

WAR AND THE SOCIAL CONTRACT: NUCLEAR POLICY,
DISTRIBUTION, AND THE RIGHT TO BEAR ARMS

ELAINE SCARRY†

“Every nation,” wrote Kant, “must be so organized internally that not the head of the nation—for whom, properly speaking, war has no cost (since he puts the expense off on others, namely the people)—but rather the people who pay for it have the decisive voice as to whether or not there should be war.”¹ He then added in parenthesis: “Of course, this necessarily presupposes the realization of the idea of that original contract.”² This exercise of the population’s voice, and with it, the affirmation of the social contract, is partly ensured in conventional war by the fact that the population is carrying the guns. Hobbes acknowledged the military as the final test point of consent when, in *Behemoth*, he wrote: “[I]f men know not their duty, what is there that can force them to obey the laws. An army, you will say. But what shall force the army?”³

Kant asserted that war *ought* to be consensual; Hobbes asserted that war *is* consensual. When both the “ought” and the “is” are held visibly side by side, they together make clear the extremity of the dissolution of the social contract that comes about when a new form of weapon is invented that is wholly independent of the population’s authorization. Everyday life continually puts before us the claim that in the emergency of war, when our own survival is at stake, some of the operations of consent have to fall away because of the speed required to respond. But in contract theory in general—as well as in one very specific social contract, the United States

† Elaine Scarry is Professor of English and American Literature at Harvard University. I am grateful to Yale Law School, to the Institute for Advanced Study in Berlin, and to the University of California, Berkeley, for the opportunities to present earlier versions of the essay. This Article has profited greatly from ongoing conversations with Akhil Amar. My thanks also to Bruce Ackerman, Peter Brooks, Tom Ehrlich, Liana Farber, Michael Gilmore, Stephen Greenblatt, Liz Hasse, Don Kates, Todd Kelly, Stephen Knapp, Sanford Levinson, D.A. Miller, Joshua Newberg, Judith Resnik, Dave Richards, Miguel Sancho, John Searle, Henry Shue, Ann Snitow, Jeremy Waldron, and Richard Wollheim.

¹ I. KANT, *On the Proverb That May be True in Theory, But is of No Practical Use*, in *PERPETUAL PEACE AND OTHER ESSAYS ON POLITICS, HISTORY AND MORALS* 61, 88 (T. Humphrey trans. 1983).

² *Id.*

³ T. HOBBS, *BEHEMOTH OR THE LONG PARLIAMENT* 59 (F. Tönnies rev. ed. 1889) (1682).

Constitution—provisions are made so that consent and the express act of contract become more explicit, not less explicit, at moments of war.

The fundamental logic of Locke's consent theory was to differentiate societies brought about by contract from those brought about by "force of arms."⁴ Thus, if within a contractual society an occasion arises that necessitates the use of arms, the licensing of those arms must be explicit precisely to ensure that the society does not at that moment begin to shift back into the very blur of coercion that the contract replaced and from which it sought to distinguish itself. The consent of a people *ought* to be *more* express in entering war than at almost any other time both because of the adversity the war will bring (the bodies of the population are subject to the risk of great injury) and also because the existence of the nation (the elemental social pact) is itself at risk. The deliberation and slowness with which a contractual society ought to go to war is described by Justice Story:

War, in its best estate, never fails to impose upon the people the most burdensome taxes, and personal sufferings. It is always injurious, and sometimes subversive of the great commercial, manufacturing, and agricultural interests. Nay, it always involves the prosperity, and not unfrequently the existence, of a nation. . . . It should therefore be difficult in a republic to declare war; but not to make peace.⁵

What prompts Story to write this passage is article I, section 8 of the Constitution which—by requiring from Congress a formal declaration of war—provides within our own social contract the highly self-conscious, overt act of consent that contract theorists insisted upon.

⁴ See J. LOCKE, SECOND TREATISE OF GOVERNMENT 8, 46, 47, 66-68, 101-24 (C. B. Macpherson ed. 1980) (6th ed. 1764); see also Dunn, *Consent in the Political Theory of John Locke*, in LIFE, LIBERTY, AND PROPERTY: ESSAYS ON LOCKE'S POLITICAL IDEA 154 (G. Schochet ed. 1971) (noting that behavior which is caused by an external force, such as force of arms, does not imply free choice). Hobbes's chapter in the *Leviathan* on the generation of the common-wealth begins: "The final Cause, End, or Designe of men . . . in the introduction of that restraint upon themselves, (in which wee see them live in Common-wealths,) is the foresight of their own preservation . . . ; that is to say, of getting themselves out from that miserable condition of Warre . . ." T. HOBBS, LEVIATHAN 223 (C.B. Macpherson ed. 1968) (1651). The self-consciousness with which the American founders, as well as earlier contractual societies, positioned contract against force, is elaborated later in the Article. See *infra* text accompanying notes 57-58, 118-135, & 164.

⁵ J. STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE ADOPTION OF THE CONSTITUTION 87 (4th ed. 1873).

The declaratory power was given to Congress, rather than to the President or to either the House or the Senate acting alone, to ensure deliberation: the reasons for going to war must prove persuasive enough to hold up under the scrutiny of the large numbers of persons who together make up the House and the Senate. The deliberative process is not private and introspective; it is public, open to view, and subject to debate and constant challenge by all assembled. Though it is difficult and time-consuming to convert hundreds of representatives from uncertainty to the decisiveness required for a declaration of war, this very unwieldiness was saluted as a great virtue at the original constitutional convention,⁶ and again by later jurists who, like Story, argued that a country must be slow to go to war but quick to attain peace.⁷

The longstanding United States strategic policy of presidential first-use of nuclear weapons⁸ is starkly incompatible with the

⁶ For statements by Oliver Ellsworth and George Mason, see *infra* text accompanying notes 118-119.

⁷ For statements by Joseph Story and William Rawle, see *supra* text accompanying note 5 and see *infra* text accompanying notes 121-122.

⁸ The most comprehensive attempt to track the paper record through which United States presidents have assumed control over nuclear weapons is Frank Graham Klotz's unpublished Oxford University D. Phil. dissertation. See F.G. Klotz, *The U.S. President and the Control of Strategic Nuclear Weapons* (1980) (unpublished manuscript). No published account of the sequence of presidential directives formalizing this strategic policy is available to the population. No president has addressed the population (in his State of the Union speech or on any other occasion) about this national policy.

Perhaps in part as a result, a 1984 Public Agenda Foundation poll found that 81% of the United States population were unaware of the nation's first-use policy; they believed that the country had nuclear weapons for defensive purposes only. See Yankelovich & Doble, *The Public Mood: Nuclear Weapons and the U.S.S.R.*, 63 FOREIGN AFFAIRS 45 (1984) (citing PUBLIC AGENDA FOUNDATION & CENTER FOR FOREIGN POLICY DEVELOPMENT AT BROWN UNIVERSITY (co-authors), VOTER OPTIONS ON NUCLEAR ARMS POLICY: A BRIEFING BOOK FOR THE 1984 ELECTIONS 34 (1984)). The poll followed an eight-year period during which the issue had been openly, but only occasionally, addressed by political and religious leaders. See, e.g., *First Use of Nuclear Weapons: Preserving Responsible Control: Hearings before the Subcommittee on International Security and Scientific Affairs of the Committee on International Relations of the House of Representatives*, 94th Cong., 2d Sess. (1976) [hereinafter *Hearings: First Use of Nuclear Weapons*]; Bundy, Kennan, McNamara & Smith, *Nuclear Weapons and the Atlantic Alliance*, reprinted in NO-FIRST-USE 4 (F. Blackaby, J. Goldblat, & S. Lodgaard eds. 1984) (originally an influential 1982 *Foreign Affairs* article); NATIONAL CONFERENCE OF CATHOLIC BISHOPS, *THE CHALLENGE OF PEACE: GOD'S PROMISE AND OUR RESPONSE* vii (1983) (urging NATO to adopt a no first-use policy).

Political, legal, and religious concern tends not to be widely reported in the press: when 1988 presidential candidate Jesse Jackson pledged no first-use, the *L.A. Times* devoted a headline to the announcement. See *Jackson Sees First Use as Irrational*, *L.A. Times*, May 27, 1988, pt. I, at 1, col. 1. Their act was unusual, though, and the

country's constitutionally mandated requirement for a congressional declaration of war. But the gravity of the country's present nuclear arms policy only emerges fully into view when article I, section 8 is seen in relation to a second consensual site available to the population in conventional war. Even if a society should fail, through its congress or parliament, to engage in an explicit act of consensual declaration, the act of calling upon the population, the call to arms, itself requires—as Hobbes reminds us—a direct courting of the population's consent.⁹ In conventional war, a population's authorization of war is ongoing in that authorization occurs both at *the threshold* and at *the interior* of war.

The consensual practice at the threshold becomes visible by inversion in eras when those drafted have refused to cross over the entry way. Alexander Bickel wrote that “the waging of war needs

issue did not become part of the election contest. On January 3, 1989, Representative Weiss of New York introduced a joint resolution on first-use, which was referred to the Committee on Foreign Affairs and the Committee on Armed Services (March 1, 1989), but did not receive public attention. See H.R.J. Res. 46, 101st Cong., 1st Sess. (1989). Nor was press attention given to the 1987 lawsuit against presidential first-use brought by California Representative Dellums. See *infra* note 33. The American public's attention to the subject is often prompted by international, rather than national, sources, such as the Soviet Union's 1990 reiteration in Vienna of its own 1982 pledge against first-use; Andrei Sakharov's editorial shortly before his death urging the United States to abdicate first-use, see Sakharov, *Sakharov on Gorbachev & Bush*, Wash. Post, Dec. 3, 1989, at C1, col. 1; *Presidents' Answers Don't Always Answer*, Int'l Herald Tribune, Dec. 4, 1989, at 6; and the November 1990 Stockholm Declaration made by the Swedish Initiative for the Prevention of Accidental Nuclear War (a coalition of all six political parties of the Swedish Parliament and nine professional organizations against nuclear arms) which calls for the nonproliferation of nuclear weapons to countries where they do not yet exist and the international *delegitimization* of nuclear weapons in countries where they already exist. The Swedish Initiative stipulated that first-use should be eliminated, even before international delegitimization of all nuclear weapons can be fully achieved:

Delegitimize the use of nuclear weapons [O]ne realistic step towards the complete elimination of all nuclear weapons, should be to negotiate an international convention banning the use, or threat of use, of nuclear weapons. Consequently, all nuclear weapons countries should declare a policy of no-first-use and adapt their military structures to this policy.

ACTION PROGRAM FOR THE PREVENTION OF ACCIDENTAL NUCLEAR WAR 19 (S. Hellman ed. 1990); see *id.* at 9, 14, 19.

⁹ With the invention of nuclear arms and the progressively more formalized policy of presidential first-use, United States presidents have ceased to view the article I requirement for a congressional declaration as binding even when entering conventional war; thus, both the Korean War and the Vietnam War were undeclared. Yet precisely because these wars were fought with conventional weapons, the second species of consent still protected the country by permitting the voice of the population to be heard.

continuous political support [and] it is subject to a continuous round of informal referenda."¹⁰ During the Vietnam period, the reflexes of consent were exercised and steadily sharpened. The antiwar movement, he wrote, succeeded in "toppling a sitting president, in the midst of war, in 1968, before a single national vote had been cast."¹¹ For Bickel, it is the very quality of constraint in the draft that insures ongoing scrutiny of the war:

A democratic state which fights with a conscripted popular army, as most states like ours have done since the French Revolution, will do so effectively with difficulty when a large and intense body of opinion, particularly among those of fighting age, resolutely opposes the war on moral and political grounds. A conscripted army requires more than majority political decision to fight a war¹²

That display of consensual powers at the threshold has also been visible in other eras. The first federal conscription bill, issued by Abraham Lincoln, at once gave rise to the 1863 Draft Riots in New York City, and similar, if much less fully documented, outbreaks of draft resistance, riot, or near-rebellion are said to have occurred in Boston and smaller towns in New York, Pennsylvania, Illinois, Indiana, and Ohio.¹³ Still earlier, toward the end of the War of 1812, the draft had been proposed by the Secretary of War. It never left the proposal stage because it was strongly resisted as unconstitutional.¹⁴

¹⁰ A. BICKEL, *THE MORALITY OF CONSENT* 102-03 (1975).

¹¹ *Id.* at 102.

¹² *Id.*

¹³ See J. MCCAGUE, *THE SECOND REBELLION: THE STORY OF THE NEW YORK CITY DRAFT RIOTS OF 1863*, at 143 (1968) (describing the unrest across the Northern states). Many of the incidents, as well as the names of participants and those killed are reconstructed in A. COOK, *THE ARMIES OF THE STREETS: THE NEW YORK CITY DRAFT RIOTS OF 1863* (1974). Resistance may also, as Joseph Story's editor observed, be initiated by national or state authorities:

When the late civil war broke out, and the President issued his call for 75,000 militia, apportioned among the several States which had not declared their secession, the governors of several of the border States responded with either a peremptory or a qualified refusal. The governors of Virginia, North Carolina, Kentucky, Tennessee, Missouri, and Arkansas refused in the most positive, and some of them in insulting terms . . . [and they contested its constitutionality].

J. STORY, *supra* note 5, at 117 n.5.

¹⁴ See T. DWIGHT, *HISTORY OF THE HARTFORD CONVENTION* 358-62 (1833), cited in J. STORY, *supra* note 5, at 99 n.1 (asserting that the Constitution gives Congress no power to draft).

As the exercise of the population's authorization can be seen at the threshold, so it can be seen in the interior of war as well.¹⁵ Those who enter the war continue to exercise, on a day by day basis, their power to give or to withhold consent. Again the photographic negative—the withdrawal of consent in the actions of mutiny or rebellion—bestows clarity on the soldiers' more ordinary acts of cooperation and participation. Here is one such photographic negative, an irregularity in the rhythm of artillery fire in World War I France:

Promptly at ten the next morning the artillery bombardment resumed—only to be checked immediately by a peculiar incident. In the fields surrounding the barracks were nearly a thousand horses which had not been fed for twenty-four hours. Now the rebels herded them together and drove them riderless down the road to the town of La Courtine¹⁶

¹⁵ The Vietnam War has been introduced here as the model of threshold consent because of the visible refusal by many of draft age to enter. But the exercise of consent and dissent was, of course, continuing to be enacted at the center by those who had initially agreed to go. In a "top-secret" cable to President Kennedy on September 19, 1963, Ambassador Henry Cabot Lodge summarized General Minh's litany of the factors weakening the Saigon-American side. This list began with the greater allegiance of the population and university students to the Viet Cong, proceeded to the problem of graft in the Vietnamese distribution of U.S. aid, and climaxed with the observation that "the 'Heart of the Army is *not* in the war.'" N. SHEEHAN, *A BRIGHT SHINING LIE: JOHN PAUL VANN AND AMERICA IN VIETNAM* 364 (1988) (quoting Cable from Henry Cabot Lodge to John F. Kennedy (Sept. 19, 1963)). Sheehan's biography chronicles the way John Paul Vann's acute criticisms of the U.S. actions in Vietnam influenced journalists who in turn communicated this picture to Americans at home. See *id.* at 316, 342. The book simultaneously provides a portrait of the influence of civilians throughout the countryside. See *id.* at 351, 355, 357, 371. In effect, the United States armed a large portion of the population, many of whom chose to use their arms on behalf of the Viet Cong. Between November of 1962 and the early months of 1964, according to Sheehan: "with the exception of the heavy weapons specialists, the U.S. government armed virtually every fighter—right down to the local hamlet guerrillas—on the Communist side." *Id.* at 374; see also *id.* at 313-14, 503-08 (describing the large quantities of arms in Communist possession).

So, too, the other U.S. wars that display the phenomenon of *threshold* consent also illustrate the *ongoing* exercise of the power to consent or dissent. The relative speed with which the United States extricated itself from the War of 1812 is conventionally attributed to the war's unpopularity with the country's population. The part played in the Civil War by the "collapse" of the Confederate army has also been documented: "Nearly 250,000 eligible whites are estimated to have deserted or to have avoided conscription altogether." J. SCOTT, *WEAPONS OF THE WEAK: EVERYDAY FORMS OF PEASANT RESISTANCE* 30 (1985).

¹⁶ R. WATT, *DARE CALL IT TREASON* 275 (1963). The French source on which Watt bases his narration of the mutiny—P. POITEVIN, *LA MUTINERIE DE LA COURTINE: LES RÉGIMENTS RUSSES RÉVOLTÉS EN 1917 AU CENTRE DE LA FRANCE* 149-51 (1938)—goes on to describe the events of September 17-19, 1917 in the same images of road

For a few hours, the road necessary for all communication and travel was clogged with the thousand newly wild horses, before they could be "collected and put out to pasture by the French. [Then t]he artillery began again."¹⁷ The interruption of the guns, the irregularity in the rhythm of the noise, is the acoustical signature of the soldiers' will, the audible registration of the sheer materiality of men and horses running beneath and controlling the gunshot fire above. It is one of many volatile events from the 1917 mutinies in France, a narrative of "avalanching" soldiers' strikes reconstructed in the diaries and speeches of military and political leaders: "The troops refuse to go into the trenches," reported Colonel Herbillon, a military-liaison officer to the government, "order is menaced everywhere. [The] fever is extending itself."¹⁸ B.H. Liddell Hart wrote that "cases of desertion in the French Army rose from 509 in 1914 to 21,174 in 1917."¹⁹ There were mutinies in sixteen different corps, "and in places the trenches were scarcely even guarded."²⁰

Germany had a shadow analogue in the naval rebellion of 1918 and the earlier mutinies in Kiel and in Wilhelmshaven.²¹ What began with the refusal of the German fleet to be ordered out against the British quickly spread and became, according to Liddell Hart,

clogging, though soon it is between 6,000 and 7,500 men rather than horses:

This release of horses was only the beginning and at two o'clock the rebels having gathered in the barracks of Laval emerged with their belongings, without arms, and formed groups of four waving little white flags. The movement of surrender had begun. The vast majority of the troupe, despite the dictates of the ultimatum, headed for La Courtine, by a small road that led to the church, next to which was the command post of the French general staff. . . . The total number of submissions reached almost 7500 men. Some came on foot, others in vans, in wagons, carts, on horseback, etc., all without arms. . . . Despite the congestion produced at the same place by the traffic of thousands of soldiers

Id. at 149-51 (translated from the French). (I am grateful to D.A. Miller for providing an English translation of this passage, as well as of passages cited in notes 18, 26, 34, & 35.)

¹⁷ R. WATT, *supra* note 16, at 275.

¹⁸ R. POINCARÉ, 9 AU SERVICE DE LA FRANCE: NEUF ANNÉES DE SOUVENIRS 153 (1932) (from the memoirs of Raymond Poincaré; the original French reads: "Des hommes ont refusé d'aller aux tranchées. L'ordre est menacé partout. La fièvre s'étend."). Continuing the metaphor of bodily disablement, Poincaré asked, "Will we need to wait for a new Marne victory to be cured?" *Id.* (translated from the French).

¹⁹ B.H. LIDDELL HART, HISTORY OF THE FIRST WORLD WAR 302 (1972).

