FEDERALISM UNWRITTEN

*Jason Mazzone**

Accounts of unwritten constitutional principles have tended to overlook unwritten principles of federalism. Using the tools that Akhil Amar provides in his book, America's Unwritten Constitution*, this Article seeks to correct that shortcoming. It begins the task of identifying the unwritten principles of federalism that developed historically and that shape our modern constitutional system. The Article does so by taking up an important historical case study: how, consistent with the Constitution's federal design, were militiamen to be armed? The written Constitution assigns power to Congress to "provide for . . . arming . . .the Militia," but what exactly this power meant in practice was unclear. Resolving the scope of this federal power—a power that could affect the lives of virtually every American citizen—generated widespread and passionate debates when, beginning in the first days of the Republic, efforts turned to ensuring that militiamen had the arms and equipment they needed to perform their national security role. These debates entailed the first significant national conversation about the meaning of American federalism that occurred after the drafting and ratification of the (written) Constitution. Unearthing this conversation enriches our understanding of federalism's historical origins and its contemporary meaning. Several lessons emerge. While today federalism is often conceived as entailing divisions of authority, historically, federalism was highly dynamic: it involved overlapping federal and state jurisdiction and ongoing interactions between the states and the national government. A key component of our early federal system was the dependence of the federal government upon the states to put in place federal programs. This dependence gave the states authority to limit the reach of federal law, to decide which federal laws would apply at all, and to resist and curtail federal laws that were inconsistent with state policies. Today, courts play a key role in enforcing federalism limits on national power. Historically, the meaning of federalism developed in Congress and the federal executive branch, in the legislatures of the states and among their governors, and from the contributions of ordinary Americans. While questions of federalism are nowadays often discussed separately from issues of individual rights, historically, feder-*

* Professor and Lynn H. Murray Faculty Scholar in Law, University of Illinois College of Law. Contact: mazzonej@illinois.edu.

alism and liberty were closely and inevitably intertwined: the language of federalism was often the language of individual rights, and vice-versa.

A recent episode highlights the importance of incorporating federalism into accounts of our unwritten Constitution. During the litigation over the Patient Protection and Affordable Care Act of 2010 that culminated in the Supreme Court's 2012 decision in NFIB v. Sebelius*, challengers to the federal individual health insurance mandate contended that never before had Congress required Americans to purchase something (in the case, an insurance policy). Supporters of the healthcare mandate responded that it was not unprecedented because in the Militia Act of May 8, 1792, Congress required militiamen to acquire their own arms and equipment. Neither side in the healthcare litigation had the story quite right, and this shared deficiency resulted from a common failure to understand the Militia Act in the context of the federalism principles this Article uncovers.*

Akhil Amar's book, *America's Unwritten Constitution*,[1] is a how-to guide for readers, whether expert or not, on engaging themselves with the Constitution and with constitutional history in order to reach their own supportable conclusions about what the document's unwritten precedents and principles require.[2] This Article takes up Amar's invitation to deploy the tools and techniques he provides in order to derive constitutional meaning from beyond the written text. Like Amar, I have picked a case study, though one that makes no appearance in his book. Mine concerns a single issue: how, consistent with the Constitution, were members of the militia—once the nation's principal fighting force—to be armed? To modern ears, and compared to the grand questions with which Amar himself has engaged—segregation, voting, speech, juries—my choice of topic sounds trivial, eccentric even. Yet the history of arming the militia is an important episode in the story of U.S. federalism and therefore of U.S. constitutionalism. The written Constitution assigns power to Congress to "provide for . . . arming . . . the Militia," but what exactly this power meant in practice was unclear.[3] As Congressman Timothy Bloodworth observed in 1791, "[t]he Constitution . . . divided the militia business between the general government, and the government of the particular states. The line, which marked the boundary of their respective powers, was in deed left in a great measure unmarked."[4] The question of how to mark this line generated widespread and passionate debate when, beginning in the first days of the Republic, efforts turned to ensuring that militiamen had the arms and equipment they

1. AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY, at XVI (2012).

2. *Id.*

3. U.S. CONST. art. I, § 8, cl. 16.

4. House of Representatives, *Debates on the Militia Bill*, Dec. 21, 1790, New-York Daily Gazette, Jan 3, 1791, at 2.

needed to perform the national security function assigned to them.[5] From the outset, these debates were about much more than the militia itself.[6] Indeed, it is fair to say that the debates entailed the first significant national conversation about the meaning of American federalism that occurred after the drafting and ratification of the (written) Constitution.[7] Unearthing this conversation, and seeing its full significance, enriches our understanding of the U.S. constitutional tradition. Every aspiration for the national government that the Constitution engendered, every accompanying fear about national power, and every concern with liberty found a forum in the early years of the Republic in the conversation about armed militiamen.[8] As a result, no account of the meaning of U.S. federalism, of the powers of the federal government, of the role of the states, or of the relationship between allocations of power and individual rights, is complete without attention to how each of these issues played out in the militia context. The history of arming the militia is the repository for a rich set of enduring principles and precedents developed outside of the Constitution's text. Federalism Unwritten deserves a place in Amar's project and the militia is a very good subject with which to begin.

Part I sets the stage by recounting briefly the history of the militia (and of their arms) in colonial times and in the immediate period following the Revolutionary War. Part I then sharpens the focus by turning to the militia provisions of the Constitution and the debates that led to those provisions being adopted. Part II traces the events, including the congressional debates, that resulted in the passage of the Militia Act of May 8, 1792, a controversial federal statute that required militiamen to provide their own arms and equipment. As Part II demonstrates, these events, stretching over a two-year period, were the focal point of a national conversation about federalism. Part III examines the operation of the Militia Act of May 8, 1792 as shedding light on the public understanding of federalism in the early national period. Part IV turns to congressional efforts to arm the militia after the failure of the Militia Act and it takes up what those efforts reveal about national power, the role of the states, and the relationship between government and individuals.

The unwritten Constitution that emerges from my account differs in some significant ways from the one that Amar himself describes. Three points provide a preview. First, Amar's overall story is one in which unwritten precedents and principles enhance federal authority vis-á-vis the states.[9] On the militia question, however, the forces beyond the text served to constrain and narrow federal authority. Indeed, a written grant of power to Congress—to provide for arming the militia—became largely

5. *Id*.
6. *Id*.
7. *See id.*
8. *Id*.
9. AMAR, *supra* note 1.

unwritten as a result of an influential political movement to constrain the role of the federal government.[10] A second difference is that, while in Amar's unwritten Constitution the courts (and especially the Supreme Court) play a regular starring role,[11] no court was involved in the issues of federalism on which I focus. Instead, events played out in the Congress, in the state legislatures, among executive officials, and at the level of ordinary citizens. Third, in Amar's account, most of the unwritten Constitution by which we live today was produced after the Civil War and a good deal of it was produced in the late twentieth century (with some of it still to be generated in the future).[12] Whatever unwritten principles and precedents developed in the antebellum era, for Amar, Reconstruction was also a rewriting. On the militia question, by contrast, federalism principles and precedents developed in the early national period outlasted the Civil War and Reconstruction.

It would be coy to end this Article without mentioning the Minimum Essential Coverage Provision of the Patient Protection and Affordable Care Act of 2010.[13] Commonly referred to as the individual mandate, and upheld in 2012 by the Supreme Court,[14] this provision requires most Americans to maintain a minimum level of health insurance coverage beginning in 2014. During the course of litigation on the constitutionality of the individual mandate, challengers contended that it was unprecedented: never before, they said, had Congress required Americans to purchase something (in this case, an insurance policy).[15] Supporters of the healthcare mandate responded, however, that it was not unprecedented because in the Militia Act of May 8, 1792, Congress required militiamen to acquire their own arms and equipment.[16] The constitutionality of the healthcare mandate is not central to this Article. Nonetheless, Part V offers some reflections on the relevance of the militia history to the healthcare case (my bottom line is that neither side had a sound understanding of the relevance of the Militia Act) while also drawing out some broader implications for identifying and using America's unwritten Constitution.

I. MILITIA AND MANDATES

This Part provides the necessary background to the debates in the early years of the Republic about federal power with respect to arming militiamen. The discussion begins with a brief overview of the colonial

10. *Debates on the Militia Bill*, *supra* note 4.
11. AMAR, *supra* note 1, at 141.
12. *Id*. at 449–77 (describing the "unfinished Constitution").
13. Patient Protection and Affordable Care Act, 26 U.S.C. § 5000A (2010).
14. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).
15. *Id*.
16. *Id*.

militia system and of the role of the militia during the Revolutionary War. It then turns to the regulation of the militia under the Articles of Confederation and the adoption of the militia clauses of the Constitution. We end up with constitutional text that, while giving both the federal government and the states explicit powers with respect to the militia, does not specify precisely how militiamen are to be armed. With the arming question left unanswered, it was resolved beyond the text in the early years of the Republic when militiamen were readied and called into service.

A. Origins

During the seventeenth century, every colony except Pennsylvania organized a militia, based loosely on the traditional English practice of universal service and self-arming.[17] In the colonial militia system, able-bodied white men of military age (typically sixteen to sixty) were required, unless they were exempt from service,[18] to enroll in the local militia unit, arm themselves, participate in training exercises, and go to fight when called.[19] The colonial requirement that militiamen possess and maintain arms had origins in the English system of assizes of arms that began with Henry II's 1181 proclamation obligating every free man to keep specified arms in order to aid in the defense of the kingdom.[20] Colonial militia laws provided for fines against individuals for failing to participate as required or failing to maintain the correct arms and equipment.[21] Fines were collected at the local level and typically were used to purchase supplies for the benefit of the local militia company.[22] For example, in Massachusetts in 1631, the Court of Assistants ordered that every town ensure that its male inhabitants were furnished with a specified list of arms: men without the arms were required to purchase them and those who could not afford to do so were to be supplied with arms by the town and then pay back the town in due course for the purchase price.[23] The next year, Massachusetts provided for single men lacking the

17. LAWRENCE DELBERT CRESS, CITIZENS IN ARMS: THE ARMY AND THE MILITIA IN AMERICAN SOCIETY TO THE WAR OF 1812, at 4 (1982).

18. Members of certain occupational groups were exempt from service. For example, in 1647, those exempted in Massachusetts included members of the general court, physicians, ministers, schoolmasters, and officers and students of Harvard College. HERBERT LEVI OSGOOD, 1 THE AMERICAN COLONIES IN THE SEVENTEENTH CENTURY 506 (1904).

19. *Id*. at 506–10.

20. *See* MICHAEL PRESTWICH, ARMS AND WARFARE IN THE MIDDLE AGES: THE ENGLISH EXPERIENCE 121 (1996).

21. OSGOOD, *supra* note 18, at 499.

22. *Id*. at 508.

23. *Id.* at 499. Massachusetts divided the infantry into pikemen and musketeers. Pikemen were required to be armed with a pike, corselet, head-piece, sword, and knapsack; musketeers were obligated to possess a musket of a specified length as well as a priming wire, scourer and mold, sword, rest, bandoleers, one pound of powder, twenty bullets, and two fathoms of matches. *Id.* at 500.

required arms to be put out to work.[24] In 1634, the colony purchased a shipment of arms from England for distribution among the towns: with this supply, men who failed to purchase arms were subject to a fine of ten shillings.[25] Within each town, a company clerk maintained the roster of town residents required to serve, collected fines from delinquent residents, and twice a year took the assize of arms and provided an accounting to the colonial government.[26] Other colonies relied upon similar mechanisms: specification by the colonial legislature of arms that militiamen had to possess, provision for the town to supply arms with the purchase price to be paid off by the militiamen, enforcement through fines collected at the local level, and reporting back to the central government.[27] The main advantage of directing militiamen to provide their own arms was obvious: the government saved money. In addition, colonial officials anticipated that militiamen would take proper care of weapons and other equipment they themselves were required to supply.[28]

The colonial self-arming requirement must, however, be understood in context. The militia was just one component of colonial security services. The colonies also had volunteer troops and by the beginning of the eighteenth century, these had become the principal defensive force.[29] Volunteer troops were raised by the colonial legislatures (which had a variety of mechanisms for enticing volunteers into service)[30] and they served for extended periods in frontier campaigns and at times under the command of British regulars.[31] These volunteer units were markedly different from the militia. Colonial officials paid volunteer troops wages for their service, appointed their officers and specified their training regimes, and, importantly for our purposes, outfitted the volunteers with arms and equipment.[32] As a result, the volunteer units were typically better-trained and better-equipped than were the ordinary militia. Not surprisingly, the role the militia played quickly became of secondary significance. While militia units occasionally served in local military campaigns, by the early eighteenth century their principal function was to

24. *Id.* at 499.
25. *Id.*
26. *Id.* at 503–04.
27. *Id.* at 499–504.
28. *See id.* at 508.
29. CRESS, *supra* note 17, at 7–8.
30. For example, by the 1720s, Massachusetts provided enlistment bounties and pensions for soldiers wounded in service; Massachusetts also experimented with supplementing the roster of volunteers by ordering vagrants into service. *Id*. at 6. During the Seven Years War, New York granted pardons to prisoners willing to serve in its volunteer regiments. *Id*. Virginia by the 1740s exempted soldiers from taxes and civil suits and ordered the unemployed into service. *Id*. *See generally* RICHARD H. KOHN, EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783-1802, at 6–9 (1975).
31. CRESS, *supra* note 17, at 5–7.
32. *Id*. at 8.

maintain civil order as a local police force.[33] In particular, the militia performed night watch functions.[34] It also put down slave insurrections, including, famously, one in New York City in 1741.[35]

B. The Militia as Symbol

Beyond its practical role, the militia served as an important symbol. Because the colonial militia represented law enforcement drawn from the local community, it had "the dual function of maintaining civil order while ensuring that the demand for domestic order did not become a disguise for tyranny."[36] In other words, the militia embodied both an ideal of universal service as well as a check on the government. Since the militia could refuse to suppress—indeed it could join—a civilian insurrection, it was not simply an arm of the colonial legislature but was rather identified with individual political responsibility and with liberty.[37]

Amar identifies a series of symbolic texts—from the Declaration of Independence to the "I Have a Dream" speech—that reinforce the written Constitution.[38] Nothing, however, symbolized revolutionary ideals and the birth of the Constitution more dramatically than did the militia. In moving, as we do in the next Sections of this Article, from the colonial period to the era of constitutional self-governance, the militia's symbolic significance can scarcely be understated. For the militia's symbolism came to far outweigh the rather limited role it performed in the revolutionary period and, with the war won, this symbolism turned into romanticism.[39] While militia units served in early high-profile campaigns, including at Bunker Hill and Saratoga, they soon took a secondary role to the better-trained Continental Army.[40] For the bulk of the war, militia companies served principally to maintain a military presence throughout the country, suppress loyalists, prevent slave uprisings, act as a stop-gap while new Continental troops were being recruited, and provide a pool of potential recruits for the Continental Army.[41] Nonetheless, to Americans in the founding era and for decades afterwards, the militia was the very embodiment of the people whose fighting spirit had brought freedom from imperial chains and whose "We . . . do" had brought the federal Constitution into being.[42] The question of who controlled the militia—

33. *Id.* at 7–9.
34. *Id.* at 7.
35. *Id.*
36. *Id*. at 9.
37. *See id*. at 12–13.
38. AMAR, *supra* note 1, at 247.
39. *See* CRESS, *supra* note 17, at 12.
40. *Id.* at 58.
41. *Id.*
42. U.S. CONST. pmbl.

and how—was the question of what kind of government Americans had won.

C. Revolution and Tradition

In preparing the militia for war against the British, the Continental Congress took a cue from the colonial system. On July 18, 1775, Congress issued a resolution that sought to compel militiamen to outfit themselves with arms and equipment.[43] The resolution "recommended to the inhabitants of all the United *English* Colonies in *North America*, that all able-bodied effective men, between sixteen and sixty years of age, in each Colony, immediately form themselves into regular companies of Militia," with one-quarter of the militiamen of each colony organized into companies of Minute Men ready to be dispatched on short notice to defend their own or a neighboring colony.[44] Congress also "recommended" "[t]hat each Soldier be furnished with a good Musket that will carry an ounce ball, with a bayonet, steel ramrod, worm, priming-wire, and brush fitted thereto; a cutting-sword, or tomahawk; a cartridge-box that will contain twenty-three rounds of cartridges, and twelve flints; and a knapsack."[45] In addition, Congress recommended "[t]hat all the Militia take proper care to acquire military skill, and be well prepared for defence, by being each man provided with one pound of good Gunpowder, and four pounds of Ball fitted to his Gun."[46] Written in the passive tense ("be furnished", "[be]. . . provided with"), these arming provisions might be understood to mean that the colonial governments were responsible for providing militiamen within their jurisdictions with the arms and equipment Congress had deemed necessary. Not so. A separate provision of the same resolution reveals that Congress was depending upon individuals to arm and equip themselves in the first instance: the Congress "recommended to the Assemblies . . . that they devise proper means for furnishing with Arms such effective men as are poor and unable to furnish themselves."[47] In other words, the default was that militiamen would arm and equip themselves; the colonial governments needed only make provision for militiamen who could not afford to comply.

D. National Power and its Limits

In a most general sense, then, Congress' resolution tracked the method colonial governments had used for enrolling and arming the militia: identify who is part of the militia, specify the arms militiamen were to

43. Res. of July 18, Cont.'l Cong. (1775).
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*

possess, and rely upon local government to supply arms to men unable to purchase them. Yet Congress' resolution was only a recommendation.[48] For unlike the colonies, the Continental Congress had no authority itself to force militiamen to supply their own arms and equipment.[49] The colonial assemblies could themselves direct militiamen to comply with the congressional resolution (and fine them or otherwise punish them for failing to do so).[50] Given the longstanding tradition of local control over the militia, however, the assemblies were not eager to simply adopt congressional regulations; nor were the assemblies eager to step up as administrators of Congressional mandates.[51] As a result, while the revolutionary assemblies took steps to prepare militiamen for war, they did not follow the precise recommendations that Congress had issued. Instead, the assemblies issued their own requirements to form and outfit militia units as they, and not Congress, saw fit. For example, the New York legislature required that "every able bodied male person Indians and slaves excepted residing within this State from sixteen years of age to fifty . . . tender himself to be enrolled as of the militia to the captain . . . of the beat wherein he shall reside . . . ."[52] So far so good: sixteen to fifty fell within the age range Congress itself had specified.[53] New York did not, however, adopt Congress' recommended list of arms and equipment. Under the New York law:

> [E]very person so inrolled and notified shall within twenty days thereafter respectively furnish and provide himself at his own expence with a good musket or firelock fit for service a sufficient bayonet with a good belt, a pouch or cartouch box containing not less than sixteen cartridges suited to the bore of the musket or firelock each cartridge containing a proper quantity of powder and ball or in lieu of such pouch or cartouch box and cartriges with a quantity of powder and ball respectively disposed of in a powder horn and shot bag and wadding equivalent to such cartriges, and two spare flints a blanket and a knapsack and shall appear, so armed accoutred and provided when called out to exercise or duty as herein after di-

48. *See id.*

49. *Continental Congress, 1774-1781*, U.S. DEP'T OF STATE, http://history.state.gov/milestones/1776-1783/ContinentalCongress.

50. *See Cress*, *supra* note 17, at 4.

51. *See* C. Joseph Bernardo & Eugene H. Bacon, AMERICAN MILITARY POLICY: ITS DEVELOPMENT SINCE 1775, at 17–18 (1955) ("Among the warmest advocates of American independence were the staunch supporters of the rights and sovereignty of the individual States. . . . Instead of uniting and pooling their resources against a common enemy, each State took to conduct its own private war with Great Britain.").

