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The Dormant Second Amendment: Exploring the Rise, Fall, and Potential Resurrection of Independent State Militias

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Repository Citation

Michael J. Golden, *The Dormant Second Amendment: Exploring the Rise, Fall, and Potential Resurrection of Independent State Militias*, 21 Wm. & Mary Bill Rts. J. 1021 (2013), <http://scholarship.law.wm.edu/wmborj/vol21/iss4/2>

THE DORMANT SECOND AMENDMENT: EXPLORING THE RISE, FALL, AND POTENTIAL RESURRECTION OF INDEPENDENT STATE MILITIAS

Michael J. Golden*

ABSTRACT

The term “militia” is polarizing, misunderstood, misapplied, and generally difficult for modern Americans to digest. That is not surprising, given the depth and breadth of American militia history and militias’ substantial evolution over four centuries.

Historically, militia simply refers to a broad-based civic duty to protect one’s fellow citizens from internal and external dangers and is not limited to activities involving firearms. Reestablishing militia’s true meaning and purpose—and reinvigorating independent state militias in the United States to effect that purpose—has the potential to address states’ emerging financial and security gaps and to produce multiple other significant benefits, including recalibrating federalism. This Article suggests a method for how best to reinvigorate independent state militias, addresses the major critique against doing so, and initiates a real discussion about the future of state militias—an issue conspicuously underdeveloped in scholarship today.

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INTRODUCTION

Militia. What does the term mean? What is its historical significance, and how has it evolved in America over nearly four centuries? Why did it merit special reference in the Bill of Rights, and why has pure state militia duty been rendered effectively dormant? What positive roles, if any, could independent state militias play today? This Article addresses those questions in an effort to ignite a serious discussion about the future of state militias—an issue unfortunately underdeveloped in current scholarship.

Given the financial and security challenges facing our national, state, and local governments today, militias have never been more relevant. Militias in their National Guard form play a critical role in national and international defense and security. But the effective federalization of state militias has practically deprived states of an important tool to address their domestic-security and emergency-response challenges¹ and has radically altered those militias' role as a fulcrum of federalism.

Based on militias' historical performance and states' current needs, state militias offer an attractive option for addressing the increasing domestic-security and emergency-response challenges facing states and their localities today. Providing states a meaningful opportunity to reinvigorate independent state militias would allow them to address those challenges better and would recalibrate federalism, reestablishing for citizens and their states a tool the Supreme Court has recognized is essential in combating government tyranny. The foundation for reinvigorating and modernizing state-focused militias is supported by history, state constitutions, public policy, and the careful constitutional balancing of powers among citizens, state governments, and the national government.

Part I of this Article discusses the origin, characteristics, and evolution of state militia duty and offers historical evidence identifying those militias' core purposes and their performance in those contexts. Part II addresses the basic opposition to reinvigorating state-focused militias based on a civic-republican critique and considers

¹ For example, during his first campaign for President, Barack Obama acknowledged an increasing inability for existing federal forces to address the nation's domestic-security needs adequately and recommended creating a civilian national defense force, which he described as serving many of the same core purposes of traditional state militias. *See* Senator Barack Obama, Address to Supporters at a Campaign Stop in Colorado Springs, CO (July 2, 2008), available at http://www.youtube.com/watch?v=Df2p6867_pw.

the import of state constitutions on the proper characterization of state militia duty. Part III offers a view of how to structure and conceptualize reinvigorated state militias and provides illustrations showing how those militias could meaningfully address emerging challenges to state governments while also reestablishing militias' recognized check-on-tyranny function with simple modifications of federal law. Reinvigorated, modernized independent state militias would build on state militias' historical successes but make them more nimble, more representative of the citizens they serve, and more effective in twenty-first-century America while respecting the unique role and successes of the National Guard.

I. THE ORIGIN, NATURE, EVOLUTION, AND EFFICACY OF STATE MILITIAS

State militia duty is a difficult and complex concept to unpack because it has evolved so significantly over the past four hundred years. The duty is quite broad—it implies a civic duty owed by a large portion of the population to defend fellow citizens from internal and external threats and to provide a meaningful way for citizens to resist government overreaching. The duty historically has been exercised both individually and collectively by citizens, and its prominence and relevance have diminished significantly as federal law has increasingly subjected state militias to actual or de facto national control. State militias' relationships with their state and national governments previously maintained a unique and delicate balance between independent and government-directed action, between faithfully supporting legitimate government requests to protect fellow citizens and resisting perceived illegitimate government requests that overreached. Historically, militias have proved to be essential to the effective operation of national and state governments. Today, effective federalization of state militias has improved their performance in the domestic-defense context at the expense of their other functions, particularly as a check on tyranny.

This Part addresses the evolving characteristics of state militias throughout their history, focusing on three different dimensions: (A) the obligations militia duty imposes on citizens, and which citizens are so obligated; (B) the relationship between state militias and government; and (C) the core functions of state militias. Those three dimensions dictate the historical efficacy of state militias and inform consideration of how those militias could best serve the needs of today's U.S. citizens.

A. State Militia Duty Obligations and Affected Citizens

1. Early American Militias Derived from European Militias and Imported Similar Concepts of Militia Duty

The concept of state militias originated millennia ago, when ancient Greek city-states required all able-bodied, free male citizens to serve as citizen-soldiers in defense

of the state.² The Romans adopted the concept, and it spread throughout Europe.³ During the Middle Ages, able-bodied members of society frequently had a civic duty to defend their community, and the civic duty by its nature imposed upon those citizens the responsibility to train and prepare themselves to fulfill that duty effectively.⁴ With little support from any sovereign, early militias in large part were citizen-led, citizen-organized, and citizen-funded.⁵ Those militias, like their forebears, did not include all residents but instead were limited to landowning individuals who, in that society's view, were able to fulfill the civic duty.⁶ And although not all components of society were represented in the militias, the militias were diffuse enough to reflect the will of the people.⁷

Early militias like England's Great Fyrd were characterized by a civic duty defined primarily by three features. First, any physically capable individual who owned land within a sovereign's domestic borders bore responsibility to assist defending it from internal and external threats.⁸ Second, that responsibility was part-time, on an as-needed basis, but membership was continuous during the period of capability and eligibility, and members were prepared to be called into service during that period.⁹ Third, it was each individual's obligation to train and arm himself to the extent necessary

² MICHAEL D. DOUBLER & JOHN W. LISTMAN, JR., *THE NATIONAL GUARD* 1 (2d ed. 2007). The concept of citizen-soldiers goes back even further, at least to the fifth century B.C. Nehemiah relied on Hebrew citizen-soldiers to defend themselves from external threats while rebuilding the walls of Jerusalem, *Nehemiah* 4:7–23, and the Jews in Persia themselves defended against the attacks authorized by King Ahasuerus and Haman, *Esther* 9:1–16.

³ DOUBLER & LISTMAN, *supra* note 2, at 1; see also James Biser Whisker, *The Citizen-Soldier Under Federal and State Law*, 94 W. VA. L. REV. 947, 952 (1992).

⁴ See DOUBLER & LISTMAN, *supra* note 2, at 1 (noting that “each male was obligated to military service and citizen-soldiers had to provide their own arms and equipment”); JOHN K. MAHON, *HISTORY OF THE MILITIA AND THE NATIONAL GUARD* 6 (Louis Morton ed., 1983) (“[I]ndividuals were expected to turn out when called with whatever weapons they could acquire.”). Initially, each colonizing agency sent a professional soldier “to train the entire community in the use of arms.” Whisker, *supra* note 3, at 952, 954.

⁵ DOUBLER & LISTMAN, *supra* note 2, at 1–2 (noting that Spanish settlers in Puerto Rico and Florida organized themselves into militia commands, established day and night watches, and began routine training); MAHON, *supra* note 4, at 14–15 (noting that private groups that founded the early settlements received no military assistance from the crown).

⁶ A prototypical example of such an early militia is The Great Fyrd, which included the “entire free male population of military age” in England. MAHON, *supra* note 4, at 6; see also DOUBLER & LISTMAN, *supra* note 2, at 5; Whisker, *supra* note 3, at 952. Although The Great Fyrd did not include women and was age-limited, its composition proved much more representative of the population than a purely professional force, and its self-armed, self-trained members reduced the government's military financial burdens. DOUBLER & LISTMAN, *supra* note 2, at 5; MAHON, *supra* note 4, at 8–9; Whisker, *supra* note 3, at 952.

⁷ See MAHON, *supra* note 4, at 14 (noting that English colonies “believed that a military obligation rested on every free, white male settler”).

⁸ See *id.* at 7, 10.

⁹ *Id.* at 7.

to provide the expected assistance.¹⁰ That concept of militia was imported into the United States through English colonization, and those same key principles provided the foundation for the state militias as they evolved in early America.¹¹

2. State Militia Duty Was Imposed on a Broad Swath of Citizens, but Not All

From its colonial origins, state militia duty extended to a broad band of citizens, although it never comprised all citizens (nor was that the goal). However, those militias were much more diffuse, representative, and exclusively loyal to the citizenry at large than their professional contemporaries, who had some measure of separation from the citizenry and owed their first duty to their government-employed superiors. Originally, militia duty was linked to perceived military capability, was limited to white men aged sixteen to around sixty, and exempted conscientious objectors, among others.¹² Over four centuries, the scope of colonial, then state, militias' membership has evolved, generally expanding. States have eliminated racial distinctions, and some have extended militia membership to women, but age restrictions have persisted.¹³ Although state militias embrace a wide spectrum of their citizenry, they are by no means universal. Similarly, the unorganized federal militia currently retains significant restrictions on membership, generally excluding men aged forty-five and older and women who are not members of the National Guard.¹⁴

3. Militia Duty Initially Was Mandatory, but State Militias Later Embraced Actual or De Facto Volunteer Models

Militia duty in America initially was mandatory by necessity, like that imposed on England's Great Fyrd. Landowning British colonists imported from their home country the belief that the duty to defend their communities was appurtenant to their right to own their land.¹⁵ And the colonists took this responsibility seriously: failure to fulfill militia duty was punishable by corporal punishment in times of war or imminent danger, or by fines in times of peace.¹⁶ However, the multiple ways to avoid

¹⁰ DOUBLER & LISTMAN, *supra* note 2, at 1; MAHON, *supra* note 4, at 10, 14.

¹¹ MAHON, *supra* note 4, at 6.

¹² *Id.* at 14, 18; Whisker, *supra* note 3, at 956.

¹³ *See, e.g.*, VA. CODE ANN. § 44-1 (2012) (including in the state militia "all able-bodied residents of the Commonwealth" between the ages of sixteen and fifty-five).

¹⁴ 10 U.S.C. § 311 (2006).

¹⁵ Members were actively involved in militia leadership decisions, and leaders frequently directed training activities. MAHON, *supra* note 4, at 15–16, 18, 57 (noting that militia officers were chosen by fellow militia members, by popular vote, or by official appointment and that militias trained on a regular basis, but the frequency correlated to the perceived degree of danger facing their respective communities).

¹⁶ *Id.* at 18 (noting that in times of peace, many rich people paid rather than serve or served in volunteer militias).

personal militia service confirm the duty was not universal: militia members who were unwilling or unable to serve could provide a substitute or pay a fine, some states exempted new citizens for a time, and slave states exempted from service overseers of four or more slaves.¹⁷

To ensure militia members were prepared to perform their duty, most colonial militias required each household to own and maintain its own arms and often required wealthier households to arm their servants, as well.¹⁸ If one could not afford to buy arms, some colonies rented them to militia members (as in New England), colonists could work for someone who could provide them arms (as in South Carolina), and other colonies assessed special taxes to provide arms for the poor.¹⁹ All colonies kept some public arms, but those arms typically were poorly maintained and often were not returned when lent to militia members.²⁰

The nature of the civic militia duty began to evolve within a few decades of colonial militias' birth—no longer was the duty purely mandatory; volunteer militia companies emerged as early as 1638 in colonies with a critical mass of financially successful individuals.²¹ Those volunteer companies typically were specialty divisions, such as horsemen and artillery, which provided the militias with unique capabilities but imposed on participating company members a high cost to maintain the horses or unique arms they required.²² Members of those companies typically received special government privileges (such as tax benefits) to offset those increased costs.²³ Organizationally, some volunteer militia companies were independent of the mandatory militias, while others were incorporated in the colony's mandatory structure.²⁴

After the War of 1812, the reduced danger posed by external threats like England and Native Americans²⁵ fueled state militias' decline generally and transformed the

¹⁷ *Id.* South Carolina exempted new citizens for a year, and Virginia exempted free blacks to serve in labor roles but exempted them from military duty. *Id.*

¹⁸ *Id.* at 16.

¹⁹ *Id.* (noting that eighty-seven percent of early Virginian settlers were armed no matter the cost because of their desire to live in isolated, rural settings that required them to provide for their own security).

²⁰ *Id.* at 17. Only in New England were public arms relatively well kept and in sufficient numbers, due in large part to a close-knit community system, which imposed meaningful accountability through periodic inspection of the arms, among other measures. *Id.*

²¹ *Id.* at 18. Volunteer companies often were specialty companies, which were more expensive to maintain. For example, while mandatory militia members typically lacked uniforms, volunteers paid for their own uniforms and paid dues to maintain their own meeting and training places. *Id.* at 18, 31–32, 57.

²² *Id.* at 31–32.

²³ *Id.* at 17 (noting that some also received exemption from involuntary military draft service).

²⁴ *Id.* at 18.

²⁵ When I refer to external threats, I refer to threats that did not reside within the sovereign territory of the United States and its predecessor colonies.

duty into a predominately voluntary exercise.²⁶ Extreme population growth created extremely large theoretical mandatory militias²⁷—militias whose size rendered them difficult if not impossible for governments to organize and manage effectively. It made sense for governments to transition to voluntary models.²⁸

In light of those new realities, numerous states eliminated mandatory militia service or minimized the penalties for failing to appear for such mandatory service. By the mid-nineteenth century, state militias based on mandatory service were essentially obsolete, replaced by volunteer-based state militias.²⁹ The contraction of militias to predominantly volunteer forces effectively distilled them to their finest core: the most dedicated, courageous, disciplined, and prepared of the eligible citizens.³⁰

The Civil War and further perceived reductions in external military threats tested the state militias' stability and their communities' commitment to maintaining them. For example, the Civil War drained volunteer militias of a considerable number of their ranks, as the survivors had little interest in volunteer military service after such a taxing, extended, and emotional conflict.³¹ Thereafter, with the United States' major internal conflict resolved and the regular army perceived as capable of addressing remaining external threats (primarily Native American), volunteer militia service—and public perceptions of its significance—waned substantially in the decade following the Civil War.³²

Like any primarily citizen-directed, citizen-staffed public service entity, militia success frequently depended upon sufficient commitment by the community and local institutions, as well as infrastructural characteristics that made it easier for a critical mass of citizens to coordinate their efforts effectively. Thus, militias in areas with a compact geographic base, relatively dense population, strong citizen support, and deep-rooted militia traditions typically thrived.³³ For example, New England militias

²⁶ Fewer saw the need to require militia service in the absence of immediate, persistent external threats to their communities. DOUBLER & LISTMAN, *supra* note 2, at 22; *see* MAHON, *supra* note 4, at 82–83.

²⁷ *See* DOUBLER & LISTMAN, *supra* note 2, at 22.

²⁸ *See id.* at 22–23.

²⁹ Delaware abolished mandatory militia duty in 1831, and over the next two decades Massachusetts (1840), Maine, Ohio, Vermont (1844), Connecticut, New York (1846), Missouri (1847), and New Hampshire (1851), among other states, did likewise. *Id.* at 23; MAHON, *supra* note 4, at 83.

³⁰ *See* DOUBLER & LISTMAN, *supra* note 2, at 26.

³¹ *See* MAHON, *supra* note 4, at 104, 108.

³² Whisker, *supra* note 3, at 966. Even earlier, colonial expansion revealed the relationship between health of militias and perceived threats: as settlements extended inland, they provided an ever-growing buffer for coastal communities, whose militias deteriorated as the imminent need to repel Native American invasions decreased. DOUBLER & LISTMAN, *supra* note 2, at 6.

³³ For example, the quality and frequency of company-level training varied and was highly dependent on the captain's commitment and the ease with which militia members could gather, favoring densely populated areas with robust infrastructure. MAHON, *supra* note 4, at 56–57.

generally were considered the strongest overall, as many companies were organized in communities with one or more of those characteristics, including support from the politically and socially powerful area churches.³⁴ Virginia and Maryland benefitted from strong historical traditions of militia duty, but were organized by counties that were larger and lacked the population density of northern militias, and they enjoyed less community support from their churches.³⁵ South of Virginia, militia quality varied significantly, as many rural areas lacked those key infrastructural and societal advantages while some urban areas, like Charleston, South Carolina, possessed them.³⁶

State militia duty originally imposed a duty on many—but not all—citizens to defend their community from internal and external threats. Originally a mandatory duty produced by necessity, given the large population of today’s United States, governments have sensibly embraced a voluntary model of militia duty, which has proved historically successful.

B. State Militias and Government

The relationship between state militias and government has always been unique. State militias were designed to operate for the benefit of citizens and, in so doing, assisted the state in its responsibility to protect those citizens. On the other hand, state militias were designed to provide those same citizens with the functional power and organization to resist government overreaching. This delicate but critical duality of militia purpose is codified in the Second Amendment: militias are “necessary” not only to ensure the “security” of each state but also to ensure the states are “free.”³⁷ To accomplish the full panoply of their purposes, militia members must be free to judge when to obey government directives as lawful and when to disobey them as tyrannical or overreaching. State militias must be capable of being subordinate to and independent of government.

1. Militias’ Unique Relationship to Government Arises from the Colonizing Agencies’ Need for Militias

This creates obvious tension for governments that seek to use militias for their desired purposes—governments (particularly the national government) prefer reliable, absolute militia obedience to accomplish their domestic-defense, domestic-security, and emergency-response goals. Governments simply do not value the check-on-tyranny function of state militias, as history reveals: the national government’s efforts to exert greater control over state militias, particularly in the late nineteenth and twentieth centuries, effectively emasculated them as meaningful checks on government overreaching.

³⁴ *Id.* at 31.

³⁵ *Id.*

³⁶ *See id.*

³⁷ U.S. CONST. amend. II.

Like their ancestor The Great Fyrd, early American colonial militias primarily were citizen-directed, citizen-staffed, and citizen-funded entities, often out of necessity.³⁸ When most countries in Europe abandoned the feudal levy and organized standing armies for defense, the private groups that founded early American settlements received no military assistance from their respective monarchies.³⁹ Without a government to fund their defenses—and without a preexisting defense or security infrastructure—those colonizing entities had no other option but to rely on citizens to provide defense and security for their colonies.⁴⁰ From their genesis, American militias were not mere tools of the government, but rather partners in providing essential services for citizens. That unique organic relationship helps explain the unique authority militias earned and retained. Although each of the thirteen British Colonies maintained its own, independent militia system,⁴¹ all thirteen militias embraced this special relationship between militia and government.

Some state militias included both organized and unorganized components, the latter of which included those who were expected to fulfill militia duty in time of need even if not currently actively engaged in it or specifically called upon to do so.⁴² Governments often relied on militia members to respond to unanticipated emergencies *sua sponte*—for example, in response to sudden attacks by Native Americans—as well as to requests from governors or other government authorities.⁴³ Indeed, American efforts to resist the British advance into Concord during the Revolutionary War would have failed were it not for a group of unorganized citizens who, without government direction, came together as a fighting force to repel the British troops.⁴⁴

2. Early State Militias Enjoyed Flexibility To Specialize Their Forces To Maximize Efficiency and Effectiveness

Before the Constitution, militias benefitted from the flexibility that decentralized colonial and later state control provided, because they could specialize their forces to

³⁸ See MAHON, *supra* note 4, at 6, 14, 15, 20; Whisker, *supra* note 3, at 952.

³⁹ See DOUBLER & LISTMAN, *supra* note 2, at 2; *supra* notes 4–5 and accompanying text.