²⁰ *Id.*

²¹ See D. DÄHNHARDT, REVOLUTION IN KIEL 48, 50-54 (1978).

“the uprising of the German people against the leaders who had led them into disaster.”²² And among British troops, strikes, resistance, and marches of protest occurred in 1919 in Folkestone, Dover, Kent, London, Sussex, Hampshire, West Country, Salisbury Plain, Wales, Scotland, Canada, France, and (more mildly) India.²³ The soldiers, wanting to be demobilized, refused to carry out what they correctly perceived to be Churchill’s next plan, the invasion of Russia to support the Whites against the Bolsheviks.²⁴

Like the wild horses on the La Courtine road, civilians and soldiers periodically obstruct the road to war, interrupt it, clog it, even bring it to a close.²⁵ These historical instances of obstruction, both at the threshold of war (United States draft resistance in 1812, the Civil War, and the Vietnam War) and at the interior of war (World War I in France, Germany, and Britain)²⁶ are recited

²² B.H. LIDDELL HART, *supra* note 19, at 379.

²³ See A. ROTHSTEIN, *THE SOLDIERS’ STRIKES OF 1919*, at 37-85 (1980).

²⁴ See *id.* at 39.

²⁵ The phenomenon of “clogging” in both war-making and law-making is elaborated later in the Article. See *infra* notes 118-35, 161-93 and accompanying text.

²⁶ The power of dissenting soldiers at the interior of war is equally visible in wars of the present decade. The defeat of Iran in a series of battles in the Iran-Iraq War, for example, has recently been attributed to the disenchantment of Iranian soldiers:

According to numerous observers, it is this demoralization of the pasdarans and the bassidjis (volunteers) that is responsible for the defeats, otherwise inexplicable, at Fao, Chalamchah and Majnoun, more than the Iraqis’ now systematic use of chemical warfare. The latter in any case constituted an additional subject of recrimination against those in power, who ‘had taken no precautions to protect us from these deadly weapons’. . . . Little by little, the fronts came undone, despite the appeals of the authorities, which now fell on deaf ears. A campaign for the enlisting of volunteers, launched with great media support after the loss of Chalamchah, managed, it is said, only to recruit . . . 250 volunteers in Teheran.

Gueyras, *La colère des pasdarans*, *Le Monde*, Aug. 21-22, 1988, at 1, col. 1, & 5, col. 1 (translated from the French).

Soldiers’ strikes, acts of desertion, and disobedience also played a stunning role in the 1989-90 revolutions in Europe. The East Germany Army, once renown for its discipline and training, was drastically reduced by desertions which took place between November and March. Its size fell by almost half, from 173,000 to 90,000; remaining soldiers sometimes expressed reluctance to participate in ordinary activities such as the military exercises carried out by Soviet troops. See *E. Germans Deserting*, *Newsday*, Mar. 1, 1990, at 12; *Int’l Herald Tribune*, Mar. 1, 1990, at 1, col. 2; Trumbull, *News Currents*, *Christian Sci. Monitor*, Mar. 1, 1990, at 2, col. 1. In late December, Romanian soldiers took the side of the population it had been ordered to suppress and in doing so brought about the fall of Ceausescu. At the end of March, after the Soviet Army in Lithuania had received “permission to use violence” against the population, almost two thousand Lithuanian soldiers deserted, formally registering their names at the parliament building in Vilnius. See Lieven & Dejevsky, *Vilnius Anger Over Seizure of Deserters*, *The Times* [London], Mar. 28, 1990, at 1, col. 1.

here not to portray conventional troops as primarily mutinous. On the contrary, the United States did pass over the threshold into the War of 1812, the Civil War, and the Vietnam War. France, Germany, and Britain, along with other countries, did over countless weeks, days, and years sustain the interior of World War I. But they did so only with the assistance of their populations. The photographic negatives make it clear that without that willing fighting, the war *cannot* be fought.

Military leaders, by their constant insistence on the strategic primacy of "morale," have always acknowledged their absolute dependence on the consent of the soldiers.²⁷ Civilian leaders, too, have recorded that dependence. Churchill, writing to Lloyd George of his desire to carry out the 1919 "intervention" in Russia, continued: "[B]ut unfortunately we have not the power—our orders would not be obeyed, I regret to say."²⁸ Similarly, in response to the French mutinies in 1917, the leadership of France acknowledged that the war was becoming unfightable: "[T]here had never been anything like May 20! We seemed absolutely powerless. From every section of the front the news arrived of regiments refusing to man the trenches."²⁹ The *War Memoirs* of Lloyd George record the early May conference between Pétain and himself during which Lloyd George expressed his recognition that French fighting power had become stalled not by a *disability* but by a *refusal*: "No, General . . . with your record I could not make this mistake [of thinking you *can't* fight], but I am certain that for some reason or other you *won't* fight."³⁰ Military leaders, civilian leaders, recruits, and soldiers thus share the recognition that conventional wars are fought only with the authorization of the population.

The constitutional protection of the population's direct authorization of war is the subject of this Article. The kind of consensual act Kant imagined—the deliberate assembling of the representatives of the people for a voiced affirmation of war—is provided for in the country's Social Contract in article I, section 8,

²⁷ Regarding the stress on morale by military leaders, see E. SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* 104-07, 153-57, 345-46 (1985).

²⁸ M. GILBERT, *4 WINSTON S. CHURCHILL* 235 (1975), cited in A. ROTHSTEIN, *supra* note 23, at 95. For a discussion of the British soldiers' awareness of the plan, see *id.* at 100.

²⁹ B. SERRIGNY, *TRENTE ANS AVEC PÉTAÏN* 146 (1959), cited in R. WATT, *supra* note 16, at 215.

³⁰ D. LLOYD GEORGE, *4 WAR MEMOIRS* 335 (1934), cited in R. WATT, *supra* note 16, at 218.

which stipulates unequivocally that Congress, not the President, has the obligation to declare war. It might appear that the second, Hobbesian form of consent would, in contrast, have no specifiable doctrinal location in the Constitution. This second species of consent appears to depend on the technical attributes of the guns themselves: because they must be carried onto the field by persons, the leaders must address the population and persuade them to carry those guns. With nuclear weapons, this requirement disappears: because there is no longer any need for the population to carry the arms, there ceases to be the need to elicit the population's consent, either at the opening of war or throughout its duration. Thus, the ordinary features of argument and citizenry are no longer needed or available.

While it might well have been the case that this second genre of consent would be left unprotected by the Constitution,³¹ this Article argues that it is not the case. This critically important

³¹ The framers of the Constitution might well have assumed that this second form of consent was protected by the material attributes of the guns themselves and therefore needed no doctrinal protection. Both Hamilton and Madison, in fact, argued that the unqualified concentration of military power in the hands of the Executive (of the kind we now have in the provisions for presidential first-use) was impossible because the need to amass that level of power also required the amassing of persons who certainly would not permit it. Hamilton, in *The Federalist No. 26*, argued: "An army, so large as seriously to menace those liberties, could only be formed by progressive augmentations . . ." THE FEDERALIST NO. 26, at 172 (A. Hamilton) (C. Rossiter ed. 1961). Then follows a cascade of rhetorical questions:

Is it probable that such a [conspiracy between the legislature and Executive to permit such a menace] would exist at all? Is it probable that it would be persevered in, and transmitted along through all the successive variations in a representative body . . . ? Is it presumable . . . ? Can it be supposed that there would not be found one man discerning enough to detect so atrocious a conspiracy, or bold or honest enough . . . ?

Id. Were the Executive to concentrate this kind of power, wrote Hamilton, the people would retract their consent and turn their backs on the state created; the union would be dissolved, and a federalism would emerge so diverse it would give way to anarchy. Then, at the end, he returns once more to the impossibility of it: "But the question again recurs, upon what pretense could [the President] be put in possession of a force of that magnitude in time of peace?" *Id.* at 173. Madison, like Hamilton, believed that this form of consent is protected by the technical attributes of the arms themselves. His formulation of this argument in *The Federalist No. 46* is perhaps even more evocative of the present nuclear circumstances than is Hamilton's: to imagine the endangering of government by a concentration of military power in the Executive means imagining an Executive with a "fixed plan for the extension of the military establishment; that the governments and the people of the States should silently and patiently behold the gathering storm and continue to supply the materials until it should be prepared to burst on their own heads." THE FEDERALIST NO. 46, at 298-99 (J. Madison) (C. Rossiter ed. 1961).

consensual requirement has its doctrinal location in the second amendment. Both article I, section 8 and the second amendment ensure the integrity of the social contract at the moment of entering war; both protect against the concentration of military power in the Executive; both are incompatible with our standing arrangements for presidential first-use of nuclear weapons. The incompatibility between a constitutionally mandated congressional declaration of war and the country's longstanding nuclear arms policy is not the subject of the present article because it already has a sturdy place within arguments about nuclear weapons. It has been the subject of articles within both nuclear discourse and legal discourse.³² In addition, those arguments have begun to enter into the formulation of cases that are now going into court to oppose presidential first-use of nuclear weapons.³³ The focus of this Article is instead the

³² For an argument about the incompatibility between art. I, § 8, cl. II and presidential first-use, see Stone, *Presidential First Use is Unlawful*, 56 FOREIGN POL'Y 94 (1984); see also F. WORMUTH, E. FIRMAGE, & F. BUTLER, *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* 267-77 (1986); Cox, *Raison d'Etat and World Survival: Who Constitutionally Makes Nuclear War?*, 57 GEO. WASH. L. REV. 1614 (1989); Forrester, *Presidential Wars in the Nuclear Age: An Unresolved Problem*, 57 GEO. WASH. L. REV. 1636 (1989); Goldstein, *The Failure of Constitutional Controls Over War Powers in the Nuclear Age: The Argument for a Constitutional Amendment*, 40 STAN. L. REV. 1543 (1988).

³³ In 1987, two congressmen challenged presidential first-use in court. See Transcript of Proceedings at 8, *Dellums v. Reagan*, No. c-87-2587-JPV (N.D. Cal. Nov. 19, 1987) (holding that plaintiffs' claims were not yet ripe for decision, but acknowledging that "[p]laintiffs may have raised a new question that will require the attention of the United States Supreme Court, because of the uniqueness of the fact situation here"). Rather than appealing this ruling, the plaintiffs decided to wait for a reformulation of the case involving the participation of a larger number of senators and representatives.

The defendant in such a case may be the President alone or may instead be the President and others in a first-use position, such as those in the line of presidential succession as specified in the 1976 congressional hearings on first-use. See *Hearings: First Use of Nuclear Weapons*, *supra* note 8, at 39, 79, 94, 128, 213, 215 (describing scenarios in which persons other than the President might be in first-use positions). Testimony during those hearings suggested that the captains of the U.S. strategic submarines are also in first-use positions. *Id.* at 76, 77, 215. The gravity of this constitutional anomaly surrounding 35 unelected strategic submarine commanders was not addressed by the press and public in the decade following the 1976 hearings. In the last three years, however, it has begun to emerge into public view. See Miller, *Who Needs PALs?*, in *PROCEEDINGS: U.S. NAVAL INSTITUTE* 50-56 (July 1988); Moss, *Water Bombs*, THE NEW REPUBLIC, Oct. 3, 1988, at 20; Hampshire, *Engaged Philosopher*, New York Review of Books, Feb. 2, 1989, at 7; Scarry, *A Nuclear Sub Accident Waiting to Happen*, Phila. Inquirer, Nov. 6, 1988, at 9-E, col. 1. Attention to the issue was in part prompted by a 1987 study by Peter Stein and Peter Feaver documenting the absence of locks on submarine-carried nuclear weapons. See P. STEIN & P. FEAVER, *ASSURING CONTROL OF NUCLEAR WEAPONS: THE EVOLUTION OF PERMISSIVE ACTION*

way the second amendment supplements and reinforces article I, section 8 in the arguments against the United States strategic policy of presidential first-use.

I. THE RIGHT TO BEAR ARMS: AN ARGUMENT ABOUT DISTRIBUTION

The second amendment, the right to bear arms, tends to enter our consciousness through claims about why criminals should be allowed to walk around with pistols. Alternatively, it emerges there through arguments made by gun clubs or even neighborhood watch groups who urge that there should be no state laws preventing us from carrying guns for hunting, for recreation, or for self-protection against the criminals carrying pistols.

But the second amendment is a very great amendment, and coming to know it through criminals and the endlessly disputed claims of gun clubs seems the equivalent of our coming to know the first amendment only through pornography. Freedom of speech may or may not protect pornography; but it would be difficult, probably impossible, to infer the monumental scale and solidity of that amendment from this one solitary inflection in its surface. The same is true of the right to bear arms. The history of its formulation and invocation makes clear that whatever its relation to the realm of individuals and the private uses they have devised for guns,³⁴ the amendment came into being primarily as a way of

LINKS 72-89, 99-103 (1987).

In addition to cases about presidential first-use, art. I, § 8 has been the constitutional basis of cases about *nuclear weapons unconnected to presidential action*, such as the sequence of lawsuits about accidental computer launch brought by Clifford Johnson. See *Johnson v. Weinberger*, 851 F.2d 233 (9th Cir. 1988); *Johnson v. Chain*, No. 89-20265-sw (N.D.Cal. 1990); *Johnson v. Weinberger*, No. c-86-3334-sw (N.D.Cal. 1986). Also, either art. I, § 8 or the War Powers Resolution has been at the center of congressional lawsuits against presidents acting with *conventional* troops, such as in Iraq, see *Dellums v. Bush*, No. 90-2866 (D.D.C. Dec. 13, 1990); in the Persian Gulf, see *Lowry v. Reagan*, 676 F.Supp. 333 (D.D.C. 1987); in Grenada, see *Conyers v. Reagan*, 578 F.Supp. 324 (D.D.C. 1984); in Nicaragua, see *Sanchez-Espinoza v. Reagan*, 568 F.Supp. 596 (D.D.C. 1983); and in El Salvador, see *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982).

³⁴ The second amendment cannot be categorically separated from the pleasures of hunting since the European and American history of that pleasure is itself entwined with issues of distributive justice. The conflation was visible, for example, during the French Revolution. In August of 1789, the majority in the General Assembly voted for a decree abolishing "the exclusive right of dovecotes and pigeon houses Pigeons will be encaged at times determined by the communities, and during this time, they will be regarded as game. Everyone will have the right to kill them." Winock, *Chronique de 1789: L'année sans pareille*, Le Monde, Aug. 16, 1988, at 2, col. 1 (translated from the French). The decree, according to Mirabeau, asserted

dispersing military power across the entire population. Like voting, like reapportionment, like taxation, what is at stake in the right to bear arms is a just distribution of political power.

When I speak here about a *distribution of arms*, what I mean is a *distribution of authorization over our nation's arms*. It is crucial to understand that the argument that follows about distributing arms does not express a hope that we can all have guns. It is rather to say that *if* as a nation-state we are to have injuring power, the authorization over the action of injuring (as well as over the risk of receiving injury in return) must be dispersed throughout the population in the widest possible way. *How much* injuring power the country should have is a wholly separate subject. Some believe we should have none; many believe we should have a great deal. The argument here does not touch that question; it is prior to it.³⁵

the principle of equality: "Every man has the right to hunt on his land, none has the right to hunt on someone else's land: this principle is as sacred for the monarch as for anybody else." *Id.* (translated from the French). The conflation of the personal right to hunt with the political right of arms also occurred in the United States. A proposed constitutional amendment emerging from the Pennsylvania ratification assembly included a provision asserting the people's "right to bear arms for the defence of themselves and their own State or the United States, or for the purpose of killing game." B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 665 (1975). The perception of intimacy continued into the nineteenth century in military tracts. William Sumner, for example, speaks of shooting game as a way the population remains limber in the use of its arms. See *An Inquiry Into the Importance of the Militia to a Free Commonwealth*, in A Letter from William H. Sumner, Adjutant General of the Commonwealth of Massachusetts, to John Adams, Late President of the United States; with his Answer, in *ANGLO-AMERICAN ANTIMILITARY TRACTS* 1697-1830, at 39-40 (R. Kohn ed. 1979) [hereinafter *An Inquiry Into the Importance of the Militia*]. Legal theorists in both the United States and Britain recognized the implications of hunting laws. "Blackstone," wrote William Rawle, saw "that the prevention of popular insurrections and resistance to government by disarming the people, is oftener meant than avowed by the makers of forest and game laws." W. RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 122-23 (1825) (citing 2 W. BLACKSTONE, *COMMENTARIES* *412).

³⁵ Because the right to bear arms is prior to such questions, revolutionaries have made it their first demand whether they were militarist or pacifist. During the first General Assembly in the French Revolution, Mirabeau argued that "it is impossible to imagine an aristocracy more frightening than that which is established in a state by the mere fact that one group of citizens would be armed and the other would not be." Meeting, Aug. 18, 1789, VIII ARCH. PARL. 455 (translated from the French), cited in D. Conrad, *Gandhi's Conception of Human Rights, Civil Disobedience as Satyagraha, and Constitutional Legality* 140 n.48 (unpublished manuscript on file with author). India presented a list of eleven demands to Great Britain, the eleventh requiring the rearming of the population. Gandhi argued that the population would decide whether or not to use its weapons only after those weapons had been restored. *Id.* at 139. He wrote: "Among the many misdeeds of the British rule in India, history will look upon the Act depriving a whole nation of arms as the blackest." 2 M.

However much injuring power we have, like all other forms of political access, it must be spread throughout our entire numerical expanse.

Only four Supreme Court rulings have centered upon the second amendment, three in the nineteenth century and one in the twentieth.³⁶ Those rulings are not incompatible with an interpretation emphasizing distributive justice, since they together stress collective rather than exclusively individual rights, and military responsibilities rather than recreational uses. But the cases are muddled. The country stands in need of a major Supreme Court reinterpretation of the second amendment.³⁷ If the Court were to

GANDHI, AN AUTOBIOGRAPHY OR THE STORY OF MY EXPERIMENTS WITH TRUTH 666 (M. Desai trans. 1927). The issue of arms distribution also became a focus in the pacific revolution in East Germany when on December 14, 1989, the Parliament "decided to do away with the right of communist party authorities to possess or carry firearms," thereby ending the formal inequality of arms that had given the SED leadership access to the weapons from which the population itself was legally barred. Marion, *Les autorités judiciaires doivent convaincre l'opinion de leur détermination*, *Le Monde*, Dec. 14, 1989, at 5, col. 3.

