inherent Resolve, a campaign against the Islamic State in Iraq and Syria.⁴⁵⁸ In February 2024, Guardsmen from Arizona, California, Kentucky, and New York represented the majority of those targeted in an attack on the Jordan-Syria border.⁴⁵⁹

The siphoning off of state militiamen into remote locations not only puts them in harm's way, but inhibits their ability to undertake their domestic duties.⁴⁶⁰ During the 2005 Hurricane Katrina recovery effort, Louisiana National Guard commanders reported that their efforts were “crippled” due to a “severe shortage of troops”—attributing this to the deployment of 3,200 Louisiana guardsmen to Iraq.⁴⁶¹ In 2024, 700 Tennessee Army National Guardsmen were unavailable to assist after Hurricane Helene brought devastating floods to the eastern portion of their state. The reason was that, days before the storm, they had been deployed to the Middle

⁴⁵⁸*Montana Guard Members End 9-Month Deployment*, LIVINGSTON ENTERPRISE, May 1, 2024, https://www.livingstonenterprise.com/news/montana-guard-members-end-9-month-deployment/article_5610374c-06dd-11ef-8a94-23d8b76bf5d7.html.

⁴⁵⁹Meghann Myers, *National Guardsmen Were the Majority of Troops Hurt in Jordan Attack*, MILITARY TIMES, Feb. 1, 2024, <https://www.militarytimes.com/news/your-military/2024/02/01/national-guardsmen-were-the-majority-of-troops-hurt-in-jordan-attack>.

⁴⁶⁰*Wars put strain on National Guard*, NBC NEWS, Jun. 5, 2004, <https://www.nbcnews.com/id/wbna5146587>; Davis Winkie, *New normal? How the Guard is fighting worsening natural disasters amid deployments*, ARMY TIMES, Sept. 2, 2021, <https://www.armytimes.com/news/your-military/2021/09/02/new-normal-how-the-guard-is-fighting-worsening-natural-disasters-amid-deployments/>. Federal “looting” of state militias is not a new problem. EVOLUTION, *supra* note 1, at 70 (describing President Woodrow Wilson’s decimation of some Guard units).

⁴⁶¹Scott Shane & Thom Shanker, *When Storm Hit, National Guard Was Deluged Too*, N.Y. TIMES, Sept. 28, 2005, <https://www.nytimes.com/2005/09/28/us/nationalspecial/when-storm-hit-national-guard-was-deluged-too.html>.

East as part of Operation Spartan Shield.⁴⁶²

X. THE PATH FORWARD

A. “Interposition” and the *Defend the Guard Act*

The practice of deploying state National Guard units on federal assignment for reasons not authorized by the Calling Forth Clause has sparked considerable controversy.⁴⁶³ State officials in particular have resisted it, as illustrated by Governor Perpich’s decision to sue the Defense Department over its deployment of his state’s guardsmen outside the country.⁴⁶⁴

This sort of “pushback” by state officials against allegedly overreaching federal actions is nothing unusual. It is one of the checks and balances built into the constitutional system. James Madison called it “interposition,” and it takes various forms.⁴⁶⁵ Perhaps the most current form of interposition is the practice of many cities and states of adopting “sanctuary” policies to impede, or at least not cooperate with, federal immigration law.⁴⁶⁶

⁴⁶²*Tennessee National Guard Task Force Deploying to Middle East*, TENN. MIL. DEP’T, Sept. 26, 2024, <https://www.tn.gov/military/news/2024/9/26/tennessee-national-guard-task-force-deploying-to-middle-east.html>.

⁴⁶³For example, on April 29, 2024, 48 governors signed a “Letter To DOD On Maintaining Governor Authority Of National Guard,” objecting to the enrollments of guardsmen in the Space Force. *See* <https://www.nga.org/advocacy-communications/letters-nga/letter-to-dod-on-maintaining-governor-authority-of-national-guard/>.

⁴⁶⁴*Perpich, supra*, 496 U.S. 334.

⁴⁶⁵*See generally* ROBERT G. NATELSON, *THE STATES’ DUTY TO DEFEND AGAINST FEDERAL EXCESS: JAMES MADISON AND THE METHODS OF “INTERPOSITION”* (2016), *available at* <https://natelsonrob.com/wp-content/uploads/2025/07/Interposition.pdf>.

⁴⁶⁶U.S. Dep’t of Justice, *Justice Department Publishes List of Sanctuary Jurisdictions*, Aug. 5, 2025, <https://www.justice.gov/opa/pr/justice-department->

Another form of interposition is enactment of state laws designed to clog the gears of federal action or to trigger a lawsuit to test a federal action's constitutionality.⁴⁶⁷ Falling into that category is proposed state legislation entitled the "Defend the Guard Act."