52. Act of Apr. 3, 1778, ch. 33, 1778 N.Y. Laws 62 (regulating the milita of the State of New York).

53. Notably, though, the New York statute did not apply to "such persons as are herein after excepted" and thus even the class of individuals subject to service (and to being armed) was more narrow than that Congress had sought. *See id.*

> rected except that when called out to exercise only he may appear without blanket or knapsack.[54]

The above list is more basic than what Congress thought a properly armed and equipped member of the militia should carry.[55] Likewise, other states required of their militiamen arms and equipment that fell short of the congressional wish-list.[56] When it came to regulating the militia, the emerging states were not mere agents of the Continental Congress.

E. The Militia and the Republic

In the period immediately following the Revolutionary War, with national troops disbanded and the Continental Congress left with virtually no military role, security was once again highly decentralized.[57] Under the Articles of Confederation, the states "enter[ed] into a firm league of friendship . . . for their common defence, the security of their liberties, and their mutual and general welfare" and they agreed to "assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever."[58] The Articles gave Congress the power of "determining on peace and war"[59] but there was no accompanying power to raise armies. The Articles required the states to "always keep up a well regulated and disciplined militia, sufficiently armed and accoutred" and to "provide and constantly have ready for use, in public stores . . . a proper quantity of arms, ammunition and camp equipage."[60] That was well and good but there was no mechanism under the Articles for Congress to enforce those requirements or, indeed, for Congress to call up militia men from

54. *Id.*

55. The statute made provision for militiamen too poor to arm and equip themselves:

> [I]f any such person shall appear to the captain or commanding officer to be too poor to arm accoutre and provide himself in manner aforesaid he shall be supplied for the purpose out of the monies to arise from the fines from time to time to accrue in the regiment to which he shall belong; and in case of deficiency thereof out of the public magazines of stores of this State by order of the person administering the government of this State for the time being.

Id.

56. *See, e.g.*, An Act for Regulating, Training, and Arraying of the Militia, and for Providing More Effectually for the Defence and Security of the State, ch. 13, 1781 N.J. Laws 12 (1781) ("And be it Enacted, That each Person enrolled as aforesaid, shall also keep at his Place of Abode one Pound of good merchantable Gunpowder and three Pounds of Ball sized to his Musket or Rifle."); An Act for establishing a Militia, 1785 Del. Laws § 7, p. 59 ("And be it enacted, That every person between the ages of eighteen and fifty . . . shall at his own expense, provide himself . . . with a musket or firelock, with a bayonet, a cartouch box to contain twenty three cartridges, a priming wire, a brush and six flints, all in good order, on or before the first day of April next, under the penalty of forty shillings, and shall keep the same by him at all times, ready and fit for service, under the penalty of two shillings and six pence for each neglect or default thereof on every muster day.").

57. *See* CRESS, *supra* note 17, at 94.

58. ARTICLES OF CONFEDERATION of 1781, art. III.

59. *Id*. art. IX, para. 1.

60. *Id*. art. VI, para. 4.

the states.[61] Likewise, states were required to share the financial costs of war in proportion to the value of property within each state,[62] but there was no means to force a state to contribute. Instead, each of these provisions depended upon the willingness of the states to comply.[63] If states declined to contribute funds for war, to send soldiers to fight, or to ensure militiamen were adequately armed and equipped, Congress had no means to force compliance.[64] The flipside, of course, was that the states had a continuing incentive to keep up their own militia system. Thus, each state continued to maintain a militia, consisting of adult, white males who were required to participate in training and other exercises several days per year.[65] Under state law, as under colonial law, militiamen were required to provide and maintain their own muskets and other equipment, according to a specified list; fines were imposed against those who failed to meet these requirements.[66] Increasingly, states also responded to the burden that arming requirements could impose. For example, in Pennsylvania, where militia service began in 1777, localities were required to provide militiamen with cartridges for firing practice on battalion day, funded by fines collected from militiamen who did not attend training exercises.[67]

1. The Interior Defence

In light of the limitations of the Articles of Confederation, in the spring of 1783, a Congressional Committee headed by Alexander Hamilton asked George Washington to prepare a plan for the "interior defence" that would be "commensurate with the principles of our government."[68] Washington responded with a proposal by which militiamen would be made available to serve the national government.[69] Amar teaches that in exploring the unwritten constitution we should give special status to George Washington's words and deeds, particularly on questions of executive authority.[70] In discovering what Amar calls our

61. *See* ARTICLES OF CONFEDERATION of 1781.
62. *Id*. art. VIII, para. 1.
63. Jason Mazzone, *The Security Constitution*, 53 UCLA L. REV. 29, 72 (2005).
64. *Id.* at 76–77.
65. *Id.* at 72.
66. *See, e.g.*, EMMONS CLARK, HISTORY OF THE SEVENTH REGIMENT OF NEW YORK, 1806-1889, at 28–29 (1890) (reporting that in 1786 the New York legislature amended its militia laws to make men between the ages of sixteen and forty-five subject to military service and requiring them to arm themselves and take part in training exercises).
67. An Additional Supplement to the Acts for the regulation of the Militia of the Commonwealth of Pennsylvania § 1, 13 Pa. Stat. at Large ch. 1339 (1788).
68. CRESS, *supra* note 17, at 78–79.
69. *Id.* at 79–80.
70. AMAR, *supra* note 1, at 332 ("To understand the full meaning of Article II . . . we must read its words through a special set of lenses—the spectacles of George Washington.").

"Georgian" Constitution,"[71] it is fair to consider its pre-1789 roots. Washington's security plan emphasized universalism and uniformity.[72] He deemed militia service a duty of citizenship: "[e]very citizen who enjoys the protection of a free Government, owes not only a proportion of his property, but even of his personal service to the defence of it . . . ."[73] Hence, under Washington's proposal, all white male citizens aged eighteen to fifty were to be enrolled in the militia.[74] At the same time, militiamen would be sorted into different classifications, with core duties falling upon a select militia.[75] This select militia would comprise volunteers willing to commit to a term of three to seven years of service (as an alternative, Washington proposed that all men aged eighteen to twenty-five comprise the select militia).[76] The select militia, the main fighting force, would be organized under the same rules as the regular army and it would operate under the command of former officers of the Continental Army.[77] As a result, the plan would reduce dependence upon the states. Washington stressed uniformity so that militiamen could act as an effective unit.[78] Hence, the members of the militia should be "provided with uniform Arms, . . . be regularly Mustered and trained, and . . . have their Arms and Accoutrements inspected at certain appointed times . . . ."[79] As far as *who* would provide the militiamen with these "uniform Arms," Washington wrote: "there should be, a perfect similarity in the Arms and Accoutrements, that they ought to be furnished, in the first instance by the public, if they cannot be obtained in any other way . . . ."[80] Thus, if individuals did not already possess the requisite arms, the "public" would supply them. Washington does not specify whether this "public" meant the federal government or the states. But the states appear the more likely candidate given that Washington also proposed that "[e]very State ought to Establish Magazines of its own, containing Arms, Accoutrements, Ammunitions, all kinds of Camp Equipage and Warlike Stores, and from which the Militia or any part of them should be supplied when-

71. *Id.*

72. George Washington, Sentiments on a Peace Establishment (May 1, 1783), *in* 26 THE WRITINGS OF GEORGE WASHINGTON 374, 391 (John C. Fitzpatrick ed., 1938).

73. *Id.* at 389.

74. *Id.*

75. *Id.* at 375, 389.

76. *Id.* at 390.

77. *Id.*

78. It bears noting that uniformity of arms did not mean what it means today in an age of mass-produced weapons. Each eighteenth-century musket varied from the next. Using a musket, without having it explode in the user's hands or face, required familiarity with the individual weapon. Muskets also required regular maintenance. See Harold L. Peterson, ARMS AND ARMOR IN COLONIAL AMERICA 1526-1783, at 178 (2000). A system of individual possession and care of muskets therefore had advantages over keeping muskets in an arsenal and handing them out to militiamen when their use was required.

79. Washington, *supra* note 72, at 389.

80. *Id.* at 393.

ever they are call'd into the Field."[81] Washington's proposed means of arming militiamen tracked that of the Continental Congress in 1775. Both approaches put the burden on the states (yet as before there was no specific means under Washington's plan to compel states to comply). Uniformity played an important role in Washington's proposal: the reason to have the "public" issue the arms was to ensure that militiamen, similarly armed and outfitted, could act as a coordinated unit.

2. From Militiamen to Volunteers

Hamilton received Washington's plan in May 1783 but he instead presented Congress with his own proposal.[82] Hamilton's proposal differed radically from that of Washington. Hamilton assigned the principal responsibility for defense to an army of volunteer professional soldiers, leaving only a supplemental role for the state militia.[83] Hamilton recommended initially a 2500-strong force, with troops enlisted for periods of six years at a time, under the command of a select officer corps.[84] Congress would control the recruitment of these volunteers and the appointment of their officers and would also be responsible for paying and equipping men in service.[85] In place of an unenforceable directive to the states to supply militiamen with arms and equipment, the federal government would take care of the matter itself. It is not clear whether Hamilton believed that the federal government had an obligation to pay its way or he simply recognized that relying on the states (or individuals) to supply arms was impracticable. Regardless, in Congress Hamilton's proposal faced a simple problem: the Articles of Confederation did not authorize a national army during peacetime.[86] With Hamilton's proposal dead on arrival, Congress did not review Washington's original plan either.[87] On June 2, 1784, with independence won, Congress dissolved the Continental Army save for eighty troops to secure federal arms depots.[88] On June 3, Congress issued a resolution "recommend[ing]" that the states of Connecticut, New Jersey, New York, and Pennsylvania provide a 700-strong militia force for twelve months of service; the Secretary of War would organize the units, and they would be paid like the Continen-

81. *Id.* at 394.

82. Alexander Hamilton, Continental Congress Report on a Military Peace Establishment (June 18, 1783), *in* 3 THE PAPERS OF ALEXANDER HAMILTON 378, 381–97 (Harold C. Syrett ed., 1962).

83. *Id*.

84. *See id*.

85. *Id.*

86. *See* ARTICLES OF CONFEDERATION of 1781.

87. CRESS, *supra* note 17, at 90.

88. 27 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 524 (Gov't Printing Office 1936) (1783).

tal Army.[89] These states complied, leaving domestic security once more the function of the state militia.

3. Knox and Washington

In 1786, Congress reissued its request for a national defense proposal. In response, Secretary of War Henry Knox presented his "Plan for the General Arrangement of the Militia of the United States."[90] Knox's plan combined aspects of the proposals Washington and Hamilton had previously offered. Like Washington, Knox's starting point was service as a universal obligation of citizenship: "every man of the proper age and ability of body, is firmly bound by the social compact, to perform personally his proportion of military duty for the defence of the state" and therefore "all men the legal military age, should be armed, enrolled, and held responsible, for different degrees of military service."[91] Also similar to Washington, Knox proposed reliance upon a select group: male citizens between the ages of eighteen and sixty were to be divided into three militia classes: an Advanced Corps, a Main Corps, and a Reserve Corps.[92] Most of Knox's plan focused on the composition and use of the Advanced Corps and here he drew on Hamilton's recommendation that the federal government cover the associated expenses.[93] Under Knox's plan, members of the Advanced Corps, men aged eighteen to twenty, were to be trained in state camps for forty-two days per year with the United States bearing the expense for arming and supplying them—at a cost of nearly $400,000 per year.[94] As with Hamilton's plan, it is not clear whether Knox's proposal here reflected anything more than a realization of practical necessity. Nonetheless, under Knox's plan, "[each individual, at] his first entrance into the advanced legions . . . shall be furnished with complete arms and accoutrements . . . ."[95] Young men who had trained in the advanced corps would go on to serve in the main corps which would consist of men aged twenty-one to forty-five.[96] Members of the Main Corps would be trained for four days per year.[97] Although Knox stated that "[t]he main corps is to be perfectly armed," he did not specify who would arm members of the main corps and, unlike the advanced corps,

89. *Id*. at 538–39.

90. HENRY KNOX, A PLAN FOR THE GENERAL ARRANGEMENT OF THE MILITIA OF THE UNITED STATES 2 (1786).

91. *Id.* at 7.

92. *Id*. at 8.

93. *Id*. at 17.

94. *Id*. at 14, 26–27. Though "[t]hose who shall serve in the cavalry, shall be at the expence of their own horses, and horse furniture, but they will receive forage for their horses, swords, pistols and clothing, equal in value to the [infantry]." *Id.* at 16.

95. *Id.* at 15.

96. *Id.* at 8.

97. *Id*. at 20.

Knox provided no budget for arming them.[98] Presumably, the burden remained therefore on the states. The Reserve Corps (ages forty-six to sixty) would assemble twice per year "for the inspection of arms," but Knox also did not specify who would arm members of the reserve corps.[99] Debate over the Knox plan was delayed as a result of the start of the Constitutional Convention in Philadelphia.[100]

4. Philadelphia

At the Philadelphia Convention, there was lengthy debate on the question of the role of the militia and control over it.[101] The issue of how the militia should be armed was a central component of that debate.[102] According to Madison's notes (the source for all references in this Section as to what transpired at the Philadelphia Convention), on August 21, 1787, New Jersey delegate (and governor) William Livingston for the Committee of Eleven proposed giving Congress power

> [t]o 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 [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 the [United] States.[103]

We know how the story turns out. This proposed language tracks almost perfectly the text that was ultimately transmitted to the states as part of the Constitution and ratified.[104] Yet the debate that transpired between the Committee of Eleven's proposal, and ratification of the Constitution reflected important perspectives on the relationship between the national government and the militia that would reemerge after 1789 once the Congress set to work on securing the new nation.

When, on August 23, 1787, the Convention took up the Committee of Eleven's militia proposal, the first issue was whether it unintentionally limited the authority of state government.[105] Roger Sherman of Connecticut moved to strike the clause specifying the powers reserved to the states on the ground that it was "unnecessary" in that "[t]he States will have this authority [to appoint officers and train the militia] of course if not given up."[106] Sherman's Connecticut colleague, Oliver Ellsworth

98. *Id.*
99. *Id*. at 21.
100. CRESS, *supra* note 17, at 92.
101. JAMES MADISON, NOTE OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 494–95 (Adrienne Koch ed., Ohio U. Press 1966) (1840).
102. *Id.*
103. *Id.* When the Convention took up the provision on August 23, Madison reports the provision ending with "discipline prescribed." *Id*. at 512.
104. U.S. CONST. art. I, § 8, cl. 16.
105. MADISON, *supra* note 101, at 513.
106. *Id*.

thought the clause should stay because "discipline was of vast extent and might be so expounded as to include all power on the subject."[107] In other words, Congress' enumerated power might swallow up the whole. As Rufus King of Massachusetts observed, "by *organizing*, the Committee meant, [only] proportioning the officers [and] men—by *arming*, [only] specifying the kind size [and] caliber of arms—[and] by *disciplining* [only] prescribing the manual exercise evolutions &c."[108] In other words, as with Washington's earlier plan, Congress' role was to ensure uniformity. Satisfied that the provision as written supported rather than undermined state power, Sherman withdrew his motion.[109]

As often happens in committee meetings, debate moved from the meaning of a specific clause to basic principles.[110] Elbridge Gerry of Massachusetts set forth the concern with national power over the militia that must have been on the minds of many of the delegates. Laying down the gauntlet, Gerry said he would rather "let the Citizens of Massachusetts be disarmed" entirely than "take the command [of them away] from the States, and subject them to the [General] Legislature."[111] National power over the militia, Gerry said, "would be regarded"—presumably by the People—"as a system of Despotism."[112] Scarcely moments into the debate, the Constitution's defenders were thus put on the defensive: they needed to explain how national governmental power over the militia was consistent with liberty.

If his convention notes are to be credited, James Madison was the great persuader. Madison explained that the powers of the national government over the militia were designed to be very limited. "[*A*]*rming*," Madison said, did not extend to supplying (or taking away) arms; and "disciplining" did not include "penalties [and] Courts Martial for enforcing them."[113] All that Congress could do was prescribe uniform standards. Rufus King resisted Madison's construction. King took the position that "*arming* meant not only to provide for uniformity of arms, but included authority to regulate the modes of furnishing, either by the Militia themselves, the State Governments, or the National Treasury . . . ."[114] Further, King asserted, "disciplining" the militia of course included setting "penalties and every thing necessary for enforcing" them.[115] In other words, the Committee of Eleven had set forth a perfect recipe for governmental abuse: the national government got to decide which arms the

107. *Id*.
108. *Id*.
109. *Id*.
110. *See id.* at 513–19.
111. *Id.* at 513.
112. *Id*.
113. *Id*.
114. *Id.*
115. *Id*.

militia would (and would not) possess and it could back up its decision by imposing penalties upon individuals who failed to comply. Acting now jointly, Ellsworth and Sherman proposed modifying the proposed language to specify that the national government had authority only to "establish an uniformity of arms, exercise [and] organization for the Militia, and to provide for the Government of them when called into the service of the [United] States."[116] This, they explained, would "refer the plan for the Militia to the General [Government] but leave the execution of it to the State [Governments]."[117] State power, along with the militia itself, would then be adequately protected. Madison had what proved to be a trump card: the pressing need for a more regularized, and thus more reliable, militia.[118] If the militia were to play a predominant security role, there needed to be coordination and such coordination could only be achieved via national authority.[119] With this rationale deployed, Ellsworth and Sherman's motion to alter the proposed language was defeated and the Committee of Eleven's draft was approved.[120] The proposed Constitution sent to the states therefore authorized Congress to declare war, to raise and support an army and a navy (with a two-year army appropriations limit), and to call out the state militias to protect the states from invasion and domestic violence, as well as to execute the laws of the Union.[121] Congress was empowered to provide for organizing, arming, and disciplining the militia, and for governing them when employed in the service of the United States.[122] The President was made Commander in Chief over federal troops and of the militia when in federal service.[123] The states retained authority to train the militia and the right to appoint officers.[124]

5. Ratification

The Constitution that left the Convention was only a proposal. When the document reached the states, the ratifying conventions also

116. *Id.* at 514.
117. *Id*.
118. *Id*. at 514–15. Madison argued:

> The primary object is to secure an effectual discipline of the Militia. This will no more be done if left to the States separately than the requisitions have been hitherto paid by them. The States neglect their Militia now, and the more they are consolidated into one nation, the less each will rely on its own interior provisions for its safety [and] the less prepare its Militia for that purpose; in like manner as the militia of a State would have been still more neglected than it has been if each County had been independently charged with the care of its Militia. The Discipline of the Militia is evidently a *National* concern, and ought to be provided for in the *National* Constitution.