⁴⁰ By their terms, the charters issued to the agencies and groups who founded the British Colonies foreshadowed that citizens would bear significant—and, initially, primary—responsibility for domestic defense and security. MAHON, *supra* note 4, at 14 (noting that charters authorized colonizing representatives “to assemble Marshal Array and put in Warlike posture the inhabitants of said colony” and that the militias were the “backbone of colonial defense”). The colonists themselves understood the critical role militias played: even Pennsylvania, with its influential, peaceful Quaker population and its relatively good relations with Native Americans, ultimately created a militia force in the 1700s. See DOUBLER & LISTMAN, *supra* note 2, at 5. Often, those charters provided the agencies and groups’ representatives explicit authority to effect that duty. See MAHON, *supra* note 4, at 14.

⁴¹ See Whisker, *supra* note 3, at 956.

⁴² See, e.g., VA. CODE ANN. § 44-1 (2012) (noting discrete organized and unorganized classes of state militia).

⁴³ MAHON, *supra* note 4, at 19.

⁴⁴ *Id.* at 36.

address their communities' unique needs (for example, Massachusetts's Minute Men).⁴⁵ When frontier colonies faced different challenges (and lacked the population density and infrastructural advantages of their coastal counterparts), they developed ranger units better suited to patrolling vast frontiers and identifying and proactively thwarting Native American threats before they could jeopardize the fledgling settlements.⁴⁶ Those frontier militia members typically engaged in security and defense activities more often than their urban counterparts, but they frequently did so in less organized form, often as ad hoc groups.⁴⁷ The decentralized government control over militias enabled those militias to serve the needs of their citizens best and adapt their forces accordingly.

Similarly, as early as the first half of the 1700s in some states, militias began local community patrols designed to address internal concerns, not external threats.⁴⁸ In some of those states, patrols—not defense responsibilities—became the “primary mission” of the militia.⁴⁹ Militias, therefore, had the nimbleness and flexibility to remake themselves and to respond promptly to radical changes in their communities' needs.

3. The Constitution and the Militia Act of 1792 Provide Limited National Control over State Militia Members

The birth of the United States brought changes in the relationship between militias and government: as the country's military structure and efforts became centralized and nationalized, the need for a stronger, unified, and more flexible military force emerged. In the constitutional debates, the Framers and delegates ultimately were more concerned with foreign enemies than with the threat of the national military overreaching, and the ratified Constitution contained a legal basis for maintaining a standing national army that could reliably defend the country against those external threats.⁵⁰

⁴⁵ DOUBLER & LISTMAN, *supra* note 2, at 4, 6. That select group was typically composed of the youngest, most able, and most politically active members of the militia; they were expected to have their arms, ammunition, and other supplies ready for response at a minute's notice. See Michael A. McDonnell, *Popular Mobilization and Political Culture in Revolutionary Virginia: The Failure of the Minutemen and the Revolution from Below*, 85 J. AM. HIST. 946, 963 (1998); Andrew Ronemus, Independence Hall Ass'n, *Minutemen*, USHISTORY.ORG, <http://www.ushistory.org/people/minutemen.htm> (last visited Apr. 16, 2013). Those citizens not only played a pivotal role in military conflicts like the Revolutionary War, but they also made the militia more nimble and responsive to community needs on a day-to-day basis. See DOUBLER & LISTMAN, *supra* note 2, at 4, 8–9.

⁴⁶ See DOUBLER & LISTMAN, *supra* note 2, at 6.

⁴⁷ MAHON, *supra* note 4, at 56.

⁴⁸ SALLY E. HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* 3, 30–32 (2001) (describing the participation of state militias in slave patrols, which were designed to limit the movement and association of groups of slaves).

⁴⁹ MAHON, *supra* note 4, at 22. Although the vast majority of militia duty fell on male citizens, patrols were one of the rare responsibilities in which women were expected to participate. See *id.*

⁵⁰ *Id.* at 48–49.

It also provided the national government some control over state militias, though that power ostensibly was limited. Congress could call state militias to federal service, but for only three purposes: “[T]o execute the Laws of the Union, suppress Insurrections and repel Invasions.”⁵¹ Congress had the authority to organize, arm, and discipline militias.⁵² States retained the power to appoint officers of their respective militias and to train their citizen soldiers within the framework prescribed by Congress.⁵³ And, of course, the Second Amendment famously recognized the unique importance of the state militias, stating that “[a] well regulated Militia” is “necessary to the security of a free State,” and protecting “the right of the people to keep and bear Arms.”⁵⁴

The Militia Act of 1792⁵⁵ followed, with the goal of “establishing an [sic] Uniform Militia throughout the United States.”⁵⁶ Those acts, like the Constitution, provided Congress the authority to summon state militias into federal service for the same three purposes enumerated in the Constitution: to execute the laws of the Union, to suppress insurrections, and to repel invasion.⁵⁷ By limiting the grounds for national control of state militias, the Militia Act of 1792 attempted to reinforce militias’ character as primarily a state, rather than federal, force.⁵⁸ But the Act also recognized that enhanced national involvement in militias was necessary to transform them into a more effective military force capable of engaging opponents on a national level.⁵⁹

To provide the national government with the militia capabilities it desired, the Militia Act of 1792 did three key things: it (1) defined the composition of the state militias, (2) required members to provide their own arms and supplies, and (3) established a unified command structure for the militias.

First, the Act stated that all “free able-bodied” white males of age eighteen and under the age of forty-five were members of their respective state militia.⁶⁰ That definition of militia largely overlapped states’ existing definitions of their militias, although some states incorporated older males as well.⁶¹ In so doing, the law largely eliminated

⁵¹ U.S. CONST. art. I, § 8, cl. 15; MAHON, *supra* note 4, at 49.

⁵² U.S. CONST. art. I, § 8, cl. 16; MAHON, *supra* note 4, at 49.

⁵³ U.S. CONST. art. I, § 8, cl. 16; MAHON, *supra* note 4, at 49.

⁵⁴ U.S. CONST. amend. II. As one author put it, “[i]n 1791 the passage of the Second Amendment guaranteed ‘the right of the people to keep and bear arms’ as the best way of maintaining a ‘well regulated Militia’ against the possible abuses of a strong federal government gone awry.” DOUBLER & LISTMAN, *supra* note 2, at 18 (quoting U.S. CONST. amend. II).

⁵⁵ Militia Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271 (repealed by Act of Feb. 28, 1795, ch.39, 1 Stat. 424).

⁵⁶ MAHON, *supra* note 4, at 52.

⁵⁷ John F. Romano, *State Militias and the United States: Changed Responsibilities for a New Era*, 56 A.F. L. REV. 233, 241 (2005); Whisker, *supra* note 3, at 963.

⁵⁸ See DOUBLER & LISTMAN, *supra* note 2, 18.

⁵⁹ See *id.*

⁶⁰ § 1, 1 Stat. at 271; MAHON, *supra* note 4, at 52. By defining militia duty to include men of age eighteen to those under forty-five, Congress was attempting to ensure the national government had the most militarily capable militia members at its disposal.

⁶¹ See, e.g., DOUBLER & LISTMAN, *supra* note 2, at 5; Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal*

state-exclusive militias by transforming the most capable core of state militia members into potential dual-enlistment militia members who owed fidelity to two distinct sovereigns: state and nation.⁶² Second, the Act required militia members to furnish themselves with proper firearms and other materials essential to fulfill their militia duty.⁶³ It was not enough for militia members simply to show up for service, as one called to participate in the standing army, nor could they expect the government to provide them with arms (as some early colonial militias did, when no standing army existed);⁶⁴ when called, militia members were expected to be prepared with the arms and supplies they needed to be effective.⁶⁵ Third, the Act dictated how state militias would be divided into units, with adjutant generals from each state overseeing the divisions.⁶⁶

Although the Militia Act of 1792 provided the national government the authority to exert control over the state militia members, in the following years, militia members served their states far more than they served the national government.⁶⁷

The potential divided loyalties created by the Militia Act of 1792's dual-sovereign control over state militia members came to a head in the War of 1812, when a number of state militias refused to respond to what they perceived was an unconstitutional call to service.⁶⁸ And despite attempts to smoothly integrate militias into the standing army structure, their different levels of training, expectations of one another, and commitment to the military effort vis-à-vis their other community obligations bred mutual contempt, at times hindering the war effort.⁶⁹

4. Additional Federal Laws Cement the National Government's Actual or De Facto Control over All State Militias

The final steps toward full national control over state militias began as the Civil War began. In the Suppression of the Rebellion Act of 1861,⁷⁰ now codified at 10 U.S.C. § 332, the federal government increased the President's authority to call any state militia "to enforce the faithful execution of the laws of the United States, or to suppress . . . rebellion" in any state where the laws were "forcibly opposed" or the

Context of the Second Amendment, 25 LAW & HIST. REV. 139, 145 (2007). The federal militia excluded older individuals precisely because it did not feel they were best suited to militia duty. In this way, the national government sought to secure the cream of the militia crop.

⁶² MAHON, *supra* note 4, at 52.

⁶³ § 1, 1 Stat. at 271.

⁶⁴ See MAHON, *supra* note 4, at 16–17.

⁶⁵ § 1, 1 Stat. at 271.

⁶⁶ § 3, 1 Stat. at 272; DOUBLER & LISTMAN, *supra* note 2, at 18.

⁶⁷ MAHON, *supra* note 4, at 53, 61.

⁶⁸ See DOUBLER & LISTMAN, *supra* note 2, at 20; MAHON, *supra* note 4, at 67. That war also revealed that, despite the Act's reforms, militias were still inconsistent as a supplement to and substitute for regular military professionals. See DOUBLER & LISTMAN, *supra* note 2, at 20.

⁶⁹ See DOUBLER & LISTMAN, *supra* note 2, at 20.

⁷⁰ Act of July 29, 1861, ch. 25, § 1, 12 Stat. 281 (codified as amended at 10 U.S.C. § 332 (2006)).

execution of those laws was “forcibly obstructed,” expanding the power originally provided under the Militia Act of 1792.⁷¹ Under Section 332, if the President believes a state militia is needed to enforce any federal law or quell any civil unrest, he may call and control that militia even if its members are not, by definition, part of the existing federal militia.⁷² Given the vast array of federal laws and the number of citizen protests that could be considered forcible opposition to or obstruction of federal laws, the national government has a plethora of potential bases for calling state militias to serve on behalf of the nation. Thus, no state militia can consider itself truly independent of national control; at just about any time in modern America, the federal government would have a good argument, somewhere in the nation, that it could use additional manpower to assist its domestic-security efforts to better enforce the laws—for example, by increasing the number of border guards or by increasing patrols of high-drug-crime areas.

The Militia Act of 1903,⁷³ also known as the First Dick Act, substantially increased direct federal control over state militias.⁷⁴ It established a federal militia that is bifurcated into two “classes.”⁷⁵ The federal Organized Militia was defined as the National Guard and the Naval Militia, and its members served both the national and state governments and thus were true dual-enlistment militia members.⁷⁶ The federal Unorganized Militia included all males aged seventeen to forty-five who were not members of the Organized Militia.⁷⁷ Thus, every male in that age range was a federal militiaman regardless of whether he served in his state militia.

Increased federal control and regulation of organized state militias meant increased federal funding and the guarantee that state militias would serve an important role in future national military affairs.⁷⁸ In exchange, the state militias in their form as the National Guard were required to organize and structure themselves in line with the national military’s structure (allowing them to be integrated more seamlessly with their full-time military counterparts) and were required to attend more rigorous, consistent, military-focused training, for which militia members received federal compensation.⁷⁹ No longer were active state militia members operating out of civic duty, focusing primarily on serving the citizens of their state; now they were expected to serve both nation and state, they trained primarily for their national defense responsibilities, and

⁷¹ *Id.* That power has remained virtually unchanged since the outset of the Civil War. *See* 10 U.S.C. § 332 (2006).

⁷² *See* § 332.

⁷³ *See* Act of Jan. 21, 1903, ch. 196, § 1, 32 Stat. 775.

⁷⁴ *See* Romano, *supra* note 57, at 242–43; Whisker, *supra* note 3, at 967.

⁷⁵ § 1, 32 Stat. at 775.

⁷⁶ *See* 10 U.S.C. § 311(b)(1); § 4, 32 Stat. at 776.

⁷⁷ 10 U.S.C. § 311.

⁷⁸ *See* MAHON, *supra* note 4, at 141. In the thirteen years after the First Dick Act, the national government contributed fifty-three million dollars to the now dual-enlistment state militias, more than all its aggregate contributions to the state militias before 1903. *See id.*

⁷⁹ 32 Stat. at 775, 777–78.

they owed much to their national government. The flexibility and customizability that served state militias well historically was forfeited in favor of consistent structure and improved military capability. In short, the National Guard after the First Dick Act began to look very much like the standing military forces: members received similar training with a national military focus, militias were organized similarly (and in accord with the national government's desires), members were compensated by the national government, and members could be called into national service.⁸⁰ Nevertheless, they shared three key characteristics of historical state militia: they were not full-time soldiers, the length of their federal service was limited (at that time, to nine months), and they could not be called to serve outside the United States.⁸¹

The Second Dick Act,⁸² in 1908, further blurred the distinctions between the National Guard and the full-time military forces. The nine-month restriction on federal service was eliminated, as was the geographical prohibition against international service.⁸³ Under the new law, the President had the authority to dictate the length and location of service, just as he could dictate those terms for the full-time military.⁸⁴ The Second Dick Act brought even more federal funding, but the amounts were not sufficient to provide all the military supplies and training the federal laws imposed on the dual-enlistment militias, so the relative usefulness of state militias for national military service was still dictated in large part by each state's investments in its now dual-enlistment militia.⁸⁵ A 1911 Judge Advocate General opinion and an Attorney General opinion the following year concluded that the Second Dick Act provisions that provided plenary authorization for the President to call the militia to serve in foreign lands were unconstitutional.⁸⁶ Militia service on foreign land was permissible only if it satisfied one of the three purposes outlined in Article I, Section 8 of the Constitution: "to execute the Laws of the Union, suppress Insurrections and repel Invasions."⁸⁷

For all practical purposes, the federal government wrested near complete control of state militias in the National Defense Act of 1916.⁸⁸ That Act gave the President

⁸⁰ *Id.* §§ 3, 4, 14, 18, 32 Stat. at 775, 777–79; Romano, *supra* note 57, at 242–43; Whisker, *supra* note 3, at 967.

⁸¹ §§ 1, 4, 5, 32 Stat. at 775–76; MAHON, *supra* note 4, at 140.

⁸² Act of May 27, 1908, ch. 204, §§ 4–5, 35 Stat. 399.

⁸³ §§ 4–5, 35 Stat. at 400; DOUBLER & LISTMAN, *supra* note 2, at 56; MAHON, *supra* note 4, at 142.

⁸⁴ §§ 4–5, 35 Stat. at 400; MAHON, *supra* note 4, at 142.

⁸⁵ William M. Donnelly, *The Root Reforms and the National Guard*, U.S. ARMY CENTER MIL. HIST. (May 3, 2001), <http://www.history.army.mil/documents/1901/Root-NG.htm>.

⁸⁶ See MAHON, *supra* note 4, at 142; see also Authority of President to Send Militia into a Foreign Country, 29 Op. Att'y Gen. 322, 324, 329 (1912).

⁸⁷ U.S. CONST. art. I, § 8, cl. 15; see also Authority of President to Send Militia into a Foreign Country, 29 Op. Att'y Gen. 322, 323–24 (1912). Thus, for example, it was acceptable to call militias to defend territories governed by U.S. law but not to serve as an army of occupation in a foreign land. See *id.*

⁸⁸ National Defense Act, ch. 134, 39 Stat. 166 (1916).

extraordinary control over the dual-enlistment militias, including the authority to dictate the type and composition of National Guard units maintained by each state;⁸⁹ assign National Guard units to whichever division, brigade, or unit he chose;⁹⁰ and select officers from either the National Guard or the regular army to command the units.⁹¹ States were severely restricted in their ability to control their now dual-enlistment militias; they were required to maintain minimum numbers of troops in their respective National Guard units, and no state was permitted to maintain its own troops outside its National Guard militias.⁹²

Although a state was permitted to use its National Guard members when they were not being used by the federal government (for example, outside of wartime and outside the members' extensive National Guard training requirements), the Act fundamentally altered the balance of federal-state control over the states' organized militias. States could not dictate the type of National Guard units they would maintain, their leadership or structure, or their size.⁹³ And whenever the national government believed it needed to use the militia to execute its laws, suppress insurrections, or repel invasions, the states had no practical way to replace those forces en masse in an organized manner.⁹⁴ State militias no longer were independent (or even state-focused) entities and no longer served any meaningful check on tyranny by the national government generally or its military specifically.⁹⁵ And by the latter decades of the twentieth century, the national government provided virtually all of the dual-enlistment Guard's expenses and effectively had complete control over the dual-enlistment militias.⁹⁶

⁸⁹ *Id.* §§ 58, 60, 39 Stat. at 197.

⁹⁰ *Id.* §§ 64–65, 39 Stat. at 198–99.

⁹¹ *Id.*

⁹² *Id.* §§ 61–62, 39 Stat. at 198.

⁹³ *Id.* §§ 60, 62, 65, 39 Stat. at 197–99, 208.

⁹⁴ *See id.*; *see also* MAHON, *supra* note 4, at 156–57 (noting the large-scale use of the National Guard in federal service).

⁹⁵ A number of subsequent federal laws allowed the President to exert even more control over dual-enlistment National Guard units more easily, including the National Guard Mobilization Act of 1933 (which makes the National Guard a component of the Army), ch. 87, 48 Stat. 153, and the Montgomery Amendment (which severely limited governors' control over their states' Guard units), Pub. L. No. 99-661, § 522, 100 Stat. 3871 (1986) (codified at 10 U.S.C. § 12301(f) (2006)).

⁹⁶ MAHON, *supra* note 4, at 246–47. Even though national control and financial support were purportedly designed to ensure state militias had the resources they needed to operate effectively, the National Guard still was inadequately capitalized in the early twentieth century. *See* Donnelly, *supra* note 85 (discussing the financial situation of the Guard in the early twentieth century). As the Industrial Revolution progressed, the National Guard found itself more frequently used to protect the interests of private corporate entities like railroads. *See* MAHON, *supra* note 4, at 113, 117–18. And because the Guard was so essential to the security of those entities, they began funding the Guard to ensure their own protection. *See id.* at 113. Private contributions were so substantial in some states that they constituted the primary source of revenue for those state Guard units. *See id.* (noting that, for a decade, the Pennsylvania National Guard's primary funding came from private, not governmental, entities).

Concerned with tight national control over state militias through the National Guard and the absence of any meaningful independent state forces, citizens in a number of states initiated efforts to resurrect putatively independent state militias. As the twentieth century wound to a close, those citizens began establishing militias known as State Defense Forces (SDFs), which are authorized under federal law.⁹⁷ Today, SDFs exist in some form in twenty-two states.⁹⁸ These SDFs do not differ much from their National Guard counterparts: they provide essentially the same services as National Guardsmen (with a similar military focus), and they frequently are staffed with former military or National Guard members.⁹⁹ They are distinguishable from Guard units to the extent they are not subject to the structure and training imposed by the national government, and they do not receive federal resources (and often lack meaningful state funding).¹⁰⁰ Despite those distinctions, however, SDFs still are subject to national control. Although they cannot be called to active duty military service, they may be called by the President for domestic national militia duty because they qualify as state militias.¹⁰¹ Thus, no truly independent state militia currently exists with the flexibility to serve its state's unique domestic-security and emergency-response needs or the independence to serve as a meaningful check on government tyranny.

C. Core Functions of State Militias

Militia duty, at its core, is the responsibility to defend one's community from internal and external threats. To that end, state militias and their colonial predecessors typically served the following core functions: (1) domestic defense; (2) domestic security and emergency response; and (3) a check on government overreaching and tyranny.

1. Domestic Defense

When imported to the American colonies in the 1600s, militias' primary function was domestic defense, consistent with their European roots.¹⁰² At the militias' genesis, colonial agencies provided basic start-up assistance because militia members generally had no professional military experience and lacked many necessary resources and

⁹⁷ See 32 U.S.C. § 109(c) (2006).