The "Defend the Guard Act" has received wide bipartisan support among state officials.⁴⁶⁸ Versions of the proposal differ from state to state, but in all its versions it provides that the state will not release guardsmen for federal active combat operations unless Congress declares war or the federal government complies with the Calling Forth Clause.⁴⁶⁹

One arguable deficiency in the Defend the Guard Act is uncertainty over its enforceability. State officials may be unable to prevent federal deployment once federal officials demand it, especially if the Guard has already been called into federal service and sent out of the state. On the other hand, some versions of the Act direct the governor to "take any action necessary to enforce" the legislation. Presumably this might include refusing state cooperation before federalization or seeking judicial relief to challenge an unlawful deployment.

Another arguable deficiency is that the measure's exception for declarations of war concedes too much: The "Militia," as the Constitution uses the term, refers to forces employed only for defense, while declarations of war traditionally arise from

publishes-list-sanctuary-jurisdictions.

⁴⁶⁷See, e.g., *United States v. Minnesota*, ___ F.Supp. 3d ___, 2026 WL 2085701 (D. Minn. 2026) (holding that Minnesota may adopt policies of non-cooperation).

⁴⁶⁸For example, in 2025 the Virginia House of Delegates passed the measure by a 99-0 margin. Aaron Sobczak, *Virginia House Passes Defend the Guard 99-0*, RESPONSIBLE STATECRAFT, Feb. 4, 2025, <https://responsiblestatecraft.org/defend-the-guard-virginia/>.

⁴⁶⁹See South Carolina Legislature, https://www.scstatehouse.gov/sess126_2025-2026/prever/3308_20241205.htm (setting forth the version introduced in South Carolina).

offensive hostilities.⁴⁷⁰ However, this exception may be a political concession rather than a statement of constitutional doctrine.

One likely result from the measure would be to trigger litigation resulting in a Supreme Court decision limiting federal control over state militias. Of course, the “Defend the Guard Act” is technically unnecessary for this purpose, because any governor, as his or her state militia’s commander-in-chief, most likely would have standing to sue to block an unconstitutional federal deployment. However, legislative adoption of the measure could pressure the governor to act and provide political support once he or she did so.

B. The Need for Accommodation

While interposition sometimes is useful for protecting areas of exclusive state jurisdiction, accommodation can be helpful in areas of concurrent state and federal jurisdiction.

During the constitutional debates of 1787-1790, Antifederalists predicted that the concurrent taxing powers of the states and federal government would result in the federal government crowding out state sources of revenue.⁴⁷¹ In response, Alexander Hamilton, writing in Federalist No. 32, contended that state-federal accommodation was more likely: “The particular policy of the national and of the State systems of finance might now and then not exactly coincide, and might require

⁴⁷⁰2 EMER DE VATTEL, THE LAW OF NATIONS 22-23 (J. Newbery et al. eds., 1760) (1758) (2 vols.).

⁴⁷¹*E.g.*, “Brutus,” Letter VI, N.Y.J., Dec. 27, 1787, 15 DOCUMENTARY HISTORY, *supra* note 1, at 110, 111 (predicting that the federal government might resolve the conflict by cancelling the state tax); *see also* “Federal Farmer,” Letter III, Oct. 10, 1787, in 14 DOCUMENTARY HISTORY, *supra* note 1, at 30, 37 (pointing out the inconveniences of concurrent jurisdiction over taxation).

reciprocal forbearances.”⁴⁷²

Hamilton’s prediction has proved correct: In the concurrent area of taxation, state and federal legislatures have practiced “reciprocal forbearances” for over two centuries. Generally speaking, the federal government raises money through income taxes, tariffs, payroll taxes, and targeted excises, while state governments focus on general sales taxes, property taxes, and more modest income levies. In the realm of taxation, the two levels of government have learned to get along.

Defensive war also is an area of concurrent state and federal jurisdiction,⁴⁷³ but in this area the federal government has not been accommodating. Instead, it has seized the only instrumentalities by which states have constitutional assurance that they may defend themselves: their militias. This action is not justified by the fact that some state officials approve it.⁴⁷⁴

We think that on militia matters, the federal government should replace imperialism with accommodation. Not only should national authorities respect the Constitution’s limits on federal deployment, they should be considerate even when deploying within those limits.

⁴⁷²FEDERALIST NO. 32 (Hamilton).

⁴⁷³*Supra* note ____ and accompanying text.

⁴⁷⁴Some National Guard officials, apparently fearing loss of federal funds, have lobbied heavily against reform. *See, e.g., Defend the Guard handout*, Mont. Dep’t of Military Affairs, State Administration and Veterans’ Affairs Interim Comm. (Sept. 5, 2024) (claiming that if Montana adopts “Defend the Guard” legislation, it would put the state at “a very high risk” of losing federal support).

One of the authors (McCollum) has observed state officials and adjutant generals appear in uniform in legislative committee hearings to lobby against the measure. *Cf., MONTANA SENTINEL, Montana’s Adjutant General Lobbies Against The Defend The Guard Act Prior To A Committee Hearing On Feb 26th*, Feb. 26, 2025, <https://montanasentinel.press/military-national-security/2025/02/26/montanas-adjutant-general-lobbies-against-the-defend-the-guard-act-prior-to-a-committee-hearing-on-feb-26th/>.