Id.
119. *Id.*
120. *Id*. at 515.
121. *Id*. at 616–26.
122. *Id.* at 620.
123. *Id.*
124. *Id*.

took up the question of arming the militia. Delegates to the Virginia Convention debated the arming question squarely as an issue of federalism and of the relationship of the proposed governmental structure to individual liberties.[125] On June 5, 1788, Patrick Henry argued that the Constitution should be rejected on the basis that it gave exclusive power to Congress to arm the militia.[126] Adding force to Elbridge Gerry's Philadelphia complaint, Henry asserted that were Congress to have such a power, tyranny would result because Congress could elect to withhold arms altogether.[127] Here is how Henry put the objection:

> [A]ll power will be in [Congress'] own possession . . . . [O]f what service would militia be to you, when, most probably, you will not have a single musket in the state? [F]or, as arms are to be provided by Congress, they may or may not furnish them. . . . [T]heir control over our last and best defence is unlimited. If they neglect or refuse to discipline or arm our militia, they will be useless: the states can do neither—this power being exclusively given to Congress. The power of appointing officers over men not disciplined or armed is ridiculous; so that this pretended little remains of power left to the states may, at the pleasure of Congress, be rendered nugatory.[128]

Henry pressed the point four days later, arguing that under the proposed Constitution the states were simply disabled from arming (and disciplining) the militia because the Constitution had assigned the power to the national government.[129] George Mason shared Henry's understanding of Congress' power, warning that the end result would be the destruction of the militia and the rise of a standing army under the auspices of the central government.[130] It fell once again upon Madison to head off a vote

125. At the Pennsylvania Convention in December 1787, arming was discussed in the context of a debate among delegates over the security benefit of a uniform militia versus the risk to liberty presented by national control of the militia. On December 11, 1787, James Wilson spoke in favor of Congress's power to regulate the militia for greater uniformity:

> [A]ny gentleman, who possesses military experience, will inform you that men without a uniformity of arms, accoutrements, and discipline, are no more than a mob in a camp; that, in the field, instead of assisting, they interfere with one another. If a soldier drops his musket, and his companion, unfurnished with one, takes it up, it is of no service because his cartridges do not fit it. By means of this system, a uniformity of arms and discipline will prevail throughout the United States.

2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 520–22 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter 2 ELLIOT'S DEBATES].

126. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 51–52 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter 3 ELLIOT'S DEBATES].

127. *Id.*

128. *Id.*

129. *Id.* at 168–69 (arguing that if "Congress will not arm [the militia], they will not be armed at all").

130. *Id.* at 379. According to Mason:

> Under various pretences, Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive right to arm them, &c. Here is a line of division drawn between them—the state and general governments. The power over the militia is divided between them. The national government has an exclusive right to provide for arming, organizing, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States. . . . Should the national government wish to

against the proposed Constitution on the ground that it threatened the militia. Madison rejected Mason and Henry's reading of the proposed Militia Clauses as disempowering the states and risking a disarmed populace.[131] Madison asserted that Congress' power to organize and call forth the militia was in fact "an additional security to our liberty" in that there would be a means of national defense and that this came "without diminishing the power of the states in any considerable degree."[132] Why was the power of the states preserved? Madison invoked the theme that motivated Washington's earlier proposal: uniformity. Madison emphasized that Congress' power over the militia was limited to "establish[ing] a uniform discipline throughout the states, and to provid[ing] for the execution of the laws, suppress[ing] insurrections, and repel[ing] invasions . . . ."[133] These, Madison claimed, were "the only cases wherein [Congress] can interfere with the militia . . . ."[134] Each realm of federal power, Madison argued, was necessary to preserving security and thus protecting liberty,[135] and outside of the constitutionally-specified realms of national power, the states governed.[136] As for arming the militia, Madison argued that the specification of congressional authority did not remove power from the states.[137] Instead, Congress' power to provide for arming the militia was "concurrent" with state power.[138] In fact, Madison claimed, Congress' power was a backstop: the power to correct for a failure on the part of the states to arm their own militiamen, a problem that should have been familiar to Virginia's delegates.[139] Henry Lee and Edmund Randolph agreed with Madison's construction of the Constitution's arming clause.[140]

render the militia useless, they may neglect them, and let them perish, in order to have a pretence of establishing a standing army.

Id.

131. *Id.* at 90.

132. *Id.*

133. *Id.*

134. *Id.*

135. Madison stated:

Without uniformity of discipline, military bodies would be incapable of action: without . . . power to call forth the strength of the Union to repel invasions, the country might be overrun and conquered by foreign enemies: without . . . power to suppress insurrections, our liberties might be destroyed by domestic faction, and domestic tyranny . . . established.

Id.

136. *Id.* at 383 ("The states are to have the authority of training the militia according to the congressional discipline; and of governing them at all times when not in the service of the Union.").

137. *Id.* at 382.

138. *Id.*

139. *Id*. ("Have we not found, from experience, that, while the power of arming and governing the militia has been solely vested in the state legislatures, they were neglected and rendered unfit for immediate service?").

140. *Id.* at 177–79 (stating that "[t]he states are, by no part of the plan before you, precluded from arming and disciplining the militia, should Congress neglect it"); *Id.* at 206 ("Should Congress neglect to arm or discipline the militia, the states are fully possessed of the power of doing it; for they are restrained from it by no part of the Constitution.").

Madison had opened the door to a basic question about the federal design. Concurrent power? Patrick Henry took the position that there could be no such thing and if the power to arm the militia was shared then other powers were shared also.[141] In Henry's view, such an arrangement was impossible: any assignment of authority to one level of government was, necessarily, exclusive: "[t]o admit this mutual concurrence of powers," he argued, "will carry you into endless absurdity—that Congress has nothing exclusive on the one hand, nor the States on the other."[142] Reading the power to arm as a concurrent power would mean "our militia shall have two sets of arms, double sets of regimentals, &c., and thus, at a very great cost, we shall be doubly armed."[143] Accordingly, for Henry, the only "rational" understanding of the Militia Clauses was "that Congress shall have exclusive power of arming them, &c., and that the state governments shall have exclusive power of appointing the officers, &c."[144] The debate quickly moved beyond the question of the militia. George Nicholas weighed in with his own account that recognized concurrent power on the question of arming but resisted a more general conclusion that powers granted were powers shared. Nicholas explained:

> The power of arming [the militias] is concurrent between the general and state governments; for the power of arming them rested in the state governments before; and although the power be given to the general government, yet it is not given exclusively; for, in every instance where the Constitution intends that the general government shall exercise any power exclusively of the state governments, words of exclusion are particularly inserted. Consequently, in every case where such words of exclusion are not inserted, the power is concurrent to the state governments and Congress, unless where it is impossible that the power should be exercised by both. It is, therefore, not an absurdity to say, that Virginia may arm the militia, should Congress neglect to arm them. But it would be absurd to say that we should arm them after Congress had armed them, when it would be unnecessary; or that Congress should appoint the officers, and train the militia, when it is expressly excepted from their powers.[145]

In other words, the baseline was that power granted to the federal government was shared with the states unless the Constitution said otherwise—or it would be "impossible" for a single power to be exercised jointly.[146] As to the militia, then, the states could provide arms because the Constitution did not prohibit them from doing so.[147]

141. *Id.* at 386.
142. *Id.*
143. *Id*.
144. *Id*.
145. *Id*. at 391 (statement of George Nicholas).
146. *Id.* Nicholas did not mention it but he had some bits of text in his favor. Section 10 of Article I contains prohibitions on the states, lending some support to Nicholas's theory of shared power

6. Enumerations and Silences

These debates reflected both a concern with arming the militia specifically and a more general shortcoming of the Constitution's enumeration of federal powers. While the Constitution gave Congress a set of specific powers, it did not make clear—did not provide by its writing—whether a grant of power to Congress removed that same power from the state governments. Article I, section 10 of the Constitution imposes some prohibitions on state government but that section does not cover all of the powers given to Congress in Article I, section 8.[148] One might infer that section 8 powers not covered in section 10 are indeed shared, but the Constitution does not say so. Thus, reading the Constitution does not tell us specifically whether giving Congress power to "provide for . . . arming . . . the Militia" means that the states can or cannot also provide for arming militia companies. The Tenth Amendment tells us where power resides if it is not delegated to the federal government but it also does not reveal whether a power that is given to Congress is exclusive.[149] The Supreme Court, for its part, has never answered this question as a general matter. After ducking the problem with respect to the Commerce Clause in *Gibbons v. Ogden* (1824)[150] and *New York v. Miln* (1837),[151] the Supreme Court in the modern era settled on a compromise approach under the dormant commerce clause doctrine.[152] Yet the Court has never supplied a dormant power doctrine for all of the other congressional powers listed in Article I, section 8 of the Constitution. In the context of considering arming the militia, therefore, the Virginia delegates identified the problem of determining whether a congressional power

(though with a qualification we will see in a moment). The Supremacy Clause of Article VI supported Nicholas's concept of impossibility. *See also* ST. GEORGE TUCKER, *View of the Constitution of the United States* (1803), *in* VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS 91, 214–15 (Clyde N. Wilson ed., 1999) (["T]he power of arming the militia, not being prohibited to the states, respectively, by the constitution, is, consequently, reserved to them, concurrently with the federal government.").

147. Edmund Pendleton sliced the apple even more finely:

> The power of the general government to provide for arming and organizing the militia is to introduce a uniform system of discipline to pervade the United States of America. But the power of *governing* the militia, so far as it is in Congress, extends only to such parts of them as may be employed in the service of the United States. When not in their service, Congress has no power to govern them. . . . [a]nd though Congress *may* provide for arming them, and prescribe the mode of discipline, yet the states have the authority of training them, according to the uniform discipline prescribed by Congress. But there is nothing to preclude them from arming and disciplining them, should Congress neglect to do it.

3 ELLIOT'S DEBATES, *supra* note 126, at 440.

148. *Compare* U.S. CONST. art. I, § 10, *and* U.S. CONST. art. I, § 8.

149. *See* U.S. CONST. amend. X.

150. Gibbons v. Ogden, 22. U.S. 1 (1824).

151. New York v. Miln, 36 U.S. 102 (1837).

152. *See, e.g.*, Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) ("Where the [state] statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.").

was exclusive even before the Constitution had taken effect. In particular, the debate between Patrick Henry and George Nicholas reflected perfectly the competing positions advanced at the Court in *Gibbons* and in *Miln*.[153] Whatever the merits of Henry and Nicholas's approach to constitution construction, in June 1788, the Virginia Convention ratified the Constitution—but proposed also several (future) amendments to clarify the role of the militia and the respective power of the federal and state governments and to ensure that militiamen would remain armed.[154]

It may be hard today to appreciate why the specific issue of regulating the militia, including arming it, would generate such controversy. In order to understand the importance of this issue, it is useful to recognize that among the powers given to Congress in section 8 of Article I of the Constitution, the powers "[t]o provide for calling forth the Militia" and "[t]o provide for organizing, arming, and disciplining, the Militia" were the most direct means by which Congress could regulate individual citizens.[155] Americans of the late eighteenth century would not have expected to be affected much by federal regulation of "commerce with foreign Nations, and among the several States" or by a "uniform rule of naturalization," and they could avoid, if they chose, federal "post offices and post roads" and the "exclusive legislation" Congress would exercise in the District of Columbia, and so on.[156] The militia powers of section 8, by contrast, allowed Congress to order citizens around: to organize, arm, and discipline them and to make them serve in federal employ.[157] Male citizens reading the proposed Constitution would zero in on the militia clauses, which related directly to them. Women too would recognize in these clauses that their lives would be affected, with their husbands and sons subject to being called into federal service and governed by other federal requirements. The exercise of militia powers could affect virtually every household.

There were three ways in which militiamen could be armed: by the federal government, by the states, or by militiamen purchasing the arms

153. *See* Mazzone, *supra* note 63, at 87.

154. *See* 3 ELLIOT'S DEBATES, *supra* note 126, at 657–60 (presenting amendments to specify the role of the militia in securing liberty and the right of the people to keep and bear arms; that standing armies should be avoided; the power of the states to provide for organizing, arming, and disciplining their militia if Congress neglects to do so; and the power of the states to impose punishments against the militia when not in the service of the United States). New York, North Carolina, Rhode Island, and Pennsylvania similarly presented amendments limiting national use of militias on ratifying the Constitution. *See* 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 330–31 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter 1 ELLIOT'S DEBATES]; 2 ELLIOT'S DEBATES, *supra* note 125, at 406; 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 245 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter 4 ELLIOT'S DEBATES]; 1 ELLIOT'S DEBATES, *supra* at 334–36; 2 ELLIOT'S DEBATES, *supra* note 125, at 545–46.

155. U.S. CONST. art. I, § 8, cl. 15–16.

156. *Id.* cl. 3–4, 7, 17.

157. *Id.* cl. 15–16.

themselves (or through some combination of these three). From a modern perspective, federal power to "provide for . . . arming" the militia easily sounds like a power that corresponds to the first of these three options and that would operate to the benefit of citizens, who would be armed by the federal government.[158] Yet to Americans of the late eighteenth century, this was the option that, of the three, could easily present the biggest threat. For if Congress could provide for arming the militia, what was to stop Congress from disarming the militia? Hence, those in favor of ratifying the Constitution needed to persuade their fellow citizens that this power was limited and that there were sufficient safeguards to prevent its abuse. As the debates at the Philadelphia Convention and in the Virginia ratifying convention demonstrate, two main arguments were made in defense of congressional power. One, offered by James Madison in Philadelphia, said that Congress' power was not a power to control the provision of arms but only the power to prescribe uniform regulations so that militiamen called into federal service would be able to act as a coordinated body.[159] (On this account, arms would have to be supplied by individual militiamen or by the states.) The second argument, made most strongly by George Nicholas, was that the Constitution did not remove from the states the authority to arm their own militia.[160] In other words, even if Congress had power to supply arms, that power was not exclusive and so there was no risk that militiamen would end up disarmed. As the next Part shows, the earliest implementations of Congress' power to "provide for . . . arming" the militia both tracked Madison's narrow interpretation and was consistent with Nicholas's theory of concurrent authority.

F. Summary

Before turning to Congress' first use of its militia powers, it is helpful to consider more generally what the history that led to the ratification of the militia clauses of the Constitution tells us about the scope of federal authority. Two points bear highlighting. The first concerns the relationship between federalism and individual rights. Debates over the scope of federal power did not relate simply to what would be left to the states to regulate. Instead, the federalism question was, at its heart, about the way in which the federal-state division impacted the interests of individuals.[161] It was not merely that strong federal authority, in this case to regulate the militia, could subtract from the power of the states, but that the allocation of authority to Congress could undermine an im-

158. *Id.* cl. 16.
159. 3 ELLIOT'S DEBATES, *supra* note 126, at 90.
160. *See supra* note 145.
161. *See* Mazzone, *supra* note 63, at 148 n.639.

portant liberty of individuals.[162] Federalism was less a question about which level of government would regulate than about how to ensure regulations would not threaten individual citizens. Second, there was a prominent idea among supporters of the Constitution that congressional powers contained built-in limitations.[163] Thus, while the Constitution assigned Congress broad regulatory authority with respect to the militia, these powers were understood as circumscribed. In particular, Congress was not presumed to have the same powers, or even the same kinds of powers, over the militia that the colonies and later emerging states had possessed and exercised.[164] It was not, then, that certain powers of the states were taken from the states and given to Congress. Rather, congressional power was of a different kind, and limited in ways that the power of the colonies and the states were not.

II. A GOOD MUSKET

Constitutional history does not end with ratification. This Part turns to Congress' first uses of its militia powers. Following a brief discussion of the limited regulation of the militia by the First Congress, this Part takes up two federal laws enacted in May of 1792. One of those laws provided for the President to call forth the militia into federal service for various purposes.[165] The other organized the militia and directed militiamen to furnish their own arms and equipment.[166] This Part traces the events that resulted in the passage of the self-arming requirement and examines what it reveals about congressional power more generally.

A. The First Congress

Congress' initial uses of its powers over the militia were tepid. The First Congress opened for business on March 4, 1789.[167] In August of 1789, Congress established the War Department[168] with an operating budget of $137,000.[169] The following month, Congress continued in service 700 troops raised by the Continental Congress[170] and authorized the President to call into service such part of the militia as he judged neces-

162. *See id.*

163. 3 ELLIOT'S DEBATES, *supra* note 126, at 414.

164. *Id.*

165. Act of May 2, 1972, ch. 28, 1 Stat. 264.

166. Act of May 8, 1972, ch. 33, 1 Stat. 271.

167. *First Forty-three Sessions of Congress*, LIBRARY OF CONGRESS, http://memory.loc.gov/ammem/amlaw/lwhjlink.html#anchor1 (last visited July 2, 2013).

168. Act of Aug. 7, 1789, ch. 7, 1 Stat. 49 ("establish[ing] an Executive Department, to be denominated the Department of War.").

169. Act of Sept. 29, 1789, ch. 23, 1 Stat. 95 ("making Appropriations for the Service of the present year.").

170. 33 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 602–04 (Gov't Printing Office 1936) (1783).

sary for "the purpose of protecting the inhabitants of . . . the United States from the hostile incursions of the Indians."[171] If called into service, militiamen received the very same "pay and subsistence" as the federal troops.[172] On April 30, 1790, Congress replaced these requisitions with an infantry regiment of 1216 troops in service for three years, adopted a revised pay scale, and set up a pension scheme for wounded soldiers.[173] By the same statute, Congress reauthorized the President, "for the purpose of aiding the troops now in service, or to be raised by this act, in protecting the inhabitants of the frontiers, . . . to call into service from time to time such part of the militia of the states . . . as he may judge necessary," with "their pay and subsistence while in service . . . the same as the pay and subsistence of the troops" as specified in the statute.[174] A year later, Congress authorized, for the purpose of frontier defense, the raising of an additional infantry regiment of 912 troops plus officers.[175] Congress also gave the President, if he thought it "conducive to the good of the service, to engage a body of militia," the authority "to offer such allowances to encourage their engaging in the service, for such time and on such terms, as he shall deem it expedient to prescribe."[176] The President additionally could employ for six months up to 2000 levies (plus officers).[177] Militiamen (and levies) were "entitled to the same pay, rations and forage, and, in case of wounds or disability in the line of their duty, to the same compensation as the troops of the United States."[178] To cover the associated costs, Congress appropriated $312,686 generated by a liquor tax.[179] None of these statutory provisions caused controversy: none regulated the militia generally and none said anything about who was to provide militiamen with arms. Things would soon heat up.

B. The Second Congress

The Second Congress was more aggressive. Within the space of a week Congress enacted two significant laws concerning the militia. On May 2, 1792, Congress approved "An Act to provide for calling forth the

171. Act of Sept. 29, 1789, ch. 25, §§ 1, 5, 1 Stat. 95, 95–96 ("recogniz[ing] and adopt[ing] to the Constitution of the United States the establishment of the Troops raised under the Resolves of the United States in Congress assembled.").

172. *Id*. § 5, 1 Stat. at 96.

173. Act of Apr. 30, 1790, ch. 10, §§ 1, 5, 11, 1 Stat. 119, 120, 121 ("regulating the Military Establishment of the United States.").

174. *Id*. § 16, 1 Stat. at 121. The statute contains detailed provisions about the rate of pay and other benefits. Pay rates ranged from $60 per month for lieutenant-colonel commandant to $3 per month for privates and musicians. *Id*. § 5, 1 Stat. at 120.

175. Act of Mar. 3, 1791, ch. 28, § 1, 1 Stat. 222 (raising "another Regiment to the Military Establishment of the United States, and for making further provision for the protection of the frontiers").

176. Id. § 7, 1 Stat. at 223.

177. Id. § 8.

178. *Id*. § 10.

179. *Id*. § 15, 1 Stat. at 224.

Militia to execute the laws of the Union, suppress insurrections and repel invasions."[180] The first three sections of the Act set out the procedures for the President to call forth the militia to respond to invasions and domestic insurrections and to enforce laws.[181] Section 4 of the Act specified payment for militiamen when they were called forth, provided that they were subject to federal rules and articles of war when in federal service, and specified that militia service was limited to periods of three months at a time.[182] Subsequent sections of the Act specified fines and other penalties against militiamen when in the service of the United States.[183] Congress was in the business of regulating the militia; federal law now reached thousands of ordinary people.