⁹⁸ Brent C. Bankus, *State Defense Forces, an Untapped Homeland Defense Asset*, STATE DEFENSE FORCE MONOGRAPH SERIES 25, 42 (2005), available at <http://www.minutemaninstitute.org/writing-program/SDF.pdf>.

⁹⁹ *Id.* at 25, 31, 36–37.

¹⁰⁰ *Id.* at 25, 38–39, 41.

¹⁰¹ See 10 U.S.C. § 332 (2006); 32 U.S.C. § 109(c).

¹⁰² England's Great Fyrd, comprised of self-trained individuals who used whatever weapons they already owned or could easily acquire, enjoyed success as a domestic-defense force—for example, when it was called to defend England from the Dutch invasion of 1016. See MAHON, *supra* note 4, at 6.

supplies.¹⁰³ Native American threats prompted quick establishment and organization of persistent militia forces for domestic defense, as conflicts with Native Americans began shortly after settlers landed at Jamestown in 1607.¹⁰⁴ Colonial militia members performed well in the domestic-defense context.¹⁰⁵ They were particularly valuable to the fledgling colonies because they could mobilize a large number of armed citizens on short notice when the colonies lacked the financial and manpower resources necessary to maintain a large standing army.¹⁰⁶

However, even when militias served as the primary combat force, they were not a true substitute for a full-time, unrestricted professional military, given the significant limitations on active militia duty—most notably, geographic and temporal restrictions that acknowledged the other responsibilities of the part-time, as-needed militia members.¹⁰⁷ Each militia served exclusively in a defensive capacity and was used only in close proximity to the area it was responsible for defending (usually limited to the respective colonial or state boundaries).¹⁰⁸ Members' length of active service was limited, so militias' continuity of experience and teamwork—as well as corporate memory—could be similarly limited.¹⁰⁹ When called to active duty, early militia members typically were expected to serve no longer than three months at a time.¹¹⁰ Limitations on active militia duty ensured colonies could muster sufficient

¹⁰³ See *id.* at 15. Some agencies initially hired professional soldiers to lead, instruct, and train militia members for their defense-related duties until those militia members were self-sufficient. See *id.* Moreover, England sent arms to supplement the colonists' supplies, and the Virginia legislature imposed additional taxes to buy additional arms and equipment for its militia members. DOUBLER & LISTMAN, *supra* note 2, at 3; see also MAHON, *supra* note 4, at 14 (stating that it was “necessary for each colony to see that its citizen soldiers had arms and received training”).

¹⁰⁴ On March 22, 1622, a coordinated attack by Native Americans that killed more than 300 English settlers in a day prompted greater community and government investment in state militias. DOUBLER & LISTMAN, *supra* note 2, at 3.

¹⁰⁵ See Whisker, *supra* note 3, at 956.

¹⁰⁶ See DOUBLER & LISTMAN, *supra* note 2, at 1–4; see also MAHON, *supra* note 4, at 10 (discussing the idea that militias were born out of a need for cheap security).

¹⁰⁷ See MAHON, *supra* note 4, at 19; Whisker, *supra* note 3, at 955 (“The militias usually served for short periods of time, commonly sixty days or less.”).

¹⁰⁸ See MAHON, *supra* note 4, at 9. There were a few exceptions: South Carolina's militia could be used outside borders until the state assembly prohibited it in 1690; North Carolina's militia could be used in South Carolina and Georgia. *Id.*

¹⁰⁹ See *id.*

¹¹⁰ *Id.*; Whisker, *supra* note 3, at 955. The length-of-service restriction protected the fiscal well-being of militia members perhaps even more than the geographical restriction: a majority of militia members were farmers, and they relied on their own labor for production and, ultimately, economic survival, so extended time away from the farm could be financially crippling. MAHON, *supra* note 4, at 19. Practically speaking, the three-month active-duty limitation also reinforced the geographic limitations of the militia as well as its role as a purely defensive force. See *id.* Given the absence of modern forms of transportation, three months was not

defenses with minimal dislocation of society or disruption to economies in their infancy; however, those same limitations created operational weaknesses when those militias faced sizable external threats capable of coordinated, geographically unrestricted attacks.¹¹¹ For example, in many instances, militia members were unwilling to leave their home colony to participate in military exercises that extended beyond a single colony's borders.¹¹² George Washington's military campaign in 1754, at the outset of the French and Indian War, is illustrative: it was notably disastrous in large part because he could not use the Virginia militia in Ohio County, which arguably lay outside the boundaries of Virginia.¹¹³ Washington's struggle in that campaign reflected core limitations of the colonial militia system in the military context, which carried over to later state militia systems: militias were not interchangeable, and they lacked the nationwide agility, cross-border reach, and offensive capability necessary to serve as true substitutes for a national, full-time military force.¹¹⁴

Despite those limitations, early colonial militias in New England were essential to the colonists' victory in two wars involving Native Americans, thus establishing the militias' domestic-defense capabilities.¹¹⁵ Militias also played an important and positive role in Britain's military efforts in the French and Indian War.¹¹⁶ In fact, the colonists claimed their militia members were "the prime mover[s] in driving the French from North America."¹¹⁷ And numerous Revolutionary War generals, like George

enough time for many continuous or distant military operations—particularly offensive operations that often faced a high degree of uncertainty of success. *See id.*

¹¹¹ *See* MAHON, *supra* note 4, at 58 (detailing some of the weaknesses created by limitations on active military duty).

¹¹² Whisker, *supra* note 3, at 955 ("When service would take [militia members] out of their own immediate areas, they usually balked at accepting service.").

¹¹³ *See* MAHON, *supra* note 4, at 19.

¹¹⁴ *Id.*; Whisker, *supra* note 3, at 958 (noting that "Washington lamented the lack of discipline and dedication of the militia and demanded that a real, trained army be formed"). As a result, some colonies experimented with ad hoc groups of "provincial" troops for military operations requiring extended time commitments or travel outside colonial borders. DOUBLER & LISTMAN, *supra* note 2, at 7.

¹¹⁵ In the Pequot War, Pequot Indians raided colonies, killed dozens of colonists, and kidnapped others. A force made up primarily of colonial militia members, supported by other Native American allies, attacked and ultimately defeated the Pequots completely after the Mystic Massacre and Fairfield Swamp Fight. *See 1637—The Pequot War*, SOC'Y COLONIAL WARS ST. CONN., <http://www.colonialwarsct.org/1637.htm> (last visited Apr. 16, 2013). King Philip's War, proportionately one of the bloodiest and costliest wars in North American history, ended when a party led by Plymouth militia members and Native American allies tracked down King Philip, a Native American leader also known as Metacom or Metacomet, and killed him. Philip Gould, Research Note, *Reinventing Benjamin Church: Virtue, Citizenship and the History of King Philip's War in Early National America*, 16 J. EARLY REPUBLIC 645, 645, 647 (1996); *1675—King Philip's War*, SOC'Y COLONIAL WARS ST. CONN., <http://www.colonialwarsct.org/1675.htm> (last visited Apr. 16, 2013).

¹¹⁶ DOUBLER & LISTMAN, *supra* note 2, at 7.

¹¹⁷ MAHON, *supra* note 4, at 30.

Washington and Philip Schuyler, gained critical military knowledge and experience while serving as militia officers during the French and Indian War.¹¹⁸ However, the geographical and temporal limitations on militia duty caused friction between militia members and some professional soldiers, who expected their citizen counterparts to meet their professional military standards.¹¹⁹

Throughout the Revolutionary War, military leaders' opinions about militias remained mixed at best. Foreign commanders like Charles Lee and Horatio Gates (British officers before joining the Continental Army), and Lafayette and Rochambeau generally were favorable,¹²⁰ while some American commanders like George Washington frequently complained about many militia members' lack of professional-grade discipline and fortitude in the fog of war.¹²¹ Although Washington and others were concerned about the extent to which Congress was relying on the militias in the war effort, they ultimately had to depend on militias to succeed militarily, and they used them effectively despite their misgivings.¹²² Indeed, Virginia militia members were members of a coalition force also including Continental Army soldiers, French troops, and French seamen that ultimately surrounded British forces and obtained their surrender at Yorktown in 1781.¹²³

The revolutionary-era relationship between the standing army and militias was strained, reflecting the contemporaneous debates on federalism, the diverse opinions

¹¹⁸ *Id.*

¹¹⁹ For example, when General James Wolfe captured Quebec in the final campaign of the French and Indian War while serving with six companies of colonial militia members, he described them as “the dirtiest, most contemptible cowardly dog[s] you can conceive.” *Id.*

¹²⁰ *Id.* at 43–44.

¹²¹ Apparently, Washington did not believe militia members met the high standards established by full-time American soldiers. He stated: “Being subject to no control themselves, they introduce disorder among the troops . . . while change in living brings on sickness; this makes them impatient to get home . . . and introduces abominable desertions.” *Id.* at 43 (internal quotation marks omitted). Nathaniel Greene opined that “[p]eople coming from home with all the tender feelings of domestic life are not sufficiently fortified with natural courage to stand the shocking scenes of war.” *Id.* (internal quotation marks omitted). He believed that an effective soldier needed to be hardened and desensitized to these scenes: “[T]o march over dead men, to hear without concern the groans of the wounded, I say few men can stand such scenes unless steeled by habit and fortified by military pride”—presumably a pride reserved only for full-time soldiers. *Id.* But it was precisely that hardened, military-focused attitude—that community concerns should yield to concerns of war—that made citizens wary of professional soldiers. *See id.* at 42–43 (discussing fears of a standing army).

¹²² *Id.* at 37, 43 (noting Washington’s claim that “[t]he dependence which Congress have placed upon [the militias] I fear will totally ruin our cause” (internal quotation marks omitted)).

¹²³ *Id.* at 41. Even after the Continental Congress created a Continental Army to serve during 1776, state militias participated in nearly all of the War’s battles. DOUBLER & LISTMAN, *supra* note 2, at 12; MAHON, *supra* note 4, at 38 (noting, for example, that 2,700 local militia were part of a 5,600-soldier force led by Major General Charles Lee that defended Charleston, South Carolina, from British attack in 1776).

about the scope of power an effective national government should wield, and the public's willingness to sacrifice military effectiveness to reduce the potential for government overreaching and avoid the high costs that came with large standing military forces.¹²⁴ Under the Articles of Confederation, militia members made up the core of the post-revolutionary Continental Army.¹²⁵ But a series of inconsistent military performances by state militias called into question their role as the primary national military force for the new nation.

The Militia Act of 1792 was designed to address the state militias' inconsistent military performance; the ultimate goal of the law, from Washington's perspective, was to create a strong, reliable national military reserve he could call into action when necessary to provide domestic defense.¹²⁶ Nevertheless, the War of 1812 revealed that the Act did not achieve its goal of consistent, reliable military performance by state militias.¹²⁷ State militias performed well in a number of circumstances: the Maryland militia performed particularly well when led by Major General Samuel Smith, who adamantly resisted federal command.¹²⁸ Additionally, Major General Andrew Jackson demonstrated one of the best uses of the militia at the Battle of New Orleans, which was the final major battle of the War of 1812 and is widely considered to be the greatest land victory of the war.¹²⁹ But poor results were not uncommon: militias in New York and Washington, D.C., turned in anemic performances that allowed British forces to loot Buffalo and Plattsburgh, New York, as well as to move into Washington, D.C., and burn public buildings with little resistance.¹³⁰

¹²⁴ See MAHON, *supra* note 4, at 48. Based on the colonists' concerns about the threats posed by maintaining a large professional military force, Congress moved to disband the Continental Army soon after the conclusion of the war. DOUBLER & LISTMAN, *supra* note 2, at 16–17.

¹²⁵ See MAHON, *supra* note 4, at 46–47.

¹²⁶ See MAHON, *supra* note 4, at 52; Whisker, *supra* note 3, at 958. Because the militias' military capability was of paramount concern, the Act's restructuring of the militias did not particularly consider state militias' domestic-security and emergency-response roles independent of their domestic-defense role. Nor did it adequately consider the need for independent state militias as a check on government tyranny. See DOUBLER & LISTMAN, *supra* note 2, at 53 (discussing how concerns over "calls for increases in the size of the Regular Army" in the early 1900s prompted Congress to absorb state militias into the National Guard to serve these roles); MAHON, *supra* note 4, at 53; Whisker, *supra* note 3, at 964.

¹²⁷ See, e.g., DOUBLER & LISTMAN, *supra* note 2, at 20–21. Action in Bladensburg, Maryland, aptly demonstrated this inconsistency on a micro level. In a battle against overwhelming odds at Bladensburg, Maryland, a number of militia units stood strong with full-time soldiers until they ultimately were overrun by British forces. However, "a majority of the [militia members] retreated with such ease that the action became known as the 'Bladensburg Races.'" *Id.* at 21; see also MAHON, *supra* note 4, at 73.

¹²⁸ See MAHON, *supra* note 4, at 73. Militia members responded in huge numbers to the call to service, militia snipers killed a British general, and the militia ultimately repelled the British invasion of Baltimore. *Id.*

¹²⁹ See *id.* at 76–77.

¹³⁰ DOUBLER & LISTMAN, *supra* note 2, at 20–21; MAHON, *supra* note 4, at 71, 73.

Although some state militias proved indispensable in the War of 1812, their high-profile successes likely created false expectations regarding the continued use of militia in high-pressure military engagements and erroneously justified Americans' belief (and desire to believe) that paying for and equipping a larger, more powerful standing army was unnecessary to provide effective military capabilities for the fledgling nation.¹³¹ After the War of 1812, the national government failed to make any meaningful investment in the militias, despite its increased control over them and its desire to standardize the militias' structure to facilitate their use in national military service.¹³² The discipline, structure, organization, and resources so necessary to the militias' effectiveness as a reliable, consistent defense force—the very things the Militia Act of 1792 was designed to address—began to atrophy absent government support and direction.¹³³

Nevertheless, state militias' greatest military contributions likely came during the Civil War—again the result of necessity. All told, more than eighty percent of the Confederate Army and ninety-six percent of the Union Army entered service as volunteer state militia members.¹³⁴ Throughout the latter half of the nineteenth century, state militias proved critical to U.S. military efforts in at least four wars, including the Spanish-American War.¹³⁵

Fundamental changes in federal law in the early twentieth century helped the national government exert greater control over state militias to make them more military-focused and easier to integrate into the existing professional military structure.¹³⁶ The National Guard concept presented an apparently attractive compromise for proponents

¹³¹ DOUBLER & LISTMAN, *supra* note 2, at 22; MAHON, *supra* note 4, at 77. Some interpreted Jackson's victory in New Orleans to suggest any American part-time citizen-soldier could serve effectively in place of a full-time soldier, despite minimal training. DOUBLER & LISTMAN, *supra* note 2, at 22. The victory also created a false sense of security, suggesting the nation could draw together a large fighting force at or around the moment of need, without elaborate and expensive training or necessary logistical forethought. *Id.*

¹³² MAHON, *supra* note 4, at 80–81.

¹³³ *Id.* at 79–81.

¹³⁴ Jerry Cooper, *Militia and National Guard*, in THE OXFORD COMPANION TO AMERICAN MILITARY HISTORY 440, 441 (John W. Chambers II ed., 1999). State militias proved essential to both sides' military efforts: in 1861, President Lincoln called 75,000 militia members into federal service; after an unexpected loss at Bull Run, he called 500,000 more for the war effort. DOUBLER & LISTMAN, *supra* note 2, at 34, 38. On the other hand, volunteer state militias were the primary forces through which Southern states seized control of federal forts, arsenals, customs houses, and mints. *Id.* at 34. State militia members participated in virtually every facet of the Civil War and were essential in holding the country together and, ultimately, ensuring the Union's success. *Id.* at 41. The fact that an overwhelming majority of both Union and Confederate forces were militia members who returned to their jobs and communities immediately after the war helps explain the unique persistence of the conflict in the United States' cultural psyche. MAHON, *supra* note 4, at 107.

¹³⁵ See DOUBLER & LISTMAN, *supra* note 2, at ch. 2; *supra* notes 121–23, 127–30, 134 and accompanying text.

¹³⁶ See *supra* Part I.B.4.

and opponents of a strong national government. Because National Guardsmen were not full-time soldiers—rather, they were dual-enlistment federal/state militia members—they did not present the same perceived risk of tyranny as direct enlargement of the regular military forces, which had been proposed.¹³⁷ However, because they were subject to an enhanced, standardized, and nationalized training regimen designed to make them military-ready on a national (and international) scale, they were more efficiently and effectively integrated into the national military forces in time of need, and their military success improved with greater national control over finances, structure, leadership, and training.¹³⁸ From the latter part of the twentieth century to the present, state militias in their National Guard form have consistently performed at high levels in military roles including domestic defense, approximating or matching the performance of full-time professionals and playing a significant role in two world wars and other military conflicts large and small.¹³⁹

2. Domestic Security and Emergency Response

Although colonial militias' primary focus initially was domestic defense, they quickly expanded their responsibilities, establishing their value in the domestic-security and emergency-response contexts as early as the seventeenth century.¹⁴⁰ Those early American militias provided hybrid border security/police patrols, organized multiple daily community watches, and developed systems to alert citizens to imminent threats—many responsibilities now handled by states' (and their localities') modern-day police forces and first responders.¹⁴¹ As a general matter, colonial militias—and later state militias—had the flexibility to refocus and expand their efforts as community needs required: they turned out whenever police were unable to maintain order, manned coastal forts, guarded criminals, and enforced quarantines in the event of infectious diseases.¹⁴²

¹³⁷ See MAHON, *supra* note 4, at 107 & ch. 10.

¹³⁸ *Id.* at 148–49.

¹³⁹ See generally DOUBLER & LISTMAN, *supra* note 2, at 59–91. The notable exception is the Vietnam War, when—in contrast with prior and subsequent military engagements—President Lyndon Johnson did not use the National Guard extensively, due primarily to political concerns. See *id.* at 110–14. During that period, the military character of the Guard changed fundamentally; citizens then sought it as a safe haven from military combat, and it was oversubscribed above federal authorization levels. MAHON, *supra* note 4, at 243–44.

¹⁴⁰ See DOUBLER & LISTMAN, *supra* note 2, at 4–7. Connecticut's charter, for example, noted that its militia's responsibilities were not limited to defense activities against purely external threats, but also included responding to internal threats. MAHON, *supra* note 4, at 14 (noting that Connecticut's militia members “were authorized to ‘expulse repell and resist by force of Arms . . . and also to kill slay destroy by all fitting ways . . . all and every Person or Persons as shall attempt the *destruction* invasion *detriment* or *annoyance* of the . . . Inhabitants’” (emphasis added)).

¹⁴¹ See DOUBLER & LISTMAN, *supra* note 2, at 4, 6.

¹⁴² By the end of the eighteenth century, state militias proved critical to state governance

Massachusetts pioneered the concept of militia specialization and used that flexibility to refine its militia into a more nimble, responsive entity capable of handling multiple threats and emergencies, in large part due to its unique Minutemen force.¹⁴³ The Minutemen units proved particularly successful, and other militias copied the concept of militia diversification and specialization that Massachusetts embraced.¹⁴⁴

By the early eighteenth century, states regularly used militia members for much more than typical military duty.¹⁴⁵ Among other responsibilities, militias protected communities from bandits and vigilantes, guarded prisoners, served as patrols, prevented lynchings when unpopular executions were scheduled, had riot duty, helped settle land-related disputes, and helped manage public ceremonies and parades, providing domestic security of the state.¹⁴⁶ In those and other similar ways, state militias emerged as key public servants: they were not merely temporary military fill-ins but core components of states' domestic-security and emergency-response systems when state professionals lacked the capacity to address citizens' needs adequately.

A few examples illustrate the breadth and diversity of state militias' domestic-security value: in the nineteenth century, the Washington, D.C., and Washington state militias were so robust and effective in their domestic-security efforts that they virtually substituted for professional police forces;¹⁴⁷ New York's 7th Regiment had a string of important successes when serving in domestic-security and emergency-responses roles;¹⁴⁸ and Maine effectively used militias to protect its Canadian border.¹⁴⁹ When

from multiple perspectives. MAHON, *supra* note 4, at 61 (noting that "indeed, the states could not have carried on government without them").

