The Bill of Rights as a Constitution

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[pages 1131 thru 1162 omitted]

C. *The Military Amendments*

1. *The Militia Amendment*

The Second Amendment reads as follows: "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." As with our First Amendment, the text of the Second is broad enough to protect rights of discrete individuals or minorities; but the Amendment's core concerns are populism and federalism.

a. *Populism*

We have already noted the populist and collective connotations of the rights of the people to petition and assemble in conventions, rights intimately bound up with the people's transcendent right to alter or abolish their government. Whenever self-interested government actors abused their powers or shirked their duties, "the people" could "assemble" in convention and reassert their sovereignty. "Who shall dare to resist the people?" asked Pendleton with obvious flourish. [149]

To many Anti-Federalists, the answer seemed both obvious and ominous. An aristocratic central government, lacking sympathy with and confidence from ordinary constituents, might dare to resist--especially if that government were propped up by a standing army of lackeys and hirelings (mercenaries, vagrants, convicts, aliens, and the like). Only an armed populace could deter such an awful spectacle. Hence the need to bar Congress from disarming freemen.

Thus, the Second Amendment was closely linked to the First Amendment's guarantees of petition and assembly. One textual tip-off is the use of the loaded Preamble phrase "the people" in both contexts, thereby conjuring up the Constitution's bedrock principle of popular sovereignty and its concomitant popular right to alter or abolish the national government. More obvious, of course, is the preamble to the Amendment itself, and its structural concern with democratic self-government in a "free State." Compare this language with a proposed amendment favored by some Pennsylvania Anti-Federalists: "[T]he people have a right to bear

arms for the defence of themselves and their own State, or the United States, *or for the purpose of killing game* . . . ." [150] Unlike our Second Amendment, this text puts individual and collective rights on equal footing.

History also connected the right to keep and bear arms with the idea of popular sovereignty. In Locke's influential *Second Treatise of Government*, the people's right to alter or abolish tyrannous government invariably required a popular appeal to arms. [151] To Americans in 1789, this was not merely speculative theory. It was the lived experience of their age. In their lifetimes, they had seen the Lockean words of the Declaration made flesh (and blood) in a Revolution wrought by arms.

To see the connection between arms and populism from another angle, consider the key nineteenth-century distinction between political rights and civil rights. The former were rights of members of the polity--call them Citizens--whereas the latter belonged to all (free) members of the larger society. Alien men and single white women circa 1800 typically could enter into contracts, hold property in their own name, sue and be sued, and exercise sundry other civil rights, but typically could not vote, hold public office, or serve on juries. These last three were political rights, reserved for Citizens. So too, the right to bear arms had long been viewed as a political right, a right of Citizens. [152] Thus, the "people" at the core of the Second Amendment were Citizens--the same "We the People" who in conventions had "ordain[ed] and establish[ed]" the Constitution and whose right to reassemble in convention was at the core of the First Amendment. Apart from the Preamble, the words "the People" appeared only once in the original Constitution, just a single sentence removed from the Preamble and in a context where "the People" unambiguously connoted *voters*: "The House of Representatives shall be . . . chosen every second Year by the People of the several States."

In emphasizing the structural and populist core of the Second Amendment, I do not deny that the phrase "the people" can be read broadly, beyond what I have called "the core." As with the language of petition and assembly, other concerns can be comfortably placed under the language's spacious canopy. [153] But to see the Amendment as primarily concerned with an individual right to hunt, or protect one's home, is like viewing the heart of the speech and assembly clauses as the right of persons to meet to play bridge, or to have sex. [154]

b. *Federalism*

Even if armed, unorganized citizens would face an uphill struggle when confronting a disciplined and professional standing army. In *The Federalist* No. 28, Alexander Hamilton described a typical nonfederal regime:

> [I]f the persons intrusted with supreme power become usurpers, the different parcels, subdivisions, or districts of which [the nation] consists, having no distinct government in each, can take no regular measures for defense. The citizens must rush tumultuously to arms, without concert, without system, without resource . . . . [155]

In the federal system of America, however, Article I, section 8, clause 16 of the Constitution explicitly devolved upon state governments the power of "Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." In the event of central tyranny, state governments could do what colonial governments had done in 1776: organize and mobilize their Citizens into an effective fighting force capable of beating even a large standing army. Wrote Madison in *The Federalist* No. 46:

> [T]he State governments with the people on their side would be able to repel the danger . . . . [A standing army] would be opposed [by] a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties and united and conducted by governments possessing their affections and confidence. [156]

Yet the "military check of federalism" [157] built into the original Constitution did not quiet Anti-Federalist fears. Many pointed a suspicious finger at earlier language in clause 16 empowering Congress "to provide for organizing, arming, and disciplining, the Militia." Might Congress try to use the power granted by these words, they asked darkly, to *dis*arm the militia? [158] The Second Amendment was designed to make clear that any such congressional action was off limits.