³⁶ See *United States v. Miller*, 307 U.S. 174 (1939); *Miller v. Texas*, 153 U.S. 535 (1894); *Presser v. Illinois*, 116 U.S. 252 (1886); *United States v. Cruikshank*, 92 U.S. 542 (1876). For an analysis of the consistent emphasis in these decisions on the second amendment as a collective, rather than an individual, right, see Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961, 995-1000 (1975), reprinted in SENATE COMM. ON THE JUDICIARY, 97TH CONG., 2D SESS., REPORT ON THE RIGHT TO KEEP AND BEAR ARMS 130, 164, 166 (Comm. Print 1982) [hereinafter SENATE REPORT ON SECOND AMENDMENT]. Don B. Kates, Jr. points out that the 1939 case is the Supreme Court's "first and last extended treatment of the second amendment," but he adds to the nineteenth century list two cases in which the amendment figures more tangentially than in those cited above: *Robertson v. Baldwin*, 165 U.S. 275 (1897), and *Scott v. Sanford*, 60 U.S. 393 (1856). See Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 246-50 (1983). Kates provides strong arguments for the individual interpretation; but, more crucially, he points out the "false dichotomy between the exclusively state's right and the unrestricted individual right interpretations" that have inappropriately absorbed legal commentary. *Id.* at 273. "In fact," he adds, "the arms of the state's militias were and are the personally owned arms of the general citizenry, so that the amendment's dual intention to protect both was achieved by guaranteeing to the citizenry a right to possess arms individually." *Id.* On the confusion of individual and collective rights, see *infra* note 109 and accompanying text.

³⁷ The call for a Supreme Court reinterpretation, implicit in the many articles observing the small number of cases, is sometimes explicit, as when David Hardy wrote: "The formation of jurisprudence of the Second Amendment is nearly two centuries overdue." Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559, 638 (1986). Similarly, Sanford Levinson wrote: "The Supreme Court has almost shamelessly refused to discuss the issue . . ." Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 654 (1989). Levinson also observed that both liberals and the legal academy continue to

follow a distributive interpretation, its reading would be supported by the key attributes of the right to bear arms. Each of these basic attributes in isolation illuminates the contemporary problem of arms. Together, they display an unexpected portrait of the deep structure underlying "contract" and "force." That structure, gradually emerging in the present section of this Article, will be unfolded in the final section. It will in the end become clear why illegal authorization of nuclear weapon use is not a simple constitutional misdemeanor, but a constitutional deformation of the most serious kind.

A. *Distribution, Ratification, and the Bill of Rights*

The first argument centers on the *form* rather than *content* of the right to bear arms. The first ten amendments came into being through the agency of distribution. They came into being not at the federal Constitutional Convention itself, but out of the ratification proceedings, the centrifugal period during which there was dispersed out to the population for its confirmation the proposed constitution, itself only a "proposal,"³⁸ a recommendation, or (as it was called during the Virginia Convention) "that paper on the desk over there."³⁹

In the records of the ratification debates, the Constitution is again and again talked about within the framework of explicit arguments about what it means "to consent," "to contract," "to compact," or "to make a social contract."⁴⁰ Most important, the

ignore the amendment at their peril, and he urged that "serious, engaged discussion" begin. *Id.* at 656-59.

³⁸ For the designation of the Constitution as "a *proposal* of a contract" or as "the *proposed* contract," see *infra* note 40.

³⁹ "Suppose," said Mr. Pendleton during the opening of the Virginia debate, "the paper on your table dropped from one of the planets; the people found it, and sent us here to consider whether it was proper for their adoption." 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, TOGETHER WITH THE JOURNAL OF THE FEDERAL CONVENTION, LUTHER MARTIN'S LETTER, YATE'S MINUTES, CONGRESSIONAL OPINIONS, VIRGINIA AND KENTUCKY RESOLUTIONS OF '98-'99, AND OTHER ILLUSTRATIONS OF THE CONSTITUTION 38 (J. Elliot ed. 1861) [hereinafter RATIFICATION DEBATES]. As in the opening hours of the debate, so in the closing: Madison referred to those who wrote the Constitution at the federal assembly as "those who prepared the paper on the table," *id.* at 618, and Mr. Harrison led into his summary of his vote by asking: "How comes that paper on your table to be now here discussed?" *Id.* at 628. For the constant designation of the Constitution as "that paper," see *infra* notes 180-183 and accompanying text.

⁴⁰ The use of these words is explicit and self-conscious, as when Patrick Henry

ratification itself is the performative action of consent. The Virginia instruments of ratification, for example, sweep through a two paragraph preamble asserting the knowledge, freedom, and deliberation with which the action of the third paragraph is performed, that third paragraph reading:

We, the said delegates, in the name and behalf of the people of Virginia, do, by these presents, *assent to and ratify the Constitution*, recommended on the seventeenth day of September, one thousand seven hundred and eighty-seven, by the federal Convention, for the government of the United States; hereby announcing to all those whom it may concern, that the said Constitution is binding upon the said people, according to an authentic copy hereto annexed, in the words following.⁴¹

The resolution of South Carolina, shorn of all preambles, reads more simply: "Resolved, That this Convention do assent to and ratify the Constitution agreed to on the 17th day of September last, by the Convention of the United States of America, held at Philadelphia."⁴² Only relatively brief records of the South Caroli-

asked, "Have they said, We, the states? Have they made a proposal of a compact between states? . . . Is this a monarchy, like England—a compact between prince and people?" Elliot, 3 RATIFICATION DEBATES, *supra* note 39, at 44. Henry also asked what it would mean to be ruled, regulated, or taxed "not by your own consent, but by people who have no connection with you." *Id.* at 56. Whether or not Patrick Henry at any given moment overtly uses the word "compact" or "contract," his arguments and comments at the Virginia Ratification Debate collectively constitute a brilliant treatise on social contract or, more precisely, on the phenomenology of the action of contracting.

The explicit language of contract is also, of course, used by many others, as when Mr. Grayson, stressing the assembly's freedom to reject the proposed contract, observed: "In all parts of the world there is a reciprocity in contracts and compacts. If one man makes a proposition to another, is he bound to accept it?" *Id.* at 614. The language of contract similarly was employed when Mr. Nicholas concluded his comments on amendment by saying: "If thirteen individuals are about to make a contract, and one agrees to it, but at the same time declares that he understands its meaning . . . (what the words of the contract plainly and obviously denote) . . ." *Id.* at 626. Almost all the participants spoke about the action of making a country, as when Mr. Zachariah Johnson described the "happy operation [of government] when [it is] judiciously constructed," *id.* at 644; when Mr. Tyler observed that "[w]e are not passing laws now, but laying the foundation on which laws are to be made," *id.* at 641; and when Mr. Nicholas discussed how varying forms of ratification affect the "binding" character of the compact. *Id.* at 626.

⁴¹ *Id.* at 656.

⁴² 4 *id.* at 338.

na Assembly exist.⁴³ Generally speaking, consent—whether exercised in the spheres of political, marital, or medical contract making—has a tonal range that extends from acquiescence and the privative, on the one hand, to eager affirmation and expansive largesse on the other. The latter, the complete merging of obligation and desire, becomes audible in the reaction to the South Carolina vote. There had been, according to Elliot's sources, a motion to delay the South Carolina vote until Virginia came in with its vote, but the motion was rejected: "The rejection of it was considered as decisive in favor of the constitution. When the result of the vote was announced, an event unexampled in the annals of Carolina took place. Strong and involuntary expressions of applause and joy burst forth from the numerous transported spectators."⁴⁴

This transformation of a speculative recommendation into "binding law" occurs through the instrumentation of ratification; it is only this that gives it the weight and authority of the material world. As Akhil Amar wrote, "The Constitution is our supreme law, superior to ordinary legislation, simply because its *source* was the supreme lawmaker, superior to ordinary legislatures: 'We the People of the United States.'"⁴⁵ The most eloquent testimony to the distributive element in the right to bear arms is the fact that it came into being, along with the other nine amendments, during the

⁴³ In Jonathan Elliot's five-volume set, South Carolina occupies ninety pages, *see id.* at 253-342, whereas the ever articulate Virginia takes up an entire seven-hundred page volume. *See 3 id.*

⁴⁴ D. RAMSAY, 2 THE HISTORY OF SOUTH-CAROLINA FROM ITS FIRST SETTLEMENT IN 1670, TO THE YEAR 1808, at 432 (1809). At moments, the performance of the consensual action overflowed the formal site of the ratification assemblies. In New York, Antifederalists joined "jubilant" Federalists in taverns to celebrate the news of the Virginia ratification: according to John Jay, "the two parties mingled at each table, and the toasts (of which each had copies) were communicated by the sound of drum and accompanied by the discharge of cannon." R. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 1776-1791, at 175 (1955) (quoting letter from John Jay to Mrs. Jay (July 5, 1788), reprinted in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 1782-1793, at 347-48 (H. Johnston ed. 1970)).

⁴⁵ Amar, *Our Forgotten Constitution: A Bicentennial Comment*, 97 YALE L.J. 281, 286 (1987) (invoking the description of ratification in THE FEDERALIST NO. 22, at 152 (A. Hamilton) (C. Rossiter ed. 1961); *id.* NO. 40, at 253 (J. Madison)); *see also* Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1094 (1988) [hereinafter *Philadelphia Revisited*] (arguing that the ratification conventions have a greater claim to being "the people" than has the Congressional Assembly because of the smaller influence of agency costs in the ratification conventions and because the delegate selection process of the conventions focused only on ratification and not on a "bundle" of oddly assorted issues).

actualization process. Such actualization was acquired from sheer proximity to so many persons willing, by their endorsement, to lend the paper some of their own material form. In effect, they endorsed the contract in exchange for an alteration in the contract—the promise of appended amendments. Roy Weatherup wrote:

There might never have been a federal Bill of Rights had it not been for one alarming event that is almost forgotten today. As part of the price of ratification in New York, it was agreed unanimously that a second federal convention should be called by the states, in accordance with Article V of the Constitution, to revise the document. Governor Clinton wrote a circular letter making this proposal to the governors of all the states.⁴⁶

Rather than put the entire Constitution at risk by a reconsideration, Madison and the Federalists agreed to the addition of amendments.

New York was successful because other state assemblies had already voiced strong reservations by attaching proposed “rights” amendments to their articles of ratification. But New York’s role was decisive and had been foreseen (even in the midst of the federal convention) by Elbridge Gerry of Massachusetts. Gerry, a tireless opponent of a centralized military, warned in August of 1787 that the proposed Constitution lacked a sufficient “check” against a standing army in time of peace, and that there would be great opposition on this basis.⁴⁷ “He suspected,” Madison wrote of Gerry in his convention notes,

that preparations of force were now making against it. (He seemed to allude to the activity of the governor of New York at this crisis in disciplining the militia of that state.) He thought an army dangerous in time of peace, and could never consent to a power to keep up an indefinite number.⁴⁸

⁴⁶ SENATE REPORT ON SECOND AMENDMENT, *supra* note 36, at 163. For Governor Clinton’s letter, see 2 RATIFICATION DEBATES, *supra* note 39, at 413-14; see also M. JENSEN, THE MAKING OF THE AMERICAN CONSTITUTION 138-50 (1964) (describing the use of the New York circular letter within the ratification process and adoption of the Bill of Rights).

⁴⁷ A. PRESCOTT, DRAFTING THE FEDERAL CONSTITUTION: A REARRANGEMENT OF MADISON’S NOTES GIVING CONSECUTIVE DEVELOPMENTS OF PROVISIONS IN THE CONSTITUTION OF THE UNITED STATES, SUPPLEMENTED BY DOCUMENTS PERTAINING TO THE PHILADELPHIA CONVENTION AND TO RATIFICATION PROCESSES, AND INCLUDING INSERTIONS BY THE COMPILER 515 (1941) [hereinafter MADISON REARRANGED]; see also *id.* at 519, 736 (noting Gerry’s opposition to the centralization of the military).

⁴⁸ *Id.* at 515.

During the New York convention in the summer months of 1788, Madison wrote letters to Edmund Randolph expressing his anxiety about the outcome, and on July 16, acknowledging that ratification was uncertain, added, "The best informed apprehend some clog that will amount to a condition."⁴⁹ That *clog* or *condition* became the Bill of Rights. In the end, New York changed the wording from "on condition" that an amendment convention be called to the words "in full confidence" that an amendment convention will be called.⁵⁰ They were right.

The fact that the right to bear arms gained constitutional standing through the agency of the ratification debates is critically important because, as will become clear below, the amendment replicates three attributes of the ratification process: first, its function as a distributional mechanism; second, the immediacy and self-consciousness of the contracting action; third, the role played in the work of validation by the phenomenon of "materiality" or (in Madison's idiom) "clogging." The first of the three will be quickly sketched here, then elaborated along with the other two in the analysis of the second amendment that follows.

It may seem only a pleasurable coincidence that a distributional mechanism (the second amendment) should arise out of a distributional process (the ratification debates). But the gravity of this circularity soon becomes apparent. As a group, the first ten amendments are increasingly recognized as sponsoring "collective" rather than narrowly individual rights, not only because they ensure the population's ongoing access to procedural gates of consent such as assembly, jury, and open press, but because they in turn sponsor later revisions in the Constitution (such as the thirteenth, fourteenth, and fifteenth amendments). These revisions in turn sponsor still later revisions: large parts of twentieth century law, various legal commentators have observed, can be seen as elaborations of the Reconstruction amendments.⁵¹ The gradual extension of the

⁴⁹ Letter from James Madison to Edmund Randolph (July 16, 1788), *reprinted in* 5 RATIFICATION DEBATES, *supra* note 39, at 573.

⁵⁰ See 2 RATIFICATION DEBATES, *supra* note 39, at 412.

⁵¹ Perhaps the most adventuresome or unrestrained articulation of this idea is made by William E. Nelson who, in a standard reference work, states that a single sentence within the fourteenth amendment—"No state shall make . . ."—has become the text upon which most twentieth-century constitutional law is a gloss." Nelson, *Fourteenth Amendment (Framing)*, in 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 757 (L. Levy, K. Karst, & D. Mahoney eds. 1986).

original contract to those large parts of the population (blacks and women) not included in its 1789 provisions occurs through the mediation of the amendments. The distributional work of the first ten amendments is, then, twofold: they multiply the number of consensual gates (assembly, jury, free press, arms) available to the limited population (white male) already included within the 1789 Constitution; they also vastly multiply over time the scale of the population that will eventually have access to those multiplied consensual gates.

Underlying contract theory is a persistent question about the temporal duration of the act of consent: should consent be imagined as a single event that, once having occurred, cannot be retracted in the future? Or is it instead the case that consent is ongoing and can be withdrawn at any time, at once dissolving the contract? This distinction between what can be called "threshold consent" and "perpetual consent" is fundamental to all species of contract: social contract, medical contract, marital contract, etc.⁵²

Other writers, even if more cautious, are also tempted into comprehensive statements. Coupling the fourteenth amendment's "equal protection" with the first amendment's "freedom of expression," Michael J. Perry asserts that the "two categories are, by consensus, among the most important in the whole corpus of constitutional law. The third category ["substantive due process"] is, again by consensus, the most controversial." M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICY-MAKING BY THE JUDICIARY* 5 (1982). Ward E.Y. Elliot writes: "[W]hile nobody actually said that they understood the Fourteenth Amendment to be a blank check to posterity, the framers and the members of the state legislatures who ratified the amendment might not have been shocked to find language like 'equal protection,' 'due process,' and 'privileges and immunities' extended to deal with problems like wiretapping, which they were in no position to anticipate." W. ELLIOT, *THE RISE OF GUARDIAN DEMOCRACY: THE SUPREME COURT'S ROLE IN VOTING RIGHTS DISPUTES, 1845-1961*, at 60 (1974).

⁵² Within social contract theory, whether a particular speaker endorses or instead disdains revolution often turns on whether the person believes consent is a perpetual act or instead a solitary act performed (and afterwards relinquished) at the threshold. Sometimes political philosophers acknowledge the existence of both forms and give them separate names. For example, Patrick Atiyah identifies the "promise" as a subspecies of consent, in which, at a single decisive moment, there is a willed abdication of the power of successive revision normally operating in consent. See P. ATIYAH, *PROMISES, MORALS, AND LAW* 177 (1981). Locke differentiates "express consent" from "tacit consent" on this basis. The first occurs in a decisive moment and is not revocable; here, the obligation incurred, rather than the action performed, becomes "perpetual." The second is open, iterative, revocable; it can be withdrawn at any time. See J. LOCKE, *supra* note 4, at 65. Within marriage law, whether a given civil or religious institution prohibits or instead sanctions separation and divorce turns on whether the consent of bride and bridegroom is seen as an exclusively threshold act (that once given, cannot then be retracted) or instead as perpetual

It provides the language for appreciating what is at stake in the apparently "circular" phenomenon in which the ratification (the moment of distributing the contract to "the population" for its approval) gives rise to the amendments (themselves the agents of the Constitution's eventual distribution to the entire population). In effect, the participants in the ratification debates settled the question of whether the parties to this contract would exercise "threshold consent" or instead "perpetual consent" by using the great, solitary "threshold" moment to revise the Constitution in such a way that the gateways become "perpetual." The Federal Assembly had already built into the Constitution the possibility of perpetual consent in the article V provisions for amendment. But the ratifiers, in effect, made the immediate application of article V a precondition for their own validation of article V and the contract's other four articles. By specifying a series of materialized loci, they gave the practice of perpetual consent a material shape and a locatable form—newspapers, jury box, assembly hall, and (as will become clear) arms.

If the amendments as a group are "distributive" in their general character,⁵³ the second amendment is so specifically.⁵⁴ The

(consent is each day renewed; it may therefore also be retracted). Within United States medicine, ethical norms in therapeutic practice and in experimental research are distinguishable by the much greater emphasis in the second on consent as ongoing. The 1947 Nuremberg Code, the 1975 Declaration of Helsinki, as well as state codes (such as the California Act on the Protection of Human Subjects in Medical Experiments), all overtly state as a central thesis the ongoing and revisionary nature of consent. "He or she should be informed that he or she is at liberty to abstain from participation in the study and that he or she is free to withdraw his or her consent to participate at any time." *Declaration of Helsinki, Principle 9, reprinted in LAW, SCIENCE, AND MEDICINE* 928 (J. Areen, P. King, S. Goldberg, & A. Capron eds. 1984). For all three codes, see *id.* at 925-26, 927-29, 972. In a hospital stay, in contrast, patients are ordinarily not told that their consent is ongoing, that the food and the medicines they are handed are (like the operations they undergo) subject to their consent, and that they may change their minds about a plan of treatment to which they have previously agreed.

⁵³ In general, the decentering of power at the ratification conventions, rather than opposing the centralizing tendency of the Constitutional Convention, can be seen as extending the distribution of power occurring there through the "separation of powers" doctrine. The idiom of "checks and balances" expresses distribution in a defensive or negative language, the withholding of all power from any one location. But this can alternatively be phrased in the positive as a dispersal of power across all locations. The language of "distribution" is used by Hamilton, who speaks of checks and balances as "[t]he regular distribution of power into distinct departments." *THE FEDERALIST NO. 9*, at 72 (A. Hamilton) (C. Rossiter ed. 1961). So, too, it is a natural mental habit for Madison to go from "separation of powers" to the image of people as a whole. Thus, in his February 6, 1792 article in *The National Gazette*, he writes,

repeated call for the decentering of military power at the ratification conventions was, in its overt phrasing, consciously poised against the centrist habits of the Constitutional Assembly. But in fact the amendment works to amplify, rather than to contradict, the dispersal of military power that had already occurred at the center. What is remarkable is that the two sites of contract-making—the Federal Assembly and the ratification assemblies—each in their separate decisions on the military, chose the largest possible unit of people to oversee questions of war. During the Federal Assembly’s deliberations on article I, section 8, the power to declare war—what Joseph Story would one day call “the highest act of legislation”⁵⁵—was explicitly withheld from the President as well as from either the House or the Senate acting alone; it was given instead to the full Congress, the largest pool of persons among the three federal branches.⁵⁶ Again, during the deliberations of the ratification assemblies, the insistent call for a “right to bear arms” amendment envisioned military responsibility dispersed across the entire population. At each site, a decision was made that war must be overseen by a group whose size was the largest possible and, perhaps even more striking, whose size was coterminous with the

“In bestowing the eulogies due to the particular and internal checks of power, it ought not the less to be remembered, that they are neither the sole nor the chief palladium of constitutional liberty. The people who are authors of this blessing, must also be its guardians.” Madison, *Government of the United States*, reprinted in THE WRITINGS OF JAMES MADISON COMPRISING HIS PUBLIC PAPERS AND HIS PRIVATE CORRESPONDENCE, INCLUDING NUMEROUS LETTERS AND DOCUMENTS NOW FOR THE FIRST TIME PRINTED 93 (G. Hunt ed. 1906). On the “separation of powers” doctrine as a distributive mechanism, see Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987). Akhil Amar has analyzed the “majoritarian,” “structural,” and “educational” characteristics of the Bill of Rights that have been obscured by what Amar described as a “clause-bound approach” to “constitutional discourse.” Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1201-10 (1991).

