Militia Organization Clause

"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 . . . ."

I. Introduction

This militia clause received considerable attention at both the Constitutional Convention and the state ratifying conventions. All agreed that the militia would be important to the United States land defense establishment. Advocates for a standing army had no illusions that the professional army would be sufficient to meet U.S. defense needs. The United States lacked both the resources and political will to keep a large standing army. Those who feared the standing army, meanwhile, wanted the militia to be the sole means of providing for land defense in peacetime. The Framers also had no conception of the modern Armed Forces, complete with large reserve forces. In their world, the militia *was* the reserve military force of the nation, and after the Revolution, there was agreement that the institution needed to be put on a solid footing.

As a political compromise, the Constitutional Convention split the militia between the national and state governments. This compromise created political accountability problems, and in the ensuing century, much of the militia was left untrained and disorganized. Beginning in the 20th century, the federal government largely took over the militia system using its Army Power to circumvent both state authority over the militia and the federal government's limited deployment power. For originalists, the legal gimmicks that the federal government used to take over the militia raise serious constitutional questions. But the intractable problems caused by the Framers' compromise has left no political appetite to return to the Framers' federalized military structure.

II. History before 1787

In theory, Britain preferred the militia as its land force for home defense. The British were suspicious of professional soldiers, believing that having a professional class of armed men was dangerous to the maintenance of a free constitution. Instead, they desired to have the entire able-bodied community under arms.

The English militia tradition can be traced back to the Saxon fyrd.[1] After the Norman Conquest, the Assize of Arms (1181)[2] and the Statute of Winchester (1285)[3] required all freemen to provide themselves with arms and to obey the call for service. Although the militia was organized nationally, principal executive control lay with county officers.[4] The militia, thus, was "[a] national force, organized by counties."[5]

Yet, although Britain preferred the militia system in theory, Britain rarely kept a properly organized militia afoot. The British public's dislike of mandatory military service extended to service in the militia. During long periods of peace, the militia were not organized or trained, and "resuscitating

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[1] 1 WILLIAM BLACKSTONE, COMMENTARIES *409; James Biser Whisker, *The Citizen-Soldier Under Federal and State Law*, 94 W. VA. L. REV. 947, 952 (1992)

[2] Assize of Arms 1181, 27 Hen. 2, §§ 1–2 (Eng.).

[3] Statute of Winchester 1285, 13 Edw. c. 6 (Eng.).

[4] Robert Leider, *Deciphering the Armed Forces of the United States*, 57 WAKE FOREST L. REV. 1195, 1219 (2022).

[5] F.W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 276 (Cambridge Univ. Press 1920).

the militia . . . was like trying to revive a dead carcass."[6] Even when attempts were made to impose military training on the population (often when a threat of invasion existed[7]), many evaded duty.[8]

The English militia eventually divided into an organized component, known initially as trained bands, and a general militia.[9] The trained bands were chosen by lot, which, in principle, enrolled a fair cross-section of the community.[10] In practice, the militia was largely a volunteer organization, as individuals could find willing substitutes. England largely limited active training only to the trained bands, which underwent light training for one or two weeks in total per year.[11] The general militia received no significant training, even as the entire population, in theory, could be called into active military service.[12]

When the British settled in North America, they brought the militia system with them.[13] In the early days, the British had no significant troop presence in America,[14] and the colonists had neither the manpower nor the money for professional soldiers.[15] Yet, they also faced significant danger from competing European colonial powers and from the Indians.[16] To provide for security, early colonists (except in Quaker Pennsylvania) organized a universal militia system.[17] All able-bodied men were required to provide themselves with arms, and they drilled routinely.[18]

A well-disciplined universal militia system did not last long, however. As the seventeenth century ended, many colonies found themselves with more security. Facing less danger, exemptions from militia service grew and training occurred less frequently.[19] In North Carolina, the militia even went inactive for a quarter century.[20] Many colonies divided their militia into a volunteer component that trained more frequently (e.g., the Massachusetts Minutemen), leaving their general militia with only perfunctory training.[21] Militia musters served as a recruiting ground for temporary military service—asking for volunteers if there were enough, but imposing a draft from the general militia if there were not.[22] For much of the eighteenth century, militia organization would ebb and flow depending on whether war was imminent.[23]

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[6] *Id.* at 160; *see also* CORRELLI BARNETT, BRITAIN AND HER ARMY 1509–1970: A MILITARY, POLITICAL AND SOCIAL SURVEY 34–35, 117, 174 (1970) (recounting that the militia was not organized during various time periods).