The obvious importance of federalism to the Constitution's original allocation of military power prompts key questions about federalism's role in the Second Amendment's clarifying gloss. A good many modern scholars have read the Amendment as protecting only arms-bearing in organized "state militias," such as SWAT teams and National Guard units. [159] If this reading were accepted, the Second Amendment would be at base a right of state governments rather than Citizens. If so, the Amendment would be analogous to the establishment clause, and similarly resistant to incorporation against state governments via the Fourteenth Amendment. [160]

Though in some ways congenial to my overall thesis about the Bill of Rights, this reading doesn't quite work. The states' rights reading puts great weight on the word "militia," but this word appears only in the Amendment's subordinate clause. The ultimate right to keep and bear arms belongs to "the people," not the "states." As the language of the Tenth Amendment shows, these two are of course not identical and when the Constitution means "states," it says so. [161] Thus, as noted above, "the people" at the core of the Second Amendment are the same "people" at the heart of the Preamble and the First Amendment, namely Citizens. What's more, the "militia" as used in the Amendment, and in clause 16, had a very different meaning 200 years ago than in ordinary conversation today. Nowadays, it is quite common to speak loosely of the National Guard as "the state militia," but 200 years ago, any band of paid, semiprofessional, part-time volunteers, like today's Guard, would have been called "a *select* corps" or "*select* militia"--and viewed in many quarters as little better than a standing army. [162] In 1789, when used without any qualifying adjective, "the militia" referred to all Citizens capable of bearing arms. [163] The seeming tension between the dependent and the main clauses of the Second Amendment thus evaporates on closer inspection--the "militia" is identical to "the people" in the core sense described above. Indeed, the version of the Amendment that initially passed in the House, only to be stylistically shortened in the Senate, explicitly defined the "militia" as "composed of the body of the People." [164] This is clearly the sense in which "*the* militia" is used in clause 16 and

throughout *The Federalist Papers*, [165] in keeping with standard usage [166] confirmed by contemporaneous dictionaries, legal and otherwise.

A more plausible bit of text to stress on behalf of a states' rights reading is "well regulated." [167] It might be asked, who, if not state governments, would regulate the militia and organize them into an effective fighting force capable of deterring would-be tyrants in Washington? And does not the right to "regulate" subsume the right to prohibit, as the Supreme Court has explicitly recognized in commerce clause cases such as *Champion v. Ames*? [168] And if so, how can a provision designed to give state governments broad regulatory power over their Citizens' arms-bearing be incorporated against states to limit that very power?

Though much stronger than the standard states' rights reading, this chain of argument has some weak links of its own. First, it appears that the adjective "well regulated" did not imply broad state authority to disarm the general militia; indeed, its use in various state constitutional antecedents of the Second Amendment suggests just the opposite. [169] Second, and connected, the notion that congressional power in clause 16 to "organiz[e]" and "disciplin[e]" the general militia logically implied congressional power to *disarm* the militia entirely is the very heresy the Second Amendment was designed to deny. How, then, can we use the Amendment's language to embrace the same heresy vis-a-vis state regulation? [170] What's more, in dramatic contrast to the establishment clause and the Tenth Amendment, the right to keep and bear arms was viewed by key framers of the Fourteenth Amendment as a "privilege of national citizenship" that henceforth would apply, and perhaps should always have applied, against states. [171] Senator Howard, for example, explicitly invoked "the right to keep and bear arms" in his important speech cataloguing the "personal rights" to be protected by the Fourteenth Amendment. [172] Howard and others may have been influenced by the antebellum constitutional commentator William Rawle, who had argued in his 1825 treatise that the Second Amendment as written limited both state and federal government--a view embraced by at least one (post-*Barron*) state supreme court in the 1840's. [173]

There is, however, another area in which the Second Amendment can be seen as analogous to the establishment clause, imposing limits on the federal government but not the states: the draft. Under this reading, the federal government cannot directly draft ordinary Americans into its army but state governments can conscript, organize, and train their respective Citizens--the militia--who can in times of emergency be called into national service. Consider first the key texts in Article I, section 8:

> The Congress shall have Power . . .
>
> To raise and support Armies . . .
>
> 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, . . . reserving to the States respectively, the Appointment of the officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