⁵⁴ It is appropriate that the second amendment was, as Hardy observed, “one of the least controversial” and, thus, one of the most consensual of the ten amendments. See Hardy, *supra* note 37, at 606.

⁵⁵ 2 J. STORY, *supra* note 5, at 87.

⁵⁶ This constitutional requirement of declaration by the full bicameral assembly strongly suggests that the policy of presidential first-use cannot be remedied by giving the decision to a congressional committee, or to “sample” members of each house, or to a council of state chosen by Congress, as several authors have recommended. See Cox, *supra* note 32, at 1633; Forrester, *supra* note 32, at 1641; Goldstein, *supra* note 32, at 1587; Stone, *supra* note 32, at 107. For a more elaborate analysis, see Banks, *First Use of Nuclear Weapons: The Constitutional Role of a Congressional Leadership Committee*, 13 J. LEGIS. 1 (1986). On the requirement of numerical participation, both in Congress and in the population at large, see *infra* notes 118-35 and accompanying text.

size of the deliberative body making the decision. The Constitutional Congress made the full Congress the arbiters of war; the Popular Assemblies made the population the arbiters of war. None disarmed themselves. To have done so would have been to dissolve the capacity even to enter into the act of contract-making.

B. *Distributive Inequities Dissolve the Contract*

As this section will show, throughout the ratification period, inequities of distribution in the nation's arms are described in the idiom of military defeat. Because armed coercion and social contract are understood as two antagonistic models, what is being perceived in this inequity is not some local species of unfairness, but a dissolution of the basic social contract itself.

The right to bear arms is widely recognized as going hand in hand with the long standing distress over standing armies. The pre-Revolutionary American arguments against the standing army—as well as the longer tradition of British arguments—had as a single goal their opposition to the concentration of the military power in the hands of a monarch, president, or any other occupant of an executive site. They were thus themselves distributive arguments, urging a decentralization of the military by means of the militia. At least seven of the states⁵⁷ had constitutional provisions protecting the militia and prohibiting (or advising against) a standing army. When during the federal convention Madison identified “large standing armies” as “the greatest danger to liberty,”⁵⁸ he was echoing a long tradition which saw not foreign armies but inequities in one's own military as subverting the social contract because they slide the society back into the blur of pre-contractual coercion. That backward slide is registered in the two recurring constructs of “invasion” and “disarming.”

An inequality of arms, a concentration in one location and an absence in another, is described repeatedly in Anglo-American

⁵⁷ These seven states are Virginia, Pennsylvania, Maryland, North Carolina, New York, Massachusetts, and New Hampshire. See 2 THE COMPLETE ANTI-FEDERALIST 447 n.26 (H. Storing ed. 1981). For a contemporary argument that the state controlled militia is a distributive mechanism designed to act as a “check on the abuse of military power by the federal government,” see *Perpich v. United States Dep't of Defense*, 666 F. Supp. 1319 (D. Minn. 1987), *aff'd*, 880 F.2d 11 (8th Cir. 1989), *aff'd*, 110 S. Ct. 2418 (1990).

⁵⁸ MADISON REARRANGED, *supra* note 47, at 524.

history as a military defeat or "invasion." For example, a 1769 resolution of the Massachusetts House of Representatives held:

That the establishment of a standing army, in this colony, in a time of peace, *without the consent* of the General Assembly of the same, is an INVASION of the natural rights of the people, as well as of those which they claim as free born Englishmen, confirmed by magna charta, the bill of rights, as settled at the revolution, and the charter of this province.⁵⁹

Benjamin Franklin one year later wrote to Samuel Cooper of the possibility that the King will raise and quarter his army:

And while we continue so many distinct and separate States, our having the same Head . . . will not justify such an *Invasion* of the Separate Right of each State to be consulted on the Establishment of whatever Force is proposed to be kept up within its Limits, and to give or refuse its *Consent*, as shall appear most for the Public Good of that State.⁶⁰

The inequalities that give rise to the conceptual geography of invasion are not themselves always inequalities of physical force or physical arms. One post-revolutionary tract arguing against inheritable military titles—Cassius's 1783 *Considerations on the Society or Order of Cincinnati*⁶¹—perceived the unequal distribution of military honor among the revolutionary soldiers as leading to two groups of citizens, the titled and the untitled (and implicitly, the entitled and the unentitled). Can anyone believe, Cassius asked, "that the remaining rights of the people which are yet left un-

⁵⁹ Resolutions of the Massachusetts House of Representatives, June 29, 1769, quoted in J. REID, IN DEFIANCE OF THE LAW: THE STANDING-ARMY CONTROVERSY, THE TWO CONSTITUTIONS, AND THE COMING OF THE AMERICAN REVOLUTION 166 (1981) (italics added).

In the *Second Treatise*, Locke speaks of "invading" another's rights, as well of "invading" the body and "invading" property which is an "annexation" to the body. See J. LOCKE, *supra* note 4, at 10, 15-17, 115-16. When he uses the word for a nonphysical object such as rights or freedom, he often includes the word "rapine" in close proximity, as though to restore the physical referent. The population enters the social contract for mutual security, to "secure them from injury and violence . . . [which is] a trespass against the whole species." *Id.* at 10.

⁶⁰ Letter from Benjamin Franklin to Samuel Cooper (June 8, 1770), cited in J. REID, *supra* note 59, at 171.

⁶¹ See Cassius, *Considerations on the Society or Order of Cincinnati, Lately Instituted by the Major-Generals, Brigadiers, and Other Officers of the American Army, Proving that it Creates, A Race of Hereditary Patricians, or Nobility, and Interspersed with Remarks on its Consequences to the Freedom and Happiness of the Republic*, in ANGLO-AMERICAN ANTIMILITARY TRACTS 1697-1830, *supra* note 34 [hereinafter *Order of Cincinnati*].

touched, will not be invaded and violated, by men, who [disdain] the condition of private citizens . . . ?”⁶²

The pre-revolutionary and post-revolutionary charge of “invasion” resurfaces continually during the ratification period. Agrippa’s 1788 letters in *The Massachusetts Gazette*, for example, include among their proposed conditions for accepting the Constitution an amendment ensuring each state’s control of its own militia and an amendment prohibiting invasion: “[N]o continental army shall come within the limits of any state, other than garrison to guard the publick stores, *without the consent* of such states in times of peace.”⁶³ Luther Martin’s letters to *The Maryland Journal* argue that if the central government’s call to the militia is unmediated by the authorizing “consent” of the states, the country will enter the condition of “martial law” and freemen will enter the situation of “slaves.”⁶⁴ The palpable apprehension of “invasiveness”—the trespass over the physical boundaries of the state, over the nation-state, or instead over the physical boundaries of persons—is itself memorialized in the progression of the amendments in the Bill of Rights. After the second amendment’s prohibition of an unequal distribution of arms comes the third amendment’s prohibition of the nonconsensual entry of soldiers into houses, followed by the fourth amendment’s prohibition of “unreasonable searches and seizures” of “persons, houses, papers, and effects.”⁶⁵

The insistent appearance of the invasion idiom in both the revolutionary and the ratification periods underscores the fact that the “invading” army may belong to another nation or to one’s own. The unequal dispersal of military power—rather than the overt spectacle of incoming soldiers—instigates the vision of contractual collapse. As defeat follows invasion, so the spectre of “disarming”⁶⁶ follows that of “invasion.” The invocation of this second

⁶² *Id.* at 10. The importance of prohibiting titles in a distributive society is saluted by Madison:

Could any further proof be required of the republican complexion of this system, the most decisive one might be found in its absolute prohibition of titles of nobility, both under the federal and the State governments; and in its express guaranty of the republican form to each of the latter.

THE FEDERALIST NO. 39, at 242 (J. Madison) (C. Rossiter ed. 1961).

⁶³ *Agrippa*, XVIII, *Mass. Gazette*, no. 406, Feb. 5, 1788, *reprinted in* P. FORD, *ESSAYS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE 1787-1788*, at 11-19 (1892) (emphasis added).

⁶⁴ *Luther Martin*, III, *Maryland J.*, no. 1021, Mar. 1788, *reprinted in* P. FORD, *supra* note 63, at 358-59.

⁶⁵ See U.S. CONST. amends. II, III & IV.

⁶⁶ The word “disarm” has the peculiarity of being, on the one hand, a neutral

idiom displays the same clash of the literal and the metaphorical, the same apprehensive conflation of foreign and domestic agents of contractual subversion. The 1689 Declaration of Rights presented to William and Mary, that later became the British Bill of Rights, contained as its fifth and sixth charges against James II the assertion that he had attempted "to subvert" the "[l]aws and [l]iberties" by "raising and keeping a Standing army . . . in Time of Peace without Consent of Parliament" and "[b]y causing several good Subjects, being Protestants, to be disarmed at the same Time when Papists were both armed and employed contrary to Law."⁶⁷ The British king, as Roy Weatherup stressed, "did not disarm Protestants in any literal sense; the reference is to his desire to abandon the militia in favor of a standing army and his replacement of Protestants by Catholics at important military posts."⁶⁸ During the American Constitutional Convention, Elbridge Gerry opposed the standing army and national control of the militia on the grounds that they approximated a "disarm[ing]" of the state citizenry and a shifting of national structures toward a "system of Despotism."⁶⁹

The charge of disarming recurs constantly during the ratification debates. The enslavement of the population that Luther Martin envisioned in Maryland would come about, he argued, through the standing army's attempts "to disarm" the militia.⁷⁰ At the Pennsylvania Ratification Committee, the minority report counseling against ratification attributed its dissent in part to the need for a constitutional provision stipulating "no law shall be passed for

descriptive term registering the state of being deprived of one's arms and, on the other hand, a concussive term within strategic writings, now most familiar to us in Clausewitz's formulations, registering total defeat by the opponent. See K. VON CLAUSEWITZ, *ON WAR* 5 (O.J. Jolles trans. 1943). As the quoted passages suggest, the first (the deprivation of arms) is often referred to as though it were the second (total subjugation), precisely because the first is perceived as inevitably entailing the second. Or, phrased in the other direction, "disarm" in strategic writings can have the resonance of total subjugation precisely because the apparently neutral deprivation of arms always involves an open or obscure state of coercion. Logically, the neutral action of "disarming" precedes the more inflammatory apprehension of "invasion" which in turn precedes the strategic outcome of "disarming" as "defeating."

⁶⁷ Weatherup, *supra* note 36, at 973 (quoting the Bill of Rights, 1 W. & M., sess.2, c. 2 (1689)). Cf. Hardy, *supra* note 37, at 571-87 (detailing the development of the political right to bear arms in seventeenth century Britain).

⁶⁸ Weatherup, *supra* note 36, at 973.

⁶⁹ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 385 (M. Farrand ed. 1966).

⁷⁰ Martin, *Mr. Martin's Information to the General Assembly of the State of Maryland*, reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 57, at 59-60.

disarming the people.”⁷¹ The fact that Pennsylvania muskets were called in for repair during the period of debate led those opposing ratification to suspect military suppression of their dissent. In an address entitled *To the People of Pennsylvania*, Centinel asked, “What otherwise is the meaning of disarming the militia, for the purpose as it is said of repairing their muskets at such a particular period? Does not the timing of the measure determine the intention?”⁷² Aristocrotis, too, charged that a recall of the public arms “upon the pretence of having them cleaned” was a way of “disarm[ing]” the militia in order to discredit and disempower all objections to ratification.⁷³

The verbal reflexes of “invasion” and “disarming” consistently reveal that a nondistribution of military power is perceived not as a secondary or tertiary attribute of a given contractual society, but as something so profoundly incompatible with it that the form of the government itself dissolves: contract disappears, and it is replaced by latent despotism. Conversely, “militia” is understood to mean “a distribution of military power,” and this “distribution of military power” is recognized as essential to the preservation of the social contract itself. It is for this reason that nineteenth century legal philosophers like William Rawle identified the militia “as the palladium of the country”⁷⁴ and political leaders like Governor Brooks of Massachusetts called it “the palladium of . . . civil rights.”⁷⁵ Joseph Story, explaining why the right to bear arms is “justly” considered “the palladium of the liberties of a republic,” said that the militia provides a free country with a defense “against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers.”⁷⁶ At the opening of this triad,

⁷¹ *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents, 1787*, reprinted in 2 B. SCHWARTZ, *supra* note 34, at 665.

⁷² Centinel, *To the People of Pennsylvania* (Jan. 5, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 57, at 182.

⁷³ Aristocrotis, *The Government of Nature Delineated or An Exact Picture of the New Federal Constitution* (1788), reprinted in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 57, at 210. This idiom of “disarming”—as well as the less serious “disabling” or “depriving”—continued into the nineteenth century. For examples, see Presser v. Illinois, 116 U.S. 252, 265 (1886); W. RAWLE, *supra* note 34, at 122-23.

⁷⁴ W. RAWLE, *supra* note 34, at 121. On the use of the word “palladium” for defense achieved through distribution, see 4 RATIFICATION DEBATES, *supra* note 39, at 338.

⁷⁵ *An Inquiry Into the Importance of the Militia*, *supra* note 34, at 68.

⁷⁶ 2 J. STORY, *supra* note 5, at 620. For an overview of the association of arms distribution with democracy in the wider philosophic framework, see Halbrook, *The*

physical invasiveness is attributed to the foreign power, but by the end it has migrated to the ground of internal inequity, as standing armies "afford [a facile means] to ambitious and unprincipled rulers to subvert the government or trample upon the rights of the people."⁷⁷

Across several centuries of Anglo-American political and legal thinking, the basic conception is consistent. In the language of "invasion of rights" and "disarming," metaphor and material reality ride close to one another. Sometimes, as when the American colonists spoke of the British standing army,⁷⁸ what was pictured was the arrival onto the shore and entry into the country of an army referred to as though it were foreign, even though the speakers were themselves British subjects. The "foreignness," the invasiveness, and the capacity to disarm arise not from the fact that the army comes from another shore but from the fact that the army is independent of the population. The idiom of invasion and disarming occurs equally if the speaker is referring to an internal standing army, as when people on the island of Great Britain speak of the standing army there,⁷⁹ or when people in the United States prohibit a standing army attached to its own central government.⁸⁰ One is invaded if there is an inequality of arms in the population group to which one belongs. If half the people in the space of a room were armed, and the other half not, the second group would by this language be disarmed, though the first intended the other no harm.⁸¹

Second Amendment as a Phenomenon of Classical Political Philosophy, in FIREARMS AND VIOLENCE, ISSUES OF PUBLIC POLICY 363-83 (D. Kates, Jr. ed. 1984) (tracing the association in Aristotle, Cicero, Machiavelli, Locke, Sidney, Rousseau, and others).

⁷⁷ 2 J. STORY, *supra* note 5, at 620.

⁷⁸ See *supra* text accompanying notes 59-60.

⁷⁹ See *supra* text accompanying note 68.

⁸⁰ See *supra* text accompanying notes 61-64, 69-73, 76.

⁸¹ The idiom of disarming continues into the present era. In an article entitled *Disarming Congress*, Christopher Paine called attention to the way the Reagan Administration lobbied Congress for MX missile funding while simultaneously renewing Geneva talks. The purpose of that coupling, Paine argued, was "to rearm the nation by disarming the public." Paine, *Disarming Congress*, BULL. ATOMIC SCIENTISTS, June/July 1985, at 6, 6. Sanford Levinson also uses the word "disarm." Of the United States, he wrote: "It is hard for me to see how one can argue that circumstances have so changed as to make *mass disarmament* constitutionally unproblematic." Levinson, *supra* note 37, at 656 (emphasis added). He later connected the Tianamen Square tragedy to a situation entailing a "totally disarmed population." *Id.* at 657.

A free standing missile is the realization of everything that ever was feared in a standing army. It permits the concentration of a military force in a central location. It is attached to executive will rather than to the will of the people. Its structures are permanently in place and depend little on historical situations, leaving no room for improvisations and debate. It is inanimate and depends on the population for nothing. One recalls Madison's two hypothetical governments, the first dependent on its population and therefore permitted to stand, and the second independent and therefore obliged to be eliminated.⁸² In the vocabulary of both the pre-revolutionaries and the Federalists, free standing missiles have disarmed and invaded us—not because we are moment by moment subject to some rhetorical subjugation, but because we have lost our power of authorization over the arms. The contractual society has begun to slip into the blur of precontractual coercion.

Like Locke, the founders understood contract and coercion as oppositional. Thus, the articles of ratification in Massachusetts and in New Hampshire preface their assent with a prayer of thanks that they can make a compact by assent rather than by fraud or surprise:

The Convention . . . acknowledging, with grateful hearts, the goodness of the Supreme Ruler of the universe in affording the people of the United States, in the course of his providence, an opportunity, deliberately and peaceably, without fraud or surprise, of entering into an explicit and solemn compact with each other, *by assenting to and ratifying a new Constitution . . . DO . . . assent to and ratify the said Constitution . . .*⁸³

Like those ratifying the Constitution, those writing it also understood the opposition between “contract” and “force” to be elemental. Madison stressed that “[e]ach State . . . [is] only to be bound by its own voluntary act,”⁸⁴ and *The Federalist Papers* as a whole both open and close with Hamilton's climactic reiteration of the

⁸² See THE FEDERALIST NO. 46, at 300 (J. Madison) (C. Rossiter ed. 1961).

⁸³ 2 RATIFICATION DEBATES, *supra* note 39, at 176 (emphasis added). Justice Story noticed this language and commented on its peculiarity. See 1 J. STORY, *supra* note 5, at 248.