[7] Ian Roy, *Towards the Standing Army*, *in* THE OXFORD HISTORY OF THE BRITISH ARMY 36 (David Chandler & Ian Beckett, eds., 1996) [hereinafter Oxford History].

[8] BARNETT, *supra* note 6, at 34.

[9] *Id.*; Ian Beckett, *The Amateur Military Tradition*, *in* OXFORD HISTORY, *supra* note 7, at 385, 388.

[10] BARNETT, *supra* note 6, at 34; Beckett, *supra* note 9, at 388; 1 BLACKSTONE, *supra* note 1, at *412; MATTHEW MCCORMACK, EMBODYING THE MILITIA IN GEORGIAN ENGLAND 83 (2015).

[11] MCCORMACK, *supra* note 10, at 84.

[12] *See supra* note 6.

[13] JOHN K. MAHON, HISTORY OF THE MILITIA AND THE NATIONAL GUARD 6 (1983).

[14] *Id.* at 24.

[15] RUSSELL F. WEIGLEY, A HISTORY OF THE UNITED STATES ARMY 4 (enlarged ed. 1984).

[16] *Id.*

[17] *Id.* at 3–4.

[18] MAHON, *supra* note 13, at 14–18; Robert L. Goldich, *Historical Continuity in the U.S. Military Reserve System*, 7 ARMED FORCES & SOC'Y 88, 91–93 (1980).

[19] MAHON, *supra* note 13, at 18; *see, e.g.*, E. Milton Wheeler, *Development and Organization of the North Carolina Militia*, 41 N.C. HIST. REV. 307, 311 (1964); WILLIAM L. SHEA, THE VIRGINIA MILITIA IN THE SEVENTEENTH CENTURY 133–35 (1983).

[20] Wheeler, *supra* note 19, at 311.

[21] WEIGLEY, *supra* note 15, at 8.

[22] *Id.*; MAHON, *supra* note 13, at 19–20; JERRY COOPER, THE RISE OF THE NATIONAL GUARD: THE EVOLUTION OF THE AMERICAN MILITIA, 1865–1920, at 2 (1997).

[23] MAHON, *supra* note 13, at 18.

During the Revolution, the militia's performance was mixed. On the one hand, the militia performed many valuable functions. These included holding territory liberated from the British and quickly providing temporary soldiers, especially when the expiration of enlistments left the Continental Army short of regulars.[24] But there were also many problems. Colonial law required the frequent rotation of militiamen (usually after three months), meaning that they left active service almost as soon as they arrived.[25] American leaders also had significant problems coordinating separate state militias. State militias "were too different from each other to be interchangeable,"[26] and "contentious state militia officers squabbled with each other over relative rank and right of command."[27]
Legally, the Articles of Confederation required the states to "keep up a well regulated and disciplined militia, sufficiently armed and accoutred."[28] But after the Revolution, the states largely failed to do this.[29] Worse, during Shays' Rebellion, many of the Massachusetts militia sided with the rebels.[30] Faced with these deficits, the Constitutional Convention would undertake to strengthen national military power.

III. Constitutional Convention

The delegates to the Constitutional Convention were acutely aware of the shortcomings of the American militia during and after the Revolution. In principle, they widely agreed about the need for greater national control over the militia. But the devil is in the details, and when it came to the details, there were bitter divisions over how far nationalization should go.