By itself, the authority to "raise" armies no more naturally subsumed a power to conscript soldiers than the authority to "lay and collect Taxes [and] Duties" and to "constitute Tribunals inferior to the supreme Court" naturally subsumed power to draft tax collectors, customs officers, judges, and bailiffs. [174] (Similarly, more than mere implication from the naked text authorizing a navy would seem necessary to allow the Congress to engage in the historically odious practice of impressment.) [175] In 1789, the word "army"--in contradistinction to "militia"--connoted a *mercenary* force, as even a casual glance at contemporaneous dictionaries reveals. [176] Of course, this was largely why an "army" was feared. It was *not* composed of a randomly conscripted cross-section of the general militia (all Citizens capable of bearing arms), but was instead filled with *hired* guns. These men, full-time soldiers who had sold themselves into virtual bondage to the government, were typically considered the dregs of society--men without land, homes, families, or principles. Full-time service in the army further weakened their ties to civil(ized)/(ian) society, and harsh army "discipline" increased their servility to the government.

Small wonder, then, that many traditional republicans opposed standing armies, at least in peacetime. (Perhaps in war, with the very survival of the nation at stake, an army was the lesser of two evils--"America's" army might be marginally less threatening to domestic liberty than the enemy's army.) Thus, mainstream republican thought in the late eighteenth century saw a "well regulated *Militia*" as the best "security of a free State." Article I clearly gave Congress authority in actual emergencies to federalize the militia instead of raising an army--but only under a system of cooperative federalism designed to maintain the integrity of the militia. Clause 16 painstakingly prescribed the precise role that state governments had to play in training and organizing the militia and in appointing its officers. These carefully wrought limitations in clause 16 were widely seen in 1789 as indispensable bulwarks against any congressional attempt to misuse its power over Citizen militiamen. Yet these bulwarks would become trivial--a constitutional Maginot Line--if Congress could outflank them by relabeling militiamen as army "soldiers" conscriptable at will, in times of war and peace, under the plenary power of the army clause. [177] Seen from another angle, the Constitution's explicit invocation of "the Militia" in clause 16, in contradistinction to its use of "Armies" in clause 12, makes clear that each word is used in its ordinary language sense: "Arm[y]" means *enlisted* soldiers, and "Militia" means Citizen conscripts. [178]

Structure confirms this technical parsing of text. Wretches miserable enough to volunteer as hired guns might deserve whatever treatment that they got at the hands of army officers, but Citizens wrenched by conscription from their land, their homes, and their families deserved better. They were entitled to be placed in units with fellow Citizens from their own locality, and officered by local leaders--men chosen by state governments closest to them and most representative of them, men who were likely to be persons of standing in their communities (indeed, likely to be elected civilian officials), men whom they were likely to know directly or indirectly from civilian society and who were likely to know them. [179] The ordinary harshness of military discipline would be tempered by the many social, economic, and political linkages that preexisted military service, and that would be reestablished thereafter. Officers would know that, in a variety of ways, they could be called to account back home after the fighting was over.

Nor should we forget the relationship among militiamen at the bottom ranks. Men serving alongside their families, friends, neighbors, classmates, and fellow parishioners--in short, their community--would be constantly reminded of civil(ian)/(ized) norms of conduct. [180] They were less likely to become uncivilized marauders or servile brutes. Thus, the transcendent constitutional principle of civilian control over the military [181] would be beautifully internalized in the everyday mindset of each militiaman.

In the end, the militia system was carefully designed to protect liberty through localism. Here, as with the Virginia and Kentucky Resolutions, freedom and federalism pulled together. Just as the establishment clause saw a national establishment as far more likely to oppress than state and local establishments--and in the worst case scenario, it was always easier to flee an oppressive locality or state than the nation as a whole--so here, national conscription was far more dangerous than the state and local militia system. Like the jury of the vicinage, which we shall examine shortly, the militia was a local institution, bringing together representative Citizens to preserve popular values of their society.