⁸⁴ THE FEDERALIST NO. 39, at 244 (J. Madison) (C. Rossiter ed. 1961). During the Virginia ratification debate, Madison contrasted the peaceable formation of the American government, which has “excited so much wonder and applause,” with the formation of other countries: “How was the imperfect union of the Swiss cantons formed? By danger. How was the confederacy of the United Netherlands formed? By the same. . . . How was the Germanic system formed? By danger . . .” 3 RATIFICATION DEBATES, *supra* note 39, at 616-17.

fundamental distinction. “[I]t seems to have been reserved to the people of this country,” he wrote in the first paragraph of the first number, “to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.”⁸⁵ The final paragraph of the final number returns to the same ground: “The establishment of a Constitution, in time of profound peace, by the voluntary consent of a whole people, is a PRODIGY, to the completion of which I look forward with trembling anxiety.”⁸⁶ Subsequent legal commentaries continued to perceive the Constitution within this basic framing opposition. So, for example, in 1825, William Rawle opened *A View of the Constitution* by placing it in the framework of contract, in contradistinction to political structures that emerge “under compulsion, or by artifice, or chance.”⁸⁷ The repeated placement of the opposition in a terminal position—the beginning and the end of *The Federalist Papers* and the opening of Rawle’s commentary—underscores its primacy.

The opposition between contract and coercion does not logically mean that the social contract must be empty of military provisions or war-making powers. On the contrary, it is precisely war-making that must be overseen with explicit constitutional provisions. It must be given a level of rigorous scrutiny and must be subjected to explicit consent procedures, warranted by nothing else within the polis except the basic contract itself. This necessity accounts for the rigor and persistence with which the phrase “without consent” is attached to phrases about the standing army. With almost breathtaking regularity, each of the sentences about “invasion” or “disarming” cited earlier—in the Massachusetts Resolution, in Franklin’s letter, in Gerry’s protest on the floor of the Assembly, and in Agrippa’s letters to the *Gazette*—posits the gateway of explicit consent as a threshold that must be passed through. The terms “army” and “consent” are inseparable. Other than the Instruments of Ratification themselves, there is no issue to which the word “consent” is so unrelentingly attached. Only in this way can “force” be brought into and made compatible with the social contract. The precise way in which the practice of contractual activity becomes embedded in military structures in a civil society emerges below.

⁸⁵ THE FEDERALIST NO. 1, at 33 (A. Hamilton) (C. Rossiter ed. 1961).

⁸⁶ *Id.* No. 85, at 527.

⁸⁷ W. RAWLE, *supra* note 34, at 13.

II. SEALING THE SOCIAL CONTRACT THROUGH DISTRIBUTIVE UNIFORMITY

Defeat is, as the previous section suggested, the perceived form of nondistribution. But what is the material form of distribution? The only way one can have coercive power within a contractual society without eliminating the context of contractual structures is by distribution. Thus, categories that appear to be ethically neutral, like sheer material uniformity and sheer numerical spread, inevitably lead to the ethically charged language of political equity, representation, notions of citizenship, "civilian power," and self-authorizing models such as voting. As nondistribution is envisioned (even in a pacific context) as military defeat, so, conversely, distribution is perceived as the material realization of contract.

A. *Of Materiality and Sentience*

In part, the desired uniformity is thought of as geographical spread. During the Virginia ratification debates, Mr. Grayson, worrying about centralization of the military, invoked as a warning the model of Britain, where there were admirable laws about the militia itself but where the militia had been permitted to atrophy in Scotland and Ireland.⁸⁸ In part, the uniformity is conceived in terms of a class spread. Thus, in the same Virginia ratification debates, George Mason imagined the militia of a future day in which "the higher classes of people," as he put it, are gradually eliminated from the obligation of duty.⁸⁹ In part, the uniformity is also understood as a distribution across age and property. During the ratification period, Richard Henry Lee's pamphlet, *Letters of a Federal Farmer*, went within a few months through "four editions (and several thousands) of the pamphlet."⁹⁰ Asserting like Mason a present equity, Lee proceeded to imagine hypothetical inequities of the future when there would be a reversion from contract to the model of coercion, with the young and landless lording over the old and propertied:

⁸⁸ See 3 RATIFICATION DEBATES, *supra* note 39, at 418.

⁸⁹ *Id.* at 426.

⁹⁰ PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 277 (P. Ford ed. 1888). On the contested authorship of these letters, see 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 57, at 214-17; Wood, *The Authorship of the Letters from the Federal Farmer*, 31 WM. & MARY Q. 299 (1974).

Should one fifth or one eighth part of the men capable of bearing arms, be made a select militia, as has been proposed, and those the young and ardent part of the community, possessed of but little or no property, and all the others put upon a plan that will render them of no importance, the former will answer all the purposes of an army, while the latter will be *defenceless*.⁹¹

The young and landless, by means of an inequality of arms, would suddenly rule over the older and landed. Universalizing provisions, he acknowledged, must be made and lodged somewhere, "but still we ought not so to lodge them, as evidently to give one order of men in the community, undue advantages over others; or commit the many to the mercy, prudence, and moderation of the few."⁹²

Mason's and Lee's statements together make it clear that when there is an inequity of arms, one may be disadvantaged by being included in the militia or may instead be disadvantaged by being excluded. Both arguments agree only that the nonuniform model is coercive. Almost any distinguishing feature—whether an irregularity in guns, titles, military exercise, or service—sets off the contractual alarm.⁹³ Aristocrotis, for example, saw the constitutional division of the militia into two parts—active and nonactive—as prelude to subjugation on the basis of class and age.⁹⁴ Concerning one class made up of the young and landless (here the apprehensions of Aristocrotis and Richard Henry Lee coincide), Aristocrotis wrote:

⁹¹ Lee, *Letters of a Federal Farmer*, in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 90, at 305 (emphasis added).

⁹² *Id.* at 306. Inequities in distribution across age continued to be a concern in the nineteenth century. In *An Inquiry Into the Importance of the Militia*, Sumner charted the gradual contraction in the age of those serving in the militia: at first those exempted from service (aged 40 to 45) participated by contributing money, but when a still younger rung of men (aged 35 to 40) was later excluded, those originally exiled were relieved of even the obligation to contribute financially. See *An Inquiry Into the Importance of the Militia*, *supra* note 34, at 49-51.

⁹³ Here, Gandhi's *Autobiography* is again illuminating. In a chapter called "Miniature Satyagraha," he describes the acts of abstention and noncompliance taken by himself and other Indians in a voluntary corps in the army. Their actions protested not the existence of the military (they themselves had volunteered) but inequities in authority between the English students appointed as their corporals and themselves. They insisted that the position of corporal either be eliminated altogether or that it come about by the vote of the corps rather than by the appointment of the commanding officer. In effect, they established as the only permissible alternatives either complete equality, or a non-equality brought about by the explicit vote of the participants, as Gandhi himself was the "chairman" and "unofficial" representative of the corps. See 2 M. GANDHI, *supra* note 35, at 525-29.

⁹⁴ See Aristocrotis, in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 57, at 202.

[By their] daring of spirit [they] may gain an ascendancy over the minds of the vulgar The second class or inactive militia, comprehends all the rest of the peasants; viz. the farmers, mechanics, labourers, etc. which good policy will prompt the government to disarm. It would be dangerous to trust such a rabble as this with arms in their hands.⁹⁵

Two unexpected features emerge across these various claims for uniformity. The constancy of their appearance underscores their importance. The first is materiality. The reversion to the coercive model is pictured as a divestiture of the people's materiality, their very physical substance. Richard Henry Lee wrote:

It is true, the yeomanry of the country [at the present time] possess the lands, the weight of property, possess arms, and are too strong a body of men to be openly offended—and, therefore, it is urged, they will take care of themselves, that men who shall govern will not dare pay any disrespect to their opinions.⁹⁶

But he went on to imagine that a central power, Congress as it happens, could "by modelling the militia" gradually over "twenty or thirty years . . . by means imperceptible" divest men "of that boasted weight and strength."⁹⁷ The same apprehension of material divestiture is pictured where arms themselves are evenly dispersed but the insignia of military authority are not. In his 1783 tract against the Order of Cincinnati, Cassius predicted a race of hereditary patricians with access to centers of civil and military power "[a]nd the whole country besides themselves, a mere mob of plebeians without weight or estimation."⁹⁸ The nonuniform dispersal of guns present in the displacement of a militia by a standing army disarms and severs parts of the body. Sometimes a specified part of the body is removed, as when John DeWitt, in his essays in the *American Herald*, described the new government's discomfort with putting "arms in the hands of a nervous people" as the necessity of "catching Samson asleep to trim him of his locks."⁹⁹ More frequent are the steady stream of references to a generalized form of bodily materiality: "weight," "burden," "firmness," or "ruggedness."¹⁰⁰

⁹⁵ *Id.* at 202-03.

⁹⁶ Lee, *supra* note 91, at 305.

⁹⁷ *Id.*

⁹⁸ Cassius, *Order of Cincinnati*, *supra* note 61, at 13.

⁹⁹ DeWitt, *To the Free Citizens of the Commonwealth of Massachusetts*, *Am. Herald*, Oct.-Dec. 1787, reprinted in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 57, at 36.

¹⁰⁰ Sumner, for example, called people at the time of the revolution "that rugged

people" and spoke of the "masculine virtues of constancy, fidelity, and firmness, which governed her conduct." See *An Inquiry Into the Importance of the Militia*, *supra* note 34, at 60 (emphasis added). Though Sumner here calls the virtues "masculine," and though the vocabulary can easily be read as gendered, it would in the long run be an error to read the idiom narrowly since the language of materialization belongs to "resistance" whether militarist or pacifist and whether male or female. This same constellation of words, for example, recurs in Gandhi's conception of resistance: judging the English phrase "passive resistance" inadequate to express the actions in which he was engaged, Gandhi designed a public contest to elicit an alternative phrase. Out of the contest emerged the then newly invented, but now familiar word, Satyagraha, chosen because it means firmness in the truth ("Sat=truth, Agra=firmness"). See 2 M. GANDHI, *supra* note 35, at 474.

A similar emphasis on "firmness" and "materiality" occurs in conjunction with women soldiers, military leaders, or heads of state. Antonia Fraser devotes a chapter of *The Warrior Queens* to "Iron Ladies." See A. FRASER, *THE WARRIOR QUEENS* 312, 315 (1989). Though the designation of Golda Meir's "iron hand" originates with a later president of Israel, and the designation of Margaret Thatcher as the "Iron Lady" originates with the Soviet Union's *Red Star*, the attributions were accepted by the women themselves. *Id.*

In her poem on Boadicea, Judy Grahn salutes the same resistant materiality: "I am the wall at the lip of the water/I am the rock that refused to be battered." *Id.* at 304. When woman soldiers themselves speak, the stress on a resistant materiality becomes evident less in the materials of metal, iron, or stone than in the fact of the resistant body. In a missive to the English military leadership, Joan of Arc wrote:

King of England, and you Duke of Bedford, calling yourself Regent of France . . . do right . . . Surrender to the Maid sent hither . . . the keys of all the good towns you have taken and laid waste in France. . . . And you, archers, comrades in arms, gentles and others, who are before the town of Orleans, retire in God's name to your own country. If you do not, expect to hear tidings from the Maid who will shortly come upon you to your very great hurt. . . . I am sent here in God's name, the King of Heaven, to drive you body for body out of all France.

M. WARNER, *JOAN OF ARC: THE IMAGE OF FEMALE HEROISM* 68 (1981).

A Palestinian woman, expressing her readiness to fight whenever called, described her political resistance in terms of the body:

Often there are applications and documents to fill out and always there is the question of where one is born. . . . [W]hen the application is returned, Palestine is always crossed out and Israel written in, instead. . . . [N]ow, I write what they wish and I say nothing. But I am Palestinian. My hair is Palestinian, my body is Palestinian, and the words I speak are Palestinian. My death will be Palestinian!

VALIANT WOMEN IN WAR AND EXILE: THIRTY-EIGHT TRUE STORIES 58 (S. Hayton-Keeva ed. 1987). The emphasis on bodily materiality found among female soldiers, whether in the medieval or modern period, must be distinguished from the external concentration on one narrow attribute of the body: the sexual. Antonia Fraser has observed the tendency of women soldiers to be described obsessively by men as alternately chaste and insatiable. See A. FRASER, *supra*, at 11. Female pacifism reveals the same stress on bodily materiality. It is evident, for example, in the protest strategies of Greenham women who conceive of their bodies as a "constant source of freshly invented obstructions." Snitow, *Holding the Line at Greenham*, *MOTHER JONES*, Feb./Mar. 1985, at 30, 42.

Material density is key to the political construct of uniformity. In all these instances, the material nonuniformity of persons (geographical location, class, age, land) must be compensated for and irregularities eliminated by the strict material uniformity of guns, insignia, and degree of participatory service. In fact, in the federal convention, in the ratification conventions, and in most subsequent discussions of the right to bear arms, it is startling how often the discussion takes place across the specified material attributes of the weapons themselves. The members of the constitutional convention, for example, debated whether there could be geographical variations of arms—rifles in one local, muskets in another¹⁰¹—and disagreed about the degree of specificity required by words like “arming” and “organizing”: “[Then Mr. King, b]y way of explanation said that by ‘organizing,’ the committee [he] 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.”¹⁰²

The same startling attention to materiality surfaces in William H. Sumner’s brilliant 1823 analysis of the militia, *An Inquiry Into the Importance of the Militia to a Free Commonwealth*.¹⁰³ For Sumner the civil nature of the military depended on its being distributive in the most concrete sense. Irregularities in material form became for him alarming evidence of the country’s growing indifference to the importance of keeping an army within a contractual frame:

This is to be apprehended from the distribution of mutilated compilations, and what are called amended editions of the United States System of Infantry Tactics . . . for the militia, in several of the states, the tendency of which, will be to defeat the great design of [C]ongress for establishing [a] uniform system of discipline, and field exercise for the army and militia, throughout the United States.¹⁰⁴

The 1939 Supreme Court case *United States v. Miller*¹⁰⁵ might be criticized for the extraordinary emphasis the Court put on the physical attributes of the weapon. The ruling appeared to be stuck to the physical surfaces of the particular gun in the case:

¹⁰¹ See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 69, at 386.

¹⁰² MADISON REARRANGED, *supra* note 47, at 520-21.

¹⁰³ See *An Inquiry Into the Importance of the Militia*, *supra* note 34, at 65.

¹⁰⁴ *Id.* at 65-66.

¹⁰⁵ 307 U.S. 174 (1939).

In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.¹⁰⁶

But that odd specificity of materialization, however inappropriate to the Court's ruling, belongs to a long tradition of attention to the physical properties of military equipment, as the Court's own citations from earlier provisions showed:

[a citizen must] provide himself, at his own Expense, with a good Musket or Firelock, a sufficient Bayonet and Belt, a Pouch with a Box therein to contain not less than Twenty-four Cartridges suited to the Bore of his Musket or Firelock, each Cartridge containing a proper Quantity of Powder and Ball, two spare Flints, a Blanket and Knapsack.¹⁰⁷

Although the principle of materiality sometimes surfaces in mystifying attention to the tattered covers of an infantry manual or the length of a barrel of a gun, in fact what is being registered is the transformation of military structures into civil structures, the basic miracle of the social contract. The principle of materiality is itself audible in the doctrinal formulation, "the right to bear arms." To bear arms is to authorize the bearing of arms, to bear them in the sense of carrying them; to bear them in the sense of standing up under them; to bear them also in the sense of risking the hazard to which having them obligates us. The word "bear"—with its complicated undertow of physical weight and the physical actions of sustaining, pressing, or (as in giving birth) bringing forth that weight—has throughout its history licensed the conflation of things within the body (to bear a baby, Shakespeare's to bear eyes, Scott's to bear a brain, Byron's to bear a heart) with things on or close to the body (the bearing of clothes and of weapons).¹⁰⁸ The work of material uniformity is to make irrelevant material characteristics of personhood: age, geography, class, and property.¹⁰⁹ Because

¹⁰⁶ *Id.* at 178. On the judicial attention to the physical properties of weapons, see Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms,"* 49 LAW & CONTEMP. PROBS. 151, 158-59 (1986); Kates, *supra* note 36, at 248, 249, 259-60; Weatherup, *supra* note 36, at 168.

¹⁰⁷ 307 U.S. at 181.

¹⁰⁸ These references for "bear" are drawn from the four-page entry for the word in *The Oxford English Dictionary*. See THE OXFORD ENGLISH DICTIONARY 731-34 (1933).

¹⁰⁹ Similarly, race is later made irrelevant, and still later, gender. See *infra* text

evenness permits everything else to be uneven, "collective" or "uniform" rights simultaneously allow high degrees of individuality and hence come to be misidentified as themselves "individual." The insistence that solid infantry books be dispersed evenly across the entire geography (or age or class range) relieves the population from being required to occupy a given local geography (or age or class) in order to become eligible for full political empowerment.

The stress on materiality is deepened and clarified by the second attribute which emerges beneath the surface of the call for uniformity: sentience, the capacity for representative feeling, or, as it was repeatedly called during the ratification debates, fellow-feeling. The overt descriptions of the militia, as well as the underlying theoretical accounts of "representation" and "con-sent" (whose etymology in "con-sentir," "to feel with," makes overt the continuity of feeling across persons),¹¹⁰ turn on these terms. Not everyone must serve, but delegates from all geographical areas, class, age, and property levels must be present to have "fellow-feeling" and judge the aversiveness or the worth of the actions undertaken. The issue is ethical; it is conceived as a matter of fairness, an attempt to establish what in twentieth century discussion of distributive justice is called a "symmetry of everyone's relations to each other."¹¹¹ Thus at the Virginia Assembly, Mr. Mason had formulated the uniformity argument on the militia using these terms. A standing army, a militia chosen from the central government, or a militia drawn unevenly across geography, age, and class, will be nonsentient, without a knowledge of the population's feelings and interests: "The representation being so small and inadequate, they will have no fellow-feeling for the people."¹¹² The phrase "fellow-feeling" recurred, almost as an incremental refrain, in Patrick Henry's brilliant analysis of contract before the same Virginia Assembly.¹¹³

accompanying notes 151-59.

¹¹⁰ While many etymologies are controversial, the derivation of "consent" in "con" and "sentire" is consistent with numerous authorities. See I E. KLEIN, *A COMPREHENSIVE ETYMOLOGICAL DICTIONARY OF THE ENGLISH LANGUAGE: DEALING WITH THE ORIGINS OF WORDS AND THEIR SENSE DEVELOPMENT THUS ILLUSTRATING THE HISTORY OF CIVILIZATION AND CULTURE* 337 (1966); C. ONIONS, *OXFORD DICTIONARY OF ENGLISH ETYMOLOGY* 206 (1966); E. PARTRIDGE, *ORIGINS: A SHORT ETYMOLOGICAL DICTIONARY OF MODERN ENGLISH* 116, 605 (1966). The sense of the word as "a feeling with or across persons" is apprehensible in the closely related word "consentient."

¹¹¹ J. RAWLS, *A THEORY OF JUSTICE* 12 (1971).

¹¹² *RATIFICATION DEBATES*, *supra* note 39, at 426.