The Committee on Detail listed among Congress's powers "the exclusive Right of establishing the Government and Discipline of the Militia . . . and of ordering the Militia of any State to any Place within [the] U.S."[31] The reported version, however, gave Congress the power to call forth the militia but no explicit power to organize it.[32] In the Convention, an amendment was offered to provide for federal regulating and training of the militia, with the states having the power to appoint the officers; but the proposal was sent to a committee.[33] Ironically, it would be Anti-Federalist George Mason who proposed on the Convention floor that the federal government should have the 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."[34] Mason wanted better militia regulation to prevent the federal government from raising a standing army,[35] and "[h]e considered uniformity as necessary in the regulation of the Militia throughout the Union."[36]

From here, the Convention fractured. Some delegates, including James Madison, wanted plenary federal control over the militia because the militia involved national defense.[37] George Read wanted the federal government, not the states, vested with the appointment of the officers; and at a

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[24] MAHON, *supra* note 13, at 44.
[25] *Id.* at 19.
[26] *Id.* at 36
[27] COOPER, *supra* note 22, at 5.
[28] ARTICLES OF CONFEDERATION OF 1781, art. VI, para. 4.
[29] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 387 (Max Farrand ed., 1911) [hereinafter "Records"].
[30] LEONARD L. RICHARDS, SHAYS'S REBELLION: THE AMERICAN REVOLUTION'S FINAL BATTLE 11–12 (2002).
[31] 2 RECORDS, *supra* note 29, at 159; *see also id.* at 136 (earlier proposal).
[32] *Id.* at 182.
[33] *Id.* at 323.
[34] *Id.* at 330; *see also id.* at 326.
[35] *Id.* at 326.
[36] *Id.* at 330.
[37] *Id.* at 331–32.

minimum, if states were to retain the authority, he wanted militia officers to be appointed, not elected.[38] Others fought for more decentralization. Jonathan Dayton, Oliver Ellsworth, and Roger Sherman offered proposals that would preserve state power while still allowing Congress to impose a national system of militia discipline.[39] Ellsworth wanted uniformity in arms and discipline, but warned against giving "[t]he whole authority over the Militia" to the federal government because the states "would pine away to nothing after such a sacrifice of power."[40]

Mason's initial compromise proposal largely stuck. With some edits from the Committee on Style,[41] the clause reached its current form.[42] The Constitution gave Congress plenary authority over the organizational system of the militia. Congress could also govern militiamen who had been called forth into federal service. The states had power to select the officers, to train the militia, and to retain control over the militia not in federal service. The Constitution did not answer many of the controversial questions of the day, such as who to enroll in the militia or how frequently to conduct the training. These were political judgments left to Congress.

The militia envisioned by the Constitution was *federal* in the literal sense, with control divided among the national and state governments. And it is one of the few explicitly cooperative federal institutions mentioned, with Congress able to control state officers directly.[43] If the English militia was "[a] national force organized by counties," the American militia was to be a national force organized by the states.

IV. State Ratifying Conventions

During the debates over ratification, the Anti-Federalists vigorously attacked Congress's plenary powers to organize, arm, and discipline the militia. Anti-Federalists leveled objections against all three powers:

> **Organization**. Congress might create armed factions in society that were unrepresentative of the population (see Armies Clause). With respect to the militia, nothing in the Constitution required that Congress enroll the whole militia. Congress might not organize the militia at all, relying instead on a standing army.[44] Alternatively, Congress might organize the militia by only enrolling part of the militia, thereby creating a "select militia."[45] Further, because the Constitution gave Congress exclusive power to organize the militia, the states could not enroll individuals into the militia on their own authority.[46]
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> **Arming**. Congress could abuse its power to arm the militia by disarming or refusing to arm the militia. Again, Anti-Federalists worried that states had no concurrent power.[47]

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[38] *Id.* at 333.
[39] *Id.* at 385–86.
[40] *Id.* at 331.
[41] *Id.* at 570, 595.
[42] U.S. CONST. art. I, § 8, cl. 16.
[43] For another power where Congress can control state and local executive officers directly, see U.S. CONST. art. I, § 4, cl. 1 (authorizing Congress to alter federal election regulations).
[44] 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1272 (John P. Kaminski et al. eds., 2000) (statement of George Mason).
[45] *Id.* at 1312–13.
[46] *Id.* at 1270 (statement of Mason), 1276 (statement of Patrick Henry), 1306 (statement of Francis Corbin).
[47] *Id.* at 1270 (statement of Mason), 1276 (statement of Patrick Henry).