Thus far my federalism argument has stressed the language and structure of Article I. Why have I advertised this as a *Second Amendment* argument? Because for me, it is the Second Amendment's gloss on Article I--a synthesis of original Constitution and Bill of Rights, if you will--that is decisive. For the stylized portrait of "army" and "militia" I have just presented was not universally subscribed to in 1789. Hamilton, for example, painted a less affectionate picture of the militia, [182] and might well have pointed to the expansive language of the "necessary and proper" clause to support a national army draft. In contrast, I have up to now omitted all reference to that clause and have read federal power strictly, emphasizing structural arguments that resonate best with Anti-Federalist and republican ideology. My warrant for this interpretive posture is the Second Amendment. I have read clause 16 jealously and have been especially vigilant about congressional circumvention of its terms, because, as we saw above, jealousy and vigilance are at the heart of the Amendment's gloss on clause 16. [183] I have emphasized republican ideology about militias and armies because that ideology was expressly written into the Amendment's preamble. [184] Truly, no other clause in the Constitution is so obviously, so self-consciously, didactic and ideological, save perhaps the (other) Preamble. If the Amendment is not about the critical difference between the vaunted "well regulated Militia" of "the people" and the despised standing army, it is about nothing. And to ask what *makes* this militia "well regulated"--a protector of, rather than a threat to, civilian society--is to confront the social and structural vision outlined above. To put the point yet another way, the Second Amendment takes the expansive word "necessary"--originally a word on the congressional power side of the ledger, as Chief Justice Marshall stressed in *McCulloch v. Maryland* [185] --and puts that word to work as a restriction on Congress. It is a well-regulated militia, and not an army of conscripts, that is "*necessary* to the security of a free State"; the Second Amendment estops Congress from claiming otherwise.

Post-constitutional history supports the foregoing analysis. During the war of 1812, various sorts of federal draft bills were introduced, setting the scene for an important congressional debate over the army and militia clauses of Article I and the gloss of the Second Amendment. Opposition to these bills in the House of Representatives was led by none other than Daniel Webster, who argued that any federal draft under the army clause impermissibly evaded the

constitutional limitations on federal use of the militia. The plan was an illegitimate attempt to raise "a standing army out of the militia by draft." [186] Webster's vivid image of the evils of such an evasion of clause 16 should by now be familiar:

> Where is it written in the Constitution, . . . that you may take children from their parents, and parents from their children . . . [?]
>
> . . . .
>
> But this father or this son . . . goes to the camp. With whom do you associate him? With those only who are sober and virtuous and respectable like himself? No, sir. But you propose to find him companions in the worst men of the worst sort. Another bill lies on your table offering a bounty to deserters from your enemy. Whatever is most infamous in his ranks you propose to make your own . . . . In the line of your army, with the true levelling of [Napoleonic] despotism, you propose a promiscuous mixture of the worthy and the worthless, the virtuous and the profligate; the husbandman, the merchant, the mechanic of your own country, with [the dregs of Europe] who possess neither interest, feeling, nor character in common with your own people, and who have no other recommendation . . . than their propensity to crimes. [187]

Webster closed with an invocation of the libertarian localism of the Virginia and Kentucky Resolutions, and a quotation of the "Right of Revolution" clause of the New Hampshire Constitution:

> It will be the solemn duty of the State Governments to protect their own authority over their own militia, and to interpose between their citizens and arbitrary power. These are among the objects for which the State Governments exist; and their highest obligations bind them to the preservation of their own rights and the liberties of their people . . . . [My constituents and I] live under a constitution which teaches us that "the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind." [188]

In the tradition of the Virginia and Kentucky Resolves, representatives of various New England states met in the Hartford Convention of 1814-15 to denounce as unconstitutional any national "drafts, conscriptions, or impressments." [189] The eventual republican triumph on this issue--none of the proposed draft bills passed [190]--should be as central a precedent for our Second Amendment as the 1800 triumph over the Sedition Act is for our first.

Only in the twentieth century did the Supreme Court uphold a federal draft, in the *Selective Draft Law Cases* [191] decided during World War I. The arguments of the Court can be charitably described as unpersuasive. Less charitably, the Court's opinion is no more worthy of deference today than the Court's contemporaneous First Amendment jurisprudence, epitomized by now-malodorous cases such as *Debs* [192] and *Abrams*. [193] The "Revolution of 1800" had been all but forgotten until *New York Times v. Sullivan* [194] made it a pole star of the First Amendment; so today, the central lessons of 1812-14 lie dormant, waiting to be rediscovered and resurrected.

2. *The Quartering Amendment*

Consider next the Third Amendment: "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."

Like the Second, the Third is centrally focused on the structural issue of protecting civilian values against the threat of an overbearing military. No standing army in peacetime can be allowed to dominate civilian society, either openly or by subtle insinuation. The Second Amendment's militia could thwart any open military usurpation--say, a siege--but what about more insidious forms of military occupation, featuring federal soldiers cowing civilians by psychological guerrilla warfare, day by day and house by house? Bostonians who had lived under the hated British Quartering Act of 1774 knew that this was no wild hypothetical. Hence the Third Amendment was needed to deal with military threats too subtle and stealthy for the Second's "well regulated Militia."