¹¹³ See B. SCHWARTZ, *supra* note 34, at 766, 770, 809, 817. Common to Patrick

The center of the collective case against the standing army is precisely its being nonsentient, severed from the knowledge of the sentience of the population. "A standing army is still a standing army by whatever name it is called; they are a body of men distinct from the body of the people."¹¹⁴ The idea of the standing army as cut off from the feelings of the citizenry—separated from any base in sentience—recurs constantly.¹¹⁵ It eventually gives rise to the most frequently invoked trope associated with the standing army: the image of the nonsentient "engine," a word that passes up and down the Atlantic coast during the ratification period in the letters of Luther Martin, the letters of Centinel, the *Essays by a Farmer*, and the writings of Brutus.¹¹⁶ The mute nonsentient missiles of the twentieth century, almost wholly independent of the human population they are empowered to destroy, are a vast magnification of this most dreaded attribute of the standing army.

Though the idea of "sentience," "con-sentir," or "fellow-feeling" opens out into the notion of political representation, it preserves at its most *minimal* the guarantee of "self-representation"—the certainty that participants will *at least* have "fellow feelings" for their own embodied personhood. For both the eighteenth and nineteenth century, that capacity for "self-interest" was the greatest safeguard on military power, the final defense of the contract, the "palladium" of all republican liberties. Sumner's *Inquiry Into the Importance of the Militia to a Free Commonwealth* unfolded the principle of self-interest as the center from which the capacity for con-sentir and the

Henry's position during the Revolution and during the ratification were both his framing of all political issues in contractual language and his insistence on the distribution of military authority. His most widely known revolutionary speech ("Gentlemen may cry, peace, peace—but there is no peace. The war is actually begun! . . . Our brethren are already in the field! Why stand we here idle? . . . Is life so dear or peace so sweet . . . Give me liberty or give me death!") was spoken to support a sequence of three resolutions he had made, first asserting the importance of a militia to a free government, then calling out and arming that militia. See R. MEADE, PATRICK HENRY: PRACTICAL REVOLUTIONARY 28-29, 35 (1969).

¹¹⁴ *Essays of Brutus*, in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 57, at 407 (quoting a speaker before the British House of Commons).

¹¹⁵ See, e.g., *Essays by a Farmer*, in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 57, at 22 (describing how troops in countries that have lost political and civil liberties "must not feel like" the population and must have "separate interests" from them).

¹¹⁶ See *Mr. Martin's Information to the General Assembly of the State of Maryland and Letters of Centinel To the Freemen of Pennsylvania*, in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 57, at 27, 140; *Essays by a Farmer*, in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 57, at 33; Brutus, *To the People of the State of New York*, in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 57, at 418.

possibility of civil structures emerge: "The history of all ages proves that large armies are dangerous to civil liberty. Militia, however large, never can be; for it is composed of citizens only, armed for the preservation of their own privileges."¹¹⁷ Uniformity, then, aspires to preserve the contract through a kind of "sentient materialization," a term whose significance for the contemporary problem of nuclear arms will be unfolded below.

The aspiration towards a uniformity that achieves this sentient materialization entails a rigorous stress on numbers. Simultaneously, it holds within it an idea about political self-authorization. I want to end by elaborating each of the two ideas because together they reinstate the consensual act in the material plane.

B. *Numbers Count*

The first argument concerns numbers, their materiality, and the way in which that materiality performs a braking function on the rush to go to war. The Framers worked to make the initiation of war difficult and its cessation easy. During the convention, Oliver Ellsworth's judgment that it "should be more easy to get out of war, than into it"¹¹⁸ was shared by most other delegates. George Mason said, "He was for *clogging* rather than facilitating war; but for facilitating peace."¹¹⁹ The notion of *clogging* or *clotting* played a critical role throughout the convention, the ratification debates,¹²⁰ and later legal commentary. Joseph Story saluted the principle of "clogging" when he wrote: "It should therefore be difficult in a republic to declare war; but not to make peace."¹²¹ William Rawle similarly saluted this principle when he observed: "[C]ongress alone can subject us to the dubious results of formal war, a smaller portion of the government can restore us to peace."¹²²

¹¹⁷ *An Inquiry Into the Importance of the Militia*, *supra* note 34, at 7-8.

¹¹⁸ MADISON REARRANGED, *supra* note 47, at 514.

¹¹⁹ *Id.* at 514. In Madison's notes, the record of Mason's argument leads directly to the record of the shift from the word "make" war to "declare" war in article I, section 8. The passage was also cited by Richard B. Morris in his statement before the Foreign Relations Committee during the hearings on war powers. *See* 93 CONG. REC. 1408 (1973).

¹²⁰ For example, Brutus, one of the most important of the anti-federalists, sometimes was absorbed with counting the numbers involved in military decisions. *See* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 57, at 413.

¹²¹ J. STORY, *supra* note 5, at 87.

¹²² W. RAWLE, *supra* note 34, at 106.

Those forming the Constitution, whether at the federal assembly, in the ratification conventions, or in the newspaper debates, always aspired to small armies when they spoke in terms of the nation's injuring power.¹²³ But they always pictured large numbers when speaking in terms of the base of authorization.¹²⁴ They aspired towards a situation that is the opposite of the one we have today, in which the injuring capacity has been pushed to

¹²³ At no point in these writings does the call for universal military service express an aspiration for a massive offensive military power. In the federal convention, suggestions are made that only 1/4 or 1/10 of the militia be in training at any one time and that the entire militia be kept fit by a gradual "rotation" across the fractions. See MADISON REARRANGED, *supra* note 47, at 518.

¹²⁴ This insistence on a wide base of authorization is visible in writings about inclusiveness across differences in age, class, and geography. See *supra* text accompanying notes 88-89, 92, 112, 120. It is also visible in the recurring preoccupation with the discrepancy between the size of an army and the size of a militia, a disproportion ensuring the population's capacity for self-defense and resistance. For example, Madison wrote:

The highest number to which, according to the best computation, a standing army can be carried in any country does not exceed one hundredth part of the whole number of souls; or one twenty-fifth part of the number able to bear arms. This proportion would not yield, in the United States, an army of more than twenty-five or thirty thousand men. 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.

THE FEDERALIST NO. 46, at 299 (J. Madison) (C. Rossiter ed. 1961). This numerical juxtaposition continually reoccurs. In an 1860 address to Congress on the militia, C.L. Vallandigham contrasted the size of the army and the official returns measuring the size of the militia for the year 1808 when the population was seven million (3,204 and 636,386, respectively). See 36 CONG. DEB. 1130 (1860) (address of Hon C. L. Vallandigham of Ohio to the House of Representatives) [hereinafter Vallandigham]. He then contrasted the size of the army and the militia for the year 1858 when the population was about thirty million (17,498 and 2,755,726, respectively). *Id.* at 1130.

The double aspiration—a small numerical base for risk and a large numerical base for authorization—is summarized perhaps most succinctly in an 1836 address to the Congress about the militia: "Let the means of defence be as ample, and the burdens on the people be as light as possible." CONG. GLOBE, 24th Cong., 1st Sess. 235, 237 (1836) (address of Ransom Gillet to the House of Representatives) [hereinafter Gillet]. Madison described that same vision of small risk and large authorization in *The Federalist Papers*:

The Union itself, which it cements and secures, destroys every pretext for a military establishment which could be dangerous. America united, with a handful of troops, or without a single soldier, exhibits a more forbidding posture to foreign ambition than America disunited, with a hundred thousand veterans ready for combat.

THE FEDERALIST NO. 41, at 258 (J. Madison) (C. Rossiter ed. 1961).

extremely large levels, but the base of authorization has been reduced to the smallest possible number of people.

President Nixon stated during the Watergate crisis, "I can go into my office and pick up the telephone and in 25 minutes 70 million people will be dead."¹²⁵ This announcement should probably not count heavily against Nixon or any other individual President. Justice Davis once wrote that this nation "has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution."¹²⁶ For this very reason, solutions must be structural and independent of psychological accidents.

President Nixon's statement had the important effect of calling attention within the government to the presidential first-use arrangement. It led to a genre of discussion that centers on the question of how many people a presidential order to launch, or alternatively a submarine captain's order to launch, must pass through before it reaches Polaris or Minuteman sites. George H. Questor conceptualized the issue in a way that ties it back to the "clogging" or "clotting" formulations of the federalists. Questor asked: "[H]ow many intervening layers of possibly resistant humanity does he have to pass through?"¹²⁷ Questor, as though reassured, at one point remarked:

The published accounts suggest that the positive decisions of as many as three or four [submarine naval] officers altogether are required, to decide whether a duly authorized signal to launch their missiles had indeed been received, and that the physical act of firing them involves the turning of keys at locations physically remote from each other.¹²⁸

The order must pass through the authorization of four or five before the weapons pass through the bodies of many millions. Repeatedly, in discussions of nuclear arms, fears about authorization by only one are calmed by reassurances that it is actually two, as fears about two are calmed by reassurances that it is actually twenty,

¹²⁵ See Questor, *Presidential Authority and Nuclear Weapons*, in *Hearings: First Use of Nuclear Weapons*, *supra* note 8, at 218.

¹²⁶ *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 125 (1866), quoted in J. STORY, *supra* note 5, at 103. Davis's words recall Madison's warning in *The Federalist Papers* that "[e]nlightened statesmen will not always be at the helm." THE FEDERALIST NO. 10, at 80 (J. Madison) (C. Rossiter ed. 1961).

¹²⁷ See *Hearings: First Use of Nuclear Weapons*, *supra* note 8, at 218 (emphasis added).

¹²⁸ *Id.* at 215.

and fears about twenty by reassurances that it is actually twenty-five. But in terms of the structure of the Constitution, talk of two or twenty or twenty-five is simply a species of category error.

It is worth remembering how many "intervening layers of possibly resistant humanity" the Constitution envisioned us as having to pass through before war could be fought. In arriving at these numbers, a general principle was continually enacted: it was always—as noticed earlier—the largest possible base over which the founders had control. Thus, when the constitutional convention determined in article I, section 8 that the full Congress should have the power to declare war, they made the first consensual site not the President (an alternative at once rejected) and not the Senate alone (a possibility introduced for its speed and, importantly, rejected on the basis of its speed). So, too, when the Constitution then went to the states, the second consensual locus was made the entire population.

These decisions were made despite the pressures toward "emergency" and "speed" that have *always* been urged in association with war.¹²⁹ Justice Story wrote a lengthy passage about the logic of including both houses in article I, section 8:

Large bodies necessarily move slowly; and where the co-operation of different bodies is required, the retardation of any measure must be proportionally increased. In the ordinary course of legislation this may be no inconvenience. But in the exercise of such a prerogative as declaring war, despatch, secrecy, and vigor are often indispensable, and always useful towards success. On the other hand, it may be urged in reply, that the power of declaring

¹²⁹ The strategic report *Discriminate Deterrence*, written by The Commission on Integrated Long-Term Strategy, provides an example of this pressure; the opening pages make the remarkable suggestion that the country needs more "national consensus" about strategic matters so that it can have "fewer legislative restrictions that inhibit its effectiveness." COMMISSION ON INTEGRATED LONG-TERM STRATEGY, DISCRIMINATE DETERRENCE 2 (1988). The complaint about legislative impediments continually re-emerges. Restrictions on military persons and restrictions on the training of foreign police forces are called "a self-inflicted strategic wound." *Id.* at 19. The refusal to train armies in countries that do not abide by standards of nuclear control is referred to as a species of "micro-management," and a Congress is imagined that will exercise its powers of partnership with the executive by restraining and effacing itself. *Id.* at 47. The legislative prohibitions on testing of our ASAT are presented as an impediment, as are Congress's low military appropriations during periods free of crisis and its reluctance to sanction even "modest expenditures in many Third World countries." *Id.* at 54, 58, 61. Such impatience with legislative encumbrances is remarkable because the aspiration for an unchecked military-executive implies a tolerance of monarchic or totalitarian forms of government. Far

war is not only the highest sovereign prerogative, but that it is, in its own nature and effects, so critical and calamitous, that it requires the utmost deliberation, and the successive review of all the councils of the nation. *War, in its best estate, never fails to impose upon the people the most burdensome taxes, and personal sufferings. It is always injurious, and sometimes subversive of the great commercial, manufacturing, and agricultural interests. Nay, it always involves the prosperity, and not unfrequently the existence, of a nation. It is sometimes fatal to public liberty itself, by introducing a spirit of military glory It should therefore be difficult in a republic to declare war; but not to make peace.* The representatives of the people are to lay the taxes to support a war, and therefore have a right to be consulted as to its propriety and necessity. The executive is to carry it on, and therefore should be consulted as to its time, and the ways and means of making it effective. The co-operation of all the branches of the legislative power ought, upon principle, to be required in this the highest act of legislation, as it is in all others. Indeed, there might be a propriety even in enforcing still greater restrictions, as by requiring a concurrence of two-thirds of both houses.¹³⁰

One of the great peculiarities of the numbers question is the belief that the President is more than one person. The fact that presidential election¹³¹ involves the whole population is wrongly taken as putting greater numerical weight behind the President's

from being embarrassed by this implication, the report unembarrassedly and repeatedly expresses its envy for dictatorships free of legislative restrictions: the "United States has some large competitive disadvantages" in its capacity to move troops "[b]ecause [the Soviet client states] are dictatorships [and] can secretly order aid missions and military units abroad and disguise their missions there." *Id.* at 21. It complains about the crisis-driven "stop-go" military spending of the U.S. and presents as an object of aspiration the "formidable stability that has long marked Soviet defense investment." *Id.* at 59. Elsewhere it observes that a "[a] dictator, or an involuntary coalition dominated by a dictatorship, has less trouble in preparing to launch military operations." *Id.* at 64.

The report is admirable in its emphasis on conventional weapons and in its aversion to nuclear weapons, the use of which can so quickly destroy "a civil society." *Id.* at 66. But in its contempt for legislative restrictions, in its vision of an unencumbered military-executive partnership, and in its envy of the military advantages of totalitarian states, it seems to have quite lost sight of what a civil society is.

¹³⁰ 2 J. STORY, *supra* note 5, at 87 (emphasis added) (footnote omitted).

¹³¹ "Election" may actually be less essential to the Executive argument than it appears, since versions of the argument occur even where the Executive has not been elected. Hanna Pitkin observed that prior to the English Civil War, "the king sought to keep the members of Parliament in their place by arguing that each spoke only for his own separate community; they did not [unlike him] collectively 'represent' the realm." H. PITKIN, *THE CONCEPT OF REPRESENTATION* 252 (1967).

solitary action than behind congressional action, even though Congress entails a much larger body of persons and is collectively elected by the entire national population. The numerical juxtaposition of the presidential electorate with the electorate of an isolated congressional district is a mental act that would be relevant only if one were choosing whether a President or a solitary member of Congress had more authority to kill seventy million persons. That numerical comparison is instead inappropriately used to invalidate the entire congressional authorization of this most fundamental of contractual events.

Locke, urging that military powers be held within the social contract, warned that anyone is "in a much worse condition, who is exposed to the arbitrary power of one man, who has the command of 100,000, than he that is exposed to the arbitrary power of 100,000 single men."¹³² A population that believes it is more safe to be subject to a solitary executive empowered to kill millions than to confront conventional troops has rejected the ground of its own authority within the social contract.

What would be the numbers—*how many intervening layers of possibly resistant humanity*—would make nuclear technology consonant with the Constitution? It would begin, but only begin, with the 535 of Congress. The term "people" in early constitutional writings is used, according to legal opinion in one court case, "to express the entire numerical aggregate of the community, whether state or national, in contradistinction to the *government* or *legislature*."¹³³ Today that would be approximately 250 million. If one takes instead the 14% who participated in World War I, the number would be thirty-five million. If one takes the 3% estimated to have fought in 17th- and 18th-century wars, today it would be over seven million.¹³⁴ If one takes a two-thirds figure at one point introduced as the number needed from the states to authorize the raising of an army (a proposal Madison thought went too far) the number today would be over 166 million. Numbers are dangerous, but the widely straddling figures from 3% to 66%—from seven million to 166 million persons—are invoked here simply to indicate that they are not in the neighborhood of the one or two or twenty persons that enter into nuclear discussions and that have been for the last few

¹³² J. LOCKE, *supra* note 4, at 72.

¹³³ *Luther v. Borden*, 48 U.S. (1 How.) 2, 21 (1849).

¹³⁴ The 3% and 14% ratios of participants to total population in earlier wars are given in Q. WRIGHT, *A STUDY OF WAR* 234, 658, 660 (1942).

decades presented to this population in a deeply insulting and gravely unconstitutional mimesis of collective decision-making. Because democratic weapons have always allowed some rough equivalence between the ratio of those injured and those authorizing the injury,¹³⁵ perhaps the number required for launch authorization ought to be set by those figures—Nixon's seventy million, for example.

C. *Political Self-Authorization: Civil Rights and Rights of Arms*

Another great peculiarity in the language of nuclear argument is the concern that only the President should control the firing of nuclear weapons and not a military officer, because the Constitution tried to guarantee "civilian control." In fact, discussions of the militia and of the right to bear arms did stress the category of civilian, but "civilian" expressed distance from, not proximity to, executive control. Adam Smith wrote: "In a militia, the character of the labourer, artificer, or tradesman, predominates over that of the soldier: in a standing army, that of the soldier predominates over every other character; and in this distinction seems to consist the essential difference between those two different species of military force."¹³⁶ Nothing in the early writings lends support to the notion that the insistence on civilian, rather than military, control could ever have been addressed by imagining a *single* civilian in control. As New Jersey Senator Case argued in the 1976 congressional hearings on the United States's nuclear policy of presidential first-use:

It was pointed out by Abraham Lincoln in a letter to his great friend, William Herndon, that it was this power of the kings to involve their countries in war that our Constitution understood to be the most oppressive of all kingly oppressions. The Founding Fathers resolved to frame the Constitution so that no man could keep that power for himself.¹³⁷

Executive control of the army was, from the infancy of the republic onward, consistently seen as the subversion rather than the fulfillment of the contractual requirement for civilian authority.

¹³⁵ For an account of this equivalence, its role in legitimating war, and its disappearance in the shift from conventional to nuclear war, see E. SCARRY, *supra* note 27, at 151-57.

¹³⁶ A. SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 660 (E. Cannan ed. 1937) (5th ed. 1789).

¹³⁷ 119 CONG. REC. 1395 (1973) (remarks of Sen. Case, N.J.).

Among the “[f]acts...submitted to a candid world” in the Declaration of Independence were two yoked clauses: “He has kept among us, in times of peace, Standing Armies without the Consent of our legislature. He has affected to render the Military independent of and superior to the Civil Power.”¹³⁸ The yoking of these two—the prohibition of an executive armed force and the assertion of the supremacy of civil over military institutions—recurs in many of the state bills of rights: Virginia (1776), Pennsylvania (1776), Maryland (1776), Vermont (1777), Massachusetts (1780), and New Hampshire (1783).¹³⁹ The phrasing of the Massachusetts Declaration of Rights—“and the military power shall always be held in exact subordination to the civil authority and be governed by it”¹⁴⁰—clarifies the way the issue was pictured. Whenever early tracts on the military introduce an “aesthetic” idiom, whenever they begin to speak of the “beauty” of the militia,¹⁴¹ what has instigated the

¹³⁸ The Declaration of Independence para. 2 (U.S. 1776).

¹³⁹ The state-by-state Declarations of Rights are reprinted in B. SCHWARTZ, *supra* note 34, at 235, 266, 280, 319, 339, 375.

¹⁴⁰ *Id.* at 342-43.

