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A STATE'S POWER OF DEFENSE UNDER THE CONSTITUTION

FRANCIS X. CONWAY†

WHEN, during the latter part of 1940, the National Guard was ordered into federal service, the several states formed guard units for the purpose of supplying a domestic defense force which would take the place of the National Guard.¹ The scope of this paper is restricted to an examination of the constitutional basis for the organization of such units by the several states and the extent to which they are, or in the future may be, subject to the control of the National Government.²

Congress has already sanctioned the organization of these defense units by the states.³ It may, therefore, appear to be somewhat of a work of supererogation or a mere indulgence in rhetoric to attempt to search out the limits of state and federal power in a matter such as the writer proposes to examine, especially in times of threatened danger such as these when military necessity is the guiding principle of action. However, the precise constitutional problem seems never to have been completely adjudicated. It involves the militia clauses of the Constitution. Uncertainty concerning the extent of the grant of power contained in these clauses, in addition to the timeliness of the subject matter, would seem to warrant a re-examination of these and related provisions of the Constitution, even though it may be found that the problem does not admit of an entirely definitive solution.

The provisions of the Constitution which will be principally discussed (their pertinency will appear later) are the following:

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1. State guard organizations during the last war were formed in 27 states, and reached a total strength of 79,000. See SEN. REP. NO. 2138, 76th Cong., 3d Sess. (1940) 3. They were issued such equipment and supplies as could be spared by the War Department under authority conferred by the Act of June 14, 1917, 40 STAT. 181. Grounds of military secrecy would seem to suggest an abstention from publication of any detailed statistics on existing state guard establishments. It is permissible, however, to mention that legislation in many states authorizes the governor to organize guard units. For typical statutes see N. Y. MILITARY LAW, § 5a (1917) and PA. STAT. ANNO. (Purdon, 1930) title 51, § 171. A uniform state guard act has been drafted and is discussed in Bacon, *The Model State Guard Act* (1941) 10 *FORDHAM L. REV.* 41. This act had been adopted by 27 states, according to *Interstate Commission on Crime—Annual Report of the President* (Sept. 1941).

2. No attempt is made in this article to consider restrictions upon state action contained in the various constitutions of the individual states. Only limitations under the United States Constitution are discussed.

3. 39 STAT. 198, 32 U. S. C. A. § 194 (1916) as amended by 54 STAT. 1206, 32 U. S. C. A. § 194 (Supp. 1940). See notes 28 and 29, *infra*.

The Congress shall have power: . . .

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;⁴

To provide for organizing, arming and disciplining the militia and for governing such part of them as may be employed in the service of the United States, reserving to the states, respectively, the appointment of the officers and the authority of training the militia, according to the discipline prescribed by Congress . . .⁵

No state shall, without consent of Congress, . . . keep troops or ships of war, unless actually invaded or in such imminent danger as will not admit of delay.⁶

A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed by law.⁷

The militia referred to in the quoted clauses of the Constitution was an institution of early Anglo-Saxon origin which existed in the colonies at the time of the Revolution as an integral part of the political institutions of the day. It will be unnecessary in this paper to touch on the historical aspects of the militia, except to advert to certain outstanding features which must have been present in the minds of those who framed the Constitution.⁸ From the earliest times in England the militia consisted of all men capable of bearing arms. Statutory definitions usually excluded those outside certain age limits (for instance, 16 to 60) but it has been pointed out elsewhere⁹ that the sole reason for this was to exempt from the duty of bearing arms those obviously not fitted to serve, at least in the first instance. All members of the militia were under the duty of supplying themselves with suitable arms and this obligation was enforced by a periodic muster and inspection known as the "assize of arms". However, while all men capable of bearing arms were enrolled and hence liable to service, the practice grew up, especially in times of threatened danger, of embodying, either by voluntary enlistment or conscription,

4. U. S. CONST. Art. 1, § 8, cl. 15.

5. U. S. CONST. Art. 1, § 8, cl. 16.

6. U. S. CONST. Art. 1, § 10, cl. 3.

7. U. S. CONST. Amend. II.

8. On English militia generally see 1 BL. COMM. (Jones' ed. 1916) 409-414; Ansell, *Legal and Historical Aspects of the Militia* (1917) 26 YALE L. J. 471; 2 TAYLOR, *THE ORIGIN AND GROWTH OF THE ENGLISH CONSTITUTION* (1889) 194-198; MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* (1926) 276-279, 455-459; 15 ENCYCLOPAEDIA BRITANNICA (14th ed. 1929) 483-486.

9. Ansell, *supra*, note 8.

only a select group of men from the general militia who, on that account, could be more efficiently trained. These were known as the "trained" or "train" bands and represent the prototype of what today we call the organized, as distinguished from the unorganized or reserve, militia. Another aspect of the English militia system which is noteworthy is the fact that it was designed primarily for defense, rather than for offensive action. The basic territorial unit was the county or shire and its principal function was the maintenance of order, if necessary, and local defense. Early statutes specifically provided that the members of the militia could not be compelled to go out of their shires,¹⁰ and under an act of Parliament, passed one year prior to the convening of our Constitutional Convention, the members of the militia could not be ordered out of their county unless in case of urgent necessity certified to by Parliament and could not be sent out of the kingdom under any circumstances.¹¹

The various legislative enactments and other historical documents of colonial days leave no doubt that it was one and the same institution which existed in England and the American colonies, based upon the same general principles of assize of arms.¹² Every able-bodied male in each colony was included and the obligation to supply himself with suitable arms applied to each. The colonies had their "train" bands and the colonial militia furnished the Minute Men of 1775. When the time arrived for the formation of a more perfect union of the states which had recently won their freedom from the mother country, the part to be played by the militia in the new scheme of government was treated as a matter of essential importance by the Founding Fathers.¹³ The right of the people to bear arms for the common defense was as much a part of their Anglo-Saxon heritage as the right to trial by jury, and the only alternative to citizen soldiery was the much-feared standing army, the king's maintenance of which in the colonies during times of peace

10. 1 EDW. III (1327) c. 2; 4 HEN. IV (1402) c. 13 at p. 434.

11. 26 GEO. III. (1786) c. 107 at p. 860.

12. OSGOOD, *THE AMERICAN COLONIES IN THE SEVENTEENTH CENTURY*, Part 2, ch. XIII; OSGOOD, *THE AMERICAN COLONIES IN THE EIGHTEENTH CENTURY* (4 vols. 1924) *passim*; 2 ANDREWS, *THE COLONIAL PERIOD OF AMERICAN HISTORY* (4 vols. 1936) 186; Wallace, *Legislation in Virginia Regulating the Enrolling and Training of the Militia* (1918) 5 VA. L. REV. 525; Scisco, *Evolution of Colonial Militia in Maryland* (1940) 35 MARYLAND HIST. MAGAZINE 166; *United States v. Miller*, 307 U. S. 171 (1938); *Selective Draft Law Cases*, 245 U. S. 366 (1918).