Discipline. Because the militia comprised all able-bodied men, Congress could abuse its power to discipline the militia to subject all able-bodied men to military law, instead of civilian law.[48] Congress could also provide for ignominious and harsh punishments for breaches of militia discipline.[49]

The Federalists attacked the Anti-Federalist legal interpretation of these provisions. The Federalists argued that states had concurrent power over the militia.[50] If Congress refused to organize or arm it, the Constitution did not prevent the states from enacting their own laws.[51]

The Federalists also justified the policies underlying the Militia Clause. Not all Federalists thought that the entire militia should be enrolled. Alexander Hamilton, for example, openly advocated for a select militia, believing that the opportunity costs of disciplining the whole militia were too high.[52] Leaving organizational questions to the political branches allowed Congress to create policies consistent with American defense needs. Moreover, the Federalists argued that the militia would remain attached to state governments because, in part, states were empowered to select the officers.[53] State selection of officers also provided a second chain of military command, should the standing army be used to usurp the constitutional government.[54]

On discipline, the Federalists had two responses. First, it was unlikely the national government would authorize unusually harsh punishments of militiamen.[55] Second, they explained that the federal government could not impose military law on the able-bodied civilian population because federal power to govern the militia was limited to those times when the militia was in active federal service.[56]

The concerns of the Anti-Federalists led them to propose a variety of constitutional amendments.[57] But proposals that altered the federal-state balance were never adopted. Other amendments that touched on the militia system were ratified. The Second Amendment guaranteed a general right to bear arms and declared that the militia was "necessary to the security of a free State." And the Fifth Amendment explicitly required that civilian law and civilian trial procedures apply to militiamen, except when those militiamen were in active military service.

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[48] *Id.* at 1304; Maryland Ratifying Convention (1788), *reprinted in* 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 729, 734 (Bernard Schwartz ed., 1971); *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents*, PHILA. PACKET & DAILY ADVERTISER, Dec. 18, 1787, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST 145, 164 (Herbert J. Storing ed., 1981).

[49] 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 44, at 1301 (statement of Patrick Henry) 1289, 1304, 1312 (statements of George Mason).

[50] *Id.* at 1280 (statement of Nicholas), 1304 (statement of James Madison).

[51] *Id.* at 1307, 1308 (statements of John Marshall).

[52] THE FEDERALIST NO. 29, at 182–83 (Clinton Rossiter ed., 1961) (Alexander Hamilton).

[53] *Id.* at 186; THE FEDERALIST NO. 46, *supra* note 52 at 299–300 (James Madison).

[54] THE FEDERALIST NO. 46, *supra* note 52 at 299–300.

[55] 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 44, at 1303 (statement of James Madison).

[56] *Id.* at 1280 (statement of Nicholas), 1288 (statement of Edmund Randolph), 1294 (statement of Henry Lee III), 1301 (statement of James Madison).

[57] *See, e.g.*, Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents, Pennsylvania Packet, Dec. 18, 1787, para. 11, *reprinted in* DAVID E. YOUNG, THE ORIGIN OF THE SECOND AMENDMENT 160 (1995) (returning power to organize, arm, and discipline the militia to the states); The Virginia Convention, June 27, 1788, *in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 44, at 1550, 1554 (granting states explicit concurrent power over the militia and allowing states to set penalties for violations of militia discipline); The Hillsborough Convention (North Carolina), Aug. 1, 1788, para. 11 *in* 30 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 456 (John P. Kaminski et al. eds., 2019) (same).

V. Early Practice

Early Congresses could not come to consensus on the organization, funding, and discipline of the militia, resulting in a disastrous lack of military preparation. President Washington's Secretary of War Henry Knox sent a proposed militia bill to Congress that would have provided for classes of militia.[58] Some parts of the militia (e.g., younger militiamen) would receive enhanced training, while others would be held in a reserve role. Congress ultimately rejected any effort to divide or class the militia. Instead, in the Militia Act of 1792, Congress required universal enrollment of all white men between 18 and 45.[59] These individuals were required to furnish themselves with muskets and other military equipment.[60]

This universal system quickly collapsed. The federal government did not provide adequate funding and oversight. The militia performed poorly during the War of 1812. Following that war, states increasingly added exemptions to militia training and, eventually, stopped actively enrolling most able-bodied citizens.[61] In place of a universal militia, states began relying on volunteer militia units. These units were their own fraternal society, but they would receive a charter making them an official militia organization of the state.[62] The remaining militia was left unorganized and untrained.