¹⁴³ MAHON, *supra* note 4, at 36–38. In Massachusetts, one-third of their militia members essentially were on call continuously, available to respond near-instantly to citizen concerns. DOUBLER & LISTMAN, *supra* note 2, at 4.

¹⁴⁴ See MAHON, *supra* note 4, at 36. The Minutemen, who typically were the first into battle because of their readiness, also played an important defensive role at the outset of the Revolutionary War. *Id.* They engaged the British Army at Lexington when the British were en route to Concord to confiscate colonial military stores. *Id.* Minutemen fired the famous shots "heard round the world." *Id.* Although the group that fired those shots did not successfully slow the march of the British military, their fellow militia members at Concord did successfully repel the British, sending them retreating to Boston. DOUBLER & LISTMAN, *supra* note 2, at 8–9; MAHON, *supra* note 4, at 36.

¹⁴⁵ MAHON, *supra* note 4, at 85. Over the next century or so, as imminent threats to the states waned, their militias' domestic-security and emergency-response roles expanded. *Id.*

¹⁴⁶ *Id.* at 61, 85.

¹⁴⁷ *Id.* at 84, 115 (noting that Washington state militia succeeded in large part because it frequently and successfully managed racial and labor-management conflicts).

¹⁴⁸ *Id.* at 85. The 7th Regiment managed unrest during the 1834 elections, policed streets and prevented looting after the great fire of 1835, stopped the dockworkers' rampage of 1836, protected property from looting in 1837, and quelled the 1849 Opera House Mob. *Id.* at 85–86. Likewise, a Pennsylvania militia company quelled the Philadelphia riots in 1833 and 1844, and militia were used to quell the New York and Boston Civil War draft riots. *Id.* at 85, 103.

¹⁴⁹ *Id.* at 90.

organized militia units failed to, or were unable to, respond to internal threats—as with the 1856 San Francisco riots—unorganized militia members filled in to provide the necessary domestic security.¹⁵⁰ Thus, state militias’ domestic-security and emergency-response roles often approached—and arguably surpassed—the importance of their domestic-defense role shortly after the Civil War.¹⁵¹

Throughout the twentieth century, state militias—before and after they were effectively transformed into dual-enlistment National Guard units by federal law—continued as an integral arm of governments’ domestic-security and emergency-response efforts. Of particular note, those militias received substantial praise for domestic-security and emergency-response assistance during disasters (both man-made and natural) like the San Francisco earthquake of 1906.¹⁵² They helped control increasing numbers of violent labor disputes like the 1934 San Francisco Longshore Strike.¹⁵³ They further proved their worth in riot control, including preventing racially motivated lynching attempts and supporting racial integration efforts.¹⁵⁴

Until the middle part of the twentieth century, when states began establishing their own police forces en masse, state militias in their pre- and post-National Guard form performed many of the responsibilities those police forces later assumed.¹⁵⁵ After the

¹⁵⁰ *Id.* at 82.

¹⁵¹ For example, governors called their militias 481 times to provide fundamental domestic-security and emergency-response functions in a variety of contexts, including guarding and transporting prisoners, preventing lynchings and quelling race riots, and responding to natural disasters like fires and floods, among other tasks. *See id.* at 110–11.

¹⁵² *Id.* at 149, 176. “Within relatively a few hours, a vast metropolis had been reduced to an area of indescribable devastation and destruction.” *The Military and the San Francisco Earthquake, 1906*, CALIF. GUARDSMAN (Apr. 1927), available at <http://www.militarymuseum.org/1906CNG1.html>. “The work done and still being done by the National Guard of California will be long and gratefully remembered [sic] by the people of San Francisco and the State. The Minute Men and the Old Continentals were the National Guard of their day.” *Id.* (quoting an editorial written shortly after the disaster).

¹⁵³ MAHON, *supra* note 4, at 176. Striking San Francisco longshoremen were wounded and killed in confrontations with police; violence would have continued, but California’s governor ordered the California National Guard to patrol the area. DAVID F. SELVIN, A TERRIBLE ANGER: THE 1934 WATERFRONT AND GENERAL STRIKES IN SAN FRANCISCO 147, 152 (1996). The Guard’s presence essentially squashed the strike once the picketers realized “that retaliation to police violence or to the Guard would be suicidal.” *Id.* at 153.

¹⁵⁴ *See* MAHON, *supra* note 4, at 212. Among other incidents, militia members were called to protect an African-American man seeking to live in a formerly all-white apartment building; they were called fifteen times in Florida alone to prevent lynchings of African Americans; they were used successfully to integrate schools in Clinton and Oliver Springs, Tennessee, as well as Sturgis and Clay, Kentucky; they were called to support integration of the University of Mississippi when federal marshals could not do the job; and they helped integrate the University of Alabama and schools in Birmingham, Mobile, and Tuskegee, Alabama. MAHON, *supra* note 4, at 149, 212–13, 224, 237–38.

¹⁵⁵ *See id.* at 226. In some instances, this extended to wholesale confrontation with corrupt, entrenched interests. For example, after the murder of a candidate for state office, Alabama

establishment and proliferation of comprehensive state police forces, those militias were freed to focus even more on emergency response, including rescue and relief missions, which—unlike many domestic-security activities—made them popular with the public.¹⁵⁶ They responded to floods, wind damage, missing persons, urban and forest fires, and snow emergencies; provided traffic and crowd control; and handled major wrecks, among other missions.¹⁵⁷

Despite militias' expanded emergency-response duties and states' and localities' greater investments in police forces, the Civil Rights movement ensured state militias would continue to play a pivotal role in riot control and related domestic-security activities. Despite the rare, but more publicized, examples of states attempting to use the dual-enlistment Guard units to oppose racial integration, states frequently called those militias to protect Civil Rights efforts and quell race riots. For example, in 1961, Alabama Governor John Patterson called 800 Guardsmen to protect Dr. Martin Luther King, Jr.'s organized freedom ride from Selma, Alabama, to Birmingham, Alabama, when federal marshals were overwhelmed by crowds opposing the demonstration.¹⁵⁸ From 1965 to 1966 alone, Guardsmen managed race riots in the Hough District of Cleveland, Ohio; Milwaukee, Wisconsin; Dayton, Ohio; Watts in Los Angeles, California (twice); San Francisco, California; and Chicago, Illinois.¹⁵⁹ Notably, King specifically praised the Guard's response to the Chicago riots.¹⁶⁰ During the Vietnam era, the Guard frequently was used stateside to manage anti-war and other riots; from 1970 to 1973 alone, more than 233,000 Guardsmen were called 201 times to provide domestic security within the United States.¹⁶¹

Near the end of the twentieth century, militias' domestic-security efforts had been reduced significantly as professional police forces grew in strength and number,¹⁶² nevertheless, they still were involved in emergency response and, in a number of notable instances in the late 1970s, filled in seamlessly for striking domestic-security and

called its Guard to raid a city infiltrated with criminals and corrupt officials; when the Guard left, some of the crime returned, but the situation was much improved compared to the prior environment. *Id.*

¹⁵⁶ *See id.*

¹⁵⁷ *Id.* at 246 (describing how militia members in New York helped dig New York City out of the worst snowfall on record, Guard companies in Alaska used helicopters to drop needed fuel for Eskimos, and militia members helped manage the aftermath of Hurricane Carla, among other contributions). The popularity of these efforts coupled with heavy advertising and publicization of the Guard increased enrollment from about 276,000 in 1954, to 434,000 just three years later. *Id.* at 220 (noting that total enrollment in 1957 actually exceeded the number authorized by federal law, resulting in a freeze in Guard recruitment).

¹⁵⁸ *Id.* at 238.

¹⁵⁹ *Id.* at 238–40.

¹⁶⁰ *Id.* at 239.

¹⁶¹ *Id.* at 244, 246 (noting that, in May 1970 alone, Guardsmen were called “twenty-four times at twenty-one different universities in sixteen states to control the rioting students”).

¹⁶² *See supra* note 156 and accompanying text.

emergency-response professionals—including firemen, policemen, and correctional employees.¹⁶³ Today, state militias in their National Guard form continue to provide domestic-security and emergency-response assistance where needed, although the national government’s recent emergency-response efforts have been criticized.¹⁶⁴

3. Check on Government Overreaching and Tyranny

From their origin in America, colonial and later state militias have occupied a unique place in the bundle of rights and responsibilities citizens possess. Because they have domestic-defense, domestic-security, and emergency-response capabilities, militias have always been valuable assets to their governments. And because state militias generally were composed of a broad cross-section of citizens performing part-time services as opposed to paid government professionals (almost exclusively so until the twentieth century brought true federalization and dual-enlistment), they were designed to provide another core function: a check on tyranny.¹⁶⁵ Militias limited the professional military power at the government’s disposal and restricted its need and ability to tax the citizens to maintain a large professional military force.¹⁶⁶ And when governments sought to take action that overstepped their authority, militias provided citizens and their states a meaningful way to resist that perceived tyranny and prevented governments from using military force to effect that tyranny.¹⁶⁷ Citizens valued relying on militias instead of larger professional forces, even when that meant militias would be less efficient or effective than their professional counterparts. Many government and

¹⁶³ MAHON, *supra* note 4, at 258.

¹⁶⁴ *Id.* at 241 (noting that, from the end of World War II until 1967, twenty-eight states called more than 197,000 Guardsmen to provide essential domestic-security and emergency-response services). Over the past half-century, militias have continued to respond to internal and external threats in their capacity as state militiamen when called by their governors and in their capacity as Guardsmen when called by the federal government. *See id.* at 258–59. However, the national government’s response to recent natural disasters like Hurricane Katrina has received considerable criticism. *See, e.g.,* APPLESEED, A CONTINUING STORM: THE ONGOING STRUGGLES OF HURRICANE KATRINA EVACUEES 3 (2006) (noting that local non-profit and government entities were more flexible and responsive to citizens’ post-Katrina needs and that some federal entities “did not seem to have the flexibility, training, and resources to meet demands on the ground”).

¹⁶⁵ *See, e.g.,* Whisker, *supra* note 3, at 959.

¹⁶⁶ *See* Romano, *supra* note 57, at 237; Whisker, *supra* note 3, at 959. Although many conceptualize this anti-tyranny role exclusively in terms of militias’ check on federal government power, *see, e.g.,* Whisker, *supra* note 3, at 959, the civil-rights era also revealed how militia members could serve as a check on tyrannical state governments, *see* MAHON, *supra* note 4, at 237–41.

¹⁶⁷ *See* David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551, 581 (1991) (noting that militias, “reflecting the sentiment of the people, refused to enforce edicts perceived as unjust, or even participated in popular resistance to them”).

military leaders, however, were less willing to accept that bargain and consistently pushed for greater militia control and efficiency at the expense of preserving militias' check-on-tyranny function.

American militias' value as a constraint on government power began to crystallize after the French and Indian War. At the conclusion of that conflict, professional British military forces remained in America to protect the territory they had captured and to maintain peace between settlers and Native Americans, among other proffered reasons.¹⁶⁸ Given the colonial militias' success to that point without a strong, centralized standing army, the colonists believed the British standing army was unnecessary for domestic defense, and they were suspicious of the British military's motives.¹⁶⁹ American colonists, who were forced to house the British forces, found them a particularly "threatening and repressive institution."¹⁷⁰ Britain imposed taxes on the colonies to pay for its army's war debts and to maintain its continued presence in the colonies, which cemented colonists' perception that the British government was overreaching.¹⁷¹ Colonists were not willing to trade their fiscal and personal freedoms for enhanced military performance, particularly when their militias had proved effective without the cost of diminished liberty. It was militias that ultimately provided colonists the manpower and military power to resist increasing British government control over the colonies.

After the creation of the Continental Army, revolutionaries recognized that a strong, unified, professional domestic force presented dangers similar to those presented by the British military.¹⁷² Many colonies, jealous of their sovereignty, reluctantly allowed their militias to work with the Continental Army, and some militia officers actively resisted being subordinated to the Continental Army.¹⁷³ What one citizen might interpret as a call to patriotic military service, another might interpret as an unconstitutional demand to participate in a war. What one citizen might interpret as an unlawful insurrection, another might interpret as a legitimate revolution. In a number of circumstances, militias provided a counterbalance to government action that—to a considerable portion of the population—had overstepped its authority.¹⁷⁴

¹⁶⁸ DOUBLER & LISTMAN, *supra* note 2, at 8.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² MAHON, *supra* note 4, at 42–43; Saul Cornell, *Mobs, Militias, and Magistrates: Popular Constitutionalism and the Whiskey Rebellion*, 81 CHI.-KENT L. REV. 883, 903 (2006) ("It was a civic republican truism that a militia, unlike a standing army, could not be coerced into fighting for causes inimical to liberty."). Ultimately, the Second and Third Amendments implicitly recognized that threat and were designed to protect against government professional military overreaching. *See* U.S. CONST. amend. II (guaranteeing citizens the right to keep and bear arms, ensuring they possess tools to resist tyrannical government empowered by professional military or police forces); U.S. CONST. amend. III (proclaiming that professional military forces may not infringe on citizens' personal privacy rights).

¹⁷³ MAHON, *supra* note 4, at 42–43.

¹⁷⁴ *See* Williams, *supra* note 167, at 581.

From a domestic-security perspective, consider state militias' response when called to quell citizen protests. Shays' Rebellion is illustrative: depending on one's viewpoint, it either revealed the inconsistency and unreliability of state militias as an insurrection-quelling arm of the national government or emphasized state militias' check-on-tyranny function.¹⁷⁵ In that conflict, some militia members sided with Shays and his rebels when called to prevent Shays from shutting down certain Massachusetts courts in a tax-related dispute, believing the government was overreaching; another militia group later defeated the rebels, captured many of them, and ended the conflict.¹⁷⁶ The militia members' varying responses to the conflict reflected the varying opinions of the citizenry from which they were drawn. Regardless of the ultimate result, state militias gave practical voice to the will of the people; they had a significant tool with which to resist perceived tyranny. However, state militias' ability to resist national control is the very reason they could not be relied on as an integral component of national domestic security.

At the 1787 Constitutional Convention, the Federalists used Shays' Rebellion and similar events to justify their position that a stronger standing military force was required for the new nation in order to guarantee its internal security and the effective administration of its laws.¹⁷⁷ Anti-federalists feared the dangers of unchecked centralized power, particularly in the form of military force, which strongly resembled the oppressive British regime the Americans had just rejected and fought to defeat.¹⁷⁸ Anti-federalists expected the United States to rely on militias primarily for its domestic-defense needs and significantly for its domestic-security needs.¹⁷⁹ Federalists, focused on the need for enhanced military effectiveness on a national (and potentially international) scale, stressed the importance of effective standing military forces.¹⁸⁰ Anti-federalists predicted that states would lose their vitality and become political nonentities if they did not retain full control over their own militias or if those militias did not play a primary role in domestic defense.¹⁸¹ Supporters of that position, like Luther Martin and Samuel Nason, "referred to a standing army as an '[e]ngine of arbitrary power, which has so often and so successfully been used for the subversion of freedom'" and as "'the bane of Republic governments,'" respectively.¹⁸² Anti-federalists were quite concerned with a national government's potential to abuse the power vested in a

¹⁷⁵ DOUBLER & LISTMAN, *supra* note 2, at 18; MAHON, *supra* note 4, at 47.

¹⁷⁶ MAHON, *supra* note 4, at 47.

¹⁷⁷ See DOUBLER & LISTMAN, *supra* note 2, at 17; MAHON, *supra* note 4, at 47–48; Whisker, *supra* note 3, at 958–59.

¹⁷⁸ MAHON, *supra* note 4, at 48; Whisker, *supra* note 3, at 958–59.

¹⁷⁹ See MAHON, *supra* note 4, at 48; Whisker, *supra* note 3, at 959 (noting the Anti-federalist argument that militias could be nationalized to suppress insurrections and repel invasions).

¹⁸⁰ See MAHON, *supra* note 4, at 48; Whisker, *supra* note 3, at 958–59.

¹⁸¹ MAHON, *supra* note 4, at 48; Whisker, *supra* note 3, at 961.

¹⁸² MAHON, *supra* note 4, at 48. Nason observed that, "[b]y [standing armies] have seven-eighths of the once free nations of the globe been brought into bondage." *Id.*

strong standing national army under its exclusive control.¹⁸³ They also correctly anticipated that the creation of a substantial regular army ultimately would result in the neglect of independent state militias, as they no longer would bear important domestic-defense responsibilities.¹⁸⁴

Ultimately, the Militia Clauses of the Constitution and the Militia Act of 1792 fundamentally recalibrated the relationship among state militias, state governments, and the national government.¹⁸⁵ They provided the national government power to call state militia members for federal service; those militia members no longer owed sole duty to their states but were potential federal militia members as well.¹⁸⁶

As militias embraced their new dual fidelity to state and nation, their effectiveness as a check on national government tyranny decreased. For example, during the Whiskey Rebellion of 1794, state militias turned in a more unified performance in support of the national government than they had during Shays' Rebellion less than a decade earlier.¹⁸⁷ Some militias opposed the national government in the Whiskey Rebellion, but an overwhelming number of other militiamen helped the national forces put down the rebellion.¹⁸⁸ State militias still empowered citizens to resist national government overreaching, but the tide had turned—in the event of a conflict between national and state governments, militias were now more likely to identify with and support the national forces over their state counterparts. Thirteen thousand militia members from four states effectively put down the Whiskey Rebellion, overwhelming a much smaller group of state militia members sympathetic to the protesters, suggesting that state militias as organized under the Constitution and Militia Act of 1792 would prove sufficiently obedient to the will of the national government in the face of state or citizen opposition.¹⁸⁹ A similar inter-militia conflict arose over Fries Rebellion, in which certain citizens resisted a federal property tax to raise funds for a war with France, with the same basic result: national forces ultimately triumphed.¹⁹⁰ The militias' overwhelming support for the national interests in those two unsuccessful rebellions coincided with the beginning of the end of state militias as a meaningful check on national government tyranny.¹⁹¹

¹⁸³ *See id.*

¹⁸⁴ *Id.* In particular, Elbridge Gerry's words about independent state militias seem prescient: "If a regular army is admitted will not the militia be neglected and gradually dwindle into contempt? and where then are we to look for defense of our rights and liberties?" *Id.*

¹⁸⁵ *See* U.S. CONST. art. I, § 8; U.S. CONST. amend. II; Militia Act of May 8, 1792, ch. 33, 1 Stat. 271.

¹⁸⁶ *See supra* notes 56–69 and accompanying text.

¹⁸⁷ *See* DOUBLER & LISTMAN, *supra* note 2, at 18; Romano, *supra* note 57, at 241; *see also supra* notes 175–76 and accompanying text.

¹⁸⁸ Cornell, *supra* note 172, at 898, 901–02.

¹⁸⁹ *See* DOUBLER & LISTMAN, *supra* note 2, at 18.

¹⁹⁰ MAHON, *supra* note 4, at 54–55.

¹⁹¹ *See id.* at 54.

Nevertheless, state militias still retained some capability to resist perceived national government overreaching. In the domestic-defense context, consider the War of 1812: when the United States declared war on Great Britain, the national government called almost 100,000 militia members to serve with the standing army.¹⁹² Several governors refused to permit their state militias to be used in the war after concluding that the basis for the President's call—to attack the British troops preemptively—was unconstitutional.¹⁹³ Because the national government could not force key militia regiments from Massachusetts and Connecticut—some of the best trained and organized state militias—to participate, several U.S. military operations were meaningfully hindered, preventing military leaders from accomplishing key strategic objectives.¹⁹⁴ And, consistent with their historically defensive focus and geographically limited service, militia forces from at least two states refused to advance into Canada to attack British positions.¹⁹⁵ In those ways, the states and their citizens provided a check on potential national government overreaching, but at the cost of overall military efficiency and efficacy.¹⁹⁶

An internal uprising in 1877—The Great Railroad Strike—revealed that state militias had not been rendered wholly impotent as a check on national government tyranny in the domestic-security context, although they put up significantly less resistance than their pre-constitutional counterparts.¹⁹⁷ When striking workers stopped rail traffic, fifteen states called 45,000 militia members to quell the rebellion.¹⁹⁸ Some

¹⁹² *Id.* at 73.