¹⁴¹ For example, in his 1786 report to Congress on his plan for the militia, Secretary of War General Knox periodically used an aesthetic vocabulary of light—“lustre,” “splendor,” “glorious”—in close proximity to statements stressing the principles of universality and equality on which the militia must be based. Shortly after emphasizing that the militia must be organized by the states “under one and the same system, to be established by Congress, including the formation of battalions and uniform equipments,” Knox spoke of the importance of instilling “habits which shall give a *lustre* to the American character. The people universally should be furnished with arms, and know how to use them.” J. WILLARD, PLAN FOR THE GENERAL ARRANGEMENT OF THE MILITIA OF THE UNITED STATES (READ BEFORE THE MASSACHUSETTS HISTORICAL SOCIETY) 8 (1863) (emphasis added). For the vocabulary of “splendor” and “glorious,” see *id.* at 33, 38.

This association between “fairness” in the sense of equal distribution and “fairness” in the sense of beauty continued into the nineteenth century. For example, in his 1826 paper on the militia presented to Secretary of War Barbour, William H. Sumner devoted half of the paper to the issue of uniformity. See W. SUMNER, A PAPER ON THE MILITIA PRESENTED TO THE HON. JAMES BARBOUR, SECRETARY OF WAR IN NOVEMBER, 1826, at 15-30 (1833). The proximity of the words “uniform” or “equal” to the word “beauty” can be sensed in the frequency with which “nonuniformity” is explicitly coupled to the words “deformity” or “defect,” sometimes even occurring in apposition, as in the phrase “defective, unequal, and oppressive.” *Id.* at 18. Observing the variations across states in the numerical composition of organizational units such as companies and regiments, Sumner wrote: “All this *deformity* arises from the operation of the existing laws, defeating the *design* of those who granted the power to the National Government, for the sake of ensuring a *perfect* uniformity of organization.” *Id.* at 15 (emphasis added). He then moved immediately from this abstract aesthetic vocabulary of “deformity,” “design,” and “perfect,” to a more concrete and tangible aesthetic practice: “[Congress] can provide arms and equipments for both officers and soldiers, and authorize *the delivery of colors and*

language of beauty is not the luxuriance of the uniforms or the parading display of military might, but the reverse. What is beautiful is the miracle of watching the principle of force brought into and held within the contractual frame. It is this that the parade of the militia displays. The bright uniforms signal uniformity: the decentering, diffusion, distribution, and hence fundamental alteration of the principle of force now relocated from its original position outside to its new position inside the "national pact."¹⁴² In his extraordinary treatise on the subject, William Sumner invokes John Adams as the "civil" father and describes the militia as a "civil" institution that is the palladium of "civil" rights because of its distributive character.¹⁴³ The loss of the distributive is the loss of civil beauty, as is audible in Cassius's lament: "They have laid in

musical instruments from the national armories." *Id.* at 15 (emphasis added). Similarly, in a speech to the U.S. Congress about arrangements for the militia in the state of New York, Ransom Gillet countless times stressed the "civil" nature of the militia by speaking of "citizen soldiers" and by stressing uniformity across age and wealth. He spoke of the thrill—"the beating of the high military pulse"—that comes on seeing the militia not in battle but in the "brilliant military array, conducted in an orderly manner" during "training and martial exhibition." Gillet, *supra* note 124, at 235, 237. For similar kinds of emphases, see Vallandigham, *supra* note 124, at 1130 (reciting in elaborate detail the precise equipment provided for the militia in a 1792 congressional act; for example, "every private among dragoons would be required to find a serviceable horse, of the same height [14½ hands high], with bridal, saddle, mailpillion, valise, holsters, breast-plates, crupper, boots, spurs, pistols, saber, and cartouch-box").

Interestingly, both Knox in 1786 and Sumner in 1826 perceived the continuous uniformity of the civil militia as a cloth or fabric spanning (and presumably sheltering, like a bright canopy) the whole country. Knox said:

[F]or a sum less than four hundred thousand dollars annually, which, apportioned on three millions of people, would be little more than *one-eighth of a dollar* each, an energetic republican militia may be durably established, the invaluable principles of liberty secured and perpetuated, and a dignified national fabric erected on the solid foundation of public virtue.

J. WILLARD, *supra*, at 29 (emphasis altered). Sumner, while stressing the importance of nationally determined uniformity, simultaneously credited the states' decentering of power through the militia "as the grand physical characteristic of state sovereignty. Without it, the pillars of the Union would be too slender to support the national fabric." W. SUMNER, *supra*, at 9 (emphasis added).

¹⁴² Brutus, *To The Citizens of the State of New York*, in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 57, at 375.

¹⁴³ See *An Inquiry Into the Importance of the Militia*, *supra* note 34, at 61, 68 (citing Governor Brooks's observation of the need for an equalization of the militia's "burdens upon the different classes of the community," an observation equating the "civil" and "distributive" principles).

ruins that fine, plain, level state of civil equality, over which the sight of the beholder passed with pleasure."¹⁴⁴

The idiom of "fairness" is, of course, drawn more often from the sphere of justice than from the sphere of aesthetics. The profound inappropriateness of ever applying the phrase "civilian control" to a President's solitary control of nuclear weapons is evident in the insistently decentered meaning of "civilian," an emphasis visible in the conflation of the right to bear arms with the right to vote, a final, and critically important, distributive attribute of the amendment.

The very small number of Supreme Court cases on the second amendment have affirmed its connection to citizenship in the fourteenth amendment,¹⁴⁵ to voting,¹⁴⁶ and to the right of assembly.¹⁴⁷ More serious evidence of the interweaving of voting and arms occurs in the history of the extension of the franchise itself. Both the House and Senate judiciary hearings on the twenty-sixth amendment repeatedly cite the participation of those fighting in Vietnam and of those exercising power to consent by refusing to be drafted as having earned for that generation and all that followed the right to vote at a younger age.¹⁴⁸ In fact, in the Senate Judi-

¹⁴⁴ See *Order of Cincinnati*, *supra* note 61, at 10.

¹⁴⁵ See *Presser v. Illinois*, 116 U.S. 252, 257-58 (1886); *United States v. Cruikshank*, 92 U.S. 542, 554-55 (1875).

¹⁴⁶ See *Cruikshank*, 92 U.S. at 555-56.

¹⁴⁷ See *Presser*, 116 U.S. at 264-67; *Cruikshank*, 92 U.S. at 551-52. The link between military and civil rights is descriptive of other countries as well. On the connection between the armies of the British citizenry and the emergence of a concept of civil rights in England, see Hardy, *supra* note 37, at 571.

¹⁴⁸ The generational argument—used on behalf of a constitutional change that is transgenerational—occurs throughout the Senate testimony and is prominently displayed in the executive summary report. That report observed that the Cox Commission on student protests at Columbia University had "called the present generation 'the most intelligent,' 'the most idealistic,' the 'most sensitive to public issues,' and with a 'higher level of social conscience than preceding generations.'" SENATE COMM. ON THE JUDICIARY, REPORT ON LOWERING THE VOTING AGE TO 18, S. REP. NO. 26, 92d Cong., 1st Sess. 3 (1971) [hereinafter SENATE REPORT ON LOWERING THE VOTING AGE]. President Nixon is cited as testifying that the country's youth are "better equipped today than ever in the past . . . [They exemplify] the highest qualities of mature citizenship." *Id.* at 4. Senator Goldwater called the country's youth "the finest generation that has ever come along." *Id.* Anthropologist Margaret Mead observed that it is "not only the best educated generation . . . but . . . more mature than young people in the past." *Id.*

The double location in which the generation is constantly pictured—the terrain of the university and the terrain of Vietnam (for the explicit portrait of soldiers, see *infra* note 150 and accompanying text)—underscores the fact that participation both in the war and in war protest provided Congress with its evidence. This double

ciary Committee report, the original age of twenty-one is itself located in military service:

The 21 year age of maturity is derived only from historical accident. In the eleventh century 21 was the age at which most males were physically capable of carrying armor. But the physical ability to carry armor in the eleventh century clearly has no relation to the intellectual and emotional qualifications to vote in twentieth century America.¹⁴⁹

The report actually proceeded to argue that the new generation can physically carry its armor at eighteen, again signalling the curious persistence with which the issue of arms is anchored in the notion of material weight.¹⁵⁰

location is also stressed in the executive summary for the House deliberations:

As noted, the 91st Congress by extraordinary majorities in each Chamber approved a Federal statute designed in part to lower the minimum voting age to 18 in Federal, State, and local elections. This action expressed a congressional judgment that the educational level reached by 18 year olds, *their civic and military obligations and their readiness and capacity to participate in the political process* rendered unreasonable a minimum voting age classification above eighteen.

HOUSE COMM. ON THE JUDICIARY, REPORT ON LOWERING THE VOTING AGE TO 18, H.R. REP. NO. 37, 92d Cong., 1st Sess. 5 (1971) (remarks of Rep. Celler) (emphasis added) [hereinafter HOUSE REPORT ON LOWERING THE VOTING AGE].

The bill for lowering the voting age had first been introduced in 1942, and as the Senate executive report noted, had been reintroduced at least once in every successive year, 150 times in total. See SENATE REPORT ON LOWERING THE VOTING AGE, *supra*, at 7-8. The timing of the bill—both its passage in 1971 and its original introduction in 1942—illustrates the principle “[o]ld enough to fight, old enough to vote” in the Senate Hearings. See *Lowering the Voting Age to 18: Hearings Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 157 (1970) [hereinafter *Senate Hearings on Lowering the Voting Age*] (statement of Sen. Kennedy).

¹⁴⁹ SENATE REPORT ON LOWERING THE VOTING AGE, *supra* note 148, at 5.

¹⁵⁰ Both anthropologist Dr. Margaret Mead and Vice President Agnew were quoted to certify the speed of physical maturation and strength which, according to Mead takes place three years earlier than it did in the 18th century, and according to the Vice President happens “sooner” than it did fifty years ago. See SENATE REPORT ON LOWERING THE VOTING AGE, *supra* note 148, at 5. In the full text of the hearings, the issue of weight was even more explicit, as was the evidence that modern eighteen year olds can carry their armor:

Strange as it may seem, the weight of armor in the 11th century governs the right to vote of Americans in the 20th century. The medieval justification has an especially bitter relevance today, when millions of our 18-year-olds are compelled to bear arms as soldiers, and thousands are dead in Vietnam.

Senate Hearings on Lowering the Voting Age, *supra* note 148, at 157 (statement of Sen. Kennedy). Moreover, the testimony on behalf of lowering the voting age came from the full political spectrum. Senator Goldwater, like Senator Kennedy, was a strong exponent of the amendment. See *Senate Hearings on Lowering the Voting Age*, *supra*

So, too, and far more profoundly, the fifteenth amendment, which extended the vote to blacks during the Reconstruction period, was inseparable from the military record: 180,000 blacks had fought in the union army, and this fact was used in arguments supporting the new amendment in Republican newspapers like the *Chicago Tribune* and *New York Tribune*,¹⁵¹ in the 1868 presidential campaign,¹⁵² and on the floor of Congress.¹⁵³ Lincoln's "Emancipation Proclamation" had itself been a brilliant merging of two separate verbal acts—a proclamation of emancipation and a call to arms:

I do order and declare, that all persons held as slaves . . . are and hereafter shall be free . . . and I further declare and make known, that such persons of suitable condition will be received into the armed service of the United States, to garrison forts, positions, stations, and other places, and to man vessels of all sorts in said service.¹⁵⁴

note 148, at 132-33 (statement of Sen. Goldwater).

¹⁵¹ Conversation with Kenneth Stampp (Oct. 25, 1987).

¹⁵² At their nominating convention in Chicago in May 1868, the Republican party announced the promise of black suffrage in their presidential platform. The idiom of the pledge directly anchored it in the recent bearing of arms: "The guarantee by Congress of equal suffrage to all loyal men at the South was demanded by every consideration of public safety, of gratitude, and of justice . . ." CONG. GLOBE, 40th Cong., 3d Sess. 691 (1869).

¹⁵³ For example, speeches on behalf of the amendment in the House specifically referred to the war: "If the measure proposed by the joint resolution should be approved . . . that race which stood firm and battled for the Union in the nation's struggle will have a voice in the selection of our rulers." See CONG. GLOBE, 40th Cong., 3d Sess., app. 92 (1869). The memory of service in the Civil War continued to be enabling at the polls for many decades. In 1901, for example, the newly formed state constitutions of both Alabama and Virginia listed military participation in the Civil War among the factors which fulfilled the "residency" requirement for voting. See ALA. CONST. 1901 § 180, reprinted in 2 DOCUMENTARY HISTORY OF RECONSTRUCTION: POLITICAL, MILITARY, SOCIAL, RELIGIOUS, EDUCATIONAL, AND INDUSTRIAL, 1865 TO 1906, at 453, 454 (W. Fleming ed. 1966) [hereinafter DOCUMENTARY HISTORY OF RECONSTRUCTION]. The Virginia Constitution of 1901 has practically the same provision. *Id.* at 453. The coupling of bearing arms and civil liberties is also evident in later wars. During the 1941 congressional deliberations over the declaration of war with Japan, for example, Representative Mitchell pledged on the floor of the House "the continued loyalty not only of the first congressional District . . . , but that of the 15,000,000 Negroes in America" and asked Congress to remember that in light of his life-altering military sacrifices of the past and the present, "the Negro expects the same treatment under our so-called democratic form of government that is accorded all other citizens." 87 CONG. REC. 9525-26 (1941).

¹⁵⁴ Lincoln, *The [Emancipation] Proclamation*, in *The Liberator*, Jan. 2, 1863, reprinted in *THE ANTISLAVERY ARGUMENT* 481, 482 (W. Pease & J. Pease eds. 1965).

The fifteenth amendment reenacted in reverse the merged logic of self-authorization: as liberty in 1863 made inevitable the eligibility to bear arms, so eligibility to bear arms in 1869 made inevitable the liberty to vote.¹⁵⁵

The association of the right to bear arms and the right to vote has sometimes worked to contract, rather than continually to extend, the franchise for blacks¹⁵⁶ and for women. Section two of the fourteenth amendment, for example, bypassed the possibility of women's suffrage by expressing its protection of the voting population in an idiom invented to express the requirements for the militia: "male inhabitants of such State, being twenty-one years of age, and citizens of the United States."¹⁵⁷ But women's suffrage was eventually achieved, both in the United States and in other countries, in part by linking the capacity to vote with the capacity to serve in war.¹⁵⁸ Those who today urge the inclusion of women in

¹⁵⁵ Lincoln's own correspondence enacted this circular logic of distributive rights. For example, in his 1864 letter to Governor Hahn of Louisiana, he privately urged the inclusion of blacks in the "elective franchise," especially "those who have fought gallantly in our ranks." Letter from Abraham Lincoln to Governor Hahn (La.) (Mar. 13, 1864), *reprinted in* 1 DOCUMENTARY HISTORY OF RECONSTRUCTION, *supra* note 153, at 112.

¹⁵⁶ In 1870, for example, the Senate debated whether black Senator-elect Revels met the constitutional requirement that a Senator have been a citizen for nine years; those opposing his eligibility cited the exclusions of blacks from the militia in some federal and state statutes between 1792 and 1815. *See* CONG. GLOBE, 41st Cong., 2d Sess. 125-30 (1870). Courts similarly have limited civil rights by associating them with rights of arms. For example, Chief Justice Taney, in arguing in the *Dred Scott* decision against the plaintiff's status as a free person, pointed out that such status would attribute to the plaintiff the power not only to have standing in court, but also to vote and to bear arms. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 415-18, 420 (1857); *see also* S. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 108-23 (1984) (noting the effects of the black codes on the formulation and passage of the fourteenth amendment); Kates, *supra* note 36, at 216 (discussing the post-Civil War black codes that arose to disarm blacks).

¹⁵⁷ U.S. CONST. amend. XIV, § 2; Conversation with Professor Akhil Amar (Oct. 15, 1987).

¹⁵⁸ Suffrage pageants in the United States linked the two imagistically by the inclusion of songs such as *Onward Glorious Soldiers*, whose chorus moves back and forth between the literal act of "marching on to war" and the analogous act of "marching as to war." *See* H. MACKAYE, SUSAN B. ANTHONY: A CHRONICLE PAGEANT, in *THE SUFFRAGIST*, Dec. 11, 1915, at 7, 8 (emphasis added). Women's capacity for military service, boxing, and the handling of guns continually reappeared in suffrage plays. *See* G. MIDDLETON, *BACK OF THE BALLOT* (1915); A. MILLER, *UNAUTHORISED INTERVIEWS* (1917); G. RUGG, *THE NEW WOMAN* (1896); M. WINSOR, *A SUFFRAGE RUMMAGE SALE* (1913), *reprinted in* *ON TO VICTORY: PROPAGANDA PLAYS OF THE WOMAN SUFFRAGE MOVEMENT* 325, 363, 130, 243 (B. Friedl ed. 1987). Articles coupled the contribution of women in World War I with the coming vote, both in the

military service (whether a voluntary or a drafted army) argue that the burden of defending the country must be distributed across genders so that the civil rights attached to those military obligations also will be fairly distributed across genders.¹⁵⁹ The logic of that coupling is clear: from the earliest moments of the republic to the most recent, the concept of the civil franchise has been inseparable from the record of military participation. The historical record also makes clear the implications of the present nuclear situation: a form of weaponry that eliminates the population of men and women from the sphere of military authorization eventually divests them of their civil authority as well.

In both the negative, and more often positive, instances, the structural equivalences between voting and bearing arms underscore the shared access they provide to the governing of the country, in peace and in war. Elections, reapportionment cases, and constitu-

United States and in Denmark. See *War and Freedom*, in THE SUFFRAGIST, Dec. 11, 1915, at 6, 6. In England, suffragists celebrated soldiers such as Boadicea and Joan of Arc in pageant banners and visual representations of their movement. See Macdonald, *Boadicea: Warrior, Mother and Myth*, in IMAGES OF WOMEN IN PEACE AND WAR: CROSS-CULTURAL AND HISTORICAL PERSPECTIVES 40, 55-56 (S. Ardener, P. Holden & S. MacDonald eds. 1987). In Russia, the call for women's suffrage during one period of World War I was closely associated with the creation of a battalion of women volunteers to compensate for the alarming number of male desertions. See A. WILTSHER, MOST DANGEROUS WOMEN 176-81 (1985). Crucial in all these examples is the conflation of a civil right such as voting with possession of authority in military affairs. That voice may be on the side of militarism or instead on the side of pacifism, as in the Puget Sound Project, Greenham Common, and the Seneca Women's Encampment against nuclear weapons.

¹⁵⁹ The National Organization of Women, for example, argued this in their report before the 1980 House Hearings on the Draft: "Those who oppose the registration and draft for females say they seek to protect women. But omission from the registration and draft ultimately robs women of the right to first class citizenship Moreover, because men exclude women here, they justify excluding women from the decision-making of our nation." *Judiciary Implications of Draft Registration: Hearings before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 157, 155-68 (1980). In the 1869 essay, *The Subjection of Women*, John Stuart Mill repeatedly affirmed the inextricability of civil liberty and military responsibility:

To Englishmen [being governed by a Queen] does not seem in the least degree unnatural, because they are used to it; but they do feel it unnatural that women should be *soldiers or members of Parliament*. In the feudal ages, on the contrary, *war and politics* were not thought unnatural to women, because [they were] not unusual. . . . There can be little doubt that Spartan experience [of bodily exercise and training for women] suggested to Plato . . . the social and political equality of the two sexes.