13. Under the ARTICLES OF CONFEDERATION, Art. VI, § 4, the States were prohibited from keeping up "any body of forces", but it was expressly provided that "every State shall always keep a well regulated and disciplined militia, sufficiently armed and accoutered."

was one of the grievances leading to the revolt of the colonies.¹⁴

The record of the proceedings in the Constitutional Convention discloses considerable conflict among the delegates on the question of conferring control over the militia upon the National Government.¹⁵ In the plan submitted by Pinckney, Congress was empowered both "to pass laws for arming organizing and disciplining the Militia of the United States" and "to call forth the aid of the Militia". However, in the report of the Committee of Detail the first power was omitted.¹⁶ Thereupon, Mason, after expressing the opinion that "thirteen States will never concur in any one system, if disciplining of the Militia be left in their hands", moved that Congress be given power "to make laws for the regulation and discipline of the Militia of the several States reserving to the States the appointment of the officers". General Pinckney agreed that uniformity was essential and instanced "serious mischiefs" during the war owing to dissimilarity in the state militias, while Madison ventured the opinion that the regulation of the militia naturally appertained to the authority charged with the public defense and that it did not seem in its nature to be divisible between two distinct authorities. Ellsworth, however, thought that Mason's proposal went too far and that the whole authority over the militia ought not to be taken from the states "whose consequence would pine away to nothing after such a sacrifice of power", adding that he thought "it must be vain to ask the States to give the Militia out of their hands". Dickinson thereupon proposed "to restrain the general power to one fourth part at a time, which by rotation would discipline the whole Militia". This latter proposal fitted in with an earlier suggestion made by Mason that if the states would not surrender power over the whole militia, they probably would over a part as a select militia and he, therefore, withdrew his original motion and moved a power "to make laws for regulating and disciplining the militia, not exceeding one tenth part in any one year, and reserving the appointment of officers to the States". Butler, Pinckney, Langdon and Madison opposed this amendment and renewed Mason's original proposal. At this juncture Sherman made the observation that the states might want their militia for defense against invasion and insurrection and for enforcing obedience to their own laws, saying "They will not give up this point. In giving

14. DECLARATION OF INDEPENDENCE.

15. The debates in the federal and state conventions bearing upon the militia clauses are collected by Prof. Scott in SEN. DOC. NO. 695, 64th Cong., 2d Sess. (1917).

16. 3 FARRAND, THE RECORDS OF THE FEDERAL CONSTITUTION OF 1787 (rev. ed. 1937) 598; 2 FARRAND, *id.* at 182.

up that of taxation, they retain a concurrent power of raising money for their own use." Gerry agreed that this was the last point remaining to be surrendered: "If it be agreed to by the Convention, the plan will have as black a mark as was set on Cain." Mason acted upon Sherman's suggestion and offered a further amendment to his motion to except therefrom "such part of the Militia as might be required by the States for their own use."¹⁷

Mason's original motion and the motion in the form amended by him were submitted to a Grand Committee of Eleven, which reported the clause as it now reads in the Constitution.¹⁸ Before a vote was taken, Ellsworth remarked that the word "discipline" was of vast extent and might be so expounded as to include all power on the subject. In an apparent effort to reassure him, King, who was a member of the committee which reported the clause, declared that "by organizing the Committee meant, proportioning the officers and men—by arming, specifying the kind size and caliber of arms—and by disciplining prescribing the manual exercise evolutions etc." After some further debate during which Luther Martin opposed the clause as reported and Randolph and Madison spoke in favor of it, again stressing the need for uniformity, a vote was taken and the clause passed.¹⁹

These proceedings and discussions in the Convention are set forth at some length because, as bearing upon the problem under examination, they evidence a strong sentiment among many of the delegates against placing too great control of the militia in the Federal Government.²⁰ It would seem safe to say that, at least as conceived by those who took part in framing the Constitution, whatever control over the militia the primordial compact gave to Congress constituted, by way of compromise, a grant by the people of the states solely for the sake of placing at the disposal of Congress a unified force for the three purposes stated in the Constitution. The late war with England had disclosed the defects

17. These discussions took place in the August 18th session of the Convention and are recorded in 2 FARRAND, 321-333.

18. Except that the words "to provide" are in the Constitution where the words "to make laws" were in the report. 2 FARRAND, 352.

19. These final discussions and the vote took place during the August 23rd session. 2 FARRAND, 384-388.

20. Kent cites an early instance of jealousy on the part of the colonists of the exercise of any power (other than that by the local governments) over the militia: when in 1693 the people of Connecticut fearlessly and successfully resisted the claim of Governor Fletcher of New York, resting on a commission for that purpose from the king to the exclusive command of the Connecticut militia. 1 KENT, COMM. (14th ed. 1896) 263.

resulting from lack of uniformity in organization, equipment and training and all but the most rabid anti-Federalists conceded the necessity for Congressional guidance to this extent. But that thereby the states were to surrender their sovereign right to maintain a militia for their own purposes seems an inference which those who participated in the Convention could hardly have drawn.

In the public discussions preceding the adoption of the Constitution,²¹ the most convincing case for federal control of the militia was placed upon the ground that such a disposition would render unnecessary the maintenance of a large standing army in time of peace. Throughout English history the standing army was distrusted as perilous to the rights of freemen just as the militia was prized and cherished as the palladium of liberty,²² and without doubt the reluctance to grant Congress power to raise and support a regular army was to a great degree overcome by the thought that the availability of a well-trained militia would render needless any extensive exercise of the power.²³ In fact two of the strongest

21. Much of the argument advanced against the militia clauses in the state conventions does not directly bear upon the problem considered in this paper. However, as pertinent to the present inquiry, the following extracts from the debate in the Virginia Convention are interesting: Patrick Henry: "If they [Congress] neglect or refuse to discipline or arm our militia they will be useless: the states can do neither—this power being exclusively given to Congress." Madison: "This [the militia clause] I conceive to be an additional security to our liberty without diminishing the power of the states in any considerable degree. . . . Congress ought to have the power to establish a uniform discipline throughout the states, and to provide for the execution of the laws, suppress insurrection, and repel invasions: these are the only cases wherein they can interfere with the militia." George Mason: "Under various pretences, Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive right to arm them." Madison: "I cannot conceive that this Constitution, by giving the general government the power of arming the militia, takes it away from the state governments. The power is concurrent and not exclusive." 3 ELLIOTT'S DEBATES (1836) at pp. 52, 90, 378-382, respectively. An argument similar to that expressed by Henry and Mason was made by Luther Martin in an address delivered to the Maryland legislature, entitled *Genuine Information*, 3 FARRAND, 209.

22. 1 BL. COMM. *op. cit. supra* note 8 at ch. 13; 1 COOLEY'S, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 729.