¹⁹³ DOUBLER & LISTMAN, *supra* note 2, at 20; MAHON, *supra* note 4, at 67, 73; Whisker, *supra* note 3, at 965. The Massachusetts Supreme Judicial Court confirmed that its governor had the authority to determine whether the enumerated constitutional exigencies existed to justify calling forth state militias for national service. *See A Letter from the Governor of the Commonwealth of Massachusetts, to the Justices of the Supreme Judicial Court, with the Answer of the Justices*, 8 Mass. 548, 549 (1812).

¹⁹⁴ *See* DOUBLER & LISTMAN, *supra* note 2, at 20; MAHON, *supra* note 4, at 68, 73 (noting that, as a result, U.S. forces were unable to stop the British from using the St. Lawrence River to support their military campaign). Connecticut and Massachusetts eventually permitted some of their militia companies to serve in domestic-security roles, for example, to secure the borders and to protect against “lawless people.” MAHON, *supra* note 4, at 67.

¹⁹⁵ DOUBLER & LISTMAN, *supra* note 2, at 20; MAHON, *supra* note 4, at 73–74; Romano, *supra* note 57, at 242; Whisker, *supra* note 3, at 965.

¹⁹⁶ However, fifteen years after the Massachusetts Supreme Judicial Court concluded that a governor had authority to scrutinize the constitutional bases underlying the President's call for his state militia to serve nationally, the Supreme Court suggested the President had exclusive authority to determine whether such bases existed. Whisker, *supra* note 3, at 965. *Compare A Letter from the Governor of the Commonwealth*, 8 Mass. at 549, with *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 30 (1827).

¹⁹⁷ *See* DOUBLER & LISTMAN, *supra* note 2, at 42. After the Civil War, most states continued with volunteer militias, while some embraced compulsory duty. *See* DOUBLER & LISTMAN, *supra* note 2, at 41–42. At least one state, South Carolina, had previously concluded that militia duty could not be compelled. MAHON, *supra* note 4, at 74, 111.

¹⁹⁸ DOUBLER & LISTMAN, *supra* note 2, at 42.

militia members sided with the workers, but they were outmanned.¹⁹⁹ The militia members' mixed performance in responding to the Great Railroad Strike mirrored the mixed feelings of the broader citizenry from which it was drawn and, for that reason, should not have been unexpected.

The persistent inability of government to rely on state militias to obey its commands absolutely in the face of citizen protests prompted calls in Congress for additional militia-reform legislation.²⁰⁰ The national government simply did not want state militias to exert any resistance to its commands. Early twentieth-century federal legislation (beginning with the First Dick Act) instigated the gradual death of state militias as a meaningful check on tyranny as the national government expanded its control over and funding of dual-enlistment state militias;²⁰¹ by the latter part of that century, state militias were generally consistently obedient to national government directives.²⁰²

D. General Observations

When reviewing the historical rise and ultimate decline of state militias, a few key observations emerge. State militia duty from its early roots incorporated domestic-defense, domestic-security, and emergency-response roles and provided citizens a valuable check on government tyranny. State militia duty initially was mandatory by necessity, but later militias embraced a voluntary model that proved successful. State militia duty is exercised by citizens who are organized by the government and those who are not, by citizens who act independently and citizens who act collectively. The national government has exerted increasing control over state militias, improving their broader military usefulness but undermining their other core purposes.

II. ADDRESSING THE INITIAL LEGAL QUESTIONS ABOUT REINVIGORATED INDEPENDENT STATE MILITIAS: THE COLLECTIVIST CIVIC-REPUBLICAN CRITIQUE AND STATE CONSTITUTIONS

History suggests a role still exists for independent state militias today. What do legal scholars and relevant law say about the future of independent state militias? Unfortunately, not much. One group of scholars opposes the reinvigoration of independent state militias not because militias were historically unsuccessful but because those scholars believe militias today could not replicate their historical successes. This Part first (A) addresses the collectivist civic-republican critique, showing how it is based on fundamental misunderstandings of historical militia duty (and thus is not a valid impediment to reinvigoration of independent state militias) but recognizing it

¹⁹⁹ *See id.*

²⁰⁰ *Id.*

²⁰¹ *See Whisker, supra* note 3, at 967.

²⁰² *See, e.g.,* H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 CHI.-KENT L. REV. 403, 536, 543–44 (2000).

does make a valuable point about the ideal composition of reinvigorated independent state militias today. This Part then (B) explains how state constitutions strongly support the conclusion that militia duty is independent, not purely collective, in nature, so reinvigorated independent state militias should be structured to embrace and encourage individual and collective exercises of militia duty.

A. The Civic-Republican Critique

The collectivist civic-republican critique, despite acknowledging state militias' historical successes, argues that reinvigorated independent state militias today would not be able to serve their historical purposes and effectively perform their core duties. That critique, essentially unchallenged in relevant part since offered,²⁰³ is based on multiple false premises: (1) that historical militias required universal participation, (2) that historical militia members were universally virtuous (and much more virtuous than today's potential militia members), and (3) that reinvigorated state militia duty would require governments to arm militia members. Nevertheless, (4) the critique makes an important point about reinvigorated state militias: to maximize their legitimacy as advocates for and defenders of the citizenry at large, those militias should attempt to maximize citizen participation.

1. Historically, State Militias Have Not Been Universal; Nevertheless, They Have Provided Broader and More Undivided Representation of Citizen Interests than Professional Alternatives

A core pillar of the collectivist civic-republican critique is the claim that state militias historically comprised all citizens²⁰⁴ and, if they did not, they aspired to. History, however, paints a much different picture; we know that not all citizens of a state were part of that state's militia.

Since militias first appeared in the colonies, militia membership has been substantially restricted on the basis of class, gender, age, race, or some combination of those characteristics.²⁰⁵ At various times in the states, state militias have been limited to only landowners, males, whites, and young-to-middle-age adults.²⁰⁶ The federal

²⁰³ See MARK V. TUSHNET, *OUT OF RANGE* 36–37 (2007) (presenting components of critique).

²⁰⁴ Wendy Brown, Comment, *Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's The Embarrassing Second Amendment*, 99 *YALE L.J.* 661, 663, 665 (1989); Williams, *supra* note 167, at 553 (claiming that historical state militias included “*all the citizens in a state, in the form of a universal militia*, which would always act in the common good” (emphasis added)).

²⁰⁵ Militia Act of May 8, 1792, ch. 33, 1 Stat. 271 (repealed by Act of Feb. 28, 1795, ch. 36, 1 Stat. 424); see DOUBLER & LISTMAN, *supra* note 2, at 5; MAHON, *supra* note 4, at 14.

²⁰⁶ This makes sense in light of the principles that spawned the first militias—landowners' militia duty was the counterweight to their freedom. See S.T. Ansell, *Legal and Historical*

militia, too, has never been universal but instead starkly exclusive on gender and age grounds, generally limiting the duty to young males and excluding considerably more than half of the population.²⁰⁷ Indeed, this author is unaware of any colonial, state, or federal militia law in the United States, past or present, that has dictated truly universal militia membership.²⁰⁸ Assuming, as scholars like David Williams and other advocates of the critique believe, that historical state militias “always act[ed] in the common good”²⁰⁹ (which, like most absolutes, is an overstatement), they did so despite considerable restrictions on their membership.²¹⁰ That is, their members successfully acted with virtue to further their core purposes and civic duty even though militias did not have universal membership and were not demographically representative of those for whom they “always act[ed] in the common good.”²¹¹ The mythological militia upon which the collectivist civic-republican critique is based—“composed of all of the citizens, deriving its legitimacy from them and being virtually synonymous with them”²¹²—simply did not exist.

Scholars like Williams who press the collectivist civic-republican critique probably know their universality argument is on shaky ground, which is why they offer a weaker alternative—that is, that universal membership was “a rhetorical aspiration or a regulative ideal” even if their claims of universal membership are false.²¹³ But even the rhetoric they cite does not support that alternative position.

When speaking about historical militias, contemporary statesmen frequently noted that the aspirational goal of militia membership did not extend to all citizens but rather was limited to those citizens physically capable of fulfilling domestic-defense, domestic-security, and emergency-response needs.²¹⁴ And because the focus often was on citizens’ fitness to provide military service, this level of ability was generally

Aspects of the Militia, 26 YALE L.J. 471, 472 (1917). Citizens at that time generally believed that those who did not enjoy the expansive freedom of liberty and landownership recognized by the colonies, and later the states and the Constitution, did not owe the same duties to their communities as those who did. See MAHON, *supra* note 4, at 14 (describing a belief that “a military obligation rested on every free, white male settler”).

²⁰⁷ See 10 U.S.C. § 311 (2006). Ironically, militias today are more demographically representative of the population than at any other time in history. See MAHON, *supra* note 4, at 252 (noting African Americans are overrepresented in dual-enlistment National Guard); WOMEN MIL. SERV. FOR AM. MEM’L FOUND., STATISTICS ON WOMEN IN THE MILITARY (2011), available at <http://www.womensmemorial.org/PDFs/StatsonWIM.pdf> (noting that, as of September 30, 2011, women made up 14.6% of the U.S. Armed Forces and 15.5% of National Guard forces). If anything, the universal-membership argument suggests modern-day militias are better equipped to serve their civic-republican goals.

²⁰⁸ MAHON, *supra* note 4, at 14–15.

²⁰⁹ Williams, *supra* note 167, at 553.

²¹⁰ *Cf. id.* (describing the argument of the republican framers of the Second Amendment).

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.* at 554.

²¹⁴ Williams, *supra* note 167, at 578.

referred to as the citizens' "military capacity."²¹⁵ Thus, Williams unwittingly undermines his universal-membership claim when he argues that the militia was designed to include "nothing more or less than the whole people *in their military capacity*," because military capacity was necessarily a narrower universe than the universe of all citizens.²¹⁶

Historically, the term military capacity frequently excluded women as a matter of course;²¹⁷ indeed, modern U.S. conceptions of women's military capacity are broader and more representative of the population now than they ever have been, so a militia today that aspired to universal membership within its members' military capacity would be even more inclusive than its historical counterparts.²¹⁸ The common exclusion of women from militia duty is confirmed in the Militia Act of 1792.²¹⁹ The fact that women generally were not included in the category of citizens presumed to owe militia duty precludes any argument for aspirational universal membership by about half.²²⁰ Setting aside the gender question, even if militias' aspiration was to secure universal membership of members with "military capacity," in many cases that excluded a significant portion of the citizenry based on age.²²¹

Other contemporary commentators described militias in terms that clarify that the claim of universal membership of members with "military capacity" is untenable. For example, when Tench Coxe said the militia ensured "the powers of the sword are in the hands of the yeomanry of America from sixteen to sixty,"²²² he noted that militia duty frequently was limited to landowners, a restriction unrelated to military ability (the term yeomanry, as used in the United States at the time, typically referred to landowning farmers).²²³ Militia membership often was limited to landowners, and the militias

²¹⁵ *Id.*

²¹⁶ *See id.* at 578 (emphasis added).

²¹⁷ *See* Militia Act of May 8, 1792, ch. 33, 1 Stat. 271 (repealed by Act of Feb. 28, 1795, ch. 36, 1 Stat. 424).

²¹⁸ *See generally* Rachel Martin, *Women in War: 'I've Lived out There with the Guys'*, NAT'L PUB. RADIO (Feb. 11, 2011), <http://www.npr.org/2011/02/21/133818218/women-in-war-I've-lived-out-there-with-the-guys> (reporting on women's changing role in the military).

²¹⁹ 1 Stat. at 271.

²²⁰ *See id.* Patrick Henry's failure to use gender-neutral language in his statement about aspirational militia membership—"[t]he great object [of the Second Amendment] is, that every man be armed"—is thus completely understandable and presumptively deliberate, given the focus on military capacity and those historical perceptions. DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 386 (Jonathan Elliot ed., Phila., J. B. Lippincott Co. 1891) [hereinafter ELLIOT'S DEBATES]; *see also* 10 U.S.C. § 311 (2006).

²²¹ For example, citizens aged forty-five and older have been excluded from the definition of federal Unorganized Militia. *See* § 311.

²²² Tench Coxe, *Number III*, PA. GAZETTE, Feb. 20, 1788 (emphasis omitted); *see also* Williams, *supra* note 167, at 578.

²²³ MAHON, *supra* note 4, at 7. This restriction goes back centuries to the Great Fyrd—a time in which militia duty was attached to the land because those who owned a piece of the

at the time were effectively race-limited to the extent they excluded slaves (and others) who were not free and capable of owning property.²²⁴ There is no reasonable basis to believe that one's race has anything to do with his military ability. Coxe's point was made to contrast the relative breadth of citizens' militia participation with the exclusive character of militias' professional counterparts and to show that militias, despite their limits on membership, nevertheless presented a more citizen-friendly option.²²⁵

The only statements even apparently supporting aspirational universal membership also discuss militia composition in relation to professional alternatives like standing armies. The context of those statements was the debate between militias and professional alternatives—that is, which was more accountable to and better represented the will of the people?²²⁶ Those statements are too vague to reference the precise contours of militia membership but instead are concerned with broader comparisons. Simply put, no history suggests the colonists or the Framers were concerned with universal—or even proportionally demographic—representation of the militias, but instead with whether militia members better reflected the entire population and were more loyal to citizens' interests than professional soldiers' interests.²²⁷ The current lack of universal militia membership would therefore serve as no impediment to the effective functioning of reinvigorated state militias. The breadth of militia participation—never actually or aspirationally universal—was sufficient for the Founders and the Framers and should be sufficient, with appropriate modifications reflecting evolving cultural norms, today.²²⁸

sovereign had a duty to protect its integrity. *See* MAHON, *supra* note 4, at 6–7. Ironically, these self-reliant citizens are the same category of which Williams and his fellow scholars seem so suspicious. *See* Williams, *supra* note 167, at 591 n.223.

²²⁴ *See* Coxe, *supra* note 222; *see also* MAHON, *supra* note 4, at 7, 14.

²²⁵ Coxe, *supra* note 222.

²²⁶ Williams therefore sets up a false dichotomy based on an erroneous reading of early commentators: “To be universal, the militia must comprise all of the citizenry. Republican writings, of the Anti-Federalist period and before, therefore insisted that the whole people should be armed, and contrasted this universality with the partiality of a standing army or a select militia.” Williams, *supra* note 167, at 578.

²²⁷ Richard Henry Lee's comment that “militia, when properly formed, are in fact the people themselves” makes perfect sense, given that professional soldiers served the people as well as their superiors, deferring to the latter when the respective entities' interests diverged. RICHARD HENRY LEE, AN ADDITIONAL NUMBER OF LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 169 (Quadrangle Books, 1962) (1788). And when George Mason asked and answered: “Who are the militia? They consist now of the whole people, except a few public officers,” he obviously knew the militia did not include infants or octogenarian great-grandmothers but rather phrased his description to contrast a body of citizens with a body made up exclusively of government employees. *See* ELLIOT'S DEBATES, *supra* note 220, at 425; *cf.* Williams, *supra* note 167, at 578.

²²⁸ Samuel Adams, for example, confirms this reality. He noted that even though the militia membership was limited to “free Citizens,” there was “no Danger of their making use of their Power to the destruction of their own Rights, or suffering others to invade them.” Samuel

In fact, history suggests that embracing a voluntary model—not a mandatory, universal model—for militia membership is preferable in terms of militia efficiency and efficacy. Given the enormous size of a mandatory militia force based on current militia definitions (much less a true universal-participation definition), arming, training, regulating, and managing such a contingent would be impractical, if not impossible. In addition to the obvious financial and logistical difficulties of attempting to manage such a gigantic force, the states had little success attempting to compel unwilling participants to perform mandatory militia duty—particularly for military needs.²²⁹ Indeed, experts already have considered the impact of the United States' rapid growth on militia feasibility and concluded that voluntary militias provide a more manageable, reliable font of manpower.²³⁰

Additionally, voluntary militia systems historically have received more praise and have performed more consistently well than their mandatory counterparts.²³¹ Even the National Guard, despite the weaknesses inherent in a dual-enlistment system, embraces a purely voluntary militia approach to good effect. The lesson from U.S. history: voluntary, self-selected militias work well for militia members, the citizenry, the governments that need their assistance, and governments' financial health. Not only is mandatory militia duty not necessary—much less universal mandatory militia duty—it most likely is not preferable to a voluntary system.

2. Historical Militias Were Not Universally Virtuous—Some Members Avoided Their Duty Altogether; Others Performed Poorly

The collectivist civic-republican critique apparently concludes that historical militias exhibited “virtue” to the extent those militias had success in their core competencies.²³² And when scholars like Williams define those successes, they correctly

Adams, *Letter to James Warren* (Jan 7, 1776), in 3 THE WRITINGS OF SAMUEL ADAMS 250, 251 (Harry A. Cushing ed., 1907).

²²⁹ See, e.g., *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 2–3 (1820).

²³⁰ MAHON, *supra* note 4, at 80–81 (noting nineteenth-century difficulties with a large potential force). See generally LINDSAY M. HOWDEN & JULIE A. MEYER, U.S. CENSUS BUREAU AGE AND SEX COMPOSITION: 2010, at 4 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf> (reporting that according to the 2010 census, roughly 50 million Americans are eligible to be members of the federal unorganized militia). See also Act of Jan. 21, 1903, ch. 196, 32 Stat. 775.

²³¹ See, e.g., BRUCE L. BENSON, *TO SERVE AND PROTECT: PRIVATIZATION AND COMMUNITY IN CRIMINAL JUSTICE* (1998); LANCE HILL, *THE DEACONS FOR DEFENSE: ARMED RESISTANCE AND THE CIVIL RIGHTS MOVEMENT* (2004); Douglas Ivor Brandon et al., *Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society*, 37 VAND. L. REV. 845, 900 (1984) (discussing the value of citizen crime-fighting groups); Tucker Carlson, *Smoking Them Out: How to Close Down a Crack House in Your Neighborhood*, 71 POL'Y REV. 56 (1995) (discussing the efforts of community organizations to rid their neighborhoods of crack houses).

²³² See Williams, *supra* note 167, at 554.

recognize the unique relationship between militia and government—that is, that militia members have acted virtuously on behalf of the government (for example, by helping effect its domestic-defense and domestic-security goals) and in limiting government overreaching and tyranny (for example, militias “offered some advantages for curbing corruption” by state governments) in the course of their militia duty.²³³

Assuming those facts are true, is Williams correct in claiming historical militia members demonstrated such civic virtue universally? Did they always fulfill their militia duty with the level of personal commitment and success critics suggest? History says no.

As an initial matter, even those purportedly obligated to militia duty frequently were not required to fulfill it themselves: states with some form of mandatory duty had provisions allowing called militia members to pay compensation or find replacements rather than serve.²³⁴ Financial substitution for personal performance was perfectly acceptable. As a result, militias’ legitimacy and success never depended on every citizen performing militia duty with virtue but rather on enough willing and able individuals creating a critical mass of effective manpower.²³⁵ Thus, militias were legitimate because of their successes in their core competencies—that is, “virtuous” in the civic-republican critique’s vernacular—and they achieved those successes because a sufficient number of citizens (not all) possessed civic virtue and performed their militia duty well.²³⁶ Although state militias were not proportionately representative of the citizens they served, citizens nevertheless trusted their state militias to provide critical domestic defense, improve domestic security, respond to emergencies, and protect them against government overreaching.²³⁷ This is the nature of pure civic republicanism: inherent in the term is a notion of representation by civic actors, not universally virtuous participation (a dynamic evident in the contexts of the right to vote and the responsibility to perform jury duty).²³⁸ History reveals no popular opposition either to limited militia membership—and thus a limited exercise of civic militia duty throughout the eligible population—or to the general evolution of mandatory state militia duty to voluntary state militia duty, which potentially allowed for greater demographic disparities through self-selection of militia members. Instead, for centuries, citizens have proved comfortable allowing a subset of the population to exhibit the virtue necessary to perform the often dangerous, time-consuming, and financially unfulfilling civic militia duty on all citizens’ behalf.