Accommodation is similarly called for in the context of conscription. Some writers have argued that since the militia is said to consist of the entire citizenry, federal conscription is necessarily an attack on the militia, and therefore unconstitutional.⁴⁷⁵ Assuming conscription is constitutional, however, it does not give the federal government license to destroy state fighting forces. Doing so would, like the law invalidated in *Printz v. United States*,⁴⁷⁶ violate a core aspect of state sovereignty, and therefore not qualify as a “proper” law under the Necessary and Proper Clause.⁴⁷⁷

Conscription is, in fact, an area in which accommodation would be quite achievable. As we have seen, despite the rhetoric of universality, when the Constitution was adopted, Anglo-American militias had *never* employed more than a fraction of able-bodied citizens,⁴⁷⁸ leaving plenty of room for both federal conscription and state militias. The federal government likely could operate a conscription system without drafting any uniformed state militiaman at all. But if the federal government claimed such dire need for troops that the non-militia pool was insufficient, it could pursue any of the following options:

- Offer sufficient pay to recruit volunteers from among state militia forces;
- Conscript a modest pro-rata number of militia forces, leaving the militia structure, along with sufficient personnel, intact; or

⁴⁷⁵*Leider, Federalism*, *supra* note 1, at 1042 (“Authorizing conscription thus unwinds the personal liberties the Framers placed in the original Constitution concerning military service. It leaves the general citizenry subject to military law at Congress’s whim.”); *id.*, at 1045 (“Moreover, recognizing a general power to conscript would work enormous mischief to state governments. The army would have the power to totally consume the militia . . .”).

⁴⁷⁶521 U.S. 898 (1997).

⁴⁷⁷*Id.*, at 521 U.S. at 923-24; U.S. CONST., art. I, § 8, cl. 18.

⁴⁷⁸*Supra* Part II-B.

- Negotiate with the states to employ the option pioneered by the British during the American Revolution—that is, employ militiamen only to fill domestic positions vacated by regular troops shipped abroad.

More ideas likely will occur to those knowledgeable about military affairs.

Our point here is that, in the realm of defensive war, as in that of taxation, the two levels of government should learn to get along.

C. The Need for Supreme Court Review

As noted above, the Supreme Court thus far has failed to address in a thorough and credible way the constitutionality of federal commandeering of state militias. The few cases in which the Court has considered the issue have amounted to abdication through dicta.

In a proper case, the Supreme Court should address the issue directly, taking full account of the actual meaning of the Militia Clauses and the extensive Founding-era explanations of them. Continued delay perpetuates a pattern of conduct profoundly subversive of the Constitution’s design.

CONCLUSION

When the Constitution uses a term designating an institution in existence when the Constitution was written, the term carries with it, as James Madison observed, the institution’s “customary requisites”—its inherent characteristics or necessary incidents—as they existed at the time.

When the Constitution was written, Anglo-American militias differed in many respects, but for over a century they had shared three “customary requisites:” First, a militia enlisted only a fraction of the citizenry, with some citizens permanently

exempt and others serving, if at all, on a rotating basis. Second, unless called forth to meet an emergency, a militia was a part-time force. Third, a militia engaged exclusively in defensive and other domestic operations.

Those characteristics were so ingrained in the Founders' concept of a militia that an institution lacking any of them is not a "Militia" as the Constitution employs the term.

The Constitution's framers drafted, and its ratifiers approved, a plan that carefully balanced the federal government's military needs against the needs of states and the rights of individuals. As part of this plan, the Constitution sharply distinguished between (1) professional "Armies" and "Troops" and (2) "the Militia" and militiamen. The Constitution granted to the federal government almost sole responsibility for conducting offensive war, which the federal government could wage with "Armies" and "Troops" raised on a volunteer or conscripted basis. It generally denied states authority to wage offensive war or maintain "Armies" and "Troops" without congressional consent.

As to defensive war, the Constitution left the federal government and the states with concurrent power. The Constitution granted the federal government authority to conduct defensive operations either with armies or, if the conditions in the Calling Forth Clause were fulfilled, with militiamen. The document left in the states the power to fight defensive war, but only through their militias, which were intended to be permanent state institutions. The fact that the Constitution assigned certain federal functions to the militias did not change their nature as state institutions.

The Constitution's Army Clause cannot be used to destroy or commandeer state militias or to override other constitutional provisions. Congress's efforts to absorb the militia into the regular U.S. military, including its "dual enlistment"

scheme, are unconstitutional.⁴⁷⁹

Just as states must conduct their militia operations with due regard to the military prerogatives delegated to the U.S. Government, the U.S. Government must conduct military affairs with due regard for reserved state war powers. Just as the federal government and the states accommodate each other when exercising other concurrent powers, they should accommodate each other in carrying out their respective military responsibilities.

⁴⁷⁹*Accord: Leider, Federalism, supra* note 1, at 993.