23. U. S. CONST. Art. 1, § 8, cl. 12 grants Congress power "to raise and support armies." Towards the close of the Convention (on September 2nd.) Mason being sensible that the absolute prohibition of standing armies in time of peace might be unsafe, and wishing at the same time to insert something pointing out and guarding against the danger of them, moved to preface the clause giving Congress power to provide for organizing the militia with the following words: "And that the liberties of the people may be better secured against the danger of standing armies in time of peace." Randolph and Madison were in favor of the motion, but Gouverneur Morris opposed it as setting a dishonorable work of distinction on the military class of citizens, and upon a vote the motion was defeated.

champions of a regular army, Hamilton²⁴ and Madison, went so far as to make persuasive pleas in *The Federalist* for the grant of power to Congress to raise a standing army on the premise that the militia of the several states would be adequate protection against any encroachment by the Federal Government through its use of a regular army.²⁵

If further evidence were needed to prove that it was the sense of those who framed the Constitution, as well as of those who voted for its adoption, that the people of the several states, in surrendering limited control over the militia to the Federal Government, did not intend to deprive the states of their sovereign right to maintain their own militia for their own purposes, the adoption of the Second Amendment, immediately after the ratification of the Constitution, would seem to furnish it. Bearing in mind that the first ten amendments were enacted out of an apprehension that the Constitution did not sufficiently safeguard in express terms the fundamental rights of the people and also that these amendments were designed to leave no doubt concerning the limits of power in the National Government, the conclusion seems inescapable that the people, through the instrumentality of the Second Amendment, intended to make unambiguous the reservation to the states of their inherent right of self-defense.²⁶

Within recent years, however, the contention has been advanced that

2 MADISON'S, PAPERS (Hunt ed. 1910) 374; 3 MADISON'S, PAPERS (Gilpin ed. 1841) 1578. 4 FARRAND, 59. See also *United States v. Miller*, 307 U. S. 174, 179 (1939) and BURDICK, *THE LAW OF THE AMERICAN CONSTITUTION* (1922) 376.

24. The eleventh article of Hamilton's plan of government submitted to the Convention on June 18th reads: "No State to have any forces land or Naval; and the Militia of all the States to be under the sole and exclusive direction of the United States, the officers of which to be appointed and commissioned by them." 1 FARRAND, 293.

25. In *THE FEDERALIST* No. 28, Hamilton asked:

"When will the time arrive that the federal government can raise and maintain an army capable of erecting a despotism over the great body of the people of an immense empire, who are in a situation, through the medium of their State governments, to take measures for their own defense, with all the celerity, regularity, and system of independent nations?" HAMILTON, JAY AND MADISON, *THE FEDERALIST* (Smith, Rev. ed. 1901) 147. In *THE FEDERALIST* No. 45, Madison after estimating the probable size of a standing army to be 25,000 said: ". . . To these would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence. It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops." *Id.* at 262. See 2 TUCKER, *THE CONSTITUTION OF THE UNITED STATES* (1899) 584-587.

26. Emery, *The Constitutional Right to Keep and Bear Arms* (1915) 28 HARV. L. REV. 473, 476.

Congress has power to prohibit the maintenance of military units, such as state guard organizations, not a part of the organized militia (i.e. the National Guard) as constituted by Congress.²⁷ As a matter of fact, in 1916 as part of the National Defense Act Congress enacted a statute which specifically provides that no state may maintain troops in time of peace other than as organized in accordance with the organization prescribed by Congress in respect to the National Guard.²⁸ This statute, it is true, not only provides that it shall not be construed as limiting the rights of the states in the use of the National Guard in time of peace but also specifically excepts from its provisions the maintenance of state police or constabulary. Congress may well have inserted these provisions out of a realization that its powers did not extend that far. However, it would seem that the same cannot be said of a recently enacted amendment to the statute²⁹ by which Congress has expressly authorized organization and maintenance by the states of military forces other than the National Guard while the latter is in active federal service. If the states have the right to organize their own defense or guard units without Congressional permission, then it appears that in this instance Congress has attempted to assert an authority which it does not possess. Some of the states may have

27. This in substance appears to be the view which has been taken by the Judge Advocate General. OP. JAG (1917) 180; OP. JAG (1919) 588; OP. JAG (1919) 720, 721, quoted in SCHILLER, *MILITARY LAW AND DEFENSE LEGISLATION* (1941). Also see Wiener, *The Militia Clause of the Constitution* (1940) 54 HARV. L. REV. 181, 215-217 and Bacon, *supra* note 1 at 45.

28. "*Maintenance of other troops by States and Territories.* No state shall maintain troops in time of peace other than as authorized in accordance with the organization prescribed under this title: *Provided*, That nothing contained in this title shall be construed as limiting the rights of the States and Territories in the use of the National Guard within their respective borders in time of peace: *Provided further*, That nothing contained in this title shall prevent the organization and maintenance of State police or constabulary." 39 STAT. 198, 32 U. S. C. A. § 194 (1916).

29. ". . . *Provided further*, That under such regulations as the Secretary of War may prescribe for discipline in training, the organization by and maintenance within any state . . . of such military forces other than National Guard as may be provided by the laws of such State or Territory is hereby authorized while any part of the National Guard of the State . . . concerned is in active Federal Service: *Provided further*, That such forces shall not be called, ordered, or in any manner drafted, as such, into the military services of the United States; however, no person shall, by reason of his membership in any such unit, be exempted from military service under any Federal law: *And provided further*, That the Secretary of War in his discretion and under regulations determined by him, is authorized to issue, from time to time, for the use of such military units, to any State . . . upon requisition of the Governor thereof, such arms and equipment as may be in possession of and can be spared by the War Department". 39 STAT. 198 (1916) as amended 54 STAT. 1206 (1940).

sought this legislation because in doubt of their power in the matter and the states may also have conformed their organizations to the regulations prescribed by the Secretary of War for the purpose of obtaining the arms and equipment provided for in the statute.³⁰ Nevertheless the question remains whether Congressional approval is required by the states in order that they may organize their own forces for defense.³¹

The language of the statute would lead one to believe that the statute may have been originally intended to implement that clause of the Constitution which prohibits the states from keeping troops in time of peace without Congressional consent.³² In the first place it is clear from the very wording of the prohibition that it does not apply in time of war. Moreover, it seems to be well-established that the word "troops", as used in this clause, was intended to refer exclusively to professional soldiers, regularly maintained, paid and equipped by the state. A state court decision to this effect, which has frequently been cited with approval, is *Dunne v. People*,³³ in which the court said:

30. 86 CONG. REC. 9846, 13375, 76th Cong. 3d Sess. (1940); Message of Governor of New York, Jan. 8, 1941, quoted in SCHILLER, *op. cit. supra*, note 27.

31. The constitutionality of the amendment does not appear to have received any consideration in the House discussion, the amendment merely having been viewed as necessary legislation in order to permit the Secretary of War to make equipment available to the state organizations. 86 CONG. REC. *id.* at 12873-12874, 13552 (Sept. 30 and Oct. 14, 1940). In the Senate debate, however, Senator Adams strenuously objected to the amendment as unconstitutional on the ground that the state's right to maintain a militia for its own defensive purposes belongs to the state as a right which antedated the Constitution and which was in no way limited or restricted by the Constitution when it was adopted. 86 CONG. REC. *id.* at 13375-13380, 13417-13420 (Oct. 8 and 9, 1940). The question of the constitutionality of the section was raised in *Sweetser v. Emerson*, 236 Fed. 161, 168 (C. C. A., 1st 1916), (1916) 30 HARV. L. REV. 176, 712, but the court did not deem it necessary to decide that question.