Thus, while the overall efforts of the state militias have been virtuous in serving their fellow citizens, not every actual or putative militia member was universally virtuous. Many proved up to the task of the militia duty, but—particularly in the heat

²³³ *See id.*

²³⁴ *See* MAHON, *supra* note 4, at 18.

²³⁵ *See id.*

²³⁶ *Id.* at 14–15 (examining the development of the militia obligation).

²³⁷ *See id.* at 48–49.

²³⁸ TUSHNET, *supra* note 203, at 35–36.

of war or in the face of mandatory militia duty—others made quite a poor impression or inadequately fulfilled their responsibilities to serve.²³⁹ Despite less than universal composition and participation, state militias adequately represented the will of all citizens when they “resist[ed] despotism”²⁴⁰ and were able to “restrain any movement toward demagogic rebellion,”²⁴¹ even though they represented only “a partial slice of society,”²⁴² a portion of which failed to fulfill its militia duty adequately—a far cry from the ubiquitously virtuous militia described by Williams.²⁴³ State militias also successfully assisted law enforcement with domestic security and aided first responders with emergency response despite their demographically underrepresentative composition.²⁴⁴ With history establishing that putative state militia members over the past four centuries have operated with varying levels of commitment and success in their militia duty, Williams’s wholesale claim that U.S. militia members possessed some heightened, universal virtue in centuries past simply is groundless.²⁴⁵

And what of today’s U.S. citizens? Are they really wholly lacking in civic virtue, as civic-republican critics suggest, and thus incapable of fulfilling militia duty effectively? Statistics suggest today’s citizens are quite virtuous and willing to support their communities with their money and time—core components of historically effective militias. More than sixty-four million Americans—about twenty-six percent of the relevant population—volunteer each year in unpaid roles.²⁴⁶ Given the median commitment of fifty-one hours for each volunteer, Americans are donating roughly 200–300 million hours or more to public service annually.²⁴⁷ In relevant contexts, the existence of about 22,000 neighborhood watch groups and numerous other citizen-directed, citizen-staffed domestic-security organizations; almost 760,000 volunteer firefighters (about seventy percent of all firefighters nationwide); and thousands of rescue squad volunteers attest to citizens’ capacity for voluntary civic virtue to achieve state militias’ traditional purposes.²⁴⁸

²³⁹ See MAHON, *supra* note 4, at 50 (describing one account of the militia’s conduct as “shameful” and “cowardly”).

²⁴⁰ Williams, *supra* note 167, at 554.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ DOUBLER & LISTMAN, *supra* note 2, at 18, 41; MAHON, *supra* note 4, at 85, 149; see also 10 U.S.C. § 12301(a) (2006).

²⁴⁵ See Brown, *supra* note 204, at 663, 665; Williams, *supra* note 167, at 554.

²⁴⁶ *Economic News Release: Volunteering in the United States, 2011*, BUREAU LAB. STAT. (Feb. 22, 2012) <http://www.bls.gov/news.release/volun.nr0.htm>.

²⁴⁷ *Id.*

²⁴⁸ MICHAEL J. KARTER, JR. & GARY P. STEIN, NAT’L FIRE PROTECTION ASS’N, U.S. FIRE DEPARTMENT PROFILE THROUGH 2011, at iii (2012), available at <http://www.nfpa.org/assets/files/PDF/OS.FDprofile.pdf>. Although the volunteer efforts of domestic-security groups like neighborhood watch reflect a strong commitment to civic virtue, those efforts often are ineffective. LAWRENCE SHERMAN ET AL., NAT’L CRIMINAL JUSTICE REFERENCE SYS., PREVENTING CRIME: WHAT WORKS, WHAT DOESN’T, WHAT’S PROMISING: A REPORT TO

Perhaps aware that a wholesale attack on modern U.S. citizens' civic virtue is untenable, the same critics also argue that those they believe most predisposed to serve in such militias—current gun owners—are a particularly nefarious lot who not only are unequipped and unprepared to use those guns for civic duty but also are likely to use those arms to oppress others.²⁴⁹ There is no way, they argue, that citizens could trust a militia primarily made up of gun owners, who they claim are not proportionately representative of the citizenry as a whole, are sexist and racist, and are untrustworthy.²⁵⁰ All the components of the claim are poorly supported or unsupported and contradict available historical evidence and contemporary realities.

No statistics show that gun owners who purchased their guns legally are any more criminal or likely to commit crimes than the general population, and those who support the civic-republican critique cite none. If anything, recent data suggest that gun owners are at least as virtuous, if not more so, than their non-gun-owning counterparts.²⁵¹ Even if gun owners are more likely to participate in reinvigorated independent state militias, there is no reason to believe their participation would adversely affect militias' virtue or their ability to fulfill their civic duty on behalf of the citizens they represent.

The truth, though, is that citizens neither need to own nor use firearms to participate in reinvigorated state militias. Just as military forces, police forces, and first responders employ those who do not use firearms, reinvigorated state militias could incorporate many who would have no need or desire to use firearms to fulfill their civic duty. As advocated in Part III, a broad concept of militia duty would encourage

THE UNITED STATES CONGRESS 35–36 (Mar. 17, 2012), available at <https://www.ncjrs.gov/pdffiles1/Digitization/165366NCJRS.pdf>.

²⁴⁹ See Brown, *supra* note 204, at 666; Williams, *supra* note 167, at 592; cf. TUSHNET, *supra* note 203, at 38. Perhaps most shocking, even those responsible for interpreting the Second Amendment and its relationship to U.S. militias and for establishing the relative authority of federal and state governments over those militias are not immune to these fallacies. Retired Supreme Court Justice John Paul Stevens apparently bases his Second Amendment jurisprudence on his unsupported and erroneous belief that citizens who keep firearms in their homes for self-defense purposes cannot adequately protect themselves because they are “not used to using” those firearms. Joel Gehrke, *Justice Stevens: Second Amendment Is ‘No Obstacle’ to Banning Automatic Weapons*, WASH. EXAMINER, Oct. 15, 2012, <http://washingtonexaminer.com/justice-stevens-second-amendment-is-no-obstacle-to-banning-automatic-weapons/article/2510773> (reporting Justice Stevens' claim that a bedside cell phone with 911 pre-dialed would provide better protection from in-home danger than a firearm).

²⁵⁰ See Brown, *supra* note 204, at 665; Williams, *supra* note 167, at 590–91.

²⁵¹ For example, one recent study from the Texas Concealed Handgun Association indicated the average citizen was 5.3 times more likely to be arrested for the violent crimes of murder, rape, robbery, and assault than the average concealed handgun license (CHL) holder and fourteen times more likely to be arrested for committing a non-violent crime than a CHL holder. WILLIAM E. STURDEVANT, TEX. CONCEALED HANDGUN ASS'N, AN ANALYSIS OF THE ARREST RATE OF TEXAS CONCEALED HANDGUN LICENSE HOLDERS AS COMPARED TO THE ARREST RATE OF THE ENTIRE TEXAS POPULATION (1996–1998), at 24, 27 (2000), available at <http://www.txchia.org/sturdevant.pdf>.

broader citizen participation, including more individuals with no desire to exercise their Second Amendment rights in connection with their militia duty. Williams's vision of a gun-crazy militia is a straw man.

3. Reinvigorated State Militias Can Rely on Citizens To Provide Their Own Arms

The final faulty cog of the civic-republican critique builds on the previous two fallacies of universal membership and virtue and adds another—the notion that government must arm militia members.²⁵² This component of the argument asserts that because effective militias must have universal composition, because today's citizens lack virtue, and because government must arm all militia members, the mandatory government arming of unvirtuous, unwilling militia participants will wreak havoc.²⁵³ Even if this argument did not fail for lack of historical universal membership or virtue, which it does, it fails because there is no reason why a government would need to provide militia members with arms or would need to arm unwilling militia participants. Having governments arm those who do not want to fulfill militia duty is not only unnecessary but financially and socially irresponsible. Historical and contemporary realities confirm that reinvigorated state militias could rely on militia members to provide their own arms where necessary.

State governments need not arm any citizens to have effective militias, nor could they likely bear that financial burden. For decades (and, in some jurisdictions, even longer) preparing and arming oneself for militia service was a core component of the duty.²⁵⁴ History indicates that when governments—particularly the national government—provide the weapons for state militias, those militias begin to look more like professional, government-controlled entities and less like citizen-driven forces. Notably, those government-armed militias lose their character as a check on tyranny because they generate a split fidelity by militia members to fellow citizens on one hand and to government actors (who provide free resources to the militia members) on the other. For example, as the national government increased its investments in dual-enlistment militias in their National Guard form, those units lost their state-exclusive character and now no longer provide any check on national government overreaching; they offer no meaningful limit on the expansion of the national government, no doubt in part because the national government pays them and provides them key resources.²⁵⁵ As a more practical matter, weapons owned by governments often were poorly managed, cared for, and accounted for by militia members absent

²⁵² Williams, *supra* note 167, at 592–93.

²⁵³ *See id.* at 593.

²⁵⁴ *See, e.g.,* MAHON, *supra* note 4, at 16–17; Whisker, *supra* note 3, at 954–55.

²⁵⁵ Even trade groups like the National Guard Association failed to consider the full gamut of state militias' responsibilities (and their citizens' interests) in the face of increased federal funding and the prospect of serving a high-profile role in the nation's military affairs. *See* MAHON, *supra* note 4, at 143.

the personal accountability inherent in private ownership.²⁵⁶ Finally, arming citizens is an unnecessary administrative and fiscal burden in a country with around 80 million gun owners who own an aggregate of 200–400 million firearms.²⁵⁷ The United States does not need to arm citizens with more guns to have effective state militias.²⁵⁸

Given the historical difficulty of ensuring that state militia members were adequately armed and prepared with the resources to fulfill their duties (particularly domestic-defense and domestic-security functions), the advantage of modern-day citizens' self-preparation is notable.²⁵⁹ States today enjoy the benefit of millions of self-trained citizens who have purchased and maintain their own arms; states can rely on their citizens to provide their personal arms and can allow others to participate in non-firearms-related roles in reinvigorated state militias.

4. The Civic-Republican Critique Correctly Favors Open, Flexible, Inclusive State Militias, but This Presents No Obstacle to Reinvigorated State Militias

Although the civic-republican critique incorrectly claims historical state militias had universal membership and that their legitimacy and success derived from that universality, the implicit foundation of that argument—that state militias should draw from the broadest spectrum of citizens possible to ensure they best reflect the needs and will of the citizens they defend and protect²⁶⁰—has value. For example, in discussing the check-on-tyranny value of historical state militias, Williams accurately notes

²⁵⁶ See *id.* at 17.

²⁵⁷ According to a 2011 Gallup poll, thirty-four percent of Americans personally own at least one gun, and forty-seven percent of American households have at least one gun on their premises. *Guns*, GALLUP (Mar. 15, 2012), <http://gallup.com/poll/1645/Guns.aspx>. There were approximately 117 million households in 2010, and approximately 237 million Americans eighteen years or older in 2011, according to U.S. census data. Howden & Meyer, *supra* note 230; DAPHNE LOFQUIST ET AL., U.S. CENSUS BUREAU, HOUSEHOLDS AND FAMILIES: 2010 (2012), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf>. These data suggest more than 80 million Americans possess guns and about 55 million households have guns. A Gallup poll in 2004—when gun ownership was lower—indicated there are approximately 1.7 guns for every American eighteen years or older, and each gun-owning household possesses an average of 4.4 firearms. Darren K. Carlson, *Americans and Guns: Danger or Defense?*, GALLUP (Jan. 4, 2005) <http://gallup.com/poll/14509/americans-guns-danger-defense.aspx>. Those statistics suggest aggregate gun ownership of 200–400 million firearms.

²⁵⁸ Moreover, having the government participate in unnecessary gun transactions, particularly in light of the Bureau of Alcohol, Tobacco, Firearms and Explosives' (ATF's) Fast and Furious operation, would be foolish. See, e.g., *ATF's Fast and Furious Scandal*, L.A. TIMES, <http://www.latimes.com/news/nationworld/nation/atf-fast-furious-sg.0,3828090.storygallery> (last visited Apr. 16, 2013) (providing links to stories noting that the government used the operation to allow Mexican drug cartels to obtain U.S. weapons and the ATF lost track of hundreds of the firearms, some of which were linked to crimes, including the fatal shooting of a border patrol agent).

²⁵⁹ See *supra* Part I.A.

²⁶⁰ TUSHNET, *supra* note 203, at 35–37.

that “[t]he republican framers of the Second Amendment were painfully aware that ultimate political power would lie with those who controlled the means of force.”²⁶¹ And he correctly observes that, “[a]s a result, they sought to arm not a narrow slice of society that might seize the government for its own end.”²⁶² That militias should be open and flexible enough to encourage and embrace broad citizen participation is fully compatible with this author’s vision of reinvigorated state militias. In fact, the development of the dual-enlistment National Guard through concerted marketing proves that demographically diverse and representative militias are realistic,²⁶³ and militias’ successes when able to specialize reveal the value of capturing the broadest set of relevant citizens’ skills and experience. As demonstrated in Part III, reinvigorated state militias should embrace a flexible structure that enables interested citizens to participate in militia duty locally or remotely, individually or collectively, with or without firearms, so all interested citizens can contribute in areas where their abilities would best serve their fellow citizens and their states. Such a structure, in turn, would open militia service to the broadest group of interested, virtuous individuals. Reinvigorated state militias, with appropriate marketing and incentives, could successfully attract a diverse, representative group across a wide range of substantive aptitudes even in the absence of universal militia participation.

B. State Constitutions and Militia as an Individual Duty

In *District of Columbia v. Heller*²⁶⁴ and *McDonald v. City of Chicago*,²⁶⁵ the Supreme Court directly rejected the view that the Second Amendment right to keep and bear arms was a purely collective right circumscribed by a collective state militia duty. Still, the relationship between the individual right protected by the Second Amendment and the civic militia duty referenced in the Second Amendment is unsettled—courts have not directly addressed whether the militia duty is individual in nature, as well.²⁶⁶ Two historical considerations as well as the plain language of numerous state constitutions support the conclusion that militia duty is individual in nature—exercised collectively at times and to different degrees—not purely collective in nature.²⁶⁷

First, militias are created with organized and unorganized components; historically, their members acted alone or in groups of various sizes, sometimes *sua sponte* and sometimes at the explicit direction of government actors.²⁶⁸ State militia structures historically embraced unstructured, individualized, specialized activity as a component

²⁶¹ Williams, *supra* note 167, at 553.

²⁶² *Id.*

²⁶³ See MAHON, *supra* note 4, at 252–53.

²⁶⁴ 130 S. Ct. 3020 (2010).

²⁶⁵ 128 S. Ct. 2783 (2008).

²⁶⁶ See, e.g., Brown, *supra* note 204, at 665; Sanford Levinson, Comment, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 640 (1989); Williams, *supra* note 167, at 553.

²⁶⁷ Williams, *supra* note 167, at 577–78.

²⁶⁸ See MAHON, *supra* note 4, at 19.

of their successful efforts.²⁶⁹ That is because, unlike government professionals, many of the state militias' responsibilities required flexibility, mobility, and the capacity for individualized, prompt attention to the unique challenges each community faced.²⁷⁰

Second, militias were designed to respect the unique quasi-independence of militia members—militiamen are not full-time professional employees of the government but citizens who serve in concert with the government on a part-time basis to protect citizens' interests. State militia duty empowered perhaps the most important responsibility for a citizen, a duality: the duty to fight and die for his fellow citizens on behalf of the government when he believed the government was acting within its constitutional and statutory bounds coupled with the duty to fight and die for his fellow citizens to resist the government when he believed the government was exceeding those bounds.²⁷¹ Members could not fulfill militias' role as a check on government tyranny if their militia duty were solely collective in nature and thus controlled exclusively by the state, for they would have neither the authority nor the opportunity to prevent government overreaching.

Third, state constitutions support the conclusion that militia duty is individual in nature. Those constitutions have provisions that directly vest citizens with the authority and means to act individually, *sua sponte*, in defense of themselves, their families, other fellow citizens, and their property.²⁷² Militia duty is individual in nature, and reinvigorated state militias should enable and encourage militia service individually or collectively, *sua sponte* or in response to government direction. Such militias would be nimble and flexible, able to fill in states' emerging domestic-security and emergency-response gaps.

1. Militias Were Created To Enable Specialization, Flexibility, and Rapid Response to Community Concerns, Which Goals Cannot Be Accomplished Through a Pure Collective-Duty Approach

Militia history reveals that militias operated most effectively when they could tailor their activities to the unique needs of their respective communities and the internal and external threats they faced. In domestic-defense scenarios, that meant the state called together a large number of militiamen, trained them for their particular

²⁶⁹ See DOUBLER & LISTMAN, *supra* note 2, at 4–6.

²⁷⁰ See, e.g., *id.* at 4–10.

²⁷¹ See *supra* notes 173–76 and accompanying text. A militia member needed to judge carefully when his obedience to government requests or directives was appropriate and when willful defiance to resist perceived government tyranny would serve his fellow citizens better; an ideal militiaman would have the wisdom to know when to obey government requests or directives, the wisdom to know when to defy them in defense of the citizens, and the courage to act either way when warranted.

²⁷² See, e.g., ARK CONST. art. II, § 5; MASS. CONST. pt. 1, art. XVII; NEB. CONST. art. I, § 1; TENN. CONST. art. I, § 26.

military duty, and coordinated their use in a military context. In the domestic-security context, militias had great success when they were able to specialize and tailor their activities; one size did not fit all. For example, during the era of continental expansion, domestic security in a frontier state would require more ad hoc, individualized or small group action by its militia, while domestic security in a more established coastal state might benefit from a militia with greater consistency, organization, and structure.²⁷³ Specialization of militias' domestic-security and emergency-response training and efforts allowed each militia to serve the needs of its citizens best.

In addition, militias have always embraced an unorganized component, which includes individual, unorganized militia members who may act independently or come together spontaneously to create an effective force without government intervention, organization, or direction (as they did, for example, to defend their communities from the British at Concord or to respond to a natural disaster in San Francisco).²⁷⁴ Throughout history, state militia duty has been exercised in many different ways: individually and to form a collective; spontaneously and under direction of the state. It is an individual duty at its core that manifests itself in those different practical dimensions depending on community need and circumstances; it is not a purely collective duty merely because government has had the authority to dictate certain of its characteristics and call members to serve the state.²⁷⁵ This unusual nature of state militia duty—the expectation of militia members to act both *sua sponte* and as an organized force in service of one's community—renders a collective-duty approach to state militia duty incomplete.

2. Militia Duty Historically Respected Militia Members' Authority To Reject Government Calls for Action When They Believed That Government Action Exceeded Its Authority, Which Is Inconsistent with a Purely Collective Duty

When one further considers the militias' role as a check on government tyranny, a collective-duty theory is wholly inadequate to reflect the comprehensive bundle of authority and responsibilities state militia duty encompasses.²⁷⁶ Militia members have proved their willingness not to act on behalf of state and local governments when their

²⁷³ See *supra* Part I.B.2.

²⁷⁴ See MAHON, *supra* note 4, at 36, 149.

²⁷⁵ See, e.g., Whisker, *supra* note 3, at 950 (“Most nations, and certainly international law, recognize the unenrolled militia as the great body of citizens who may rise up to defend their homes in time of invasion or insurrection.”). Similarly, voting is not a collective civic duty merely because states may dictate ballot rules and voting times and places.

²⁷⁶ This is demonstrated historically, where we find numerous examples of militia members not responding to calls deemed overreaching or tyrannical, as they did at the outset of the War of 1812, in the split loyalties generated by the Great Railroad Strike and the Whiskey Rebellion, and in the attempted uses of militia to oppose integration. See *supra* notes 175–76, 187–99 and accompanying text.

service would support perceived government overreaching.²⁷⁷ Militia members do not always share the will of their respective state or national governments, and thus a collective-duty view of militia duty would deprive them of the authority to accomplish the full scope of militia duty, including their role as a check on government tyranny.²⁷⁸ A collective-duty view is plainly inconsistent with this core militia responsibility, which has proved historically important, and therefore cannot be correct.