Note also how the Third reinforces the federalism argument against the draft inspired by the Second. Since the Third flatly forbids Congress to conscript civilians as involuntary innkeepers and roommates of soldiers in peacetime, what sense does it make to read the army clause as giving Congress peacetime power to exercise even more drastic coercion by conscripting civilians into the army itself? It would be odd indeed to say that Congress has absolutely no peacetime power to force soldiers upon civilians, but virtually total peacetime power to force civilians into soldiers. I stress peacetime, because the army clause makes no distinction between war and peace. If its text allows a wartime draft, peacetime conscription must likewise be deemed necessary and proper. The militia clause, by contrast, limits Congress' conscription power to specified national emergencies [195] --just as the Third Amendment limits Congress' quartering power to war time.

The strict limits in both places derive from the awesome nature of the conscription power. Like a criminal sanction, conscription can take over much of a person's life. This leads to my final structural point about the Third Amendment. Just as criminal law requires special legislative and judicial safeguards (as we shall see below) to protect against possible executive overreaching, so too the Third Amendment requires a special legislative finding before a civilian's house can be conscripted. Military use must be explicitly prescribed by national law, and as the *Youngstown* Court pointedly observed in an analogous context, only Congress can pass such a law. [196] Surprisingly, only one of the seven opinions in *Youngstown* even mentioned the Third Amendment; [197] as with federalism, the separation of powers implications of the Bill of Rights often go unnoticed because of our modern day fixation on individual rights.

To the extent modern lawyers think about the Third Amendment at all, they are likely to see it as an affirmation of the general right of individual privacy thought to pervade the penumbras and inhabit the interstices of the Bill of Rights. The most notable Supreme Court mention of the Amendment in the modern era, Justice Douglas' opinion of the Court in *Griswold v. Connecticut*, [198] epitomizes this perspective. But as we have seen, this is not the whole story--indeed perhaps not even the headline. To be sure, there is an important connection between the Third and Fourth Amendments. Both explicitly protect "houses" from needless and dangerous

intrusions by governmental officials. But the obvious connections between the Third Amendment and the one which immediately follows it--to which we now turn--must not be allowed to obscure the equally significant but typically unmentioned linkages between the Third Amendment and the words that immediately *precede* it in the Second Amendment. [199]

D. *The Fourth Amendment*

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[pages 1175ff omitted]

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[149] *See supra* text accompanying note 100.

[150] E. Dumbauld, *supra* note 3, at 174 (emphasis added).

[151] Apparently, the violent nature of revolution induced Locke to strictly limit the legitimate occasions for the exercise of the people's right to revolt. The people, said Locke, could reclaim their sovereignty only when government action approached true and systematic tyranny. J. Locke, The Second Treatise of Government §§ 221-43 (T. Peardon ed. 1952). Between 1776 and 1789, Americans domesticated and defused the idea of violent revolution by channeling it into the newly renovated legal instrument of the peaceful convention. Through the idea of conventions, Americans *legalized* revolution, substituting ballots for bullets. As a result, by 1789 Americans could expand the Lockean right to "revolt"--to alter or abolish government--into a right the people could invoke (by convention) at any time and for any reason. *See, e.g.*, G. Wood, *supra* note 12, at 342-43; 1 Works of James Wilson 77-79 (R. McCloskey ed. 1967); 2 Elliot's Debates, *supra* note 40, at 432-33 (remarks of James Wilson at Pennsylvania ratifying convention). Yet as the Second Amendment reminds us, even the new legal institutions ultimately rested on force--force that ideally would never need to be invoked, yet whose latent existence would nevertheless deter.

[152] There is some fuzziness at the edges, but arms-bearing and suffrage were intimately linked 200 years ago and have remained so for two centuries. Thus, Lincoln's initial decision to propose the Thirteenth Amendment, and the Republicans' eventual decision to endorse the Black franchise in the fifteenth Amendment, were importantly influenced by the fact that Black soldiers had served the Union during the Civil War. Bell, *Racial Remediation: An Historical Perspective on Current Conditions*, 52 Notre Dame Law, 5, 9-11 (1976). Indeed, section 2 of the Fourteenth Amendment defined a state's presumptive electorate as all males over 21. This was virtually identical to the definition of the general militia, which encompassed all adult males capable of bearing arms. In our own century, Woodrow Wilson and other national politicians explicitly endorsed women's suffrage in recognition of women's roles as "partners" in the war effort against

Germany. 1 W. Wilson, War and Peace 263, 265 (R. Baker & W. Dodd eds. 1927); A. Kraditor, The Ideas of the Woman Suffrage Movement 1890-1920, at 166 (1971); A. Grimes, *supra* note 84, at 92. Even more recently, the Twenty-Sixth Amendment extending the franchise to eighteen-year-olds grew out of the perceived unfairness of any gap between the Vietnam draft age and the voting age. *Id.* at 141-47. For an extraordinarily rich discussion of the *political* connotations of arms bearing, see Scarry, *War and the Social Contract: The Right to Bear Arms*, 139 U. Pa. L. Rev. (forthcoming 1991).