32. See note 6, *supra*.

33. 94 Ill. 120, 138, 34 Am. Rep. 213, 226 (1879); *State ex rel. Madigan v. Wagener*, 74 Minn. 518, 77 N. W. 424 (1898); see BURDICK, *op. cit. supra*, note 23 at 444. But see *Smith v. Wanser*, 68 N. J. L. 249, 258, 52 Atl. 309, 312 (1902) which is in accord with *Dunne v. People*, in holding that organized militia are not troops. Yet its *obiter* assumption that any military force maintained by a state in time of peace, other than the organized militia (the National Guard of New Jersey), would be troops within the constitutional prohibition seems unwarranted and disregards the fundamental distinction between troops and citizen soldiers pointed out above. Wiener, *supra*, note 27, makes the observation that it may well be doubted whether the National Guard of today can be said not to be troops. Whether soldiers are militia or troops within the meaning of the Constitution should not depend upon their designation but upon the fact whether they are citizen or professional soldiers and also upon the purpose for which they are organized. This may, undoubtedly, involve a mere difference in degree, for a state military force may be so regularly maintained, paid and supported as a distinctly military establishment as to take on the character

"Our understanding is, the organization of the active militia of the State conforms exactly to the definitions usually given of militia. Lexicographers and others define militia, and so the common understanding is, to be 'a body of armed citizens trained to military duty, who may be called out in certain cases, but may not be kept on service like standing armies, in time of peace.' That is the case as to the active militia of this State. The men comprising it come from the body of the militia, and when not engaged at stated periods in drilling and other exercises, they return to their usual avocations, as is usual with militia, and are subject to call when the public exigencies demand it. Such an organization, no matter by what name it may be designated, comes within no definition of 'troops', as that word is used in the Constitution. The word 'troops' conveys to the mind the idea of an armed body of soldiers, whose sole occupation is war or service, answering to the regular army. The organization of the active militia of the State bears no likeness to such a body of men. It is simply a domestic force as distinguished from regular 'troops', and is only liable to be called into service when the exigencies of the State make it necessary."

The Supreme Court of the United States has noted the distinction in speaking of the Second Amendment:

"The Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the consent of Congress. The sentiment of the times strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia—civilians primarily, soldiers on occasion."³⁴

In addition, the context of the clause in which the restriction is found lends support to the conclusion that the "troops" alluded to in the Constitution are regular professional soldiers. The war power was vested exclusively in the National Government by the Constitution and hence it was appropriate that all war-like attributes, such as the right to maintain a standing army, should be denied to the states.³⁵ The prohibitory clause, therefore, has no application to the problem with which we are concerned in this paper, namely, whether the states may, by virtue of their own authority, maintain a citizen-soldiery, designed, not for offensive warfare, but solely for the defense of the state itself.

of professional soldiery. So far as this writer is aware, it has never been seriously argued that the constitutional restriction upon the states applied to those bodies of police or constabulary (for example, the Texas Rangers) regularly paid and maintained by the states solely for the purpose of enforcing the law and preserving domestic order, even though they may often be designated as "troops" or "troopers." The purpose for which such forces are maintained would prevent their being considered as troops within the constitutional prohibition, even though they may be military in appearance and organization.

34. *United States v. Miller*, 307 U. S. 174, 179 (1939).

35. *Selective Draft Law Cases*, 245 U. S. 366, 381 (1918).

However, the main argument of those who contend that the state may maintain no military forces for defensive purposes other than the militia organized by Congress is posited upon a basis more subtle and intricate than the one just considered. The contention, it would appear, amounts to this: Congress is given the exclusive power to provide for organizing the militia and this power includes the power to provide how it shall not be organized. Congress, therefore, may provide that the militia organized by it shall be the only militia.³⁶ Apparently this conclusion is intended to apply in time of peace or *war*.

By way of parenthesis it should be pointed out that, while the word "militia" has most frequently been used to comprehend all the arms-bearing male population, historically it has never been thought to include within its scope the distaff side of the population. Consequently, the claim could hardly be made that Congressional approval would be required for the state to organize a force composed of females (a sort of Women's Auxiliary Corps) to aid in its own defense, for the Constitution apparently did not authorize Congress to constitute an entirely new kind of militia, but merely to organize the militia as it was then understood.

In order to allow the fullest effect to the argument as presented, it may be conceded that the word "militia" was used in the Constitution in its broadest signification³⁷ and that theoretically Congress has power to legislate into the organized militia the whole manpower of the State capable of bearing arms. What power has Congress over that militia? It has been empowered to provide (i.e. makes laws) for organizing, arming and disciplining that body of men. Attention has already been called to the meaning, which the committee of the Convention, which drafted the militia clauses in that form, ascribed to the words.³⁸ As regards "organizing", this connotation seems to accord substantially with the popular one.³⁹ Details of organization may be many and varied, but in general it would appear that Congress was empowered to enact legislation calling for the arrangement by the several states of their potential manpower into

36. Note 27 *supra*.

37. Opinion of the Justices, 14 Gray 614 (Mass. 1860); *Ex parte* Coupland, 26 Tex. 387, 396 (1862); *Kneedler v. Lane*, 45 Pa. St. 238 (1863); *Burroughs v. Peyton*, 16 Gratt. (57 Va.) 470, 475 (1864); *Ex parte* McCants, 39 Ala. 107, 113 (1863); Ansell, *supra* note 8, at 475, 479.

38. *Supra*, p. 173.

39. See FUNK & WAGNALLS, NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE (1930); see also, *Acker v. Bell*, 62 Fla. 108, 113, 57 So. 356, 358 (1911), for a definition of "organization" as applied to the military.

such tactical units as Congress should deem most appropriate and effective according to the prevailing military opinion of the time. Such units were to remain essentially a state force, to be trained by the states "according to the discipline prescribed by Congress." From a practical standpoint any organization to be effective and worthwhile would have to be selective and in this respect, more than any other, the first organization of the militia attempted by Congress in the "notorious Militia Act of 1792" was deficient and doomed to failure.⁴⁰ It did not result in the "well-regulated militia" which was deemed "necessary to the security of a free state." Whether or not from a legal viewpoint the legislation might be considered as an exercise by Congress of its power in all its plenitude, in a practical sense it did not constitute a completely effective instrument of organization. Accordingly most of the states attempted through legislation to perfect their own organization by selecting from the great body of the militia, as constituted by Congress, a limited number of men who could thereby be more efficiently armed, equipped and trained.⁴¹ Such bodies of men eventually became commonly known as the "National Guard" of the particular state.