The militia system largely lapsed after the Civil War.[63] But labor strikes caused many states to reorganize their militia. At this point, the National Guard system became widespread. Many states relied on a volunteer, organized militia (usually labeled the "National Guard"), with an untrained reserve militia.[64] Courts upheld these laws against challenges that they violated the Militia Act of 1792 or resulted in states keeping "troops" in violation of Article I, Section 10.[65]

But these National Guard units were organized at the state level. Their training was uneven. So, too, was their combat performance. The Spanish-American war would be a watershed for militia organization, as many National Guardsmen volunteered for service and performed poorly.[66]

VI. Modern Practice, Judicial Precedent, and Open Questions

The poor performance of Guardsmen during the Spanish-American War led President Theodore Roosevelt to pursue militia reform. Legally, the Militia Act of 1792 remained the primary federal law governing the militia. In practice, it had been in desuetude for decades. Moreover, in the early 1900s, the federal government sought an army reserve force, and the National Guard lobbied for that role.[67]

In 1903, Congress passed the Dick Act.[68] The Act legally separated the militia into an organized militia, consisting of the National Guard and naval militia, and a reserve militia, consisting of the remaining militia. Congress authorized federal funds for the National Guard and naval militia, but only if their units met federal standards.

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[58] HENRY KNOX, A PLAN FOR THE GENERAL ARRANGEMENT OF THE MILITIA OF THE UNITED STATES 10 (Francis, Childs & John Swaine, pub. 1790).

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

[60] *Id.* § 2, 1 Stat. 271.

[61] *See* Frederick B. Wiener, *Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 188–91 (1940); MAHON, *supra* note 13, at 81–82; *see also* Perpich v. Dep't of Def., 496 U.S. 334, 341 (1990) (relying on Wiener's article).

[62] COOPER, *supra* note 22, at 15–16.

[63] *Id.* at 23–24.

[64] *Id.* at 44.

[65] State v. Wagener, 77 N.W. 424, 425 (Minn. 1898); Smith v. Wanser, 52 A. 309, 312–13 (N.J. 1902); Alabama Great S. R.R. Co. v. United States, 49 Ct. Cl. 522, 531 (1914); *see also* Wiener, *supra* note 61, at 216–17 (expressing skepticism of these cases' continued validity).

[66] COOPER, *supra* note 22, at 96–98, 108.

[67] For a recount of the history in this section, see Leider, *supra* note 4, at 1227–32.

[68] Militia Act of 1903 (Dick Act), ch. 196, 32 Stat. 775.

After the Dick Act, Congress also created ways to evade the constitutional limitations on the Militia Clauses. During World War I, Congress authorized direct conscription into the national army so that Guardsmen could be deployed abroad. The Supreme Court upheld conscription, holding that, notwithstanding the Militia Clauses, Congress could deploy individuals abroad as soldiers in the army.[69] Conscription relieved Guardsmen of their status as "militia" and incorporated them into the army. But Guardsmen did not enter service as units, nor did they automatically return to the militia when their federal service was over.[70]

To avoid these problems, Congress created a system of "dual enlistment."[71] This system required National Guardsmen to enlist in two coextensive organizations: the National Guard of their state, which was the organized militia of the state, and "the National Guard of the United States," which was a component of the Army Reserve.[72] The theory behind "dual enlistment" is that the federal government could exercise more power over Guardsmen by changing their "hat."[73] If the Guardsmen was wearing his army hat, then the constitutional limitations of the Militia Clauses would not apply because he would be deemed a soldier in the army.[74] In an earlier Act, Congress also established qualification standards for militia officers and required states, as a condition of receiving federal funds, to appoint only officers meeting those standards and to dismiss officers who lose federal recognition.[75]