[153] For arguments supporting a broad reading of the Amendment as protecting arms-bearing outside of military service, see Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to Bear Arms*, Law & Contemp. Probs., Winter 1986, at 151. *But see, e.g.*, Aymette v. The State, 21 Tenn. (2 Hum.) 154, 161 (1840) ("The phrase '*bear arms*,' . . . has a military sense, and no other. . . . A man in the pursuit of deer, elk and buffaloes, might carry his rifle every day, for forty years, and, yet, it would never be said of him, that he had *borne arms*. . . ."); *accord* Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 219-20, 267 (1983) [hereinafter Kates, *Original Meaning*]. Kates has subsequently modified his position in response to Halbrook's evidence. Kates, *The Second Amendment: A Dialogue*, Law & Contemp. Probs., Winter 1986, at 143, 149.

[154] *See* Scarry, *supra* note 152.

[155] The Federalist No. 28, at 180 (A. Hamilton).

[156] *Id.* No. 46, at 299 (J. Madison).

[157] *See generally* Amar, *Sovereignty*, *supra* note 11, at 1494-1500.

[158] *See, e.g.*, 3 Elliot's Debates, *supra* note 40, at 48, 52 (remarks of Patrick Henry at Virginia ratifying convention).

[159] *See, e.g.*, J. Ely, Democracy and Distrust 94-95, 227 n.76 (1980); L. Tribe, American Constitutional Law § 5-2, at 299 n.6 (2d ed. 1988). For a more detailed catalogue of Second Amendment scholarship, see Kates, *Original Meaning*, *supra* note 153, at 206-07.

[160] L. Tribe, *supra* note 159, at 299 n.6.

[161] *See* U.S. Const. amend. X (distinguishing between "States respectively" and "the people").

[162] *See, e.g.*, Kates, *Original Meaning*, *supra* note 153, at 214-18; Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 Harv. J. L. & Pub. Pol'y 559, 623-28 (1986); *Letters From the Federal Farmer* (III, XVIII, in 2 The Complete Anti-Federalist, *supra* note 38, at 242, 341-42.

[163] In addition to sources cited *supra* note 162, see S. Halbrook, That Every Man Be Armed: The Evolution of a Constitutional Right (1984); Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 Mich. L. Rev. 893, 920 (1978).

[164] E. Dumbauld, *supra* note 3, at 214.

[165] *See, e.g.*, The Federalist No. 25, at 166 (A. Hamilton); *id*. No. 29, at 184 (A. Hamilton); *Id.* No. 46, at 299 (J. Madison).

[166] *See, e.g.*, 3 Elliot's Debates, *supra* note 40, at 425 (remarks of George Mason at Virginia ratifying convention) ("Who are the Militia? They consist now of the whole people. . . ."); *Letters From The Federal Farmer* (XVII), in 2 The Complete Anti-Federalist, *supra* note 38, at 341 ("A militia, when properly formed, are In fact the people themselves . . . and include . . . all men capable of bearing arms . . . .").

[167] *See, e.g.*, J. Ely, *supra* note 159, at 227 n.76; L. Tribe, *supra* note 159, at 299 n.6.

[168] 188 U.S. 321 (1903).

[169] *See, e.g.*, Va. Declaration of Rights of 1776, § 13; Del. Declaration of Rights of 1776, § 18; Md. Const. of 1776 (Declaration of Rights), art. XXV; N.H. Const. of 1784, pt. I, art. I, § XXIV; *see also* Hardy, *supra* note 162, at 626 n.328.

[170] *Cf.* State v. Reid, 1 Ala. 612, 616-17 (1840) (distinguishing between arms regulation and arms prohibition).

[171] *See generally* S. Halbrook, *supra* note 163, at 107-53; Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 Geo. Mason L. Rev. 1 (1981).

[172] Cong. Globe, 39th Cong., 1st Sess. 2765-66 (1866).

[173] W. Rawle, A View of the Constitution of the United States of America 120-30 (1825); *accord* Nunn v. State, 1 Ga. 243 (1846); *see also* State v. Chandler, 5 La. Ann. 489 (1850) (state regulation of arms case with dictum, "This is the right guaranteed by the Constitution of the United States.").

[174] U.S. Const. art. I, § 8, cls. 1, 9. *See* 4 Elliot's Debates, *supra* note 40, at 210 (remarks of Richard Spaight in North Carolina ratifying convention: "Men are to be *raised* by bounty.") (emphasis added).