The right of the states to enact any such legislation was very soon thereafter challenged in the early case of *Houston v. Moore*.⁴² The precise question presented in that case was whether it was competent for a court-marshal, deriving its jurisdiction under state legislation, to try and punish militiamen called by the President into the service of the United States, who refused or neglected to obey the call. The majority of the Supreme Court held that the legislation providing for the trial and punishment was valid.⁴³ However, there was a lack of concurrence in all of

40. See Wiener, *supra* note 27, at 187. THE MILITIA ACT OF 1792, 1 STAT. 271 (1792) provided that every able bodied man between 18 and 45 (with exceptions not now material) should be enrolled in the militia and required to arm and equip himself at his own expense. It fixed the organization, the armament and the rules of discipline, but left to the legislators of the states the arrangement of the militia of each state into divisions, brigades, regiments, battalions and companies. This was the only organization prescribed by Congress until the passage of the Dick Act, 32 STAT. 776, 32 U. S. C. A. § 11 (1903) more than a century afterwards and not long after the enactment of the Act of 1792 its provisions became obsolete and worthless. For a description of the subsequent legislation down to the present time, see, Wiener, *id.*

41. See, *Dunne v. People*, 94 Ill. 120, 34 Amer. Rep. 213 (1879) cited *supra*, note 33; and *People ex rel. Leo v. Hill*, 126 N. Y. 497, 27 N. E. 789 (1891).

42. 5 Wheat. 1 (U. S. 1820).

43. In substance the majority held that it was not intended by Congress that the militiamen be engaged in the service of the United States until they reached the place of rendezvous, and that there was no law of Congress which excluded the states from jurisdiction to punish the militia before that time.

the reasoning by which the decision was reached. Washington, J., delivered the principal opinion, Johnson, J., concurred in a separate opinion, and Story, J., delivered a dissenting opinion in which another member of the court concurred. The case has become well-known, not because of the actual decision, but because of the pronouncements made by the members of the Court on the broad question of the competency of the states to legislate on a subject, such as the militia, where the Constitution has empowered Congress to legislate on the subject and such power has been exercised. Let us begin an analysis of the opinions by quoting from the dissenting opinion of Justice Story, because it contains language which fairly describes the concurrent (perhaps "subordinate" would be a better word) power of legislation which the states have over their own militia:

"It is almost too plain for argument, that the power here given to congress over the militia, is of a limited nature, and confined to the objects specified in these clauses; and that in all other respects, and for all other purposes, the militia are subject to the control and government of the state authorities. . . .

"Nor does it seem necessary to contend, that the power 'to provide for organizing, arming and disciplining the militia', is exclusively vested in congress. It is merely an affirmative power, and if not, in its own nature, incompatible with the existence of a like power in the states, it may well leave a concurrent power in the latter. But when once congress has carried this power into effect, its laws for the organization, arming and discipline of the militia, are the supreme law of the land; and all interfering state regulations must necessarily be suspended in their operation. It would certainly seem reasonable, that in the absence of all interfering provisions by congress on the subject, the state should have authority to organize, arm and discipline their own militia. The general authority retained by them over the militia would seem to draw after it these, as necessary incidents. If congress should not have exercised its own power, how, upon any other construction, than that of a concurrent power, could the states sufficiently provide for their own safety against domestic insurrections, or the sudden invasion of a foreign enemy? They are expressly prohibited from keeping troops or ships of war, in time of peace; and this, undoubtedly, upon the supposition, that in such cases, the militia would be their natural and sufficient defense."⁴⁴

However, Justice Story's statement, just quoted, did not directly touch upon the question whether Congressional legislation, such as the Militia Act of 1792, precluded the states from enacting their own legislation, in their own interest, for the purpose of improving upon the organization ordained by Congress. Justice Washington, in the opinion he gave, was most emphatic in denying that the states had this power. He took the

44. *Houston v. Moore*, 5 Wheat. 1, 50-51 (U. S. 1820).

position that, in enacting the Militia Act of 1792, Congress had exercised its power to legislate on that subject as fully as it thought proper, even though, from the practical view, the legislation might be considered inadequate. The Congressional and state legislation might not, in their terms or in their operation, be contradictory; none the less, in his opinion, the state legislation would be invalid. He said:

“. . . I am altogether incapable of comprehending how two distinct wills can, at the same time, be exercised in relation to the same subject, to be effectual, and at the same time, compatible with each other. If they correspond in every respect, then the latter is idle and inoperative; if they differ, they must, in the nature of things, oppose each other, so far as they do differ.”⁴⁵

On this aspect of the question, Justice Story did not wholly agree, because we find him saying:

“There is this reserve, however, that in cases of concurrent authority, where the laws of the states and of the Union are in direct and manifest collision on the same subject, those of the Union, being ‘the supreme law of the land’, are of paramount authority, and the state laws, *so far, and so far only, as such incompatibility exists*, must necessarily yield.”⁴⁶

Justice Johnson, on this broad issue, seemed more in agreement with Justice Story than with Justice Washington. He said:

“But it is contended, that if the states do possess this power over the militia, they may abuse it. This is a branch of the exploded doctrine, that within the scope in which congress may legislate, the states shall not legislate. That they cannot, when legislating within that ceded region of power, run counter to the laws of congress, is denied by no one; but, as I before observed, to reason against the exercise of this power, from the possible abuse of it, is not for a court of justice.”⁴⁷

Even should we allow Justice Washington’s assumption that the Militia Act of 1792 was intended by Congress to represent a full exercise of its legislative power (and such an assumption is debatable),⁴⁸ his sweeping generalization to the apparent effect that the states were “*ipso facto*” evluded from all power of legislation in reference to the militia requires further scrutiny. It will be unnecessary to become involved in a discussion of the distinctions between the so-called exclusive and con-

45. *Id.* at 21-24.

46. *Id.* at 49-50 (Italics added).

47. *Id.* at 45.

48. See *Dunne v. People*, 94 Ill. 120, 34 Am. Rep. 213 (1879) cited *supra* note 33; Wiener, *supra*, note 27 at 187, remarks that, after the passage of the Act, Washington continued to recommend militia legislation as though none had passed.

current powers of legislation under the Constitution and no attempt will be made to fit the militia clauses into any of the suggested classifications.⁴⁹ For present purposes it seems sufficient to point out that in a somewhat related field state legislation has been sustained, even where it covers a subject within the "exclusive" domain of Congress, upon which that body has legislated. In *Gilbert v. Minnesota*⁵⁰ the Supreme Court sustained a conviction under a state statute making it unlawful "for any person in any public place . . . to advocate or teach . . . that men should not enlist in the military or naval forces of the United States", even though the matter seemed to have been fully covered by Congress in the Espionage Act of 1917. The Minnesota statute was upheld as a legitimate measure of cooperation by the state with the United States and also as an exercise of the state's power to preserve its own peace.

In a field of concurrent authority, such as the militia, whether the state's power to legislate is subject to merely diminution or extinction often depends not only upon the extent to which Congress has actually exercised the power granted to it but also upon the intent of Congress, manifested either expressly or impliedly, to permit or prohibit coordinate state legislation. Concededly, state legislation, even in exercise of its police power, is invalid if it conflicts or interferes with legislation enacted by Congress in its exercise of a power granted by the Constitution, since it is ordained that the latter "shall be the supreme law of the land."⁵¹ Hence, if state legislation purporting to organize the militia conflicts

49. See Grant, *The Scope and Nature of Concurrent Power* (1934) 34 COL. L. REV. 995, especially pages 1009-1013.

50. 254 U. S. 325 (1920); Grant, *supra* note 49; *State v. Holm*, 139 Minn. 267, 166 N. W. 181 (1918); *State ex rel. Atwood v. Johnson*, 170 Wis. 218, 175 N. W. 589 (1919), in which it was held that the power conferred upon Congress by the Constitution over the army and navy and the acts of Congress in execution thereof did not preclude states from raising by taxation a bonus for soldiers of the state who fought in the first World War, since the benefit which flowed to all the United States from the services performed was also a benefit to the state. Also see *Halter v. Nebraska*, 205 U. S. 34, 27 S. Ct. 419 (1907).