1. The First Mandate?

Six days later, on May 8, 1792, the Second Congress, at the very end of its first session, passed "[a]n Act more effectually to provide for the National Defence by establishing an Uniform Militia throughout the United States."[184] For more than a century, this was the only federal statute under which the militia was organized. The Act enrolled every "free able-bodied white male citizen" between the ages of eighteen and forty-five in the militia company "within whose bounds such citizen shall reside."[185] Section 1 set out how these militiamen were to be armed. It read:

> [E]very citizen so enrolled and notified, shall, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball: or with a good rifle, knapsack, shot-pouch and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder; and shall appear, so armed, accoutred and provided, when called out to exercise, or into service, except, that when called out on company days to exercise only, he may appear without a knapsack. . . . [T]he commissioned officers shall severally be armed with a sword or hanger and espontoon, and . . . from and after five years from the passing of this act, all muskets for arming . . . the militia as herein

180. Act of May 2, 1792, ch. 28, 1 Stat. 264.

181. *Id*. §§ 1–3.

182. *Id*. § 4.

183. *Id*. §§ 5–8, 1 Stat. at 264–65.

184. Act of May 8, 1792, ch. 33, 1 Stat. 271. The Second Congress also added three infantry regiments to serve for three years and authorized the President to summon cavalry to protect the frontiers. Act of Mar. 5, 1792, ch. 9, §§ 2, 4, 13, 1 Stat. 241, 241–43.

185. Act of May 8, 1792, § 1, 1 Stat. at 271. The Act exempted certain federal officials and continued existing exemptions under state law. *Id*. § 2, 1 Stat. at 272.

> required, shall be of bores sufficient for balls of the eighteenth part of a pound.[186]

Congress had not asked the states to provide militiamen with arms in the way that the Continental Congress once sought. Nor had Congress taken the Hamiltonian path of itself issuing militiamen with arms. Instead, Congress had "provided" for arming the militia with a law telling militiamen to arm themselves.[187]

2. Constitutional Questions

The May 8, 1792 law resulted from an intense congressional debate on the scope of federal authority with respect to the militia and, more generally, on the contours of U.S. federalism.[188] That debate gives a particular meaning to the statutory requirement that militiamen provide their own arms.

The May 8, 1792 law began with a proposal for organizing the militia that Washington directed Secretary Knox to submit to Congress in January 1790.[189] Knox submitted a proposal based upon his 1786 plan which, in Knox's words, he had "modified according to the alterations" Washington had suggested.[190] Aside from some minor changes (the main difference was to reduce the number of days of training required of the advanced corps), the new plan did not differ in substance from the old.[191] The Knox/Washington plan was not well received in Congress and

186. *Id.* § 1, 1 Stat. at 271–72.

187. A separate provision of the statute imposed self-arming requirements on artillery and other specialized companies. The statute specified that out of the enrolled militia there would be formed for each battalion at least one company of grenadiers, light infantry, or riflemen, and that to each division there should form at least one company of artillery and one troop of horse made up of volunteers from the brigade, who "shall be uniformly clothed in regimentals, to be furnished at their own expense . . . ." *Id.*, § 4, 1 Stat. at 272–73. The statute specified how these companies were to be armed and equipped:

> [T]here shall be to each company of artillery, one captain, two lieutenants, four sergeants, four corporals, six gunners, six bombadiers, one drummer, and one fifer. The officers to be armed with a sword or hanger, a fusee, bayonet and belt, with a cartridge-box to contain twelve cartridges; and each private or matross shall furnish himself with all the equipments of a private in the infantry, until proper ordnance and field artillery is provided. There shall be to each troop of horse, one captain, two lieutenants, one cornet, four sergeants, four corporals, one saddler, one farrier, and one trumpeter. The commissioned officers to furnish themselves with good horses of at least fourteen hands and an half high, and to be armed with a sword and pair of pistols, the holsters of which to be covered with bearskin caps. Each dragoon to furnish himself with a serviceable horse, at least fourteen hands and an half high, a good saddle, bridle, mailpillion and valise, holsters, and a breast-plate and crupper, a pair of boots and spurs, a pair of pistols, a sabre, and a cartouch-box, to contain twelve cartridges for pistols.

Id. In addition, section 5 of the statute stated that "[E]ach battalion and regiment shall be provided with the state and regimental colours by the field officers, and each company with a drum and fife, or bugle-horn, by the commissioned officers of the company, in such manner as the legislature of the respective states shall direct." *Id.* § 5, 1 Stat. at 273.

188. Letter from George Washington to the Senate and House of Representatives (Jan. 21, 1790), *in* 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS 6.

189. *Id.*

190. Letter from Henry Knox to George Washington (Jan. 18, 1790), *in* 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS 6.

191. KOHN, *supra* note 30, at 128–30.

among the general public.[192] Besides the expense involved, there was strong opposition to dividing men into separate classes and in particular to putting the youngest men in an advanced corps such that they would be absent from their communities for a month each year.[193] With Congress having tabled the Knox/Washington Plan, in late April of 1790 a national defense committee began preparing legislation governing the militia.[194] On July 1, 1790, and again on December 15, 1790, Representative Elias Boudinot of New Jersey read the committee's proposed bill before the House.[195] The committee's bill departed in significant ways from the Knox/Washington proposal. Under the committee's bill, there was no separate corps for younger men.[196] Instead, men between the ages of 18 and 24 would serve in light infantry or rifle companies attached to regular companies and they would train four times per year alone and twice yearly with the company to which they were attached.[197] Instead of the federal government arming the militia, each militiaman would provide himself with specified arms and equipment: a musket and ammunition, a bayonet, a cartridge pouch, and a knapsack.[198] A militiaman who failed to appear when his company was mustered or who did not own the prescribed weapons and equipment was subject to a fine of up to one dollar.[199] The proposed bill exempted various categories of individuals from service but required them to pay an annual tax of two dollars.[200] Among other administrative officers, the proposed bill provided for the President to appoint a federal inspector who would attend training exercises and inspect arms and equipment in order to ensure compliance with federal requirements.[201]

The House Committee of the Whole took up the bill on December 16, 1790.[202] Opposition immediately emerged based on the financial burden the arming requirement would impose upon ordinary Americans.[203] Virginians had resisted congressional power over the militia at their ratifying convention and it was a Virginian, Josiah Parker, who released the first arrow.[204] According to the Annals of Congress, Parker complained that requiring Americans to arm themselves was simply "impracticable"

192. *Id.* at 130–31.
193. *Id.*
194. 1 ANNALS OF CONG. 1597 (1790) (Joseph Gales ed., 1834).
195. 1 ANNALS OF CONG. 1848 (1790) (Joseph Gales ed., 1834).
196. KOHN, *supra* note 30, at 131.
197. *Id.* at 131–22.
198. *Id.* at 132.
199. *Id.*
200. *Id.*
201. *Id.*
202. 1 ANNALS OF CONG. 1851 (1790) (Joseph Gales ed., 1834).
203. *Id.*
204. *Id.*

because "there are many persons who are so poor that it is impossible they should comply with the law."[205] Parker's solution was simple: "provision should be made for arming such persons at the expense of the United States."[206] Pennsylvania Representative Thomas Fitzsimons saw a more general burden. For one thing, "subjecting the whole body of the people to be drawn out four or five times a year was a great and unnecessary tax on the community . . . ."[207] The point would have squarely resonated with Americans who needed to plough fields and harvest crops to ensure their livelihoods. In addition, Fitzsimons thought the congressional list of arms and equipment was extravagant: "[a]s far as the whole body of the people are necessary to the general defence, they ought to be armed; but the law ought not to require more than is necessary . . . ."[208] Combining Parker's complaint with that of Fitzsimons, Timothy Bloodworth of North Carolina thought Congress should simply foot the bill: "as the militia was to be organized and disciplined under the authority of the United States, and to be employed for the general defence, whenever and wherever Congress should direct, it appeared but reasonable that those who benefited by them should be at the expense of arming them."[209] Yet when Representative Parker moved to amend the bill, he did not adopt Bloodworth's wholesale approach but instead sought only to have the federal government pay to arm and equip militiamen who could not afford to do so themselves.[210] Parker was no fool. We can see why his amendment did not embrace universal provision by the federal government by taking up the arguments of those who defended the committee's bill.

In responding to objections, and to Parker's motion, members of the House offered two main arguments. One, made principally by James Jackson of Georgia, recalled the debates during the ratifying period, and focused on the threat to individual liberties should Congress be responsible for arming the militia.[211] The Annals report that Jackson stated that:

> [T]he people of America would never consent to be deprived of the privilege of carrying arms. Though it may prove burthensome to some individuals to be obliged to arm themselves, yet it would not be so considered when the advantages were justly estimated. . . . The Swiss Cantons owed their emancipation to their militia establishment. The English cities rendered themselves formidable to the Barons, by putting arms into the hands of their militia; and when the militia united with the Barons, they extorted *Magna Charta*

205. *Id.*
206. *Id.*
207. *Id.* at 1852.
208. *Id.*
209. *Id.* at 1854.
210. *Id.* at 1853.
211. *See id.* at 1852–53.

> from King John. . . . If we neglect the militia, a standing army must be introduced . . . . In a Republic every man ought to be a soldier, and prepared to resist tyranny and usurpation, as well as invasion, and to prevent the greatest of all evils—a standing army.[212]

Jackson may have been long on rhetoric but his points captured perfectly what was at stake at the moment in time the House found itself. The lesson of history was that it was essential to resist the temptation to have the national government supply ordinary citizens with arms. Giving in would alleviate a short-term financial burden but it came with the unavoidable risk of blurring the distinction between the militia and the (national) state. Arms supplied by the national government were not free: the price might be liberty itself. We should pause to address the seemingly incongruous nature of Jackson's remarks. Here, after all, was a member of Congress warning that Congress was a threat to individual freedom. Why, one might ask, couldn't Representative Jackson and those of a like mind keep the federal government in check? Here, Jeremiah Wadsworth pointed out the lingering problem. He asked: "[i]s there a man in this House who would wish to see so large a proportion of the community . . . armed by the United States, and liable to be disarmed by them?"[213] And he continued: "[n]othing would tend more to excite suspicion, and rouse a jealousy dangerous to the Union."[214] In other words, whatever Jackson and Wadsworth and other liberty-loving members of Congress might themselves do to prevent federal overreaching, the general population would remain fearful of the threat that a federal government in charge of weapons would represent. It was in Congress' own interest, in the interest of the national government as a whole, for militiamen to supply their own arms because of the destabilizing effect that would come from federal power, whether exercised or merely feared. Suspicion was no basis for a Republic.

A second argument in favor of self-arming rested on economics but reflected also concerns with preserving harmony among the states.[215] Were the national government to supply arms, this argument said, the militia of each individual state would have little incentive to keep costs in check because expenses would be borne by the taxpayers of the nation as a whole.[216] Costs would spiral and rivalries would ensue as each state would fear its own inhabitants were paying out more in taxes than they were receiving (in arms) in return. Waste would beget waste. Tensions would ever escalate. Complaining, thus, that Parker's solution "would empower the officers to create an enormous charge against the United States," Connecticut Representative Wadsworth explained that if indi-

212. *Id.*
213. *Id.* at 1855.
214. *Id.* at 1855–56.
215. *See infra* note 217 and accompanying text.
216. *See infra* note 217 and accompanying text.

viduals could not afford to provide themselves with arms, "he would prefer a clause to excuse them altogether" than to have Congress pay.[217] As evidenced by Roger Sherman's opposition to the federal government supplying arms, objections based on finances were closely tied to concerns with limiting federal power.[218]

The dilemma that existed was thus clear: telling individuals to arm themselves was a burden, but having Congress provide arms came with considerable risks. And so interest returned to the old approach: put the responsibility on the states to provide arms. Benjamin Huntington from Connecticut advocated this remedy. He argued that the problem with Parker's proposal was that it "will produce great inequalities; it will excite jealousies and discord between the Governments—but if left to the States, the officers will be more exact to prevent impositions on the particular State from which they receive their appointments."[219] Yet when Parker agreed to alter his motion to have the states bear the expense,[220] Virginia Representative William Giles objected on federalism grounds. Congress telling the states to supply militiamen with arms was, in Giles's view, "an improper interference with the authority of the State Governments."[221] Worse, such a directive would produce a predictable outcome, one seen already under the Articles of Confederation: the states "may, or may not, comply with the law. If they should not, it would prove nugatory—and render the authority of the United States contemptible."[222] Citizens' fears and rivalries among the states could prove destabilizing, but so would a federal government unable to govern.[223] Although there was some support for Congress directing the states to arm their own militia,[224] Parker's motion to amend the committee's bill was defeated.[225] In the

217. 1 ANNALS OF CONG. 1853 (1790) (Joseph Gales ed., 1834).

218. The Annals of Congress report that

> it appeared to him [Sherman], that by the Constitution, the United States were to be put to no expense about the militia, except when called into actual service. . . . What relates to arming and disciplining means nothing more than a general regulation in respect to the arms and accoutrements. There are so few freemen in the United States who are not able to provide themselves with arms and accoutrements, that any provision on the part of the United States is unnecessary and improper. He had no doubt that the people, if left to themselves, would provide such arms as are necessary, without inconvenience or complaint; but if they are furnished by the United States, the public arsenals would soon be exhausted—and experience shows, that public property of this kind, from the careless manner in which many persons use it, is soon lost.

Id. at 1854.

219. *Id.* at 1853–54.

220. *Id.*

221. *Id.* at 1854.

222. *Id.*

223. Likewise, Thomas Tudor Tucker of South Carolina took the position that "the United States may, without doubt, furnish the arms—but he very much questioned their right to call on the individual States to do it." *Id.* at 1855.

224. *See* 1 Annals of Cong. 1855 (1790) ("With respect to the constitutionality of the measure, there can be no doubt; every grant of power to Congress necessarily implies a conveyance of every incidental power requisite to carry the grant into effect.") (statement of Rep. Vining).

225. *Id.* at. 1856.

short run, the loss did not much matter. By the time the House Committee of the Whole had finished with the rest of the bill, many of the provisions had been removed or amended.[226] Among other things, the provision separating out young men for special service was abolished and, tellingly, the duties of the federal inspectors—responsible for monitoring compliance—were transferred to the states.[227] There had also emerged strong opposition to Congress imposing, as the proposed bill did, fines upon militiamen who did not participate in state training exercises or lacked the requisite arms.[228] Members of the House complained that the power to impose fines upon recalcitrant militiamen when not in federal service rested exclusively with the states[229] and that the federal fines proposed in the bill represented an unconstitutional tax.[230] In the end, rather than send the resulting legislation to the floor, the House appointed a new committee simply to write a new bill.[231] That committee reported its proposal in January of 1791, but the committee made a fatal error. The bill lacked exemptions from service on religious grounds and generated substantial resistance from Quakers.[232] The (first) Congress adjourned before taking any legislative action on the bill.[233]

3. Round Two

Following St. Clair's Defeat in November of 1791, the administration pressed Congress to move forward with legislation that would provide for federal use of the militia.[234] Jeremiah Wadsworth of Connecticut reintroduced in the Second Congress a bill that was substantially similar to the bill that Boudinot and his committee had advanced previously.[235] When the Committee of the Whole took up Wadsworth's bill in February 1792, attention focused once more on whether Congress could impose fines against militiamen who did not possess the requisite arms and equipment.[236] The Annals report that Thomas Fitzsimons of Pennsylvania moved "to exempt persons who are not able to arm and equip themselves, from any penalty on that account," and that this motion "occa-

226. *See* KOHN, *supra* note 30, at 134.
227. *Id.* at 135.
228. *See infra* notes 229–30 and accompanying text.
229. *See* 1 ANNALS OF CONG. 1864 (1790) (Joseph Gales ed., 1834) ("[T]he House had entered too much into the minutiae of the business, and in a great measure were about depriving the States of the power granted to them by the Constitution.") (statement of Rep. Bloodworth).
230. *See id.* at 1864 (describing proposed fines as "an absolute poll-tax, and not levied according to the number of inhabitants, which was in violation of the Constitution") (statement of Rep. Sherman).
231. KOHN, *supra* note 30, at 133.
232. *Id.*
233. *Id.*
234. *Id.* at 134.
235. *See id.*
236. 2 ANNALS OF CONG. 420–21 (1792) (Joseph Gales ed., 1834).

sioned some debate."[237] Thomas Sumpter of South Carolina thought that if militiamen were called into federal service it became "the duty of the General Government . . . to provide them with the means of defence" but that Congress had "no right to say that the militia, previous to being thus called out, shall be at the expense of arming themselves" and that it would be an "injustice" to require militiamen to furnish their own arms as well as to serve.[238] Recalling the 1790 objections in the House to federal fines, Vermont Representative Nathaniel Niles viewed the arming provision "as operating like a capitation tax; and this species of tax, he observed, was to be assessed only in a certain way, agreeably to a particular clause in the Constitution."[239] In other words, the penalty provision of the proposed bill was unconstitutional.

Eventually, debate shifted to the wisdom of Congress specifying that militiamen carry *uniform* arms.[240] This issue, too, proved divisive. Aaron Kitchell of New Jersey complained that the clause providing that "the calibres of the guns should be of one bore" was "unnecessary, and in fact impossible to be complied with."[241] Sumpter "asked what was to be done with the arms which the militia now have in their hands. Are they to be thrown away?"[242] The Annals do not report much in the way of a defense by Wadsworth except that he stated that requiring consistent arms was "one of the very few good regulations" of the bill and that omitting such a requirement "would render the militia a fallacious source of defence, and effectually destroy every ideal of uniformity."[243] The House took up the bill on March 5, 1792. The Annals indicate that certain unspecified amendments were adopted[244] and that the bill passed the House the next day by a vote of 31-27.[245]

The self-arming requirement survived the congressional debate as section 1 of the Militia Act of May 8, 1792. Along with that provision, the statute created a state-appointed adjutant-general in each state responsible for "distribut[ing] all orders from the commander-in-chief of the state to the several corps" and for providing the governor and the President with annual reports specifying the composition of militia units and their supply of arms.[246]

Nonetheless, the final legislation differed in significant ways from the bill that Wadsworth (and Boudinot) had originally proposed. Com-

237. *Id*. at 420.
238. *Id*. at 420–21.
239. *Id.* at 421.
240. *Id*. at 421–22.
241. *Id.* at 421.
242. *Id.*
243. *Id.* at 421–22.
244. *Id.* at 435.
245. *Id.*
246. Act of May 8, 1792, ch. 33, §§ 6, 10, 1 Stat. 271, 273.

pared to the Knox/Washington Plan in particular, the Militia Act of May 8, 1792 Act gave the federal government vastly reduced power over the composition and organization of the militia.[247] In place of specialized corps with specified periods of training, the law enrolled all men between eighteen and forty-five in a generalized militia and required no training of them at all.[248] Instead of prescribing how militia units were to be arranged, the law contained only recommendations that states were free to adopt or ignore.[249] While the Act specified such things as the number and assignment of officers,[250] the actual organization of the militia was left to the states. The militia was to be "arranged into divisions, brigades, regiments, battalions and companies, as the legislature of each state shall direct . . . ."[251] The Act specified the size of brigades, regiments, battalions, and companies, but these specifications only applied "if the same be convenient"[252] to the states. The states were to train their militia according to Baron Steuben's rules of discipline,[253] but that provision also came with an escape hatch: states did not need to comply if there existed "unavoidable circumstances."[254] Further, the states were free to exempt classes of individuals from militia service (and the arming requirement that went with it) without restriction.[255]

Most significant, the bill that George Washington signed into law contained no enforcement mechanisms, either with respect to how states were to organize their militia companies or, more importantly for our purposes, with respect to the obligations imposed upon individual citizens.[256] States suffered no penalty if they failed to carry out the plan (and, as already noted, the statute contained various provisions excusing states from compliance).[257] There was likewise no provision in the law for fines or other penalties against individual militiamen who did not possess the proper arms or did not participate in training or other exercises.[258] True enough, the statute specified that the rules of discipline from 1779 that applied to federal troops also applied to the militia (again

247. *Id.*
248. *Id*. § 1, 1 Stat. at 271.
249. *Id*. § 7, 1 Stat. at 273.
250. *Id*. §§ 3–4, 1 Stat. at 272–73.
251. *Id*. § 3, 1 Stat. at 272.
252. *Id*.
253. Friedrich Wilhelm Augustus von Steuben, the Prussian general who volunteered at Valley Forge, published in 1779 a set of rules for organizing military units, known as the "Blue Book." *See* JOSEPH R. RILING, BARON VON STEUBEN AND HIS REGULATIONS (1966).
254. Act of May 8, 1792, ch. 33, § 7, 1 Stat. 271, 273.
255. *Id*. § 2, 1 Stat. at 272.
256. *Id.* §§ 2–4, 7, 1 Stat. at 272–73.
257. *Id.* §§ 3–4, 7, 1 Stat. at 272–73.
258. *Id.* § 1, 1 Stat. at 271.

with the possibility of nonconformity).[259] But those rules, likewise, contained no penalties for failing to possess the requisite arms for the simple reason that regulars were not required to arm and equip themselves. Furthermore, there was nothing in those rules that would punish militiamen who did not participate in state-level training exercises.[260] More generally, the statute left states free to exempt classes of citizens from the militia entirely. Under the statute, then, states could simply exempt men from the self-arming requirement and other obligations of militia service. With respect to the states, the Militia Act of May 8, 1792 was no better than the resolution of the Continental Congress of July 18, 1775, or the aspirations of the Articles of Confederation. State compliance depended upon state cooperation. With respect to individuals, the requirement to arm oneself and to train was not, as a matter of federal law, backed up by any penalty. No fine or tax, no seizure of property, no arrest and imprisonment, no penalty at all could result (as a matter of federal law) when militiamen failed to arm and outfit themselves or to attend training exercises in accordance with Congress' specifications.[261]

Even without any penalty, the self-arming requirement of the Militia Act of May 8, 1792 remained controversial. The law's opponents did not give up with their legislative defeat. When the Second Congress reconvened in November of 1792 for its second session, Maryland Representative William Vans Murray sought to repeal the requirement that militiamen provide their own arms.[262] Echoing earlier opposition, Murray complained that the requirement that men of all economic circumstances bear the same expense worked a "glaring instance of injustice" and rendered implementation of the law "impracticable."[263] "It was," Murray argued, "a principle of political justice . . . that protection and taxation should be commensurate. That wherever a tax was levied for the protection of society, its apportionment among individuals should be as exactly as possible correspondent with the property of each individual."[264]

259. *Id.* § 7, 1 Stat. at 273 ("[E]xcept such deviations from the said rules as may be rendered necessary by the requisitions of this act, or by some other unavoidable circumstances.").