The end result of this system is that neither the Calling Forth Clause nor the federal-state division of the militia in this clause have much practical application today. Using dual enlistment, Congress may activate entire units of the National Guard, sending them abroad for offensive wars in their capacity as Army Reserve soldiers. The federal government also trains much of the militia in their capacity as officers and soldiers in the U.S. Army Reserve. And although states formally commission militia officers, the federal government exercises near plenary de facto control over officer appointment, including by forcing states to dismiss militia officers who lose federal recognition.[76]

The Supreme Court effectively upheld the constitutionality of dual enlistment in *Perpich v. Department of Defense*.[77] That case involved state governors who tried to veto missions to send the National Guard for training in Central America. Congress responded by eliminating the authority of governors to veto Guard training on political grounds. The Supreme Court held that the Constitution did not require that state governors be given veto power over National Guard training because the federal government had authority under the Armies Clause to require Guardsmen to train abroad in their capacity as soldiers in the Army Reserve. Although the states did not challenge the constitutionality of dual enlistment, the Court held that the Militia Clauses did not limit Congress's power to raise armies under the Armies Clause.[78]

As an originalist matter, the decision is problematic and inadequately reasoned. The Supreme Court explained that Guardsmen were militiamen because they were nonprofessional soldiers. The Court did not explain, however, how these nonprofessional soldiers could also be soldiers in the regular army.[79] Nonprofessional soldiers are not regular forces, and the power to raise armies was the power to

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[69] Arver v. United States (*Selective Draft Law Cases*), 245 U.S. 366, 376–78 (1918); Cox v. Wood, 247 U.S. 3, 4 (1918).

[70] Perpich v. Dep't of Def., 496 U.S. 334, 345 (1990); Wiener, *supra* note 61, at 208.

[71] Wiener, *supra* note 61, at 207–09.

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

[73] *Perpich*, 496 US. at 348.

[74] *Id.*

[75] Wiener, *supra* note 61, at 200–01 (citing various provisions of the Act of June 3, 1916, 39 Stat. 166).

[76] Leider, *supra* note 4, at 1238–39.

[77] 496 U.S. 334 (1990).

[78] *Id.* at 349–52.

[79] *Id.* at 348.

create regular forces. As both militiamen and army soldiers, Guardsmen occupy two legal statuses that are arguably inconsistent.[80]

When it comes to militia organization, many open questions remain. The Court has not ruled on the limits of federal power over the militia. Early, the Supreme Court, in a fractured opinion, held that states have concurrent power with the federal government to organize and discipline their militia.[81] Whether states may *override* federal militia legislation is a contested question. Before *District of Columbia v. Heller*, many courts stated that the Second Amendment gave states preclusive authority against the federal government to organize militia forces. But in military law cases, courts have uniformly upheld federal supremacy.[82]

In *Perpich*, the Court never resolved the issue of how far the federal government may regulate militia forces. The Court explained that if a state did not want federal interference in its militia system, then it could create a state defense force at its own expense, which would not be subject to the cooperative federalism provisions that govern the National Guard. This provision, the Court explained, vindicated whatever "constitutional entitlement" that a state has "to a separate militia of its own."[83]

As one early 20th-century commentator explained, the federal takeover of the militia is "prickly with doubt."[84] Yet, the political compromises struck at the Constitutional Convention by this militia clause created systemic dysfunction in the militia system, such that the nationalization of all military forces has become well-entrenched today.

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[80] Robert Leider, *Federalism and the Military Power of the United States*, 73 VAND. L. REV. 989, 1017–35 (2020).

[81] Houston v. Moore, 18 U.S. 1 (1820).

[82] On the tension between these two lines of cases, see J. Norman Heath, *Exposing the Second Amendment: Federal Preemption of State Militia Legislation*, 79 U. DET. MERCY L. REV. 39 (2001).

[83] *Perpich*, 496 U.S. at 352 & n.25.

[84] S.T. Ansell, *Legal and Historical Aspects of the Militia*, 26 YALE L.J. 471, 480 (1917).