51. U. S. CONST. Art. 6; *The Minnesota Rate Cases*, 230 U. S. 352-398 (1913). In *Hines v. Davidowitz*, 312 U. S. 52, 74 (1941), noted in (1941) 18 N. Y. U. L. Q. REV. 584, a Pennsylvania statute requiring aliens, with certain exceptions, to register once each year, pay a registration fee of one dollar, furnish certain information and carry an identification card was held unconstitutional on the ground that Congress, by enacting the Federal Alien Registration Act of 1940 "manifested a purpose to do so in such a way as to protect the personal liberties of law-abiding aliens through one uniform national registration system, and to leave them free from the possibility of inquisitorial practices and police surveillance that might not only affect our international relations but might also generate the very disloyalty which the law has intended guarding against." See also the recent case, *Cloverleaf Butter Co. v. Patterson*, 62 Sup. Ct. 491 (1942).

with organization legislation enacted by Congress, it is invalid. But that all state legislation on the subject of the militia is necessarily invalid, without reference to whether Congress intended to permit or prohibit such legislation, once it is shown that Congress has acted, cannot be accepted as an established principle of constitutional law, without disregarding precedents such as *Gilbert v. Minnesota*.⁵² If any general rule can be derived from the cases, it seems to be this: at least in the absence of a prohibition by Congress, state legislation will be valid provided it does not unduly interfere with the realization of the national policies intended to be promoted or safeguarded by the exercise of the power granted to Congress. It would appear to be an over-simplification to say that the sole test of the validity of state legislation is whether or not it operates in a field in which Congress has likewise legislated, pursuant to a power granted to that body.⁵³

In the relatively few reported cases dealing with the state's power to legislate concerning the militia, nothing contrary to the above has been decided. A case frequently alluded to on the subject is *Opinion of the Justices*.⁵⁴ In that case the Governor of Massachusetts requested the Supreme Judicial Court of Massachusetts to advise him whether the state legislature could constitutionally provide for the enrollment in the militia of persons other than those enumerated in the Militia Act of 1792. After briefly tracing the history of the militia clauses the court rendered the following opinion:

" 'Organizing' obviously includes the power of determining who shall compose the body known as the militia. The general principle is that a militia shall consist of the ablebodied male citizens. But this description is too vague and indefinite to be laid down as a practical rule; it requires a provision of positive law to ascertain the exact age which shall be deemed neither too young nor too old to come within the description. One body of legislators might think the suitable ages would be from 18 to 45, others from 16 to 30 or 40, others from 20 to 50. Here the power is given to the general government to fix the age precisely, and thereby to put an end to doubt and uncertainty; and the power to determine who shall compose the militia, when executed, equally determines who shall not be embraced in it, because all not selected are necessarily excluded."

*Dunne v. People*⁵⁵ is another case dealing with the same problem.

52. 254 U. S. 325 (1920); Grant, *supra* note 49; Dickinson, *The Functions of Congress and the Courts in Umpiring the Federal System* (1940) 8 GEO. WASH. L. REV. 1165.

53. ROTTSCHAEFFER, *HANDBOOK OF AMERICAN CONSTITUTIONAL LAW* (1939) 89-93.

54. 14 Gray 614 (Mass. 1859).

55. See note 33 *supra*; see also *People ex rel. Leo v. Hill*, 126 N. Y. 497, 27 N. E. 789

Briefly, the specific question presented was whether the Military Code of Illinois was constitutionally valid, especially in so far as it related to organization of the active militia of the state known as the Illinois National Guard, the claim being made that it was repugnant to the same Militia Act of 1792. The court concluded that, in its general scope and effect, the Military Code was not antagonistic to the Act of Congress, and that, if in minor matters of detail in organization, some regulations might be found not in harmony with the organization prescribed by Congress, the most that could be said would be that they would give way to the paramount laws of Congress.

Since in the field of concurrent authority, the general rule seems to be that state legislation is invalid where Congress has indicated in its legislation the intention that such legislation be exclusive, does it follow that the power which Congress possesses to organize the militia includes the power to provide how it shall not be organized? It must be conceded that Congress may, by positive legislation, provide, either expressly or by implication, that the method of organization which it prescribes shall be the only one. For example, Congress may enact legislation which, though sufficiently inclusive in its composition of the militia, offers a very scanty and inadequate organization, as it did in 1792, and in addition enjoin any other organization. Or, as would appear to be the case with present legislation,⁵⁶ Congress may provide for the organization of a select class of the primary militia, and, expressly or by implication, indicate its will that such organized militia shall be the only one. How-

(1891); *Ansley v. Timmons*, 3 McCord (S. C.) 329 (1825); U. S. *ex rel. Gillett v. Dern*, 74 F. (2d) 485, 488 (App. D. C. 1934). The constitutionality of the Illinois Military Code was also challenged in the United States Supreme Court on similar grounds in *Presser v. Illinois*, 116 U. S. 252 (1886). In that case the defendant was convicted under a section of the Military Code making it unlawful for any body of men, other than the organized volunteer militia of the state, to associate together as a military organization without a license from the governor. The court upheld this particular section as a legitimate exercise of the state's police power, without passing upon the other sections of the Code dealing with organization of the militia, which the court found were separable.

56. The National Defense Act of 1916 as amended, 39 STAT. 197, 32 U. S. C. A. § 1 (1916) declares that "the militia of the United States shall consist of able-bodied male citizens of the United States and all other able-bodied males who have or shall have declared their intention to become citizens of the United States, who shall be more than eighteen years of age and, except as hereinafter provided, not more than forty-five years of age, and said militia shall be divided into three classes, the National Guard, the Naval Militia, and the Unorganized Militia." Subsequent sections provide for the organization of the National Guard, and indicate the intention that the National Guard and the Naval Militia shall constitute the only organized militia of the United States, especially 39 STAT. 198, 32 U. S. C. A. § 194 (1916), cited *supra*, note 28 and 29.

ever, and now we reach the crux of the problem, would such a prohibition deprive the individual states of the sovereign power, which they possessed before the adoption of the Constitution, to maintain their own guard or defense units, by whatever name called, for their own defense and to aid, if necessary, in the enforcement of their own laws?