260. There were, however, penalties for losing, selling, or failing to take care of arms and equipment supplied to soldiers. *See, e.g.*, An Act for establishing Rules and Articles for the government of the Armies of the United States, ch. 20, art. 38, 2 Stat. 359, 364 (1806) ("Every non-commissioned officer or soldier, who shall be convicted before a court-martial, of having sold, lost, or spoiled, through neglect, his horse, arms, clothes, or accoutrements, shall undergo such weekly stoppages, (not exceeding the half of his pay) as such court martial shall judge sufficient, for repairing the loss or damage; and shall suffer confinement or such other corporeal punishment as his crime shall deserve."); *see also* 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 115 (Gov't Printing office 1936) (1775) (adopting "Rules and Orders [to] be attended to, and observed by such forces as are or may hereafter be raised") ("No officer, non-commissioned officer or soldier, shall fail of repairing, at the time fixed, to the place of parade or exercise, or other rendezvous appointed by the commanding officer, if not prevented by sickness or some other evident necessity . . . .").

261. Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271, 273.

262. 2 ANNALS OF CONG. 701 (1792) (Joseph Gales ed., 1834).

263. *Id*. at 701–02.

264. *Id*. at 708.

Moreover, muskets and other equipment were not easily obtained.[265] Rather than put the burden on militiamen to arm themselves or violate the law, Murray proposed that Congress provide for "the furnishing of the arms at the public expense" or at least supply arms to men who could not afford them.[266] Although Murray's criticisms received some support, there was overall no desire to change the May 8 law, which had taken many moths to enact. Hugh Williamson of North Carolina fired back with a taxation argument of his own, describing public arming of the militia "a most unequal and oppressive species of taxation,"[267] and John Kittera of Pennsylvania estimated that $42 million would be required to arm the militia.[268] Jonathan Dayton of New Jersey opposed "any plan of arming the militia which should give either the State or General Government a right to dispossess them of their arms on any occasion."[269] The House voted against Murray's proposal.[270]

4. The Unwritten Principle

Members of Congress who asserted that the federal government lacked constitutional authority to impose fines against militiamen outside of federal service had prevailed. A clear distinction had thus been drawn. On one hand, the May 2, 1792 calling-forth act *did* impose fines upon militiamen who failed to heed a call to federal service.[271] These fines, which could run as high as a year of pay,[272] were assessed by state courts-martial and collected by federal marshals.[273] The calling-forth law also provided for sale of a militiamen's property and even his imprisonment for failure to pay a fine assessed under the statute.[274] Government records provide evidence of enforcement of the penalties for failing to

265. *Id*. at 709.
266. *Id*.
267. *Id.* at 710.
268. *Id.*
269. *Id*.
270. *Id.* Rep. John Francis Mercer spoke of the "injustice of the requisition, which enjoins, that a man who is not worth twenty shillings should incur an expense of twenty pounds in equipping himself as a Militia man" and warned that placing the burden on individual militia members "sanction[ed] the idea . . . that there is a disinclination on the part of [Congress] to provide for an effective Militia . . . ." *Id*. at 702. Rep. James Hillhouse argued that before amending the statute, Congress should wait to see how the states implemented the requirements. *Id*. Rep. Hugh Williamson thought arming the militia at the public expense worked "a most unequal and oppressive species of taxation, especially as it is conceded that more than one half of the militia are already armed." *Id*. at 710. Rep. John W. Kittera, estimating that the total cost to arm the militia would be £42 million at the rate of £20 per man, opposed Congress assuming the expense. *Id*. In the end, the House voted 50–6 against convening a committee to consider amendments to the Act. *Id*. at 710–11.
271. Act of May 2, 1792, ch. 28, § 5, 1 Stat. 264.
272. *Id.*
273. *Id.* §§ 5, 7, 1 Stat. at 264–5.
274. *Id.* § 7, 1 Stat. at 265.

answer a call to federal service.[275] On the other hand, the Militia Act of May 8, 1792 allowed for no federal penalty against militiamen who did not maintain the requisite arms and equipment or did not show up for state training exercises.[276]

In essence, the limited account of federal power—merely to specify a uniform list of arms—which Madison had described at the Philadelphia Convention had carried through. The federal government could inform militiamen which arms they should possess but it could not force compliance. The principle, one that reflected also amendments delegates at the state conventions had offered at the time of ratification,[277] held firm in ensuing decades. Although penalties were at times proposed,[278] Congress never would amend the Militia Act of May 8, 1792 to authorize the imposition of fines against militiamen who failed to possess the requisite arms or to participate in state exercises. That the Constitution prohibited fines under such circumstances became congressional policy.

Thus, in response to requests by Jefferson in 1802 and 1805 to augment the Militia Act of May 8, 1792, Congress responded that the statute already reflected the full scope of federal authority under the Constitution.[279] Similarly, when, in 1810, Madison pressed for fines against militiamen (for failure to attend state training exercises), the Senate responded that fines would be unconstitutional:

> The constitution of the United States gives to Congress only a qualified agency on the subject of the militia .... As, under this provision, no authority is delegated to Congress to regulate fines for non-attendance, nor to fix the days for training, the only efficient means seem to be wanting to give force and skill to this establishment. The law of 1792 already provides for organizing and disciplining the militia; and a subsequent act makes provision for arming

275. *See, e.g.*, Letter from John C. Calhoun to President of the Senate (Feb. 14, 1821), *in* 2 AMERICAN STATE PAPERS: MILITARY AFFAIRS 314 (transmitting reports of fines imposed upon militiamen for neglect of duty during the War of 1812); House Resolution, Jan. 7, 1823 (directing the Secretary of the Treasury to report to the House "the amount of all fines assessed upon citizens of the State of Virginia for the non-performance of militia duty during the late war with Great Britain), quoted in Letter from William H. Crawford to P.P. Barbour (Jan. 23, 1823) *in* 2 AMERICAN STATE PAPERS: MILITARY AFFAIRS 527.

276. Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271, 273.

277. *See, e.g.*, 3 ELLIOT'S DEBATES, *supra* note 126, at 660 (presenting amendment stating that "when not in the actual service of the United States, [the militia] shall be subject only to such fines, penalties, and punishments, as shall be directed or inflicted by the laws of its own states").

278. *See infra* Part III.B (discussing proposal in 1795 to authorize penalties).

279. *See* Communication to the House of Representatives (Feb. 7, 1803), *in* 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS 163 (reporting that the May 8, 1792 Act "embraceth all the objects of a militia institution, delegated to Congress"); Communication to the House of Representatives (Jan. 2, 1806), 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS 189 ("[T]he powers necessary to produce an efficient militia are divided between the General Government and the State governments. In pursuance of the power vested in the General Government on this subject, Congress did, in the year 1792, pass an act to establish an uniform militia throughout the United States, which act seems to embrace all the principles in the case delegated to Congress.").

> them. All, therefore, within the power of Congress seems to have already been done . . . .[280]

So too, in 1818, in response to a message from President James Monroe, Representative William Henry Harrison (who would go on to serve as the ninth President) wrote on behalf of a House committee that a federal penalty imposed upon militiamen for failure to arm themselves "will be unjust, for it will operate as a capitation tax, which the opulent and the needy will pay equally, and which will not be borne by the states in the proportion fixed by the constitution."[281] A similar House committee report in 1829 deemed "compelling individuals enrolled for militia service to furnish arms" a "capitation tax" that was "unequal and . . . extremely oppressive" and therefore "unconstitutional."[282]

G. Summary

The self-arming provision of the Militia Act of May 8, 1792 Act represented a constrained view of federal power with respect to the militia. Self-arming avoided the danger of federal control over the supply of weapons. In addition, the self-arming provision reflected the understanding that Congressional authority was limited to specifying uniform arms that militiamen should possess in order to serve as an effective fighting force. On this view, the Constitution did not allow the federal government to penalize militiamen who did not possess the requisite arms. The power to punish belonged to the states. As a result, the self-arming requirement lacked any enforcement mechanism. It was not, therefore, a mandate.

III. ARMING THE MILITIA

Part III examines the operation of the Militia Act of May 8, 1792 as shedding additional light on the meaning of federalism in the early national period. As Part III shows, individuals considered themselves free to ignore Congress' arming requirements and the states declined to serve as simple enforcers of federal law. Rather than a command to either militiamen or to the states, the self-arming provision of the May 8, 1792 law operated, in effect, as a recommendation of the arms and equipment militiamen ideally should possess. The result was a federal law dependent, in the absence of voluntary compliance, upon state cooperation. Instead of clear lines of authority between the federal government and the states, the states, as intermediaries, were in a position to shape and limit the federal statute.

280. Communication to the Senate (Mar. 6, 1810), *in* 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS 256.

281. *Arming the Militia: Report of the Committee, on so much of the president's message as relates to the militia, Jan. 9, 1818*, WASH. REP., Feb. 9, 1818, at 3.

282. *Report of Feb. 4, 1829*, RICHMOND ENQUIRER, Feb. 13, 1830, at 4.

A. State Enforcement and Underenforcement

With federal law providing no incentive for militiamen to arm themselves, the only remaining option to force militiamen to arm themselves was for the states to step in with their own penalties.[283] States did take some steps in this direction. Soon after the enactment of the 1792 statutes, all fifteen states enacted new militia laws.[284] After France declared war on England in February 1793, some states passed laws imposing fines (retained within the state) against militiamen who failed to attend (state) training days properly armed and equipped.[285] Yet these state laws did not require the same arms and equipment that Congress had specified in the Militia Act of May 8, 1792.[286] In addition, the states provided for men who could not afford the arms and equipment to be excused from the obligation state law imposed.[287] Moreover, there was a sizeable gap be-

283. C. JOSEPH BERNARDO & EUGENE H. BACON, AMERICAN MILITARY POLICY: ITS DEVELOPMENT SINCE 1775, at 81 (1955). In 1820, the Supreme Court upheld the power of state government to impose fines on militiamen who failed to appear for federal service. Houston v. Moore, 18 U.S. 1 (1st ed. 1820). Announcing the judgment of the Court, Justice Washington explained:

> "[T]he State Court Martial had a concurrent jurisdiction with the tribunal pointed out by the acts of Congress to try a militia man who had disobeyed the call of the President, and to enforce the laws of Congress against such delinquent . . . . [T]his authority will remain to be so exercised until it shall please Congress to vest it exclusively elsewhere . . . ."

Id. at 32.

284. *See* BERNARDO & BACON, *supra* note 283, at 82–83.

285. *See* Report of the Secretary of War *in* 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS (Dec. 10, 1794), 69–71 (describing some of these statutes). For instance, the New Jersey law of June 5, 1793 provided that "if any . . . militia-man shall appear, when called out to exercise or into service, without a musket or a rifle, he shall forfeit and pay the sum of three shillings and nine pence; and for want of every other of the aforesaid articles six pence." *Id.* at 70.

286. Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271.

287. Statutes from four states are illustrative. Pennsylvania law provided: "Whenever the field-officers of any regiment shall judge any person enrolled therein, unable to arm and equip himself as aforesaid, such person shall not be subject to any fine for not arming . . . ." Pa. Act of April 11, 1793, *reprinted in* 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS 70. According to a statute enacted in North Carolina on July 18, 1794:

> [E]very non-commissioned officer and private who shall fail to appear on the said occasions, shall forfeit for every such failure or neglect, ten shillings, or, if appearing, he be not armed and provided in manner as directed by this act, shall, for such deficiency, forfeit and pay five shillings. And if *the officers of a company, or any two of them,* after an examination upon oath, shall adjudge any person or persons, enrolled as aforesaid, to be incapable of providing and furnishing him or themselves with the arms, ammunition, and accoutrements required by this act, they shall make report thereof to the next battalion court-martial, as the case may be, who may, if it should appear necessary, exempt such person or persons from the fines and forfeitures by this act imposed, until such arms and accoutrements shall be provided and delivered him or them by the court-martial, who shall take security for the safe keeping of such arms and accoutrements, to be returned when required.

N.C. Act of July 18, 1794, *reprinted in* 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS 70. Under New Jersey law:

> And if any such militia-man shall appear, when called out to exercise or into service, without a musket or a rifle, he shall forfeit and pay the sum of three shillings and nine pence; and for want of every other of the aforesaid articles six pence. . . . *Provided always*, That whenever the *majors* of any battalion shall judge any person, enrolled therein, unable to arm and equip himself, as aforesaid, such person shall not be subject to any fine for not arming; any thing herein contained to the contrary notwithstanding.

N.J. Act of June 5, 1793, *reprinted in* 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS 70. According to a November 1793 Maryland statute:

tween the laws states created on the books and how those laws operated in practice. Given that militiamen could not necessarily afford to purchase arms and there was often an inadequate supply, fines levied by the states did not reliably produce obedience.[288] In addition, local officials seeking reelection were not eager to collect fines against militiamen particularly against the backdrop of a federal statutory mandate.[289] State officials were required to navigate treacherous waters: they needed to ask militiamen to arm themselves but they could not appear to be mere puppets of the national government. Thus, in a message asking citizens of Ontario, New York, to arm and ready themselves, Governor Daniel T. Tompkins framed his plea in terms of duties, liberties, and the Constitution of New York State.[290]

The states therefore took an approach that might be described today as cooperative federalism:[291] they took seriously the need for the militia to be armed but they also viewed the specific provisions of the federal law to be unnecessary or unduly burdensome.[292] The states, therefore, adopted and implemented their own standards, generating their own lists of arms, determining who should be required to possess them, and excus-

> And any non-commissioned officer or matross in the artillery, and any non-commissioned officer or dragoon, who shall so refuse or neglect to attend on any of the said days, armed and accoutred as aforesaid . . . shall forfeit a sum not exceeding two-thirds of a dollar per day; and all other non-commissioned officers and privates who shall refuse or neglect to attend, armed and accoutred as herein before directed . . . shall forfeit and pay *one cent* per day; unless excused for appearing without arms and accoutrements, by the commanding officers of their respective companies for the day.

Md. Act of Nov. 1793, *reprinted in* 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS 70.

288. *See, e.g.*, *supra* note 287.

289. WILLIAM H. RIKER, SOLDIERS OF THE STATES: THE ROLE OF THE NATIONAL GUARD IN AMERICAN DEMOCRACY 30 (1957).

290. Referencing the New York State Constitution (which provided that "Every man who enjoys the protection of Society ought to be prepared and willing to defend it"), Tompkins stated: "Those . . . who are able to supply themselves with the equipments required by law and omit so to do so are censurable for the neglect of a most important and indispensable *duty*." In addition, Tompkins said:

> [E]very freeman ought to feel a pride in having in his own possession the means of defending his rights and privileges when infringed from any quarter, and disdain a dependance upon the public arsenals for a supply in cases of emergency. The Legislature has calculated upon the performance of this important duty by the citizens of the State and has, therefore, been sparing in the appropriations for small arms. . . . Little reliance is . . . to be placed on the assistance of the State for anything but ammunition. It, therefore, behooves officers of the Militia and all other influential characters . . . to exert their influence and authority in persuading and requiring those of the Militia who can afford the expense, to equip themselves immediately according to law.

Letter from Daniel D. Tompkins, Governor of N.Y. to John Nicholas and others, Committee of the County of Ontario, (Sept. 1, 1807), *in* 2 PUBLIC PAPERS OF DANIEL D. TOMPKINS, 1807-1817, at 11–12 (Hugh Hastings ed., 1902).

291.

> Cooperative federalism programs set forth some uniform federal standards—as embodied in the statute, federal agency regulations, or both—but leave state agencies with discretion to implement the federal law, supplement it with more stringent standards, and, in some cases, receive an exemption from federal requirements. This power allows states to experiment with different approaches and tailor federal law to local conditions.

Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1696 (2001) (footnotes and citations omitted).

292. *See, e.g.*, *supra* note 287.

ing—in law and in practice—individuals along the way.[293] If uniformity was the goal, it was not achieved by state enforcement. "State legislation passed to implement the law contained tremendous variations on every subject, from unit structure to fines and number of musters."[294] Besides state recalcitrance, the supply of arms was limited and arms that were available were expensive.[295] Under these circumstances, states were particularly disinclined to enforce the exact letter of the May 8 federal statute. Some states furnished their militia units with a supply of muskets.[296] And Massachusetts, the state whose mandated list of arms and equipment came closest to the federal requirements,[297] shifted the responsibility to *towns* to furnish militiamen with arms and equipment.[298] But states did not view themselves as agents of the federal government.[299] While Congress was ever exhorting the states to take steps to ensure that militia units were in compliance with the 1792 law,[300] even in subsequent decades

293. *See, e.g.*, *supra* note 287.

294. KOHN, *supra* note 30, at 135.

295. *See, e.g.*, Edward Rutledge, Governor-Elect of South Carolina, Governor's Inaugural Address, Address Before the Legislature of South Carolina, Dec. 19, 1798, *in* GEORGETOWN GAZETTE, Jan. 9, 1799, at 1 ("The provisions made by the [state] militia act, for arming the militia of the state, have not produced the beneficial effects which were intended. . . . I earnestly recommend it to you, therefore, to provide a fund for the purchasing of a sufficient number of arms, for arming the whole militia of the state . . . .").