3. State Constitutions Support the Conclusion That Militia Duty Is Individual, Not Collective

State constitutions (and the courts that interpret them) strongly support the conclusion that militia duty is individual in nature and that the full responsibilities of that duty are enabled by rights to keep and bear arms that specifically authorize citizens to defend themselves, their families, their fellow citizens, and their property.²⁷⁹ The Second Amendment notes that a well-regulated militia is necessary to the security of a free state; the right to keep and bear arms provided to the people through that amendment, which is individual in nature, is a key enabler of militia duty.²⁸⁰ Numerous states, in turn, provide another layer of protection for those militia-enabling arms rights in their own constitutional Second Amendment equivalents.²⁸¹ Those states describe the right in a way that confirms that the concomitant militia duty is not merely collective

²⁷⁷ See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2800–01 (2008) (noting that one of the key reasons why the militia is “necessary to the security of a free state” is because militia members are “better able to resist tyranny”).

²⁷⁸ To be sure, the measure of state and national government control over state militias does implicate militia effectiveness in their core functions, as discussed in Part III. For example, the more nationally funded and nationally controlled state militias have become, the more obedient they have been to the governments (particularly the purse-holding federal government). This is reflected in the National Guardsmen’s near-universal obedience to federal (and state, when not conflicting) calls; their willingness to meet increased training requirements; and their compliance with calls to serve in international military defense capacities—all of which contrast with the less submissive attitude of pre-Dick Act state militias. To preserve their check-on-tyranny function, revived independent state militias should be structured to minimize governmental control except where necessary to effect the core purposes of militia legitimately.

²⁷⁹ See *Whisker*, *supra* note 3, at 971 (“It is the clear intention of state constitutions generally to guarantee an individual right to keep and bear arms while simultaneously reaffirming the right of the state to maintain a militia.”); see also David B. Kopel, *What State Constitutions Teach About the Second Amendment*, 29 N. KY. L. REV. 827, 849 (2002) (noting forty-two states have a provision similar to the Second Amendment and have found that provision protects a private right). *But see* Romano, *supra* note 57, at 235 n.12 (noting recent judicial criticism of the collective rights model).

²⁸⁰ See U.S. CONST. amend. II.

²⁸¹ See, e.g., ARK. CONST. art. II, § 5; MASS. CONST. pt. I, art. XVII; NEB. CONST. art. I, § 1; TENN. CONST. art. I, § 26.

but incorporates critical individual elements—that is, citizens are authorized (if not expected) to defend the security of the state and of their fellow residents not only when called in response to explicit state directives and in concert with large groups of other citizens but also individually in defense of themselves and others in the community.²⁸² For example, at least twenty-five states specifically empower an individual, self-directed component of traditional militia duty in the domestic-security context, noting that each citizen has the authority to use arms to guarantee his safety individually and for the benefit of the state collectively, drawing a textual distinction between the two.²⁸³ Even more telling, eleven of those states specifically note that this individual component of militia activity extends to protection of persons or property other than the citizen himself—using terms like “family,” “home,” or “others”—even absent explicit state authorization or direction.²⁸⁴

One might argue semantics—for example, that this legal authority for individual domestic-defense activities does not speak to militia duty but instead to a separate individual right to self-defense. That is flatly inconsistent with the language of some state constitutions and is irrelevant as applied to the others. With respect to a number of states, the argument fails textually, because their respective amendments extend beyond the person (simple self-defense) and explicitly reference security of land or property and safety of family and others.²⁸⁵ Defense of fellow citizens is a core component of traditional militia responsibility, as is the security of property within the state. With respect to the other states, even assuming that the absence of explicit constitutional authority to defend others was intentional, the independent self-defense authority provided by their constitutions informs militia duty. If the relevant language protects a separate individual right to self-defense, the broad swath of citizens included in the state militia must have it. That others not in the militia may also have it is irrelevant to the question of whether those in the militia do. Moreover, scholars have explicitly recognized that this type of unorganized, individual-driven domestic-security activity—whatever its name—is a component of militia duty.²⁸⁶

²⁸² See, e.g., Kopel, *supra* note 279, at 829, 832, 836 (analyzing certain state constitutions).

²⁸³ Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 205 (2006) (noting that an individual self-defense right is expressly secured, and keeping and bearing arms for other purposes may also be protected, in Alabama, Arizona, Colorado, Connecticut, Delaware, Kentucky, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming). An individual right is expressly secured, and court decisions treat the right as aimed at least in part at self-defense, in three other states: Illinois, Louisiana, and Maine. *Id.* at 205–07.

²⁸⁴ Those states are Colorado, Delaware, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Oklahoma, Utah, and West Virginia. *Id.* at 192–204.

²⁸⁵ See Whisker, *supra* note 3, at 971.

²⁸⁶ *Cf. id.* at 950 (noting that the citizen-soldier may be a member of either the unenrolled or enrolled militia).

There is no legal impediment to reinvigorating independent state militias. The collectivist civic-republican critique provides no valid basis to oppose such efforts, but it properly counsels reinvigorated state militias to strive for inclusiveness and to encourage broad-based citizen participation to maximize community trust in, and thus legitimacy of, those militias. To ensure militias may accommodate the widest spectrum of capable citizens, reinvigorated state militias should embrace both individual and collective citizen action—*sua sponte* and state organized—consistent with historical evidence and state constitutional provisions that indicate militia duty is, in fact, individual in nature.

III. HOW REINVIGORATED INDEPENDENT STATE MILITIAS COULD HELP ADDRESS EMERGING DOMESTIC-SECURITY AND EMERGENCY-RESPONSE NEEDS AND RECALIBRATE FEDERALISM

Given the challenges and constraints facing states and the areas in which state militias historically have succeeded, the environment for reinvigorating independent state militias is ripe. This Part will examine how best to structure those militias to accomplish the goals of flexibility and inclusiveness while maximizing effectiveness in their core competencies: (A) State militias should continue to perform their domestic-defense responsibilities in their National Guard form; (B) New financial realities²⁸⁷ mean citizens no longer can rely on states and their localities to be the exclusive providers of high-level, comprehensive domestic-security and emergency-response services. Reinvigorated independent state militias could step in to fill the gaps by providing a broad-based citizen support network; (C) Federal law should be modified to provide reinvigorated state militias true independence from federal control, providing a real check on government tyranny, respecting federalism, and freeing states to attract an even more diverse, productive set of militia members.

A. The National Guard and Domestic Defense

The National Guard's tight integration with the national military and its organization, structure, and training have made the Guard an effective component of the U.S. military both domestically and abroad. To the extent the Guard fulfills state militias' domestic-defense responsibilities, it does so well. The absence of independent state militias in the domestic-defense context has had no negative impact on military success;

²⁸⁷ See generally CHRISTOPHER W. HOENE & MICHAEL A. PAGANO, NAT'L LEAGUE OF CITIES, CITY FISCAL CONDITIONS IN 2011 (2011), available at <http://www.nlc.org/File%20Library/Unassigned/city-fiscal-conditions-research-brief-rpt-sep11.pdf>; NAT'L GOVERNORS ASS'N, THE FISCAL SURVEY OF STATES (2011), available at <http://www.nga.org/files/live/sites/NGA/files/pdf/FSS1111.PDF>.

to the contrary, the dual-enlistment National Guard was created specifically to address state militias' military weaknesses, and it has served as a more effective, integrated component of the U.S. military than its immediate state militia predecessors.²⁸⁸ This is, in large part, because the national government can dictate the size, composition, and characteristics of each National Guard force; it can control training; and it can control organizational structure.²⁸⁹ Equally important from the national government's perspective, those Guard forces have provided a critical source of additional manpower for extended and overseas missions; they no longer are limited by the temporal and geographic restrictions on traditional state militia service, making them better suited to the type of global, integrated military strategy employed by modern-day U.S. armed forces. One would be hard pressed to argue that militias in their National Guard form are not performing well—perhaps as well as ever—in terms of their defense function, although at the expense of losing their state character, their pure non-professional status, and their role as a check on government overreaching.

Because of tightening federal budgets, professional armed forces likely will be reduced by 100,000 over the next decade, suggesting the National Guard will become an even more important component of a leaner U.S. military strategy going forward.²⁹⁰ Focusing independent state militias on other militia responsibilities would free the Guard to focus almost exclusively on its military role, where it likely will be needed most in the foreseeable future.

B. States' Emerging Domestic-Security and Emergency-Response Needs

Increasing state and local budgetary constraints are: (1) rendering police increasingly incapable of effectively maintaining the peace; (2) forcing some jurisdictions to decriminalize violations, forcing some police agencies to stop investigating entire categories of crimes, and forcing some jurisdictions to stop prosecuting crimes altogether; and (3) undermining efficient, comprehensive emergency services. Evidence suggests citizens no longer will be able to rely on state and local governments to serve as exclusive providers of the domestic-security and emergency-response protections to which they have become accustomed, but reinvigorated independent state militias could help those governments address those emerging challenges.²⁹¹

²⁸⁸ See Nathan Zezula, Note, *The BRAC Act, the State Militia Charade, and the Disregard of Original Intent*, 27 PACE L. REV. 365, 388 (2007); see also *supra* Part I. The Army National Guard is integral to the current defense system; as of 2010 the Army National Guard made up roughly fifty-four percent of the country's combat forces. See *id.*

²⁸⁹ *Id.* at 367–68.

²⁹⁰ Tom Vanden Brook, *Defense Secretary Leon Panetta Defends a Leaner Military*, USA TODAY, Jan. 26, 2012, <http://www.usatoday.com/news/washington/story/2012-01-26/panetta-military-defense-cuts/52805056/1> (discussing the Pentagon's 10-year plan to reduce defense spending by \$487 billion).

²⁹¹ The emergence and proliferation of private groups like community neighborhood watches and the Guardian Angels to fill domestic-security gaps attests to the inability of state

1. Increasingly Nimble and Well-Organized Criminals and Insufficient Police Staffing Create New Dangers for Citizens, Small Businesses, and Communities

A recent Staten Island incident is illustrative of the new domestic-security challenges for citizens and the professional police who serve to ensure their security. When two officers responded to a 911 call reporting a group of teens amassing outside a house and threatening a teen inside, the officers were unable to maintain order.²⁹² Both officers were attacked when trying to make an arrest; despite calls for police backup, the officers were saved and the crowd dispersed only after firefighters on a nearby engine shot a water cannon into the crowd.²⁹³ When a large police presence finally arrived, police were able to arrest only nine of the fifty to sixty instigators.²⁹⁴

Nimble, more coordinated criminal activity like that example is increasing because of the ease of mass communication via text messaging, Twitter, Facebook, and other large-scale social and communication networks.²⁹⁵ Increasingly, as in Staten Island, police across the nation find themselves rapidly outnumbered and incapable of maintaining peace and arresting criminals in such group settings. In addition to a lack of adequate manpower, police response is reactive and often occurs only after the groups have reached critical mass.²⁹⁶ Citizens describe these overwhelming scenes with terms like “human tidal wave[s]” and “a tsunami of kids,” and media often refer to them as “flash

and local governments to maintain their citizens’ security and citizens’ perception that additional resources are needed. *See generally supra* notes 246–48 and accompanying text (chronicling local volunteer response efforts). The Department of Justice agrees, perceiving a need for additional citizen involvement in domestic-security activities. *See generally* ANDREW MORABITO & SHELDON GREENBERG, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, ENGAGING THE PRIVATE SECTOR TO PROMOTE HOMELAND SECURITY: LAW ENFORCEMENT-PRIVATE SECURITY PARTNERSHIPS (2005), *available at* <https://www.ncjrs.gov/pdffiles1/bja/210678.pdf>. The pro-community, voluntary actions of the citizens who created and populate private volunteer groups like the Guardian Angels further attest to the font of civic virtue present in the modern-day United States. *See* Brandon et al., *supra* note 231, at 895–901 (discussing the Guardian Angels); *see also supra* Parts II.B.1–2.

²⁹² John M. Annese, *Mayhem in Mariners Harbor, FDNY Rescues NYPD at Riot*, STATEN ISLAND ADVANCE, Dec. 7, 2011, at A1.

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ Business leaders and government officials observe that over the past few years criminal flash mobs have become “an emerging phenomenon” responsible for increasing vandalism, robberies, and assaults. Liz Parks, *Fighting Back: Increased Communication and Tougher Penalties Are Among Methods to Combat Flash Robs*, STORES (Nov. 2012), <http://www.stores.org/STORES%20Magazine%20November%202012/fighting-back>.

²⁹⁶ *See* Erik Ortiz, *Chicago Clothing Store Loses \$3,000 Worth of Jeans in Flash Robbery*, N.Y. DAILY NEWS, July 30, 2012, http://articles.nydailynews.com/2012-07-30/news/32946321_1_surveillance-video-mob-flash (noting that about twenty young adults robbed a clothing store of more than \$3,000 of merchandise and that police took more than thirty minutes to respond to the store owner’s 911 call).

mobs” to describe the sudden and potentially dangerous nature of the gatherings.²⁹⁷ Given individuals’ ability to aggregate en masse with little advance notice via private or diffuse communication methods that are difficult to track comprehensively, police often rely on citizens to inform them of impending trouble.²⁹⁸ But when police arrive, they often find it difficult—if not impossible—to maintain order, and most flash-mob members can escape without fear of prosecution.

Even when citizens give police advance warning of such flash mobs, police often do not have the resources necessary to prevent criminal activity proactively. For example, in 2011, a neighborhood watch volunteer alerted police to a planned flash mob in Venice Beach, California, more than six hours before a man was shot by a member of the mob.²⁹⁹ Despite the warnings, police could do nothing to prevent the shooting or control the crowd, which rapidly dispersed and hid in nearby shops.³⁰⁰

The lack of adequate police response to spontaneous, coordinated group acts of criminality seems to have encouraged their proliferation. For example, on Christmas night, 2011, an estimated 5,000 teenagers descended on a suburban Miami outdoor mall after being organized on Twitter and Facebook.³⁰¹ Police needed officers from nine different agencies to respond to the criminal activity that ensued, but order was not restored before one officer was punched in the face, at least two employees of the mall’s movie theater were assaulted, and a sixteen-year-old boy was shot.³⁰² The incident forced police to declare a countywide state of emergency and impose an 8:00 p.m. curfew on minors.³⁰³

Stories like those, particularly including groups that rob stores en masse (apparently confident that police will be unwilling or unable to prevent the crimes or arrest the assailants), are increasingly prevalent and threaten serious degradation of security for individuals in public areas like malls and beaches, for business owners, and even for individuals in their own homes.³⁰⁴ Police departments are acknowledging the trend

²⁹⁷ Gale Holland, *‘Flash Mob’ on Venice Boardwalk Ends in Shooting*, L.A. TIMES, Apr. 18, 2011, <http://articles.latimes.com/2011/apr/18/local/la-me-venice-shooting-20110418>; Ian Urbina, *Mobs Are Born as Word Grows by Text Message*, N.Y. TIMES, Mar. 25, 2010, at A1.

²⁹⁸ See Parks, *supra* note 295 (noting that police rely on citizen reports and tips provided through the city’s recently created “iwatchphiladelphia.com” website).

²⁹⁹ Holland, *supra* note 297.

³⁰⁰ *Id.*

³⁰¹ *Mall Mob, Shooting Leads to Miami Lakes Teen Curfew*, CBS MIAMI (Dec. 30, 2011), <http://miami.cbslocal.com/2011/12/30/mall-mob-shooting-leads-to-miami-lakes-teen-curfew/>. Another large-scale flash mob recently wreaked havoc in and around a Jacksonville, Florida, Walmart, as 300 young adults robbed and vandalized the store and allegedly discharged firearms. Liz Parks, *Mob Mentality: Multiple-Offender Crimes Are on the Rise*, STORES (Oct. 2012), <http://www.stores.org/STORES%20Magazine%20October%202012/mob-mentality?adid=STWeekly>.

³⁰² *Mall Mob, Shooting Leads to Miami Lakes Teen Curfew*, *supra* note 301.

³⁰³ *Id.*

³⁰⁴ E.g., Kitty Caparella & Stephanie Farr, *Another Flash Mob Rocks South Street*, PHILA. DAILY NEWS, Mar. 22, 2010, at 8; *Flashmob in Downtown San Jose Starts Pillow Fight*, SAN

and, more important, the fact that their forces are inadequate to manage these mass events that spawn criminality.³⁰⁵ For example, Detroit police recently warned citizens to “Enter [Detroit] At Your Own Risk,” noting that, with hundreds fewer officers than ten years ago, they are unable to protect citizens adequately from “America’s most violent city” and are “fearful for their [own] lives.”³⁰⁶ Oakland police similarly recognized that a recent crime surge—including a 43% annual increase in burglaries—was in large part due to the fact that the force had about 200 fewer officers in 2012 than the 800 officers the city employed in 2008.³⁰⁷

In the face of increasing, more opportunistic coordinated criminal activity, concurrent reductions in overall police presence are concerning. The number of police officers per capita in big U.S. cities and states has a strong correlation with crime, and increasing the number of officers in population-dense and high-crime areas has the greatest crime-reduction impact.³⁰⁸ Thus, the Department of Justice’s October 2011 report indicating police forces were reduced by approximately 10,000 officers and sheriffs’ deputies in the previous year alone suggests even greater threats to domestic security will follow under the current system.³⁰⁹

Police professionals themselves publicly acknowledge the need for supplemental assistance with domestic security.³¹⁰ Some even openly advocate citizens arming

JOSE MERCURY NEWS (Calif.), Feb. 14, 2011, http://www.mercurynews.com/science/ci_17379761; Troy Graham, *10 Teens Found Guilty of Rioting in Feb. 16 ‘Flash Mob,’* PHILA. INQUIRER, Mar. 23, 2010, at B1; Richard Khavkine, *‘Flash Mobs’ Burst onto Local Scene: Throng of Teens in South Orange Part of Growing, Menacing Trend,* STAR-LEDGER (Newark, N.J.), Apr. 8, 2010, at 1.

³⁰⁵ See, e.g., Todd South, *Chief: More Police Needed,* CHATTANOOGA TIMES FREE PRESS, Apr. 16, 2010, <http://www.timesfreepress.com/news/2010/apr/16/chief-more-police-needed/?mobile>.

³⁰⁶ Kathryn Larson, *Enter at Your Own Risk: Police Union Says ‘War-Like’ Detroit Is Unsafe for Visitors,* CBS DETROIT (Oct. 6, 2012), <http://detroit.cbslocal.com/2012/10/06/enter-at-your-own-risk-police-union-says-war-like-detroit-is-unsafe-for-visitors/>.

³⁰⁷ Phil Matier, *Oakland Crime Rate Soaring as City Loses Officers,* CBS SF BAY AREA (Nov. 28, 2012), <http://sanfrancisco.cbslocal.com/2012/11/28/phil-matier-oakland-crime-rate-worries-city-officials/>.

³⁰⁸ Steven D. Levitt, *The Relationship Between Crime Reporting and Police: Implications for the Use of Uniform Crime Reports,* 14 J. QUANTITATIVE CRIMINOLOGY 61, 78 (1998) (suggesting that lack of consideration for reporting bias accounts for previous studies that found that police force size did not correlate with reduced crime); Steven D. Levitt, *Using Electoral Cycles in Police Hiring To Estimate the Effects of Police on Crime,* 87 AM. ECON. REV. 270 (1997); see also SHERMAN ET AL., *supra* note 248, at 166, 170–71.

³⁰⁹ U.S. DEP’T OF JUSTICE OFFICE OF CMTY. ORIENTED POLICING SERVS., *THE IMPACT OF THE ECONOMIC DOWNTURN ON AMERICAN POLICE AGENCIES* 13 (2011). Reductions in police staffing have become so severe that large cities have been forced to cut back or eliminate common services. For example, Detroit no longer can afford to provide complimentary police escorts for funerals. *Detroit Ending Free Police Escorts for Funerals,* CBS DETROIT (Dec. 6, 2011), <http://detroit.cbslocal.com/2011/12/06/detroit-ending-free-police-escorts-for-funerals/>.