It must be remembered that the Constitution, though it enumerates the powers conferred upon the Federal Government, contains no grant of power to the states. Under the Constitution the states retained those powers which they possessed as sovereign states before its adoption, except in so far as such powers are granted to the Federal government. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the People."⁵⁷ The clause giving Congress the power to organize the militia, read in connection with the clause which immediately precedes, empowering Congress to call forth the militia for the three designated purposes, on its face appears to be complementary to, and in aid of, the preceding clause. In other words Congress was given paramount authority to provide for organizing, arming and disciplining the militia solely in order to render it an effective and unified military force should the national exigency require its call. Until such call, the militia was intended to remain under the supervision, training and control of the states, to be employed for purely intra-state purposes. The only apparent restriction upon state control of the militia is that it will not be permitted to clash with federal supremacy if such control will lessen the efficiency of the militia for eventual federal service.⁵⁸ The policy motivating this grant of power to Congress would seem to mark out the ultimate reach of Congressional power. Granting that under the expanding concept of implied powers, the organizing power of Congress may extend farther than was realized at the time of the Constitution's adoption, the fact remains that this power has its limits. A point must be reached where the power of Congress ends and that of the states begins. Pre-scinding from the provision relating to troops (which we have seen does not apply), there seems to be nothing within the four corners of the Constitution which expressly empowers Congress to prohibit the states from organizing their own defense units. The Second Amendment apparently sanctions such action by the states. The inference that

57. U. S. CONST. AMEND. X. See Dodd, *Implied Powers and Implied Limitations in Constitutional Law* (1919) 29 YALE L. J. 137.

58. *Presser v. Illinois*, 116 U. S. 252 (1886); *Stewart & Co. v. Sadrakula*, 309 U. S. 94, 103 (1940); *United States ex rel. Gillett v. Dern*, 74 F. (2d) 485, 487 (App. D. C. 1934).

the power to organize begets the power to disorganize (for that is what such a prohibition would amount to) appears to rest upon the premise that the power to organize the able-bodied male population of the states for the limited purposes specified in the Constitution carries with it by implication vast power to dictate to the states the regulation of the citizenry of the states, even to the point of prohibiting their use for purely local functions.

Let us test this premise. Now potentially the militia consists of every able-bodied male, and conceivably Congress might, as it has come near doing, declare every such male a member of the militia. Assuming it to be practicable, Congress might then organize this vast body of manpower into military units, specify what arms each should have, and prescribe a complete and detailed discipline for their training. In other words, let us envisage a case where Congress has exercised to the fullest extent its power under the Constitution. Until this militia has been called into the service of the United States, its members remain subject in every respect to any legitimate exercise of the state's authority. These militiamen are citizens of the state, and like other civilians, they remain subject to the state's laws, civil and criminal; they may be called upon to enforce the laws of the state; they may be employed as its policemen, fire-fighters or civilian defense workers. In other words they may be made subject to any police regulation of the state and employed in any capacity by the state which does not interfere with their organization and training as militiamen or lessen their efficiency for eventual federal service. With this latter qualification, it may be asked what authority or interest has Congress to question the service they render to the state, so long as they remain properly organized, armed and trained according to the discipline prescribed by Congress? It would be unsafe to attempt to specify the limits of federal power under the paramount prerogative it possesses to provide for the organization and discipline of the militia, but even the most extreme advocate of nationalism would concede there must be some limit to the power of Congress in this respect, beyond which federal action impinges upon the residuary sovereignty of the states. When all the militia of a state has been organized by Congress, as hypothetically assumed above, the state may unquestionably use such organized units for its own defense until they are drafted into federal service. When, as is the case under existing legislation organizing the militia, only a limited portion are organized, then there appears to be no constitutional barrier to the state under its authority and without permission from Congress, by conscription or voluntary enlistment, forming the remainder into such guard or defense units as it deems

necessary. *Opinion of the Justices* has been cited as invalidating the foregoing conclusion and lending support to the contention that Congressional consent is required for the maintenance of an organization, military in appearance and character (such as the various state guard units), not part of the militia organized under the laws of Congress. Quite to the contrary, for after expressing the opinion quoted above, the court said:

"We do not intend, by the foregoing opinion, to exclude the existence of a power in the state to provide by law for arming and equipping other bodies of men, for special service of keeping guard, and making defense, under special exigencies, or otherwise, in any case not coming within the prohibition of that clause in the Constitution, art. 1, § 10, which withholds from the State the power to 'keep troops'; but such bodies, however armed or organized, could not be deemed any part of 'the Militia,' as contemplated and understood in the Constitution and laws of Massachusetts and of the United States, and, as we understand, in the question propounded for our consideration."⁵⁹

We all know that the provisions of the Constitution, intentionally general in phraseology, are applied today in situations not within the prevision of the framers. Increased social and economic integration of the nation has necessitated national action in new areas, where state power has proven inadequate to cope successfully with existing problems. Particularly through the instrumentality of the commerce clause, Congress has been sustained in its power to cure ills, which, while localized in cause, are national in effect, and in certain instances, prohibition has been deemed a proper exercise of the power to regulate.⁶⁰ But an inference of a prohibitory power in such a field does not compel its acceptance in unrelated fields, where similar necessity for drawing the inference does not obtain. Although the powers granted to Congress follow one another in the same section of the Constitution, any attempt to analyze the constructions they have received in the courts for the purpose of reasoning by analogy to the possible extent of the power granted in the militia clauses would serve no useful purpose. Any such analogical treatment must necessarily be imperfect. For instance, the war power is more extensive in the field it covers than the power conferred over the militia.⁶¹ The power to regulate foreign commerce, though found in the

59. *Opinion of the Justices*, *supra* note 54 at 619; see also *Ansley v. Timmons*, 3 McCord (S. C.) 329 (1825).

60. *United States v. Darby*, 312 U. S. 100, 113 (1941); *Mulford v. Smith*, 307 U. S. 38 (1939); 1 WILLOUGHBY, *THE CONSTITUTION OF THE UNITED STATES* (2d ed. 1928) 52; Corwin, *Congress's Power to Prohibit Commerce* (1933) 18 CORN. L. Q. 477.

61. *Northern Pacific Ry. Co. v. North Dakota*, 250 U. S. 135, 149 (1919); *Ashwander*

same clause with the power to regulate commerce between the states, seems less restricted since it draws support from other powers;⁶² in one case the probability of an asserted conflict with state rights is negligible, in the other more apparent. The states, more and more, may be losing their character as social and economic units, yet, while this Constitution continues, they remain political units, however limited in power they may be.⁶³ Political sovereignty may today be deemed to reside in the people, but the states retain a residue of sovereignty, recognized in our dual form of government. When federal action has tended to frustrate or nullify the power of the state derived from this sovereignty, the action has failed. The power to tax is of the essence of sovereignty⁶⁴ and federal encroachment upon this power has been restrained.⁶⁵

Research has failed to disclose authoritative interpretation of the militia clauses in respect to the power of Congress to interdict state military establishments. Foundation in fact may exist for the implication of such power, but one is left with the impression that those who have asserted it have leaped from recognition of one power, the one to organize, to the affirmation of another, the one to prohibit, without pausing to search for a nexus bridging the two concepts. In the case of interstate commerce, prohibition, having some relation to the policy underlying the grant of regulatory power, has been sustained. In the case of the militia no perceptible connection exists between a ban on state military organizations and the grant of power to enact legislation for the organization, arming and discipline of the militia.