296. *See* Michael A. Bellesîles, *The Origins of Gun Culture in the United States, 1760–1865*, 83 J. AM. HIST. 425, 430 (1996).

297. According to a Massachusetts law of June 22, 1793:

> [E]ach and every free able-bodied white male citizen, of this or any other of the United States, residing within this Commonwealth, who is or shall be of the age of eighteen years, and under the age of forty-five years (except as is herein after excepted) shall severally and respectively be subject to the requisitions of this act, and shall be enrolled in the militia . . . . [E]very non- commissioned officer and private of the infantry shall constantly keep himself provided with a good musket, with an iron or steel rod, a sufficient bayonet & belt, two spare flints, a priming-wire and brush, and a knapsack, a cartridge-box and pouch, with a box therein to contain not less than twenty four cartridges suited to the bore of his musket, each cartridge to contain a proper quantity of powder and ball; or with a good rifle, knapsack, shot-pouch, powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder . . . .

Mass. Act of June 22, 1793, *in* LAWS FOR THE GOVERNMENT OF THE MILITIA OF THE COMMONWEALTH OF MASSACHUSETTS 11, 22–23 (1801). The statute imposed fines of up to twenty shillings for failure to maintain the requisite arms. *Id.* at 23.

298. According to the June 22, 1793 Massachusetts law:

> [W]henever the selectmen of any town shall judge any inhabitant thereof, belonging to the militia, unable to arm and equip himself in manner as aforesaid, they shall at the expence of the town provide for and furnish such inhabitant with the aforesaid arms and equipments, which shall remain the property of the town at the expense of which they shall be provided . . . .

Id. at 24.

299. *See* 3 ANNALS OF CONG. 1041 (Dec. 4, 1807) (Joseph Gales ed., 1834) (describing the "faulty execution" by the state governments of the federal plan for arming the militia).

300. *See, e.g.*, *Communication to the House of Representatives* (Feb. 7, 1803), *in* 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, 163 (resolving that "the President . . . be requested to write to the Executive of each State, urging the importance and indispensable necessity of vigorous exertions, on the part of the State Governments, to carry into effect the militia system adopted by the national Legislature").

when arms become more widely available, states adhered to their own arming specifications.[301]

Two years after the Militia Act of May 8, 1792, Secretary of War Henry Knox reported to the House of Representatives on the operation of the statute. He wrote: "[a] difficulty of primary importance appears to oppose the execution of the first section of the . . . act. The militia are requested to arm and equip themselves, at their own expense; but there is no penalty to enforce the injunction of the law."[302] Knox reported that just five states had enacted "auxiliary laws to the act of Congress" to aid in enforcement of the arming and equipping requirements by the imposition of fines.[303] According to Knox, however, because of the persistent shortage of arms, such fines produced little benefit; even increasing penalties would be pointless.[304] Knox estimated that fewer than one-fourth of militiamen had met the demands of federal law.[305] Promoting compliance, Knox reasoned, required increasing domestic production by the "establishment of manufactories."[306]

B. The Georgian Constitution

Eighteen months after the enactment of the statutes of May 1792, Washington politely suggested to Congress that it should revisit those laws.[307] The inadequacies Washington perceived in the laws at that time

301. Here, for example, were the requirements imposed by New Hampshire in 1829:

> [E]very noncommissioned officer and private, who shall appear on parade, not completely equipped according to law, shall forfeit and pay the following sums as fines for the equipments, with which he shall not be provided, to wit; a gun, eighty cents; steel or iron ramrod, twenty cents; bayonet, scabbard and belt, twenty five cents; rifle, one dollar; pistol, forty cents; sword, forty cents; two pare flints, ten cents; priming wire and brush, ten cents; cartridge box capable of containing twenty four rounds, twenty five cents; cavalry cartridge box, twenty five cents; knapsack, twenty cents; canteen, ten cents; valise, twenty cents; holsters, twenty cents.

An Act Imposing Fines for Neglect of Military Duty and for Other Purposes, § 13, Jan. 3, 1829, *in* N.H. STATESMAN & CONCORD REG., Mar. 7, 1829. Funds collected under this law were retained by the militia company. *See id.* § 20 ("[A]ll fines and forfeitures . . . shall be expended in defraying the necessary expenses . . . in purchasing and repairing musical instruments, and instructing the musicians belonging to [the] company.").

302. Report of the Secretary of War (Dec. 10, 1794), *in* 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS 69.

303. *Id.* at 70.

304. *Id.* ("[I]t is certain that, were the penalties greatly enhanced, an insuperable difficulty would occur in obtaining the requisite number of arms in any reasonable period.").

305. *Id.* ("The numbers comprehended in the act, from eighteen to forty-five years of age . . . may be estimated probably at about four hundred and fifty thousand men. Of these, probably not one hundred thousand are armed as the act requires, although a greater number might be found of common and ordinary muskets, without bayonets.").

306. *Id*. (advocating for the establishment of factories in each state).

307. He stated:

> [I]t is an inquiry, which cannot be too solemnly pursued, whether the act "more effectually to provide for the National defence by establishing an uniform Militia throughout the United States" has organized them so as to produce their full effect; whether your own experience in the several States has not detected some imperfections in the scheme.

George Washington, Fifth Annual Address to Congress, Dec. 3, 1793, *in* 33 THE WRITINGS OF GEORGE WASHINGTON 163 (John C. Fitzpatrick ed., 1940).

would quickly prove real. In the summer of 1794, President Washington called up some 15,000 militiamen from Pennsylvania, Virginia, Maryland, and New Jersey in order to respond to the Whiskey Rebellion in western Pennsylvania.[308] Although the force was sufficient to quell the disturbances, and Washington would boast of the success, "[i]n not one of the states did the mobilization go smoothly."[309] The problem was that "[w]hile the militia act . . . had established standards of training and readiness, it had left to the various states the responsibility for checking and enforcing. That responsibility had not been met."[310] In Virginia, Maryland, and Pennsylvania, men simply refused to serve.[311] Troops that did mobilize lacked training and the requisite arms: returning to Philadelphia after handing over the field command to Major General Henry Lee in October, Washington turned back poorly outfitted militia units he encountered making their way west.[312] Even in New Jersey, from which the President sought just 2100 men, and where the mobilization went relatively well, "[s]upply problems plagued the entire operation, causing many of the state's troops to be late reaching the rendezvous point—indeed, some were so late that they missed the expedition altogether."[313] In his own report to Congress, Henry Knox stated that to call forth 15,000 militiamen to quell the Whiskey Rebellion "the number of ten thousand arms have been issued from the public arsenals. Loss and injury must be expected to arise upon the articles issued."[314] In other words, two-thirds of the deployed militiamen had to be armed by the federal government after hostilities were already underway. Congress' plan for arming and training the militia in advance so that they could efficiently mobilize in response to threats had proven a failure.

Enough was enough for the first President. When Washington addressed Congress in November of 1794, his complaint about the federal militia laws took sharpened form:

> In the arrangements to which the possibility of a similar contingency will naturally draw your attention, it ought not to be forgotten, that the militia laws have exhibited such striking defects, as could not have been supplied but by the zeal of our citizens. Besides the extraordinary expense and waste, which are not the least of the defects, every appeal to those laws is attended with a doubt of its success. The devising and establishing of a well regulated militia, would be a genuine source of legislative honour, and a perfect title to publick gratitude. I, therefore, entertain a hope, that the present

308. DAVE R. PALMER, 1794: AMERICA, ITS ARMY, AND THE BIRTH OF THE NATION 269 (1994).
309. *Id.* at 269, 277.
310. *Id.* at 269.
311. *Id.* at 269–71.
312. *Id.* at 269–71, 274–76.
313. *Id.* at 269.
314. Report of the Secretary of War, *supra* note 302, at 70.

> session will not pass, without carrying to its full energy the power of organizing, arming, and disciplining the militia; and thus providing, in the language of the constitution, for calling them forth to execute the laws of the Union, suppress insurrections, and repel invasions.[315]

Washington plainly understood the defects of the Militia Act of May 8, 1792. Militiamen did not voluntarily arm and equip themselves in accordance with the law. States did not force compliance with the law either but instead imposed their own arming standards with exemptions for militiamen who could not afford to purchase arms. The root problem, however, was neither disobedient militiamen nor state interference with congressional authority. For the law itself, lacking as it did any enforcement mechanism gave individuals and the states the ability to say no to federal requirements. Given the longstanding concerns with federal power over the militia, the weak approach of the May 8, 1792 statute is understandable. Yet the experience under the Articles of Confederation forecast the statute's outcome: when Congress makes only a recommendation, compliance is spotty.

Congress got the message. A few weeks after Washington's address, a House Committee had laid bare the basic problems:

> [T]he principal defects in the existing provisions for arming the militia, consist in the want of a competent source of supplying the arms; the want of some provision for furnishing persons with arms, who may be deemed unable to furnish themselves; and the want of adequate and uniform penalties to enforce a compliance with the requisitions of the existing militia laws.[316]

The committee thus recommended that "further provision ought to be made, by law, for arming the militia of the United States, and for enforcing the execution of the existing militia laws, by adequate and uniform penalties."[317] It was back to the drawing board.

The House thereafter wasted no time in its effort to figure out how to produce an armed and readied citizenry that would render the militia a reliable force. The option on the table was the one that Congress had previously rejected as unconstitutional: federal fines. Consistent with the magnitude of the issue, according to the Annals of Congress in January of 1795 there was "a long debate"[318] in the House over whether Congress had constitutional authority to impose fines to enforce provisions of federal militia laws. The renewed debate on this issue reflected the sharpening of divisions within Congress, and in politics in general, about the scope of federal authority over the militia and conflict even within par-

315. George Washington, Sixth Annual Address to Congress, November 19, 1794, *in* 34 THE WRITINGS OF GEORGE WASHINGTON 35 (John C. Fitzpatrick ed., 1931–44).

316. Letter from Rep. Giles to the House of Representatives (Dec. 29, 1794), *in* 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS 107.

317. *Id.*

318. 3 ANNALS OF CONG. 1067 (1795) (Joseph Gales ed., 1834).

ties about the proper balance between national and state power.[319] The Annals report no statements made on whether or not Congress could enforce through fines the self-arming requirement specifically, and, therefore while this possibility might have been on the minds of some representatives, there is no evidence that it was ever proposed or discussed.[320] Instead, the reported debate concerned principally ensuring that militiamen were properly trained for federal service.[321] On that issue, two members of the House in particular took the position that Congress could legitimately impose fines upon militiamen who did not comply with the requirements of federal law and participate in state training exercises.[322] John Marshall would not author *McCullouch v. Maryland* for another twenty-four years but the members of the House did not need his opinion to recognize the potential significance of the Constitution's Necessary and Proper Clause to give additional force to Congress' enumerated militia powers.[323] Theodore Sedgwick of Massachusetts took the position that "when a general power was granted, all the usual and known means necessary and proper to carry it into effect were granted also."[324] Thus, in Sedgwick's view, "it would seem absurd . . . to say [that] penalties could not be imposed by law"[325] in order to force compliance with training requirements. Connecticut Representative Uriah Tracy, deploying what we might call today intratextualism,[326] took the position that a power to impose fines upon militiamen who failed to participate in training exercises could be inferred by contrasting the militia clause of Article I, section 8 with other enumerated federal powers.[327] How broad the support was in Congress for the merits of these arguments on the consti-

319. KOHN, *supra* note 30, at 136 ("Federalist military thinkers might desire classing, but party stalwarts from seaboard constituencies saw hardships worked on their townsmen, and some no doubt realized that a weak militia enhanced the need for a strong national military establishment. . . . Republicans might want a viable militia to fight the Indians and avert a national army, but too many party members believed in reducing federal budgets and minimizing the power of the central government over the states.").

320. 3 ANNALS OF CONG. 1067–71 (1795) (Joseph Gales ed., 1834).

321. *Id.*

322. *Id.* at 1067–68.

323. *See id.* at 1068.

324. *Id.*

325. *Id.*

326. *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999) (describing intratextualism as a method by which "the interpreter tries to read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase").

327. Here is how Tracy reached a pro-federal conclusion:

> [I]n ordinary cases, a certain specified portion of power was, by the Constitution, given to Congress, and all not specified was of course reserved by the States; but in this case the tables were turned—all the power was vested in Congress by the first part of the sentence [of the militia clause], and a specified portion reserved to the States, which ought to be strictly construed, so as to give the several States no constructive power to defeat any thing Congress should do upon the subject; or, prevent uniform and general laws from operating by the interference of local and State regulations.

3 ANNALS OF CONG. 1070 (1795) (Joseph Gales ed., 1834).

tutional question is not clear. Nonetheless, reform was plainly needed. The House approved a resolution stating that the May 8, 1792 law should be amended "and that further provision ought to be made by law for arming the Militia of the United States, and for enforcing the execution of the Militia laws, by adequate and uniform penalties."[328] And so, another committee was formed to prepare legislation.[329]

The next Part will take up the resulting legislation and other federal programs to arm the militia. But the punch line need not be hidden: Sedgwick and Tracey's constitutional argument did not stick. Although there was a desperate need to reform the militia, at no time did Congress ever enact legislation imposing fines or other penalties upon militiamen who did not possess the requisite arms and equipment or participate in state training exercises. If, as Amar tells us, congressional practice provides evidence of constitutional principle,[330] it remained bedrock that "[t]o provide for arming the militia" did not include the power to order militiamen—upon threat of penalty—to provide their own arms.[331]

IV. ARMED BY GOVERNMENT

This Part examines congressional efforts to arm the militia after the failure of the Militia Act of May 8, 1792. As this Part shows, Congress used three strategies: compensating militiamen for the use of their own weapons; lending out arms; and, finally, providing funding for the purchase of arms to be distributed to the states and their militia.

A. Subsidies and Loans

In January 1795, Congress began a new practice of compensating militiamen for use of their own arms, horses, and equipment.[332] The theory was that militiamen would be more likely to purchase and maintain arms if they received money from the federal government when they

328. *Id.* at 1071.

329. *Id.*

330. AMAR, *supra* note 1, at 337.

331. *See id.* This was true even though when Congress enacted a law in 1803 organizing the militia in the District of Columbia it provided for fines for attending musters unarmed. A captain attending a muster unarmed was subject to a fine of up to $20; a non-commissioned officer or soldier "failing to attend at his brigade, legionary, battalion, or company muster, armed and equipped as the law directs, shall forfeit and pay a sum not less than seventy-five cents, nor more than five dollars, at the discretion of the battalion courts of inquiry." However, "[i]f any non-commissioned officer or private shall be returned as a delinquent in not appearing, armed and accoutred as the law directs, the court of inquiry before whom the same shall be tried, may, if it appear reasonable, remit the fine incurred by him, provided every such delinquent shall make it appear that he was unable to procure the legal equipment." An Act, more effectually to provide for the organization of the Militia in the District of Columbia, Mar. 3, 1803, ch. 20, § 20, 1 Stat. 215, 222.

332. Act of Jan. 2, 1795, ch. 9, 1 Stat. 408 ("regulat[ing] the pay of the non-commissioned officers, musicians, and privates of the Militia of the United States, when called into actual service, and for other purposes.").

used those arms in federal service.[333] Congress allocated forty cents per day to each militiaman "for the use of his horse, arms and accoutrements," with a further twenty-five cents per day if militiamen provided their own "rations and forage."[334] Notably, the next month, Congress reenacted the May 2, 1792 Act setting forth the procedures for calling forth the Militia.[335] That law provided for fines for failure of militiamen to respond to the call of the President—"shall forfeit a sum not exceeding one year's pay, and not less than one month's pay, to be determined and adjudged by a court martial"—to serve in federal service.[336] Once more there was no provision imposing fines for failure to be armed and equipped, however.

Congress also implemented two programs for increasing the supply of arms for use by the militia: one program lending out arms to militia and the other purchasing arms and then reselling them to the states.[337] The Act of May 28, 1798 authorized militia corps to borrow field artillery belonging to the United States, "to be taken, removed and returned, at the expense of the party requesting: who are to be accountable for the same, and to give receipts accordingly."[338] The Act also permitted militia called forth into federal service and volunteer corps to borrow (upon request of the state executive, in the case of the militia) arms and artillery from federal arsenals, with "proper receipts and security" and acceptance of responsibility for "the accidents of . . . service."[339] Further, the Act made available $200,000 for the President to purchase "a quantity of caps, swords or sabres, and pistols with holsters" sufficient to equip 4000 cavalry, and to be loaned out to cavalry called into federal service.[340] Under a statute passed on July 6, 1798, during the crisis with France, Congress appropriated $400,000 for the purchase of 30,000 stands[341] of arms, to be made available for sale to the states and to militia units; unsold arms were made available for lending to the militia when called into

333. *See id.*

334. *Id*. § 2.

335. Act of Feb. 28, 1795, ch. 36, 1 Stat. 424 ("provid[ing] for calling forth the Militia to execute the laws of the Union, suppress insurrections, and repel invasions; and to repeal the Act now in force for those purposes").

336. *Id.* § 5.

337. See Act of May 28, 1798, ch. 47, 11, 1 Stat. 558; Act of June 22, 1978, ch. 57, § 3, 1 Stat. 569.

338. Act of May 28, 1798, ch. 47, § 11, 1 Stat. 558, 560 ("authorizing the President of the United States to raise a Provisional Army").

339. *Id.* § 12.

340. *Id*. § 13. The June 22, 1798 statute also allowed the President to sell or lend artillery, small arms, and accoutrements from federal arsenals to volunteer companies. Act of June 22, 1798, ch. 57, § 3, 1 Stat. 569, 570.

341. A stand of arms is a complete set of weapons for one man. The term typically referred to a musket, bayonet, cartridge box, and belt but it could also refer to the musket and bayonet alone. *See* Oxford English Dictionary Online (2013) (accessed April 24, 2013).

federal service.[342] This statute, "An act for providing arms for the militia throughout the United States," was designed to give the states a reliable source of weaponry.[343] Even so, states were not eager to purchase these weapons and many went unsold.[344]

At the same time that Congress was taking steps to create a supply of weaponry, it was putting in place an expanded national military structure independent of the state militia. Congress authorized the President, "in the event of a declaration of war against the United States, or of actual invasion of their territory, by a foreign power, or of imminent danger of such invasion," to raise an army of 10,000 men to serve for up to three years.[345] In addition, the President was empowered, whenever "in his opinion the public interest shall require," to accept into federal service volunteer companies whose members would be "armed, clothed and equipped at their own expense," but who would receive the same pay and provisions as regulars.[346] These volunteers were exempted from militia service.[347] As the eighteenth century came to a close, Congress was moving away from near total reliance upon militiamen for the nation's security to troops under tighter federal control.[348]

B. Funded

After Jefferson was elected President in 1800, he sought renewed reliance on the militia for the nation's security in place of the creeping use of federal troops.[349] Jefferson aimed to classify militiamen into well-defined categories and to assign the principal security functions to an elite corps that would serve for an extended period.[350] Congress rejected this approach. Congress also rejected James Madison's similar calls to reform the militia after his election in 1808.[351] Nonetheless, Congress lay groundwork for additional use of the militia in accordance with Jefferson's overall goal. In March of 1802, Congress reduced the size of the

342. Act of July 6, 1798, ch. 65, §§ 1–2, 1 Stat. 576, 576 ("providing Arms for the Militia throughout the United States").

343. *See id.*

344. *See* RIKER, *supra* note 289, at 21–22.

345. Act of May 28, 1798, ch. 47, § 1, 1 Stat. 558, 558 ("authorizing the President of the United States to raise a Provisional Army").