Mill, *The Subjection of Women*, in ESSAYS ON EQUALITY, LAW, AND EDUCATION BY JOHN STUART MILL 270 (J. Robson ed. 1984) (emphasis added).

tional care about numerical translations from the population base to representation all exemplify what the Supreme Court in *Baker v. Carr* called the "distribution of political strength for legislative purposes."¹⁶⁰ So, too, the right to bear arms holds within it the assertion of a just distribution of military power for war-making purposes.

III. THE REQUIREMENT FOR DOUBLE AUTHORIZATION IN BOTH WAR-MAKING AND CONSTITUTION-MAKING

Throughout this argument, war-making and law-making have been steadily implicated in one another, both as those acts are performed by the population and by Congress. The distribution of arms, I have argued, mimics the problems of *reapportionment*. The bearing of arms is interwoven with the history of *voting*. The draft, said Alexander Bickel, entails a series of informal *referenda*.¹⁶¹ Jacob Javits, as he ushered the War Powers Resolution through the Senate, described "the exclusive authority of Congress to 'declare war'" not as *one* of Congress's powers but as *that* power "which the framers of the Constitution regarded as the keystone of the whole Article of Congressional power."¹⁶² Justice Story identified the moment of shifting the nation from a state of peace to a state of war as "the highest act of legislation."¹⁶³ Rather than allowing the coupling of law-making and war-making to remain a loose analogy, I want to end by stressing that the equation is quite literal.¹⁶⁴

¹⁶⁰ *Baker v. Carr*, 369 U.S. 186, 197 (1962) (citing *Baker v. Carr*, 179 F. Supp. 824, 826 (1959)).

¹⁶¹ See A. BICKEL, *supra* note 10, at 102-03.

¹⁶² See *Hearings of the Senate Foreign Relations Comm. on the War Powers Act*, 93rd Cong., 1st Sess. 1403 (1973) (remarks of Sen. Javits, N.Y.).

¹⁶³ J. STORY, *supra* note 5, at 87. The congressional obligation to oversee the entry into war is in many additional places referred to as a set of "legislative" responsibilities. See, e.g., *Presser v. Illinois*, 116 U.S. 252, 258 (1886) (noting that the Constitution authorizes Congress "to legislate [the militia's] organization, army, and discipline").

¹⁶⁴ The argument that follows summarizes the relation between war-making and constitution-making specifically within the U. S. Constitution; but the connections are, of course, much broader. On the relation between the two in social contract theory, see *supra* notes 1-5, 25, 50-51, 55-56, 83-87 and accompanying text. The connection also emerges historically, both at the original moment of contract formation and at the moment of ratification in representative assemblies. In his examination of the birth of the 5,000 major European cities between the eleventh and fifteenth centuries, Harold J. Berman showed that they did not simply "emerge" but were instead self-consciously "formed" by means of explicit contracts, collective oaths taken by the entire community. See H. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE*

Congressional legislation obviously lacks the weight of constitutional law. The greater authority of the latter derives not from its age, the Constitution will always be under continuous revision, but from the fact that it has two consensual locations. Like statutory law, it originates in verbal actions—declarations, proposals, resolutions—confirmed by the full bicameral congressional assembly. But unlike statutory law, it then migrates out to the population where it must be ratified. The very congressional vote, that within the statutory framework transforms a verbal proposal into a “law,” within the constitutional framework, merely transforms a proposal into a more formal proposal. It retains its character as a verbal construct. A two-thirds vote in the House and a two-thirds vote in the Senate—the size of a vote ordinarily required to pass a law, even over a presidential veto, makes it a proposed amendment that then goes before the state assemblies for ratification.¹⁶⁵ The requirement of authorization both from the Congress and from the people tests the nature of representation both in terms of politics and language. The population votes for representatives who vote for a proposed law, which is then sent back to the population for their approval. The process constitutes a literal referendum: an act of referring back and a return to the original ground of political empowerment and linguistic delegation.

The Constitution reserves this requirement for a double location of authorization almost exclusively for constitution-making. A jealous guardian of its own exalted status, the Constitution places encumbrances on its own genesis that ensure its separation from all other legislative products. The single other phenomenon to which the Constitution accords this double authorizing ground, and hence

WESTERN LEGAL TRADITION 361-63, 367-68, 374, 376, 383, 396 (1983). In many cases the charters or social contracts were “communes for peace” (*communia pro pace*) that included provisions for self-government such as voting and bearing arms. See *id.* at 368. Historical analysis of the formation of general assemblies in France suggests that such assemblies came into being specifically for war-making purposes. The king, needing to elicit the consent of the population to fight the war, negotiated with the assemblies as a prelude to requiring a war subsidy from local populations. See Taylor, *Assemblies of Towns and War Subsidy, 1318-1319*, in *STUDIES IN EARLY FRENCH TAXATION* 109, 167-72 (J. Strayer & C. Taylor eds. 1939); see also Taylor, *An Assembly of French Towns in March, 1318*, 13 *SPECULUM* 295 (1938). As in the United States experience, the French consent requirements were intensified, rather than relaxed, by the context of war.

¹⁶⁵ See U.S. CONST. art. V (establishing that proposed amendments may originate either in the Congress or among the population through two-thirds of the state legislatures).

the single other phenomenon which acquires a gravity equal to its own, is that of war-making. The two doctrinal sites on war—firstly, article I, section 8 and secondly, the second amendment—literally re-enact this double location of certification. War originates in article I, section 8 as a proposition, a verbal performative, a “declaration” in Congress. The proposal must then be substantiated by the call to arms, in which the proposal either is ratified or refused, depending on what portion of the population approves of the country’s military participation. This is the second amendment. At the original constitutional convention, the last minute shift in the phrasing of article I, section 8—replacing “to make war” with “to declare war”¹⁶⁶—registered the fact that though far less speculative a sentence than the moment before the congressional vote, the “declaration” has not yet left the realm of verbal performance. The declaration of war is extraordinary because, in front of the eyes of the world, the representative assembly puts at risk the very population it exists to represent. It puts at risk the ground of its own authorization. The assumption or rejection of the risk by the population—the referenda, the ratification—is therefore crucial. As only the population can “make” the constitutional changes that Congress “proposes,” so only the population can “make” the war that Congress declares.

The fact that article I, section 8 was written by the Federal Assembly, and that the second amendment emerged out of the ratification debates, reconfirms the double consensual location. The argument is often made that the emergency context of international security in a nuclear age necessarily entails some abbreviation or relaxation of the consent procedures followed during peacetime. But together article I, section 8 and the second amendment make it clear that the Constitution guarantees just the reverse: consent processes will be more rigorous, not less rigorous, in wartime. It guarantees that the act of consenting will be more express, not less express, for it requires a literal “declaration.” It guarantees that the distributive mechanisms will be heightened and amplified through the full vote of both houses and the popular referenda, not relaxed and contracted down to a central authority. Accidental convergences of language are not actually accidental. The language of consent became explicit during ratification (we the people of Virginia, of South Carolina, of New York do assent to and ratify . . .), just as the

¹⁶⁶ See MADISON REARRANGED, *supra* note 47, at 513-14.

word "consent" became explicit in, indeed almost inseparable from, the colonial, pre-revolutionary, and post-revolutionary dialogue on the standing army. The coincidence of its iteration accurately reflects the rigor, expressness, and distributional breadth in both constitution-making and constitutionally sanctioned war-making.

In both constitution-making and war-making, this heightened process of consent takes a visible, material form. The materiality is signalled in the fleeting iteration of the awkward but strangely positive little word "clog." George Mason described the participation of both houses and the slowing down of war that results as "clogging,"¹⁶⁷ and Madison, complaining of the delay in the New York state ratification convention that would lead to the Bill of Rights, described it as a "clog" that would lead to some "condition."¹⁶⁸ Both the making of constitutions and the making of war must be clotted with matter—clogged with "intervening layers of possibly resistant humanity"¹⁶⁹—to give them a gravity and weight consonant with the gravity of the risks brought about. Precisely because human sentience is at stake in the outcome of constitutional revisions and wars, human sentience must also be acutely and elaborately present when both are authorized.

An obstructionist materiality or (in its positive expression) a substantiating materiality resides at the center of both constitution-making and constitutionally sanctioned war-making. This materiality lies beneath the insistent bodily idiom that occurs in both spheres. In the sphere of war-making, the idiom surfaces (as has been visible throughout this essay) in an unexpected array of locations: the stress on "firmness" in Gandhi's conception of nonviolent resistance,¹⁷⁰ the idiom of "ruggedness" and "boasted weight and strength" in the advocacy of a distributed American militia,¹⁷¹ the odd invocation of the physical properties of a shotgun in *Miller v. United States*,¹⁷² and the collaborative "road-clogging" performed by combatants and hungry horses in World War I France.¹⁷³ The same physical idiom of weight, firmness, and embodiedness has from the earliest moments of the nation been used to describe acts of legislative ratification. Among the

¹⁶⁷ See *supra* text accompanying note 119.

¹⁶⁸ See *supra* text accompanying note 49.

¹⁶⁹ See *supra* text accompanying note 127.

¹⁷⁰ See *supra* note 100 and accompanying text.

¹⁷¹ See *supra* text accompanying note 97.

¹⁷² See *supra* text accompanying note 105.

¹⁷³ See *supra* note 16 and accompanying text.

"[f]acts [to] be submitted to a candid world" by the Declaration of Independence was the charge that the king "has dissolved Representative Houses repeatedly, for opposing with manly *firmness* his invasions on the rights of the people."¹⁷⁴ So echoic of *military resistance* is this description of the population's *legislative resistance* that it might with ease be mistaken for its kindred form of obstruction.

During the later period of actual constitutional ratification, the participants repeatedly described the process as one of materialization. While Madison's attribution of the world "clog" to the New York ratification was uttered derisively,¹⁷⁵ those resisting passage of an unamended Constitution announced their clogging materiality with pride. The most articulate exegeses came from Patrick Henry:

I declare, that if *twelve states and a half* had adopted [the unamended Constitution], I would, with manly *firmness*, and in spite of an erring world, reject it.¹⁷⁶

. . . .

Gentlemen strongly urge, its adoption will be a mighty benefit to us; but, sir, *I am made of so incredulous materials*, that assertions and declarations do not satisfy me.¹⁷⁷

Henry's language was echoed by similar declarations in the other states' debates, where ratification was repeatedly envisaged either as a bodily internalization of the document¹⁷⁸ or instead as a fusion of body and document.¹⁷⁹ The proposed document was perceived as an insubstantial piece of paper: "[T]he paper on the table," said Madison;¹⁸⁰ "[T]hat on your table," said Patrick Henry;¹⁸¹ "[T]he paper before you," said Governor Randolph;¹⁸² "[T]hat paper on your table," said Mr. Nicholas.¹⁸³ These phrases suggest

¹⁷⁴ The Declaration of Independence para. 2 (U.S. 1776). On the adjective "manly" prefixed to the word "firmness," see *supra* note 100.

¹⁷⁵ See *supra* text accompanying note 49.

¹⁷⁶ B. SCHWARTZ, *supra* note 34, at 771 (emphasis added).

¹⁷⁷ *Id.* at 781 (emphasis added).

¹⁷⁸ For example, the idiom of internalization was audible in the Massachusetts debate when General Thompson, protesting the absence of a Bill of Rights, spoke of ratification as the "swallowing" and "digesting" of an only partly ingestible document. See *id.* at 683. The idiom reappeared in South Carolina's debate in which Mr. Dollard spoke of the refusal to ratify as provoking the standing army to "ram it down their throats." *Id.* at 753.

¹⁷⁹ See *infra* notes 184-86 and accompanying text.

¹⁸⁰ See B. SCHWARTZ, *supra* note 34, at 823.

¹⁸¹ See *id.* at 809; see also *id.* at 813 ("the plan on the table").

¹⁸² See *id.* at 821.

¹⁸³ See *id.* at 829; see also *supra* note 39.

how fragile, how provisional the document was prior to its confirmation, seemingly deriving its sturdiness from the table alone. For the participants during the debates, the document did not yet have any substantial weight, and it could only acquire weight by annexing the participants' own materiality: "You have not solid reality—the hearts and hands of the men who are to be governed."¹⁸⁴ "Will gentlemen, then, lay their hands on their hearts, and say that they can adopt it in this shape?"¹⁸⁵ The Constitution would only become law, they repeatedly said, if they put a hand to it, if they put their hearts to it, if they stood behind it.¹⁸⁶ The ratification assemblies provided the sentient base for substantiation and, somewhat remarkably, made vocal and explicit the nature of the materialization process.

The very requirement of materiality impedes the alteration of the Constitution and protects it against unexamined legal flights of fancy. Over five thousand amendments have in two centuries been proposed. Of these five thousand, thirty-three have left the Congress with a two-thirds vote in both House and Senate; of these thirty-three, twenty-six have then received the ratifying vote of the states.¹⁸⁷ Thus 4,974 have been prevented from acquiring constitutional reality by the encumbering process, the same encumbering

¹⁸⁴ B. SCHWARTZ, *supra* note 34, at 818 (quoting Patrick Henry).

¹⁸⁵ *Id.* at 827. When the amendments were eventually passed, Patrick Henry and Richard Henry Lee believed that the final document still insufficiently protected the population against presidential concentration of power and a standing army. Significantly, both continued to express their reservations in terms of the document's lack of materialization. In a letter, Patrick Henry wrote to Lee: "For Rights, without having power & might is but a shadow." See 3 PATRICK HENRY: LIFE, CORRESPONDENCE AND SPEECHES 398 (W. Henry ed. 1891) (emphasis added). Lee responded: "Your observation is perfectly just. . . . [T]he english language has been carefully culled to find words *feeble* in their nature" *Id.* at 402 (emphasis added).

¹⁸⁶ Metaphorical use of parts of the body becomes even more literal when describing war. On the use of the body for substantiating issues of war, see E. SCARRY, *supra* note 27, at 119-21, 124-39, 143-48, 350 n.138.

¹⁸⁷ See Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 427 (1983). Because amending the Constitution through article V is so cumbersome, the Constitution may appear to prohibit ongoing consent, subjecting those in the present to the will of the past. For a counter-argument, see *supra* notes 50-54 and accompanying text. On the reconcilability of democracy and the Constitution, see Holmes, *Precommitment and the Paradox of Democracy*, in CONSTITUTIONALISM AND DEMOCRACY 195 (J. Elster & R. Slagstad eds. 1988). Holmes argued that "imaginative interpretation" by each successive generation is a supplementary way of amending the Constitution. See *id.* at 224; see also Amar, *Philadelphia Revisited*, *supra* note 45, at 1051-58, 1098-99 (describing methods of amending the Constitution outside article V through the direct actions of the population).

process that has given the surviving twenty-six their weight and solidity.¹⁸⁸ We lack the means to calculate how many thousands of wars have passed through the minds of solitary individuals, how many fewer of these wars would have seemed plausible once reviewed by a council, and how many still fewer of these would have received the population's enactment. Perhaps, like the ratio of amendments, we collectively fight twenty-six of every 5000 wars that are individually imagined. Though numerically incalculable, the clogging process at least can be glimpsed in the story of the wild La Courtine horses blocking the road in World War I France,¹⁸⁹ as well as the many other occasions in which the encumbering actions of strike, demonstration, or rebellion, either at the threshold or the center, have impeded the waging of war, bringing it (at least for a time) to a stop.¹⁹⁰

This requirement for materiality—the assent of person after person after person iterated thousands of times—makes it hard to make constitutions and hard to declare wars with speed and efficiency. But it is also precisely this encumbering materiality that gives both constitution-making and constitutionally sanctioned war-making their capacity to secure our liberty. William Sumner articulated the relation between armed resistance and legislative resistance. Describing the way the distribution of military authority to a wide population endows the country with a thick materiality or a highly textured surface, he wrote, “[t]he general unevenness of our country; the numerous *obstructions* to the progress of an enemy, which its woods, rocks, ravines, rivers, meadows, mountains, mills, stone walls, and villages present, are peculiarly favourable to militia operations.”¹⁹¹ As Sumner proceeded to elaborate at length, this

¹⁸⁸ Hamilton and Madison both applied the language of “solidity” or “substance” to the population’s ratification. See THE FEDERALIST NO. 22, at 152 (A. Hamilton) (C. Rossiter ed. 1961); THE FEDERALIST NO. 40, at 252-53 (J. Madison) (C. Rossiter ed. 1961).

¹⁸⁹ See *supra* notes 16, 173 and accompanying text.

¹⁹⁰ That a population “authorizes” the infliction of injury does not mean necessarily that their actions are “justified.” Authorization and justification entail two distinct sets of requirements. Nevertheless, a claim that the waging of a particular war is “justified” must fail in a contractual society if the population has not authorized the war. In this sense, authorization logically precedes justification, even though experientially the chronology may be reversed: in order to secure the population’s authorization, a government may have to begin by identifying the justifying conditions. The relation of the two terms was clarified for me by a conversation with Stephen Knapp in Berkeley, Cal. (Nov. 19, 1987).

¹⁹¹ See *An Inquiry Into the Importance of the Militia*, *supra* note 34, at 21 (emphasis added).

impedes an enemy's entry into the country far more effectively than does a centralized army, which may disappear after a single battle. In discussing the constitutional guarantees provided by the doctrinal formulation of the right to bear arms, Sumner returned to the word "obstruction" as the mysterious center of political liberty: "*Obsta principiis.*"¹⁹² The Constitution, through a provision such as the second amendment, works by obstruction; it anticipates and eliminates the possibility of executive tyranny. It thereby eliminates the need for the population even to have to speculate about so ungracious a possibility. Both our Constitution and our constitutionally mandated requirements for a distributed defense system thus protect our political liberty through the benign material principles of obstruction and substantiation.

CONCLUSION

I have been arguing that nuclear weapons themselves constitute a large tear in the social contract. When one contemplates the physical attributes of nuclear war—the scale of the hurt involved in images we all know—it may seem beside the point to add that there is a tear in the social contract. But those physical attributes—the irrecoverable injury to people, to all they have made, and to the earth—that *is* the tear in the contract. That is what it looks like when a social contract is torn up. For that reason, it seems important to bring our own contract to bear on the problem. The right to bear arms has been said, not uncontroversially, to contain within it the right of revolution.¹⁹³ Either we ourselves can bear arms and change the situation by revolution, or as seems more plausible and desirable, we can bring into view the pre-revolutionary situation and call for judicial recognition of the distributive intent of the right to bear arms.

¹⁹² See *id.* at 37 (emphasis added).

¹⁹³ This is a final instance of the deep structural continuity between constitution-making and war-making: the right to bear arms contains the right of revolution. Similarly, as Walter Dellinger has argued persuasively, article V's provision for constitutional amendment represents the right of revolution built into the contract. See Dellinger, *supra* note 187, at 431.