It is unsafe to reason from a theoretically possible abuse of power to an absence of power. Yet such a circumstance may be taken into consideration as a factor in determining the intent with which a plan of government such as ours was formulated. The contention that Congressional permission is required by the states for the organization of their own guard units, carried to its logical extreme, would vest Congress with power, arbitrarily and without relation to the legitimate exercise of any

v. Tennessee Valley Authority, 297 U. S. 288, 326 (1935); United States v. Bethlehem Steel Corp., 62 Sup. Ct. 581, 589-590 (1942).

62. 2 WILLOUGHBY, *op. cit. supra* note 60 at § 417. See United States v. Curtiss-Wright Corp., 299 U. S. 304, 315-318 (1936).

63. A succinct, but all the same comprehensive, review of the recent decisions of the Supreme Court bearing upon the distribution of powers between the nation and states may be found in Dodd, *The Decreasing Importance of State Lines* (1941) 27 A. B. A. J. 78.

64. McCulloch v. Maryland, 4 Wheat. 316, 428 (U. S. 1819); Curry v. McCannless, 307 U. S. 357, 366 (1939).

65. Ashton v. Cameron County Water Imp. Dist., 298 U. S. 513 (1936); *cf.* United States v. Bekins, 304 U. S. 27 (1938).

other power, to abolish the militia of the several states and thereby nullify the second principle of the Bill of Rights. When we call to mind the atmosphere of misgiving and reassurance and final compromise which attended the genesis and birth of the Constitution, it seems safe to say that the state's power of defense, within constitutional limits, was scarcely at that time considered to be so illusory. Nor has any palpably changed condition, affecting the national interest, intervened between then and now which would disclose to view a latent power, never before discerned, but which is now perceived always to have been present.

The conclusion, which this paper suggests, that the states retain the inherent power of self-defense which they possessed prior to the adoption of the Constitution, is not weakened by the fact that the Constitution places upon the National Government the duty to protect the states against invasion, and when the states apply for such aid, against domestic violence.⁶⁶ It has been decided that the President shall be the sole judge whether the National Government shall come to the aid of the state claiming protection under the Constitution.⁶⁷ The element of time or other circumstances may prevent the prompt sending of such aid,⁶⁸ and in any event, while the ultimate obligation of protection may rest upon the National Government, there is nothing in the Constitution to indicate that the states were to be left entirely dependent upon the national government for their own defense.⁶⁹

It must not be supposed that any of the views expressed above are intended to deny in the slightest degree to Congress the supreme power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States."⁷⁰ Under the grant

66. U. S. CONST. Art. IV § 4. See SEN. DOC. No. 263, 67th Cong., 2d Sess. (1922) on *Federal Aid in Domestic Disturbances*. This Document presents a detailed review of the occasions in our history in which this clause of the Constitution was invoked.

67. *Luther v. Borden*, 7 How. 1, 42-43 (U. S. 1849); *Martin v. Mott*, 12 Wheat. 19 (U. S. 1827); SEN. DOC. No. 263, 220.

68. Secretary of War Stimson and General Marshall, the Chief of Staff, have warned that regular troops may not be available for local defense purposes. N. Y. Times, Feb. 20, 1942, p. 1, col. 3 and March 3, 1942, p. 4, col. 2.

69. "Unquestionably, a State may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the States of this Union as to any other government." Taney, Ch. J., in *Luther v. Borden*, 7 How. 1, 45 (U. S. 1849). See also *Hamilton v. Regents of the University of California*, 293 U. S. 245, 260 (1934); *Ansel v. Timmons*, 3 McCord (S. C.) 329, 332 (1825).

70. U. S. CONST. Art. 1, § 8, cl. 18.

of power to wage war and to raise and support armies and maintain a navy, Congress is fully competent to legislate for the protection of the national interest, even though such legislation may result in a diminution or total extinction of some area in which the power of the individual states might otherwise operate. The right of the states to maintain their own militia for their own purposes must give way to the dominant power of Congress to raise armies.⁷¹ Today no one questions the power of Congress to draft into war service every member of the militia to the last man and, if need be, women and others not forming a part of the militia. Time and again events have revealed the foresight of those who framed the Constitution. In granting Congress the power to raise armies this is particularly true. The limitations contained in the militia clauses of the Constitution made them an unworkable and ineffectual instrument for real national defense.⁷² Recent history has furnished graphic evidence of the truth of the adage that offense may be the best form of defense. The militia organized by Congress, that is the National Guard in its character as state militia, may be called only in the three exigencies specified in the Constitution and even when called into Federal service they may not be sent out of the country.⁷³ But no such limitations fetter Congress in the exercise of its powers to raise armies, and it was under the clause of the Constitution granting that power that Congress eventually formulated the basis for the effective military force which was developed in time of peace.⁷⁴

It should also be made clear that, even assuming the existing state guard units are not members of the organized militia as constituted by Congress,⁷⁵ they will become such by the simple expedient of a Congressional enactment legislating them into the organized militia. Such units will then, of course, be subject to the call of the President for duty

71. Selective Draft Law Cases, 245 U. S. 366, 381-388 (1918) cited *supra* note 12; Tarble's Case, 13 Wall. 397, 408 (U. S. 1871); Kneedler v. Lane; Burroughs v. Peyton; *Ex parte* Coupland, all cited *supra* note 37; Jeffers v. Fair, 33 Ga. 347, 353 (1862); Ansell, *Status of State Militia under the Hay Bill* (1917) 30 HARV. L. REV. 712.

72. Wiener, *supra* note 27.

73. 29 OP. ATT'Y GEN. (1912) 322 quoted in SCHILLER, *MILITARY LAW AND DEFENSE LEGISLATION* (1941) 70.

74. Wiener, *supra* note 27; MacChesney, *National Defense—Constitutionality of Pending Legislation* (1916) 64 U. OF PA. L. REV. 347 and 449; Ansell, *supra* note 71.

75. It might be inferred from the provisions of 55 STAT. 628, 32 U. S. C. A. § 194 (Supp. 1941) *supra* note 29, that the military forces authorized in that statute are intended by Congress to be a part of the organized militia. However, this seems unlikely in view of the fact that 39 STAT. 197, 32 U. S. C. A. § 1 (1916) *supra* note 56, fails to exclude them from the unorganized militia.

“to execute the laws of the Union, suppress insurrections and repel invasions”.⁷⁶ Or pursuant to its extensive war power or the power to raise armies, Congress may see fit to organize, under federal control, a national home guard, a counterpart to the one existing in England.⁷⁷ In short Congress has ample power, under the Constitution, to provide for both national and purely local defense. However, at least until Congress, in the exercise of the power granted to it in the Constitution, fully occupies the field, confusion may exist among state officials charged with the responsibility for local defense on the question whether or not the power of the individual states to organize their own defense establishments depends, for its exercise, upon the consent of Congress. Solely in an effort to furnish some clarification of the issues involved, the views expressed in this paper have been presented.

76. A change would be required in the law, since 54 STAT. 1206, 32 U. S. C. A. § 194 (Supp. 1941) *supra* note 29, presently provides that such organizations shall not be called as units into the military service of the United States.

77. This was done during the last War, the force being known as the United States Guards. See 1 REP. SEC'Y WAR (1918) 1146-67; *Kahn v. Anderson*, 255 U. S. 1, 7 (1921).