346. *Id*. § 3.

347. Act of June 22, 1798, ch. 57, § 1, 1 Stat. 569, 569 ("An Act supplementary to, and to amend the act, intituled 'An act authorizing the President of the United States to raise a provisional army.'").

348. *See* Act of Mar. 2, 1799, ch. 31, §§ 1, 6–9, 1 Stat. 725, 726 ("An Act giving eventual authority to the President of the United States to augment the army."); s*ee also* Act of Mar. 2, 1799, ch. 44, § 1, 1 Stat. 741, 741–42 ("An Act making appropriations for the support of the Military Establishment, for the year one thousand seven hundred and ninety-nine," enacting additional military appropriations in the amount of $4,288,549).

349. BERNARDO & BACON, *supra* note 283, at 95.

350. CRESS, *supra* note 29, at 169.

351. *Id.*

regular army from 5500 to 3300 troops.[352] A year later, at a time of growing hostilities between England and France, Congress enacted legislation requiring the adjutant-general of the militia in each state to provide the President, by the first Monday of each year, with militia "terms" (i.e., the number of militiamen and their arms).[353] The same legislation specified that "every citizen duly enrolled in the militia, shall be constantly provided with arms, accoutrements, and ammunition,"[354] but the statute studiously avoided the question of *who* had to provide these militiamen with arms. Congress also authorized the President to call into federal service 80,000 militiamen,[355] and would authorize additional detachments in ensuing years.[356] Although these measures represented renewed reliance upon the militia, the use of volunteer troops continued nonetheless.[357]

The increased reliance upon the militia spearheaded by Jefferson brought an increased need for the militia to be properly armed. But how was that to be achieved? Individuals could not be counted on to voluntarily arm themselves. Penalizing militiamen for failing to possess the requisite arms was not a viable option. States were not going to implement a congressional directive. Having the federal government equip and outfit militiamen raised all of the old concerns that the militia would end up disarmed and liberty would be sacrificed. Navigating these various hazards, Congress settled on a new approach, one that combined elements of federal power with individual responsibility and with a mediating role for the states. In April 1808, Congress authorized an annual appropriation of $200,000 "for the purpose of providing arms and military equipments for the whole body of the militia of the United States, either by purchase or manufacture, by and on account of the United States."[358] The statute authorized the President both to purchase arms on the private market and to "purchase sites for, and erect such additional arsenals and manufactories of arms, as he may deem expedient . . . ."[359]

352. Act of Mar. 16, 1802, ch. 9, §§ 1–4, 14–15, 27, 2 Stat. 132, 132–33, 135, 137 ("fixing the military peace establishment of the United States.").

353. *See* Act of Mar. 2, 1803, ch. 15, § 1, 2 Stat. 207.

354. *Id.* §§ 1–2, 2 Stat. at 207 ("An Act in addition to an act, intituled 'An act more effectually to provide for the National defence, by establishing an uniform Militia throughout the United States.'").

355. Act of Mar. 3, 1803, ch. 32, § 1, 2 Stat. 241, 241 ("directing a detachment from the Militia of the United States, and for erecting certain Arsenals.").

356. *See, e.g.*, Act of Apr. 18, 1806, ch. 32, § 1, 2 Stat. 383, 383 ("authorizing a detachment from the Militia of the United States.").

357. *See, e.g.*, Act of Feb. 24, 1807, ch. 15, §§ 1–3, 2 Stat. 419, 419–20 ("authorizing the President of the United States to accept the service of a number of volunteer companies, not exceeding thirty thousand men."); Act of Mar. 3, 1807, ch. 39, 2 Stat. 443 ("authorizing the employment of the land and naval forces of the United States, in cases of insurrections.").

358. Act of Apr. 23, 1808, ch. 55, § 1, 2 Stat. 490, 490 ("making provision for arming and equipping the whole body of the Militia of the United States."). On December 1, 1807, John Randolph of Virginia moved in the House "[t]hat provision ought to be made, by law, for arming and equipping the whole body of the militia of the United States." 10 ANNALS OF CONG. 1005 (1807) (Joseph Gales ed., 1834).

359. Act of Apr. 23, 1808, ch. 55, § 2, 2 Stat. 490.

Under the statute, "all the arms procured in virtue of this act" were to be transmitted to the states and territories, in proportion to their militia enrollments.[360] The states and territories were in turn required to distribute the arms to the militia "under such rules and regulations as shall be by law prescribed by the legislature of each state and territory."[361] Significantly, the federal government did not retain title to the arms it supplied. The appropriation imposed no conditions upon the receipt of arms.[362] Given the risk that militiamen might neglect to take proper care of weapons they received for free, federal law provided for militiamen (at least when in federal service) to have their wages garnished and to be corporally punished for selling or neglecting the care of their weapons and equipment.[363] The $200,000 appropriation represented the very first grant-in-aid in the history of the United States.[364] The total amount, equivalent to nearly $4 million today,[365] representing about sixteen percent of military spending for that year and nearly two-thirds of army pay,[366] likely exceeded what the states themselves were spending on the militia.[367] As a result of the appropriation, "[d]rawing upon the two major arsenals in Springfield, Massachusetts, and Harpers Ferry, Virginia, as well as private companies throughout the United States, the government absorbed the vast majority of guns produced prior to 1840 . . . ."[368]

360. *Id.* § 3, 2 Stat. at 490–91.

361. *Id.*

362. *Id.* § 1, 2 Stat. at 490. There were different views on the wisdom of this program. In 1810, General Ebenezer Huntington wrote:

> In respect to arming the militia by the General Government, I cannot believe it expedient in any point of view. If the public should be willing to place their arms in the hands of the soldiery, they would, under every care which would be taken, be nearly rendered useless in a very short period. If they should be placed under the care of the officers, they would soon be destroyed with rust, without a regular armorer to take care of them; if they should be put in the hands of the men on their responsibility, they would be sold by them in many instances, and loaned, and used for gunning in others, and, I have no doubt might be considered a total loss in five years; besides, if the public were to furnish arms for the militia, the arms, now in our country, and many of them very fine pieces, would be totally neglected . . . . I should consider a magazine in each State, supplied with field pieces, arms, ammunition, and all the equipments necessary for a thousand men, and under the care of a suitable man paid for the purpose, more to be relied on than a supply for three thousand, dealt out to the men, or placed under the care of militia officers, at the close of every training day.

Letter from Ebenezer Huntington to Benjamin Tallmadge (Jan. 5, 1810), *in* 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS 264.

363. *See* Act of Apr. 10, 1806, ch. 20, § 1, art. 38, 1 Stat. 359, 364 (providing for "weekly stoppages"); *id.* art. 97, 1 Stat. at 371 (applying this provision to militiamen in federal service).

364. RIKER, *supra* note 289, at 22.

365. Two hundred thousand dollars in 1808 is equivalent in purchasing power to $3,700,000 in 2012. Samuel H. Williamson, *Seven Ways to Compute the Relative Value of All U.S. Dollar Amount—1774 to Present*, MEASURINGWORTH.COM, http://www.eh.net/hmit/compare/ (last visited Jan. 23, 2013).

366. For 1808, the military budget was $1,223,850.40, including $302,952 for army pay. Act of Mar. 3, 1808, ch. 27, § 1, 2 Stat. 470, 470 ("making appropriations for the Military establishment of the United States, for the year one thousand eight hundred and eight.") (summarizing components).

367. *See* RIKER, *supra* note 289, at 22.

368. Bellesîles, *supra* note 296, at 445–46.

This $200,000 annual appropriation remained in place until 1887 when Congress increased the amount to $400,000.[369] The program addressed, if it did not fully resolve, many of the anxieties about Congress' role in arming militiamen. Instead of Congress handing out arms (to which it might perhaps retain title), the states served as buffers between the national government and individuals. Rather than compelling individuals to arm themselves, states had a supply of weaponry that they could distribute.

D. Outcomes

What sounds good in theory does not always produce optimal results. Even with the 1808 law, many militiamen remained unarmed. Several problems arose. First, production of weapons remained inadequate and would not increase to sufficient levels to satisfy demand until the 1840s and 1850s.[370] Thus, writing to the Secretary of War, James Barbour, in 1826, Brigadier General Joseph Gardner Swift reported that he "had occasion to observe the organization of militia in South and North Carolina, New Jersey, and New York, during my service with them in the late war" and that he encountered "the evils of malformation, disproportion in the various 'arms,' and imperfect instruction."[371] Barbour tied the continued poor state of the militia to the problem of the supply of arms:

> The subject of organization has something to do with arms and equipments. That these are not in conformity with the United States laws is well known, the fancy of volunteers being a common guide to their choice, while the use of muskets and fowling-pieces of various lengths and calibres promote the usual disposition in the ordinary militia to pass muster with as little of either uniformity or of service as possible. On the subject of uniformity of arms, it cannot be effected until an efficient mode of supply be adopted. It would require nearly a century to arm the present militia by the existing means, at the expiration of which period the increase of population would fourfold the number of the militia. . . . [I]f a bounty were to be paid to each citizen who would arm and equip himself as the laws should direct . . . uniformity and arming the whole would sooner be effected . . . than by any other legal provisions.[372]

A second (and likely related) problem that arose was that while the statute made available an annual amount of $200,000 for supplying the states with arms, the administration evidently did not understand the statute to *require* it to spend and distribute to the states that amount in

369. Act of Feb. 12, 1887, ch. 129, 24 Stat. 401. The annual amount was increased again in 1900 to $1 million. Act of June 6, 1900, ch. 805, 31 Stat. 662.

370. Bellesîles, *supra* note 296, at 446–47.

371. Letter from J.G. Swift to James Barbour, Sept. 6, 1826, *in* 3 AMERICAN STATE PAPERS: MILITARY AFFAIRS 436–37.

372. *Id.* at 437.

arms every year.[373] After the first five years of the program, by which time $1 million had been appropriated, less than $100,000 had actually been spent: 34,477 stands of arms had been acquired and, even worse, only 26,000 stands of arms had been distributed among the states (and territories).[374] Explaining these figures, the Committee on Military Affairs in the House stated that by failing to specify any time period in which the arms "shall be transmitted to the several states" in proportion to their militia numbers, Congress had left the actual distribution to the discretion of the President.[375] Such discretion made sense, the committee reasoned, because requiring the President to ensure each state received, at a single time, a proportionate share of arms, would undermine the ability of the President to concentrate distribution where arms were most needed in times of war or other security threats.[376] In other words, it was better to save up for a rainy day. In addition, the committee explained, any annual or more frequent proportional distribution would be wasteful because the number of arms sent to any individual state would be small, shipping costs might exceed purchase price, and a small quantity of arms would not make any difference to the overall effectiveness of a state's militia.[377] While "in due time all the States must and will receive their respective proportions of arms," the committee concluded, the statute did not require any particular distribution schedule.[378] In a further display of thriftiness, the administration also took the position that the 1808 law was designed to supplement rather than replace the self-arming requirement of the Militia Act of May 8, 1792.[379] Hence, only limited distribution was needed. According to a communication from the Ordnance Department:

373. What the states actually did with the arms varied. A report from the Ordnance Department to Secretary of War John C. Calhoun in 1824 stated:

> Under the existing provisions of the act, the arms are procured by the General Government, and distributed in due proportions to the several States and Territories. The arms are delivered to the respective Governors, or to other executive officers, duly authorized to receive them. When the arms are thus delivered, they become the property of the State, and the officers of the General Government no longer exercise any control over them. How the arms are then disposed of, this department is not fully informed. It is known, however, that no uniform practice prevails. In some of the States, the arms are deposited in State arsenals, and reserved for occasions when the militia shall be called into actual service; in others, they are distributed to certain corps or companies, in whose hands they remain. In some of the States . . . the arms are deposited in the arsenals, and given out to the militia on days of general parade and inspection, and returned again to the arsenals after the exercises of the day are over.

Letter from G. Bomford to John C. Calhoun, Feb. 19, 1824, in 2 AMERICAN STATE PAPERS: MILITARY AFFAIRS 671.

374. Communication to the House of Representatives, July 8, 1813, *in* 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS at 337.

375. *Id.*

376. *Id.* at 338.

377. *Id.*

378. *Id.*

379. *Id.*

> The laws of the United States respecting the militia require that every citizen enrolled in the militia shall provide himself with suitable arms and accoutrements. The difficulties which may have been experienced in enforcing an exact compliance with these laws, it is presumed, may have induced the Legislatures of some of the States to distribute the arms received from the United States, with a view to promote the discipline of the militia. This plan, it is conceived, tends rather to increase the difficulty of enforcing a compliance with the laws than to diminish it; for few individuals will provide arms, at their own expense, when the State will furnish them gratis; nor will they be willing to do so, even if required by the State, when it is seen that their neighbors are furnished at the public expense.[380]

In other words, the administration viewed (surely wrongly) the 1808 appropriation as a backstop: individuals should be expected to arm themselves in the first instance. Consistent with this interpretation of the law, the administration also believed it was preferable for arms distributed under the 1808 funding scheme to be retained by the states in arsenals rather than given out to individuals because individuals could not be counted upon to maintain them properly.[381] The states, for their part, resisted the administration's miserly interpretation of the 1808 law. Thus, for example, when its militiamen served under federal command during the War of 1812, Massachusetts dispatched a bill to the Secretary of War that included charges for arms the state had purchased, deductible from the state's quota under the 1808 statute.[382]

A third impediment was that in the long term $200,000 annually was inadequate to keep the militia armed. From 1816 to 1823, 108,000 stands of arms were obtained to share among more than a million militiamen.[383] A bleak report from that time states

> [T]he arms procured during the last eight years are sufficient to arm only about one-tenth of the present number of effective militia in the United States; and this proportion will not be materially varied for several years to come, because the annual increase of the militia is more than double the number of arms procured annually.[384]

380. Letter from G. Bomford to John C. Calhoun, Feb. 19, 1824, *in* 2 AMERICAN STATE PAPERS: MILITARY AFFAIRS 671.

381. Bomford explained:

> Such of the States as shall retain in their arsenals the arms which have already been received from the United States, will, in the event of a war . . . be prepared to furnish about one-tenth part of its militia with arms of a good quality and of a uniform pattern, without placing any reliance upon the arms dispersed throughout the country in the hands of individuals. On the contrary, such of the States as shall distribute the arms to their militia, immediately upon their reception from the United States . . . will, in the event of a war . . . be found nearly, if not entirely, destitute of an efficient equipment for their militia; and thus the great purpose for which a large annual expenditure is made for procuring arms will be partially, if not wholly, defeated.

Id. at 672.

382. Letter from J.R. Poinsett to James K. Polk. Dec. 27, 1837, 7 AMERICAN STATE PAPERS: MILITARY AFFAIRS 775.

383. *Id.* at 671.

384. *Id.*

Even when the government did spend the annually-appropriated amount, the number of arms acquired remained small in proportion to the total number of militiamen who needed them. A report to the Secretary of War showed that in 1826 the federal government distributed to the states and territories 9960 muskets, 3520 rifles, 1998 rifle flasks, 1625 sets of rifle accouterments, 156 sabre belts, 1.2 million flints, and 26 travelling carriages, at a cost of $188,091.84.[385] The report also shows how these arms were apportioned among the states and territories.[386] In total, 15,000 arms were distributed among a whopping 1,129,277 militiamen.[387]

A fourth difficulty was that the federal government did not even have accurate information about the number of militiamen in each state and the arms in their possession. In a time of increasing population, states should have had an incentive to report their militia enrollments and their arms (as required under the Militia Act of May 8, 1792) so as to receive their appropriate share of arms.[388] While some states, like Massachusetts and Connecticut, diligently completed returns almost every year, other states failed regularly to make any kind of report.[389] Following an initial period of optimistic compliance, the percentage of states reporting declined after 1812 and by the Civil War just a few states were still submitting returns.[390]

E. Decline

Neither the failure of the states to submit reports nor of the federal government to distribute arms occurred because militiamen were already adequately armed. Instead, the decline in reporting likely reflected the fact that states were generally less committed to maintaining a militia system at all, let alone one in which militiamen were armed, trained, and ready to fight.[391] State neglect followed federal disinterest. The War of 1812 marked a turning point, with the federal government increasingly reliant upon volunteer troops over militiamen. In February of 1812, Congress authorized the President to organize a volunteer corps to be

385. Report of George Bomford to James Barbour, Nov. 27, 1827, *in* 3 AMERICAN STATE PAPERS: MILITARY AFFAIRS 649, 654.

386. *Id.*

387. *Id.*

388. In 1855, Congress changed the method of allocating arms to a distribution based on the number of Representatives and Senators from each state. *See* an Act Making Appropriations for the Support of the Army, for the Year Ending the Thirtieth of June, One Thousand Eight Hundred and Fifty-six, and for Other Purposes, March 3, 1855, ch. 169, § 7, 10 Stat. 635, 639.

389. *See* RIKER, *supra* note 289, at 27 (tabulating the percent of years in which individual states reported); H. RICHARD UVILLER & WILLIAM G. MERKEL, THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT 285–87 n.78 (2002) (summarizing returns).

390. RIKER, *supra* note 289, at 24–25.

391. *Id.* at 24.

"armed and equipped at the expense of the United States,"[392] and with provision for compensating soldiers for injuries or loss to property.[393] Congress appropriated $1 million for the expenses of the volunteer corps, a sum that made the 1808 appropriation for the militia seem paltry.[394] But a separate provision of the statute was even more symbolic of the shift that was occurring: Congress specified that every volunteer serving for at least one month was to receive upon discharge from federal service "a musket, bayonet, and other personal equipments; or, if attached to the cavalry, with the sabre and pistols furnished him by the United States."[395] After decades of trying to arm the militia, the federal government simply handed out weapons to volunteer fighters. With the militia performing poorly during the War of 1812 (the Massachusetts and Connecticut governors simply refused to dispatch militia units in response to the President's call), federal reliance upon the militia as part of the national security apparatus quickly declined.[396] The Seminole War of 1836-1842 marked the last significant occasion on which the federal government relied upon the militia.[397] In its place, a standing army became the nation's principal defensive force, and the old militia companies, such as they remained, eventually turned into volunteer units.[398]

F. Summary

The question of national power over the militia was the earliest opportunity for a sustained debate over the meaning of federalism and of the relationship between constitutional structures and individual liberties. Virtually all of our modern perspectives on federalism, and our approaches to constitutional interpretation, were found in the early militia

392. An Act authorizing the President of the United States to accept and organize certain Volunteer Military Corps, Feb. 6, 1812, ch. 21, § 1, 1 Stat. 676.

393. *Id.* § 4, 1 Stat. at 677.

394. *Id.* § 8.

395. *Id.* § 7.

396. RIKER, *supra* note 289, at 36–37.

397. *Id.* at 41.

398. *Id.* An accompanying development was that funds available under the 1808 statute did not produce the desired effect. For example, in a report to President Monroe in February 1823, Secretary of War Calhoun transmitted militia returns from the states and territories showing the number of enrolled militiamen and the individual arms and pieces of equipment in their possession. Some states, including Virginia and South Carolina, provided information about the number of militiamen but not their arms and equipment. Other states, including Delaware and Maryland did not submit recent returns (Maryland not since 1811 and Delaware not since 1814). The returns show that in no state or territory were militiamen fully armed and equipped according to the specifications of the May, 1792 Militia Act. Maine, for example, reported in its 1822 returns, 37,042 total militia members. Among the arms and equipment reported: 19,001 muskets, 18,644 bayonets, 19,950 cartridge boxes and belts, and 18,070 knapsacks. Rhode Island, with 8,942 militiamen in 1821 reported 5522 muskets, and shortfalls in other arms and equipment. Deficiencies were especially acute among southern states. In Georgia, 5567 muskets were dispersed among 29,661 militiamen while in Alabama, which became a state in 1819 there were 2905 muskets for 11,281 members of the militia. Letter from J.C. Calhoun to James Monroe (Feb. 21, 1823), *in* 2 AMERICAN STATE PAPERS: MILITARY AFFAIRS, 534, 535–37.

debates. Significantly, federalism was worked out not in the courts, which played almost no role in resolving the militia question, but in Congress and the federal executive branch, and in the legislatures of the states and among their governors.