³¹⁰ See, e.g., Morabito & Greenberg, *supra* note 291 (advocating professional-citizen partnerships to improve public safety).

themselves with concealed weapons to fill the security gap.³¹¹ And areas with significant military presence, like Columbus, Georgia, have solicited the help of military volunteers to serve as “Courtesy Patrol” during high-crime periods to assist overburdened forces.³¹²

Budget cuts also are forcing police agencies to reduce training and delay upgrading equipment, undermining their effectiveness.³¹³ The lack of adequate resources seems to be increasing the risks posed to police officers as well, with 2011 producing one of the highest annual rates of police officer deaths in recent memory.³¹⁴ The National Law Enforcement Officers Memorial Fund attributes that problem to increasing “budget cuts to public safety departments.”³¹⁵

States’ financial challenges are undermining police professionals’ ability to provide high-quality, comprehensive domestic-security services, but there are a number of ways reinvigorated independent state militias could fill the gap, including:

Increased uniformed patrols at “hot spots” and “hot times”—that is, high-crime areas and high-crime periods—produce a strong correlation to reduced crime, even after those patrols leave the area.³¹⁶ Moreover, the patrols need not maintain their position for extended periods of time to have a persistent effect; uniformed individuals who stay at hot spots for just fifteen minutes provide a minute-for-minute reduction in crime after they leave.³¹⁷ To combat common criminal activity that frequently occurs at the same time in the same place, one jurisdiction now is using two-person volunteer patrols in non-police uniforms who are unarmed (they simply alert police to criminal activity).³¹⁸ Data and experience confirm that patrol members need to be neither armed nor members of the police force to be effective, although some type of uniform—and

³¹¹ See *Sheriff: Time for Citizens to Arm Themselves*, WYFF (Oct. 31, 2011), <http://www.wyff4.com/r/29638219/detail.html>.

³¹² Sarah Panko, *Military Patrols Start Friday Night in Downtown Columbus*, WRBL NEWS (Apr. 22, 2011), <http://www.wrbl.com/story/21330594/military-patrols-start-friday-night-in-downtown-columbus>.

³¹³ CHRISTIANA MCFARLAND, NAT’L LEAGUE OF CITIES, STATE OF AMERICA’S CITIES SURVEY ON JOBS AND THE ECONOMY 2 (2010).

³¹⁴ Since 2001, more officers died in the line of duty in 2011 than in any year save 2007, and officer deaths due to firearm fatalities have increased every year since 2008; 2011 totals are 117% higher than three years earlier. *Officer Deaths by Year*, NAT’L LAW ENFORCEMENT OFFICERS MEM’L FUND, <http://www.nleomf.org/facts/officer-fatalities-data/year.html> (last visited Apr. 16, 2013).

³¹⁵ Greg Bluestein, *U.S. Police Fatalities Up 13 Percent in 2011 to 173*, WASH. TIMES, Dec. 28, 2011, <http://www.washingtontimes.com/news/2011/dec/28/us-police-fatalities-13-percent-2011-173/>.

³¹⁶ See SHERMAN ET AL., *supra* note 248, at 171 tbl. 8-4; Christopher S. Koper, *Just Enough Police Presence: Reducing Crime and Disorderly Behavior by Optimizing Patrol Time in Crime Hot Spots*, 12 JUST. Q. 649, 657 (1995).

³¹⁷ SHERMAN ET AL., *supra* note 248, at 171.

³¹⁸ Panko, *supra* note 312.

its concomitant accountability or authority—seems to be important.³¹⁹ Therefore, states could use small or large groups of uniformed militia members on brief patrols, leveraging whatever time and manpower citizens can offer to generate a meaningful reduction in crime in high-crime areas while minimizing financial burdens on states.

Some studies suggest that decreased police response times to crime scenes may help increase successful prosecution of those crimes, but the value derived from more prompt police response relies on prompt crime reporting by victims or witnesses.³²⁰ Studies have shown benefits when reporting times are less than nine minutes, but the relative scarcity of mobile communications at the time of those studies made such prompt reporting rare.³²¹ With the proliferation of cell phones, texting, and access to social networks, prompt reporting of crime—through public or proprietary channels—is increasingly feasible.³²² Such reporting can come from militia patrols in high-crime areas who witness crime, individuals monitoring social networks who receive reports of actual or planned crimes, or additional police dispatch support. Those activities may be too time- and manpower-intensive for police departments to devote additional professional resources to, but properly trained militia members could easily provide them on an individual or group basis.

If citizens simply have an interest in improving domestic security but have no relevant skill set, as militia members they could play potentially valuable roles as independent liaisons between public safety professionals and the communities they serve.³²³ Studies show that citizens' positive perceptions of police concern for and responsiveness to them, as well as citizens' prior positive interactions with police, have the potential to reduce crime.³²⁴ State militia members drawn from that citizenry, whose sole purpose is to foster and improve a better relationship with professional public servants, can help facilitate that goal.³²⁵ Particularly in those environments where trust in the professional police force is at its nadir, state militia members drawn from the communities they serve could prove a valuable bridge between the two groups, helping to ensure citizens receive the responsive service and professionalism they deserve from

³¹⁹ See *id.*; see also MORABITO & GREENBERG, *supra* note 291, at 16 (noting the value of citizens' ability to recognize a private security enterprise).

³²⁰ See SHERMAN ET AL., *supra* note 248, at 169–70.

³²¹ *Id.*

³²² See Holland, *supra* note 297.

³²³ For example, when police were unable to prevent a group of about forty young adults from “taking over” a Detroit gas station, members of a local church went to the station, spoke to the youths, and advocated on behalf of the owner and law enforcement. Alexis Wiley, *Owner: Loitering Teens Taking Over Detroit Gas Station, Driving Business Away*, FOX DETROIT (Sept. 26, 2012), <http://www.myfoxdetroit.com/story/19642028/owner-loitering-teens-taking-over-detroit-gas-station-driving-business-away>.

³²⁴ SHERMAN ET AL., *supra* note 248, at 178.

³²⁵ See *id.* at 180 (concluding that focused community policing that improves the relationship between citizens and police is promising for crime-reduction purposes).

their public safety professionals and improving those professionals' understanding of the needs and challenges facing the communities.

2. Financial Shortfalls Impede and, in Some Instances, Prevent Crime Investigation and Prosecution for Entire Classes of Crimes

Budgetary constraints are adversely impacting another key component of domestic security: investigating crimes and prosecuting crimes once suspects have been arrested. Two recent examples are illustrative.

First, Sheriff Sue Rahr of King County, Washington—a locality with 305,000 residents—recently announced that, due to “draconian” budget cuts, her office no longer would investigate property crimes as a matter of course: “That means if you are the victim of a burglary, car prowl, theft, auto theft, fraud, and so on, we will have no detectives to conduct the follow-up investigation. Our citizens need to know this.”³²⁶ Other jurisdictions have similarly found themselves unable to investigate entire categories of crimes.³²⁷

Second, even where police departments can adequately investigate crimes, many jurisdictions are in such financial straits that they have stopped, or have threatened to stop, prosecuting certain categories of crimes altogether. For example, the City Council of Topeka, Kansas, decriminalized domestic violence when it no longer could afford to prosecute the crimes and provide the required support staff for victims and their families.³²⁸ This shifted the burden to Shawnee County, Kansas, to prosecute the Topeka crimes in addition to the county's prosecutorial burden, despite a ten percent budget cut.³²⁹ Shawnee threatened not to continue prosecuting Topeka's misdemeanors absent a cash payment of \$350,000—equal to the size of the budget cut—and released thirty domestic violence arrestees before ultimately relenting and agreeing to prosecute future Topeka crimes, despite being short-staffed.³³⁰

Absent a radical financial turnaround, citizens increasingly may face state and local criminal justice systems unable to enforce their laws, putting people and their property at greater risk.

State militia members with criminal justice or legal experience and the appropriate training, where necessary, could assist investigations of lower-priority crimes like the

³²⁶ Sue Rahr, Opinion, *Sheriff Rahr: The Outcome of Budget Cuts on King County Law Enforcement*, KENT REP. (Nov. 18, 2010), <http://www.kentreporter.com/opinion/109072504.html>.

³²⁷ See Aimee Green, *County Has to Let Lower-Level Crime Slide*, OREGONIAN, Oct. 6, 2010.

³²⁸ A. G. Sulzberger, *Facing Cuts, a City Repeals Its Domestic Violence Law*, N.Y. TIMES, Oct. 12, 2011, at A11.

³²⁹ *Id.*

³³⁰ See Greg Wilson, *Cash-Strapped Topeka May Stop Prosecuting Domestic Violence*, NBC CHI. (Oct. 13, 2011), <http://www.nbcchicago.com/news/weird/Cash-Strapped-Topeka-Stops-Prosecuting-Domestic-Violence-131468933.html>.

property crimes King County, Washington, claims it no longer has the resources to investigate, or they could support prosecutions in jurisdictions like Topeka, which lack adequate prosecutorial resources.³³¹ State militia members with social work or psychology experience could help provide the pre- and post-trial social services necessary to support crime victims, their families, and criminals for whom rehabilitative efforts would prove valuable, on an individual or group basis. And militia members with mediation or arbitration experience could help resolve disputes without the need for full-blown litigation,³³² just as some historical militias helped resolve land disputes extrajudicially.³³³ In those and similar ways, citizens could provide judicial assistance in a manner similar to the various pro bono efforts of numerous law firms throughout the nation.

3. Shrinking Budgets Are Forcing Significant Cuts in Emergency Response

Just as financial strains on state and local budgets are negatively impacting police forces, they are reducing the efficacy and resources of emergency first responders. For example, faced with a one million dollar shortfall, St. Paul, Minnesota, was forced to eliminate one of its three rescue squads, which provide critical search-and-rescue services and address hazardous materials emergencies.³³⁴ Similarly, Edison, New Jersey, attempted to reduce its budget by eliminating its two fire-rescue units and replacing them with a single freelance emergency medical technician crew that was qualified neither to fight fires nor perform rescues.³³⁵ As a result, citizens frequently were forced to wait double the recommended time for emergency medical system responses, and at times the city had no ambulances to respond to citizen emergencies.³³⁶ As state and local budgets have decreased substantially, so have those governments' abilities to address citizens' emergency needs adequately with professional first responders.

³³¹ Rahr, *supra* note 326; Sulzberger, *supra* note 328, at A11.

³³² In Florida, the Orange County Bar Association provides a good model: it offers free mediation to resolve family-law issues and citizen disputes involving a number of substantive legal issues. See *Citizen Dispute Settlement/Family Law Mediation*, ORANGE COUNTY BAR ASS'N, <http://www.orangecountybar.org/mediation> (last visited Apr. 16, 2013).

³³³ DOUBLER & LISTMAN, *supra* note 2, at 43.

³³⁴ Brady Gervais, *City May Cut One Rescue Squad—Two Would Still Operate; Union Offers Its Proposal*, ST. PAUL PIONEER PRESS (Minn.), Sept. 15, 2011, at B1.

³³⁵ *Edison Mayor Jeopardizing Public Safety with Cuts*, HOME NEWS TRIB. (Mar. 5, 2011), <http://www.mycentraljersey.com/article/20110305/NJOPINION0201/103050326/>.

³³⁶ *Id.* In jurisdictions with adequate financial resources, a dearth of qualified professionals is creating similar concerns. Philadelphia's Emergency Medical System, for example, is in crisis due to insufficient numbers of paramedics. Mike Newell, *Butkovitz Finds EMS Responses Still Badly Inadequate*, PHILA. INQUIRER, Oct. 13, 2011, at A1. In 2002, the city had 280 paramedics; seven years later, it had only 210, even though emergency calls increased by about thirty-five percent. *Id.* The remaining paramedics are severely overworked, with some crews taking more than two-and-a-half times the number of recommended calls, often resulting in unacceptably long wait times for citizens facing medical emergencies. See *id.*

Despite being underfunded and generally neglected by their states, SDFs demonstrate the potential value of independent state militias for emergency response, particularly in assisting with atypical events that require atypical manpower or events that are otherwise disproportionately time-intensive. For example, more than 2,200 SDF members from at least eight states were used to support post-Hurricane Katrina recovery efforts.³³⁷ New York and New Jersey members assisted in post-9/11 response, recovery, and infrastructure security.³³⁸ And SDFs frequently assist with missing person searches.³³⁹ Independent state militias—particularly if their governments organized, supported, marketed, and expanded them beyond existing SDFs—could capitalize on the same volunteer resources on a larger scale to generate greater, more persistent emergency-response support for states.

A plethora of opportunities exists for states to capture the unique skills of their citizens—in roles suited for individuals or groups, with or without arms—to improve emergency response. Reinvigorated independent state militias could provide such services to ensure they maximize civic involvement and fill states' increasing domestic-security and emergency-response gaps.

C. Federal Law Should Allow for Truly Independent State Militias

State militias provided some restriction on unfettered government power in their pre-National Guard form. In their current form, however, they no longer serve as a meaningful check on government tyranny or potential abuse of national military forces.³⁴⁰ Since the effective federalization of state militias—explicitly through the National Guard and de facto through 10 U.S.C. § 332, which allows the President to call and control any state militia³⁴¹—states have no real power or ability through their militias to resist tyrannical national government actions.³⁴² States need militias to ensure their citizens remain “free” from government overreaching, and the individual right to

³³⁷ Martin Hershkowitz, *Summary of Available State Defense Force After Action Reports from Hurricanes Katrina and Rita Deployments*, 2 ST. DEF. FORCE J., 13, 14 (2006), available at <http://www.23bn-vdf.com/s3/AARs%20of%20SDFs%20in%20Katrina.pdf>.

³³⁸ Arthur N. Tulak, Robert W. Kraft & Don Silbaugh, *State Defense Forces and Homeland Security*, 33 PARAMETERS 132, 133 (2003–2004), available at <http://www.carlisle.army.mil/USAWC/Parameters/Articles/03winter/tulak.pdf>.

³³⁹ For example, a handful of New Mexico members conducted a two-day search for an eleven-year-old boy missing from his family's campsite in Robenson Canyon. The volunteers were able to stay on-site after the first evening and ultimately located the child early the following morning. See N.M. State Guard, *New Mexico State Guard Search and Rescue Success, Carlsbad, May 2010* (2011), available at <http://data.opi.mt.gov/legbills/2011/Minutes/House/Exhibits/sth28a01.pdf>.

³⁴⁰ See *Sterling v. Constantin*, 287 U.S. 378, 399–401 (1932) (reviewing a challenge to a Texas governor's use of military force to shut down oil wells); Romano, *supra* note 57, at 241–42; Whisker, *supra* note 3, at 961.

³⁴¹ See 10 U.S.C. § 332 (2006).

³⁴² See National Defense Act, ch. 134, §§ 63, 79, 39 Stat. 166, 198, 202–03 (1916); Whisker, *supra* note 3, at 961.

keep and bear arms gives real teeth to state militias' check-on-tyranny function.³⁴³ As the Founders believed, and as the Supreme Court confirmed in *District of Columbia v. Heller*, the check-on-tyranny role that state militias are designed to provide is essential to healthy citizen-government relations and meaningful federalism.³⁴⁴ But federal law in the nineteenth and twentieth centuries excoriated it, so that protection no longer exists in any meaningful form after the federalization of state militias. Not surprisingly, absent a meaningful check on government tyranny, political forces from all sides of the spectrum have joined a crescendo of criticism of federal government actions, more increasingly accusing the national government of exceeding its bounds and failing to protect the rights of individuals and of the states.³⁴⁵ Reinvigorated state militias would help address this concern and recalibrate federalism.

Today, federal law by its terms gives the national government near plenary power over the state militia members currently enrolled in the National Guard, including the ability to obviate their state militia status altogether and transform them into a component of the regular military forces, with extended tours and the possibility of overseas deployment³⁴⁶—two characteristics at odds with historical state militia duty. Federal law also permits the federal government to “use” any other state militia when necessary to further any federal law, among other purposes.³⁴⁷ That ability has a chilling effect on state militias, because those militia members interested in serving their states but not the national government—or those who have no interest in engaging in international military action—have no productive, safe outlet for their public service. Similarly, states interested in investing in SDFs or other non-National Guard entities risk the possibility that the national government will simply take control of them at its leisure under 10 U.S.C. § 332³⁴⁸ or—as with the National Guard—appropriate them on a more permanent basis through additional federal legislation.³⁴⁹

To give states the freedom to create, organize, equip, and train militias best suited to addressing their unique needs, federal law requires revision. The simplest solution is to revise 10 U.S.C. § 311 to limit federal militia to the organized

³⁴³ See U.S. CONST. amend II.

³⁴⁴ *District of Columbia v. Heller*, 128 S. Ct. 2783, 2800–01 (2008); Cornell, *supra* note 172, at 890–91; Whisker, *supra* note 3, at 961–62.

³⁴⁵ In a 2011 poll, a shocking eighty-nine percent of Americans surveyed said they did not trust the government to “do the right thing.” Jeff Zeleny & Megan Thee-Brenan, *New Poll Finds a Deep Distrust of Government*, N.Y. TIMES, Oct. 26, 2011, at A1. This extreme level of dissatisfaction with government has spawned Tea Party and Occupy movements over the past few years, both of which are demanding radical changes in the way government interacts with its citizens. *Id.*

³⁴⁶ § 79, 39 Stat. 166, 202–03; 32 U.S.C. §§ 102, 109 (2006).

³⁴⁷ 10 U.S.C. §§ 332–333; *Perpich v. Dep’t of Defense*, 496 U.S. 334, 352–53 n.25 (1990) (noting that non-Guard state militias, including SDFs, may be called by the President for domestic national service).

³⁴⁸ See 10 U.S.C. § 332 (2006) (providing that the President has authority to call into Federal service any state’s militia as he sees necessary to enforce laws or suppress rebellion).

³⁴⁹ See *Perpich*, 496 U.S. at 352 n.25.

militia—that is, those enrolled in the National Guard and the Naval Militia as defined by Section 313(b)(1)³⁵⁰—and make clear that the national government cannot call members of other state militias under 10 U.S.C. § 332 for national service without a declaration of war. Outside of a legitimate exercise of its war powers, the national government should limit its control over militias to those who voluntarily seek to participate in national militia duty—primarily National Guard members who willingly subject themselves to the possibility of extended, international military duty in exchange for the benefits Guard membership provides.

Such a limitation on national control over state militias would allow independent state militias to concentrate their efforts on traditional state responsibilities like domestic security and emergency response, which they have performed well historically, while providing some check on government tyranny. Respecting citizens' choice to participate in a federal or state militia without fear of involuntary appropriation by the national government would be an important, concrete show of respect for federalism. Citizens in independent state militias could provide an additional layer of protection from national government overreach. That check-on-tyranny function, so fundamental to the federalist structure of our government (as the Constitution recognizes and the Supreme Court has noted),³⁵¹ is even more essential in an environment of increasing national government power.

Based on their historical successes, independent state militias are well suited to fill states' emerging domestic-security and emergency-response gaps while reestablishing a meaningful check on government power.

CONCLUSION

Throughout four centuries of evolution, state militias have played a unique, productive, and eclectic role in the bundle of rights and responsibilities citizens possess. Today state militias are subject to actual or de facto national control, and pure state militia duty lies dormant. However, simple modifications to federal law could reestablish independent state militias, providing substantial help in addressing states' emerging domestic-security and emergency-response needs—areas of traditional state responsibility in which state militias historically have performed well. Those reinvigorated independent state militias would also provide a meaningful check on national government overreaching, recalibrating federalism to its intended balance. Moreover, those militias could be designed by their respective states to capture the maximum breadth and depth of relevant citizen abilities (consistent with the breadth of the underlying civic militia duty), to encourage participation by gun owners and non-gun owners alike, and to target the militias' efforts precisely to address their citizens' greatest needs. In this way, reinvigorated state militias could serve a critical role in improving effective state governance while preserving and protecting individual liberty and the delicate balance of American federalism.

³⁵⁰ 32 U.S.C. § 313 (2006).

³⁵¹ *District of Columbia v. Heller*, 128 S. Ct. 2783, 2800–01 (2008).