[175] British impressment in the 1770's was one of the major grievances triggering the American Revolution and was explicitly denounced by the Declaration of Independence. In the later impressment debate leading to the War of 1812, Secretary of State Monroe declared that impressment "is not an American practice, but is utterly repugnant to our Constitution. . . ." 28 Annals of Cong. 81 (1814) (remarks of Senator Jeremiah Mason). Yet even if naval impressment were deemed permissible, army conscription power would not necessarily follow. Historically the two were distinct issues--the British government before the Revolution "did attempt to exercise in this country the supposed right of impressment for the Navy, which it never did for the Army." *Id.* As explained below, the word "army," in contradistinction to "militia," connoted a volunteer force. The word "navy" was more ambiguous, as illustrated by the British-American

tussles over impressment. These textual and historical points can be recast into a structural argument: impressing "private" sailors who had already voluntarily agreed to abandon ordinary civilian life and submit to the harsh discipline and command on a merchant ship involved a smaller marginal deprivation of liberty than wrenching Citizen farmers from their families and lands through an army draft.

[176] *See*, *e.g.*, The Federalist No. 24, at 161 (A. Hamilton) (defining "army" as "permanent corps in the pay of government"); Webster's American Dictionary (1828). In addition to the sources cited *supra* notes 162-63, *see* J. Graham, A Constitutional History of the Military Draft (1971); Freeman, *The Constitutionality of Direct Federal Military Conscription*, 46 Ind. L.J. 333, 337 n.14 (1971); Friedman, *Conscription and the Constitution: The Original Understanding*, 67 Mich. L. Rev. 1493 (1969); Hirsch, *The Militia Clauses of the Constitution and the National Guard*, 56 U. Cin. L. Rev. 919, 958-59 (1988); 3 J. Story, *supra* note 90, at § 1179.

[177] *But see* Malbin, *Conscription, The Constitution and the Framers: An Historical Analysis*, 40 Fordham L. Rev. 805, 824 (1972). Malbin claims that although Congress can conscript under the army clause, the militia clause is not thereby rendered trivial. According to him, had Congress not been able to rely on the militia as a back-up military force, Congress would have been tempted to keep a large (and thus dangerous) *standing* army at all times. The militia clause removes this temptation, and thus adds something valuable, he claims. Malbin's argument fails miserably. If Congress did have army conscription power, as he claims, surely it would have the lesser power under the *army* clause to draft back-up army "reserves" obviating the need for large standing armies--but once again, this contingent draft violates the cooperative federalism safeguards imposed by the militia clause.

[178] The idea of a national army based on a national draft is a distinctly modern one, born in Napoleonic France in 1798--a decade *after* ratification of our Constitution. Freeman, *The Constitutionality of Peacetime Conscription*, 31 Va. L. Rev. 40, 68 (1944); Friedman, *supra* note 176, at 1498-99 & n.20; Malbin, *supra* note 177, at 811. Tellingly, although many leading Anti-Federalists voiced loud fears about the federal government's power to mistreat conscripted militiamen, virtually nothing was said about possible mistreatment of conscripted army soldiers--the very idea bordered on oxymoron. Put another way, even the most suspicious Anti-Federalists generally seemed to assume that the federal government could not use the army clause to justify conscription, and no Federalists, of course, ever supported such a reading. Friedman, *supra* note 176, at 1525-33; *see also Essay by Deliberator*, in 3 The Complete Anti-Federalist, *supra* note 38, at 178-79. *But see Essays of Brutus* (VIII), in 2 *id.* at 406 (questioning whether Congress might have impressment power under the army clause, but referring to this as a draft "from the militia"). Elsewhere, Brutus took the extreme position that the Article I enumeration of powers imposed no meaningful or sincere limits on congressional authority.

[179] Friedman, *supra* note 176, at 1508. States' rights advocates viewed the state appointment of officers as vital. When Madison proposed to limit states to appointments "under the rank of General," the Philadelphia convention voted overwhelmingly against him. Roger Sherman called the modification "absolutely inadmissible" and Elbridge Gerry sarcastically suggested that the convention might as well abolish state governments altogether, create a king, and be done with it. 2 M. Farrand, *supra* note 44, at 388.

[180] The social aspects of militias are nicely captured in the following account of a typical militia muster in late seventeenth-century Massachusetts:

> On the training days, a town's militia company generally assembled on public grounds, held roll call and prayer, practiced the manual of arms and close order drill, and passed under review and inspection by the militia officers and other public officials. There might also be target practice and sham battles followed in the afternoon--when times were not too perilous--by refreshments, games, and socializing.