Federalism is typically described as a division of power between national and state governments. In a basic sense, the militia debates of the late-eighteenth and early-nineteenth centuries concerned that sort of power division. At the same time, federalism was a highly dynamic concept. Rather than clear lines of authority, there was, when it came to the militia, overlapping federal and state jurisdiction and interactions between the states and the national government. These features resulted, in part, from the Constitution's assignment of power to regulate the militia both to the federal government and to the states. Yet overlaps and interactions were a product also of the dependence of the federal government upon the states to put into place federal programs. Such dependence gave the states authority to limit how far federal statutes would reach, to decide upon the ways in which federal laws would apply, and to prevent their application when states thought those laws unduly burdensome or inconsistent with state policy.[399]

Stepping back from the militia question, the events described in this Article represent a rich moment in the history of U.S. federalism. Congress sought to achieve a federal goal but faced resistance in interpreting its powers broadly to implement that goal through plain coercive measures. Congress therefore settled on an initial legislative program in which federal standards would be set out but without any mechanism to enforce those standards on their targets. In the absence of individual compliance, Congress relied upon the states to carry out the task of actual implementation. States were not eager to impose burdensome federal rules upon their own citizens and had different views about how the federal goal should be achieved. States therefore viewed the federal law to entail simply recommendations and tailored their own local rules. Congress subsequently made it easier for states to comply by facilitating market access. When this proved unpopular, Congress directed the states to implement federal law, a strategy that under modern doctrine would be deemed unconstitutional. When this did not result in compliance, Congress gave states the resources to carry out the federal program.

V. MANDATES OLD AND NEW

The Minimum Essential Coverage Provision of the Patient Protection and Affordable Care Act of 2010 requires most Americans to main-

399. *Cf.* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 11 YALE L.J. 1256 (2009).

tain a minimum level of health insurance coverage by 2014.[400] Failure to comply with the requirement will result in a financial penalty enforced against the taxpayer by the Internal Revenue Service.[401] In the constitutional challenge to the statute that culminated in the Supreme Court's decision at the end of the 2011 term, the early question of arming militiamen played a notable role.[402] Among the arguments against the constitutionality of this provision was one grounded in historical exception: those who contended that the individual mandate exceeded Congress' powers under the Constitution asserted that never before this law had Congress required Americans to enter into a market and purchase a good or service from a private entity. According to these critics, the fact that Congress had never previously mandated that people buy something was evidence that Congress lacked the power to force Americans to buy a health insurance policy.[403] If it had not been done, these critics said, Congress could not do it.[404] In response to this argument, supporters of the individual mandate's constitutionality argued that the law's opponents had their history wrong.[405] As evidence that Congress had indeed mandated private commercial transactions in the past, supporters offered as historical precedent the Militia Act of May 8, 1792.[406] As we have seen, this statute, signed into law by President George Washington, enrolled free white men between the ages of 18 and 45 in the militia and directed them to provide their own arms and equipment, according to a congressionally specified list.[407] If Americans could be required to purchase guns in 1792, the healthcare law supporters claimed, Americans could surely be required to purchase health insurance in 2014.[408]

400. 26 U.S.C. § 5000A (2010).

401. *Id.*

402. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

403. *See, e.g.*, Adam Winkler, *The Founding Fathers' "Individual Mandate"*, HUFFPOST POLITICS (Apr. 2, 2010, 9:45 AM), http://www.huffingtonpost.com/adam-winkler/the-founding-fathers-indi_b_523001.html.

404. *Id.*

405. *Id.*

406. *Id.*

407. Act of May 8, 1792, ch. 33, 1 Stat. 271.

408. *See, e.g.*, Akhil Reed Amar, *The Lawfulness of Health-Care Reform* 17 (Yale Law Sch. Paper No. 228, 2011), *available at* http://papers.ssrn.com/5013/papers.cfm?abstract_id=1856506 (referring to the 1792 Militia Act as "a venerable legislative precedent for the Obamacare mandate"); Richard Cordray, *Should Ohio Join Attempt to Overturn Health-Care Law? No: Commerce Clause Gives Lawmakers Power to Require Purchase of Insurance*, COLUMBUS DISPATCH, Apr. 1, 2010, http://www.dispatch.com/content/stories/editorials/2010/04/01/cordray-gmt81qna-1.html ("The claim is . . . made that Congress has never required anyone to purchase a product or service. That is factually wrong. The Second Militia Act of 1792, signed by President George Washington, explicitly required many Americans to make an economic purchase: of a gun, ammunition, gunpowder and a knapsack to be properly prepared for military service."); Mark A. Hall, *Commerce Clause Challenges to Health Care Reform*, 159 U. PA. L. REV. 1825 (2011) ("The Constitution's authority 'for calling forth the Militia' [sic] provides no . . . express power to mandate the private purchase of arms. Therefore, this purchase mandate must have been based . . . on the Necessary and Proper Clause. If a mandate to purchase can augment one enumerated federal power, there is no principled reason it cannot be used to augment

In a footnote in her opinion in *NFIB v. Sebelius*, Justice Ginsburg cited the Militia Act of May 8, 1792 as a prior example of Congress requiring individuals to take action.[409] Rather than explore the details of the comparison, Chief Justice Roberts in response took the position, adopted by challengers to the law,[410] that Congress' power over the militia was not relevant to a question of the scope of Congress' power under the Commerce Clause.[411] With that distinction drawn, Roberts deemed the healthcare mandate unprecedented: never before had Congress used its power over interstate commerce to mandate a private transaction.[412]

Neither Ginsburg nor Roberts (nor their respective fans) appreciated the full picture. A close historical look at the self-arming requirement of the Militia Act of May 8, 1792 and its subsequent iterations presents a far more complex story about the scope of and limits to early federal power than either justice acknowledged. Unearthing that history presents significant difficulties for any contemporary reliance upon early federal self-arming requirements as support for the proposition that Congress may direct individuals to purchase a good or service from a private vendor. Considered in isolation, the May 8, 1792 Act does appear to

the commerce power."); Joe Conason, *So George Washington Was a Socialist, Too!*, SALON, (Mar. 25, 2010, 12:26 PM), http://www.salon.com/2010/03/25/militia ("[T]he founders saw no constitutional barrier to a law ordering every citizen to buy a gun and ammo."); Winkler, *supra* note 403 ("[T]he founding fathers adopted the first 'individual mandate' back in 1792. It required individuals to outfit themselves with guns and ammunition, even if they had to buy those items from private sellers. . . . Regardless of the burden, people had to equip themselves, even if they might never have any need to use that equipment.").

409. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius 132 S. Ct. 2566, 2627 n.10 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("Congress regularly and uncontroversially requires individuals who are 'doing nothing' . . . to take action. Examples include federal requirements . . . to purchase firearms and gear in anticipation of service in the Militia, 1 Stat. 271 (Uniform Militia Act of 1792).").

410. *See, e.g.*, Gary Lawson & David B. Kopel, *Bad News for Professor Koppelman: The Incidental Unconstitutionality of the Individual Mandate*, 121 YALE L.J. ONLINE 267, 280 n.51 (2011), *available at* http://yalelawjournal.org/images/pdfs/1025.pdf (conceding that the Constitution's Militia Clause "specifically authorizes Congress to compel 'commercial' transactions" and citing the May 8, 1792 Militia Act's arming requirement as reflective of that Clause; Julia Shaw, *The Use and Abuse of the Founders: The Individual Mandate is Still Unprecedented and Unconstitutional*, FOUNDRY, (March 26, 2010, 11:10 AM), http://blog.heritage.org/2010/03/26/the-use-and-abuse-of-the-founders-the-individual-mandate-is-still-unprecedented-and-unconstitutional/ ("Unlike the reach of the health care bill, the Second Militia Act applies to a narrow sub-section of society: white, male citizens between the ages of eighteen and forty-five who are members of the militia;" "It is possible that a man could have inherited a musket, bartered for a knapsack, or made his own bullets, and still be in compliance with the Act;" "There is solid constitutional basis for the Second Militia Act: Article I, section 8, clause 16 . . . ."); Memorandum from Randy Barnett et al., HERITAGE FOUNDATION, Why the Personal Mandate to Buy Health Insurance is Unprecedented and Unconstitutional 6 (Dec. 9, 2009) ("A mandate to enter into a contract with an insurance company would be the first use of *the Commerce Clause* to universally mandate an activity *by all citizens* of the United States.") (emphases added).

411. *See* 132 S. Ct. at 2586 n.3 ("The examples of other congressional mandates cited by Justice Ginsburg . . . are based on constitutional provisions other than the Commerce Clause. See Art. I, § 8, . . . cl. 16 (to "provide for organizing, arming, and disciplining, the Militia") . . . ").

412. *See id.* at 2586 ("[I]t is no surprise that Congress has employed the commerce power in a wide variety of ways to address the pressing needs of the time. But Congress has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product.").

mandate that individual militiamen purchase weapons and other military supplies. Yet, as this Article has shown, the May 8 Act's requirement must be viewed as just one point in a history of arming militiamen, a history that began in the colonial era and continued until the mid-nineteenth century, and that involved fundamental questions of the relative powers of central versus local government, of the relationship between the national government and the states, and, ultimately of individual liberties.[413] Once that history is properly understood, it is too simplistic to view the self-arming requirement as supplying evidence (or not) of congressional power to compel purchases under the Militia Clauses or any other constitutional provision.

Several points shed light on the healthcare mandate and serve also to tie together some of the themes of this Article. First, viewed in context, the self-arming requirement of the Militia Act of May 8, 1792 represented a *constraint on* rather than an *assertion of* federal power. The militia of the 1790s was universally viewed as the bulwark of liberty: armed militiamen at the local level protected the population from central government and from standing armies.[414] Were *Congress* permitted to arm the militia, or responsible for doing so, Congress might elect to provide militiamen with insufficient weaponry, or, worse, later decide to reclaim the weapons it did provide. Either action, a serious risk in the minds of Americans of the early Republic, would leave the militia poorly armed or disarmed and thus unable to do its duty and protect the people's liberties. These concerns took particularized form at the time of enactment of the Militia Act of May 8, 1792. In the early 1790s, manufacture of weapons, particularly those useful for military activity, lagged demand.[415] It was well understood that if the federal government were to assume the role of supplying the militia with weapons—to serve, in the language of healthcare and health insurance, as single-payer—it could quickly capture the entire market, leaving nothing for individual purchase.[416] In addition, federal supply of weapons could easily crowd out private purchases: rather than buy their own weapons, militiamen would rely upon the federal government to supply them. Accordingly, the self-arming requirement of the Militia Act of May 8, 1792 reflected not a powerful federal government ordering around individuals, but rather a commitment to the principle that liberty required that militiamen not depend upon the national government for their arms and equipment. The requirement in 1792 that individual militiamen acquire their own weapons represented a victory by those who sought to minimize the federal government's use of its constitutional powers with respect to the militia. As such, con-

413. *See supra* Part I.
414. *See* Winkler, *supra* note 403.
415. Bellesîles, *supra* note 296, at 431.
416. *Id.* at 435.

sider the Militia Act of May 8, 1792 in conjunction with the Second Amendment's protection of the right of individuals to keep and bear arms. The Militia Act ensured *individual* ownership of arms; the Second Amendment prohibited the national government from taking those arms away.

Analogizing the Militia Act of May 8, 1792 to the 2010 healthcare law requires ignoring a fundamental difference—one that almost nobody engaged in debates over the constitutionality of the minimum essential coverage provision seemed to notice—between the two statutes. The difference is this: unlike the healthcare law, which enforces its mandate through income tax penalties, the Militia Act of May 8, 1792 contained no federal enforcement mechanism. While the Militia Act seemingly directed individual militiamen to provide themselves with arms and equipment, the statute imposed no fine, tax,[417] or other penalty against militiamen who failed to comply with this requirement. (The law also offered no financial or other incentive for compliance.) The principle that Congress lacked authority to penalize militiamen outside of federal service emerged in the early 1790s and held firm. Individuals could (and did) simply refuse to purchase the arms and equipment Congress told them to purchase and there was nothing any federal officer could do about it.[418] Congress saw in the militia returns it collected and from the complaints of officers that militiamen did not arm and equip themselves according to the law. Congress also enacted a slew of additional statutes regulating the militia. At no point, however, did Congress impose a penalty against militiamen for failing to purchase or otherwise obtain the requisite arms and equipment.[419] There was, therefore, no mandate to purchase arms and equipment because Congress lacked the authority to punish militiamen who did not comply.

Besides lofty expectations of militiamen obeying federal law out of a sense of patriotic duty, Congress counted on the *state*s, mostly by exhortation but at times also by legislation, to give effect to the federal arming requirements.[420] But the states were no puppets of the federal government, and relying upon them replicated the problem Congress had in telling militiamen what to do with no penalty to back up the requirement. States also suffered no penalty if their militiamen were not armed and equipped according to federal direction and they received no reward for producing compliance.[421] While states implemented a system of monetary fines against militiamen who failed to maintain arms and equipment, the states themselves decided which arms and equipment their mi-

417. Of course, the Congress that enacted the Affordable Care Act had the benefit of power granted to it by the Sixteenth Amendment. U.S. CONST. Amend. XVI.

418. Bellesîles, *supra* note 296, at 432.

419. *See supra* notes 256–60 and accompanying text.

420. Bellesîles, *supra* note 296, at 428.

421. *Id.* at 438.

litiamen should possess rather than following blindly Congress' demands. To the extent federal law was implemented, it was implemented in the ways that individual states deemed fit.[422] Moreover, state enforcement through fines was lax. Muskets were not always available for purchase and when they were available they were expensive.[423] The states understood that there was generally little point in fining local militiamen who did not have a musket (let alone other equipment) in their possession. Local officials, who wanted to remain in office, were also reluctant to seek fines against resentful militiamen.[424] Viewed in terms of the relationship between the federal government and the states, therefore, the arming provision of the Militia Act of May 8, 1792 (and subsequent statutes) reinforced the authority of the state governments over the militia rather than enhanced federal power.

Consider, then, what the version of federalism embodied by the Militia Act of May 8, 1792 would look like in the modern health care context: a federal statute would state that everyone is to enroll in a health insurance plan and the statute would further specify the requirements that the plan must meet. There would be no fine, tax, or other penalty under the statute if individuals failed to possess the requisite insurance. Congress would instead rely upon individuals voluntarily to obtain health insurance; any enforcement mechanisms would be left to the states. States would be able to enforce the requirement, or some other requirement they preferred, through fines and other mechanisms. Since having health insurance is attractive to large segments of the population, many people would possess insurance even without Congress telling them to do so (in the same way that many Americans are and have been gun owners without Congress mandating gun ownership). Americans might not, however, possess the precise kind of insurance plan specified in a federal law. Some states might determine that they want their own citizens to be insured and implement state-level mandates backed up by penalties. State insurance requirements would, however, likely differ from those contained in the federal statute. Just as the Militia Act of May 8, 1792 failed to produce a uniformly armed militia, state oversight would be unlikely to produce a fully or uniformly insured America. The Patient Protection and Affordable Care Act is, of course, a quite different animal. Rather than rely upon voluntary compliance or upon state cooperation, the minimum essential coverage provision sets federal standards for health insurance and backs them up through tax penalties assessed against individuals who do not comply.

Beyond the question of precedent, some broader points emerge. A further way of thinking about the relationship between guns and

422. *Id.* at 446.
423. *Id.* at 445.
424. *Id.* at 438.

healthcare is in terms of individual rights. A common criticism of arguments that the individual health insurance mandate was beyond Congress' power to enact was that the arguments were "really" concerned with individual liberty.[425] The implication of this criticism was that plaintiffs challenging the mandate and their supporters were (improperly) using a federalism argument to conceal a liberty argument—and in particular an argument based on substantive due process that they could not win.[426] In his dissenting opinion from the 11th Circuit's ruling holding the individual mandate unconstitutional, Judge Stanley Marcus made the point: "[o]n appeal, the plaintiffs have expressly disclaimed any substantive due process challenge to the individual mandate . . . Nevertheless, it is clear that individual liberty concerns lurk just beneath the surface, inflecting the plaintiffs' argument throughout, although largely dressed up in Commerce Clause and Necessary and Proper Clause terms."[427] (Judge Marcus then went on to explain why in his view the individual mandate did not violate substantive due process under rational basis view.)[428] Americans who debated the reach of national power over the militia would have found this species of criticism bizarre, almost unintelligible. They understood that federalism was all about individual liberties. The challenge, with the birth of the Republic, was to produce a national goal—security—while also ensuring that liberties were not threatened by the way in which power was divided up and assigned. To be sure, there were different conceptions of what liberty meant and how best to protect it, but nobody thought it somehow improper for those who spoke the language of federalism to be motivated by concerns about individual rights.

Yet the "gotcha" quality of criticisms that the individual mandate plaintiffs were "really" concerned with liberty is perhaps not surprising in the modern era. In the way constitutional law is today taught, studied, and practiced, there is an unfortunate (because it is artificial) divide between "structure" and "rights." In many law schools, there are separate first-year courses for constitutional structure and for constitutional rights; in schools where the topics are combined in a single course, there is also often a division between the first half of the course (structure) and the second (rights). Most, but not all, casebooks also reflect this approach. The division is further reinforced by upper-level classes in the First Amendment and criminal procedure (where structure is rarely mentioned). Likewise, there are scholars who concern themselves with con-

425. Hall, *supra* note 408, at 1838.

426. *Id.* at 1859.

427. *See, e.g.*, Florida ex rel. Atty. Gen. v. U.S. Dept. of Health & Human Services, 648 F.3d 1235 (11th Cir. 2011) (*cert. granted*, 132 S. Ct. 603 (U.S. 2011) and *cert. granted*, 132 S. Ct. 604 (U.S. 2011) and *cert. granted in part*, 132 S. Ct. 604 (U.S. 2011) and *aff'd in part*, *rev'd in part sub nom.* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (U.S. 2012)).

428. *Id.* at 1361–63.

stitutional rights (sometimes just one right) and others who focus on structures. Comparing guns to healthcare reminds us how federalism and other structural provisions of the Constitution relate to, indeed, are inseparable from, individual liberties—and vice-versa.

CONCLUSION

We return to the unwritten Constitution. Federalism is central to any account of constitutional precedents and principles that lie beyond the text. The written Constitution provides a framework of federalism but many of the details of our federal structure have been worked out in other settings and contexts. Early debates over arming militiamen were an important vehicle for the development of unwritten federalism principles that continue to shape and inform the operation of our political system. The militia question is, of course, just one case study. Most of the work of identifying and understanding Federalism Unwritten remains to be done. The tools that Amar provides in *America's Unwritten Constitution* are helpful for this archeology but they are not a complete set. The case study this Article has examined features activities outside of the courts. It deals with constitutional questions that today do not easily generate popular enthusiasm although at one time they affected huge numbers of ordinary Americans. Its key protagonists are individuals unknown to most accountants of constitutional history. Its effects have survived the dividing line of the Civil War. It is a study ultimately in individual liberty but of a kind that is no longer given its full due. Attention to federalism enhances the understanding of our unwritten constitution and gives that constitution a more complete and sharper form.