R. Weigley, History of the United States Army 6 (1967). Note how the reference to prayer fits well with the role of local religious establishments in Massachusetts, *see supra* text accompanying notes 143-46.

[181] At least seven Revolution-era constitutions or bills of rights echoed--almost *in haec verba*--the language of the Virginia Bill of Rights of 1776, § 13: "[I]n all cases the military should be under strict subordination to, and governed by, the civil power." These provisions were invariably placed alongside paeans to "the militia" and/or guarantees of the right of "the people" to keep and bear arms. *See* Pa. Const. of 1776 (Declaration of Rights), art. XIII; Del. Declaration of Rights of 1776, § 20; Md. Const. of 1776 (Declaration of Rights), art. XXVII; N.C. Const. of 1776 (Declaration of Rights), art. XVII; Vt. Const. of 1777, ch. 1, § XV; Mass. Const. of 1780, pt. I, art. XVII; N.H. Const. of 1784, pt. I, art. I, § XXVI. *See generally* 2 A. De Tocqueville, *supra* note 147, at 279-302. Although not explicitly analyzing the allocation of military power under the U.S. Constitution, Tocqueville's account of civilian versus professional armies strongly supports my analysis.

[182] *See*, *e.g.*, The Federalist Nos. 25, 29 (A. Hamilton).

[183] *See supra* text accompanying notes 157-58; *see also supra* note 179.

[184] *See* 1 Annals of Cong., *supra* note 53, at 777 (remarks of Elbridge Gerry) ("What, sir, is the use of the militia? It is to prevent the establishment of a standing army, the bane of liberty."); *cf.* Malbin, *supra* note 177, at 824 n.69 (criticizing overreliance on republican ideology in interpreting militia and army clauses of Article I). Interestingly, at the Philadelphia convention George Mason proposed an anti-standing-army preamble to the Article I militia clause, but the proposal failed. 2 M. Farrand, *supra* note 44, at 617.

[185] 17 U.S. (4 Wheat.) 316, 419-21 (1819).

[186] 1 Papers of Daniel Webster: Speeches and Formal Writings 21 (C. Wiltse ed. 1986).

[187] *Id.* at 25-29.

[188] *Id.* at 30.

[189] *Report and Resolutions of the Hartford Convention, reprinted in* 1 Great Issues in American History 237, 240 (R. Hofstadter ed. 1958).

[190] The precise degree to which constitutional scruples contributed to the bills' defeat is the subject of some dispute. *Compare* Malbin, *supra* note 177, at 820-21 & n.56 *with* Friedman, *supra* note 176, at 1541-44 *and* Freeman, *supra* note 176, at 341-42. *See generally* J. Leach, Conscription in the United States: Historical Background 30-126 (1952).

[191] 245 U.S. 366 (1918).

During the Civil War, the federal government adopted a draft bill of sorts, although many of its supporters conceded that the army clause might not allow direct conscription. These supporters tried to characterize the bill as akin to a tax and denied that it established illegitimate conscription, pointing to its provisions allowing money payment in lieu of personal military service, 1 F. Shannon, The Organization and Administration of the Union Army, 1861-1865, at 308 (1928). In the end, less than one-fifth of the men "drafted" personally served, *see* Freeman, *supra* note 178, at 72 n.102. In an unpublished sketch in preparation for a proper judicial case that never materialized, Chief Justice Taney nevertheless declared the act unconstitutional as an impermissible circumvention of the militia clause. R. Taney, *Thoughts on the Conscription Law of the United States, reprinted in* The Military Draft 207-18 (M. Anderson ed. 1982).

[192] Debs v. United States, 249 U.S. 211 (1919).

[193] Abrams v. United States, 250 U.S. 616 (1919).

[194] 376 U.S. 254, 273-76 (1964).

[195] The national government may call out the militia only to "execute the Laws of the Union, suppress Insurrections and repel Invasions." U.S. Const. art. I, § 8, cl. 15.

[196] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587-88 (1952).

[197] 343 U.S. at 644 (Jackson, J., concurring).

[198] 381 U.S. 479, 484 (1965).

[199] A LEXIS search of Supreme Court citations to the Third Amendment since *Youngstown* reveals seven attempts to associate the amendment with privacy, and only one (dissenting) invocation of the amendment in a context involving alleged military overreaching. *See* Laird v. Tatum, 408 U.S. 1, 22 (1972) (Douglas, J., dissenting) (Army surveillance case). By contrast, the precursors of the Third Amendment proposed by state ratifying conventions invariably linked the quartering amendment with its militia counterpart. E. Dumbauld, *supra* note 3, at 182, 185, 201.