



January 1990

# Constitutional Narratives - War and the Social Contract: The Right to Bear Arms

Elaine Scarry

Follow this and additional works at: <https://digitalcommons.law.yale.edu/yjlh>



Part of the [History Commons](#), and the [Law Commons](#)

## Recommended Citation

Elaine Scarry, *Constitutional Narratives - War and the Social Contract: The Right to Bear Arms*, 2 YALE J.L. & HUMAN. (1990).

Available at: <https://digitalcommons.law.yale.edu/yjlh/vol2/iss1/9>

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Journal of Law & the Humanities by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact [julian.aiken@yale.edu](mailto:julian.aiken@yale.edu).

# Constitutional Narratives

## War and the Social Contract: The Right to Bear Arms

Elaine Scarry\*

Philosophers of social contract have often emphasized the fact that at the moment when a nation goes into war, the processes of consent have to be more explicit than under ordinary peacetime conditions. Kant, for example, said that all nations ought to be “organized internally” in a way that ensures that at that moment when they go into war, it is not the head of the nation (“for whom, properly speaking, war has no cost”) but the people themselves who exercise the “decisive voice.” Kant then adds parenthetically, Of course this “presupposes” the notion of a social contract.

Under ordinary circumstances—that is, in an era before nuclear weapons—the operation of consent was to some extent automatically guaranteed by the fact that in order to carry the conventional weapons onto the field, individuals collectively had to agree to fight the war. Hobbes acknowledges the operation of consent in the substantiating actions of conventional soldiers when in *Behemoth* he writes, “If men know not their duty, what is there that can force them to obey the laws. An army, you will say. But what will force the army?”

I start by invoking the words of Kant and Hobbes because 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

---

\* This is the edited text of the oral presentation given at “Language, Law, and Compulsion.” This talk is a partial summary of a larger manuscript forthcoming.

away because of the speed required to respond. Today, I want to emphasize the fact that in contract theory in general, as well as in one very specific social contract, the American Constitution, provisions were 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 based on force from those based on contract. That means that at the moment when a country is actually going to be engaged in a military enterprise, precisely because the contractual society may now begin to slip back into the coercive blur of the oppositional model from which it sought to distinguish itself, there have to be heightened consensual procedures for overseeing the entry into war. One of the locations for overseeing that entry in our Constitution is Article I Section 8, what many call the "cornerstone of congressional powers." This section requires that Congress, not the President, declares war. I am not going to elaborate this particular argument since it has already a very sturdy place within arguments about nuclear weapons. The incompatibility between the constitutionally mandated Congressional obligation to declare war and the country's long-standing strategic arms policy has been the subject of articles within both nuclear discourse and legal discourse. 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.

I want instead to look at a second location within the Constitution that was meant to ensure and heighten the exercise of consent: the Second Amendment, the right to bear arms. As you can hear from this description, my particular interest in this amendment is the way it supplements and reinforces Article I Section 8 for the arguments against our first-use policy in the United States. What emerges in the actual analyses of the Second Amendment that took place during the constitutional period, during the ratification period, and again in subsequent juristic examinations, is a complex revelation that in the brief time today I can only hint at: the relationship between forms of substantiation in constitutional ratification and forms of substantiation in war.

The Second Amendment, the right to bear arms, tends to enter our consciousness through claims about why criminals ought to be allowed to walk around with pistols. Alternatively, it emerges 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 coming to know the First Amendment only through pornography. Freedom of speech may or may not protect pornog-

raphy but it would be difficult, probably impossible, for most of us 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, the amendment came into being primarily as a way of 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 about the distribution of arms, what I mean is a distribution of authorization over our nation's arms. It seems nearly impossible that I will be misunderstood, but because it is important to me that on this one point I not be misunderstood, let me stress that it is not my wish that we can all have guns. It is rather to say that if as a nation we are to have injuring power, the authorization over that action of injuring as well as 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 as a whole is a separate subject. Some believe that we should have none. Many believe that we should have a great deal. My argument does not even touch that question; it is prior to it. However much we have, whether almost none or a great deal, it must, like all other forms of political access, be spread throughout our entire national expanse.

I should add parenthetically that it is because the right to bear arms is prior to such questions that revolutionaries have made it their first demand whether they were militarist or pacifist. During the first General Assembly in the French Revolution, the charge that the population had been disarmed was immediately brought to the floor by Mirabeau. So, too, Gandhi listed as his major grievance against the British their disarming of the Indian people: give us back our arms, he said, and then we will decide whether or not we wish to use them. As is audible in the juxtaposition of these two historical instances, the argument about the distribution of political power is prior to any question about the exercise of pacifist or militarist uses.

Only four Supreme Court rulings have centered in the Second Amendment, three in the nineteenth century and one in the twentieth (the numbers vary slightly from one legal commentary to the next). 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 and many who have looked at them agree that it is time for the Supreme Court to make a new ruling on the Second Amendment. Were the Court to make the distributive interpretation, their reading would be supported by five attributes of the right to bear arms. Each of

the five in isolation illuminates the contemporary problem of nuclear arms. Placed side by side, the five together display across their full surface an unexpected portrait of the deep structure underlying contract and force. Together they shed light on the nature of the substantiating procedures that convert declaratory statements, speculative recommendations, and verbal narratives into constitutional structures that are taken as having far more weight. In the end, it also becomes clear why an illegal strategic arms policy would be not simply a constitutional misdemeanor but a constitutional deformation of the most serious kind.

The first argument centers on the form rather than the content of the right to bear arms. The first ten amendments came into being through the agency of distribution. They came into being not in 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. Consent in the ratification procedures is a very self-conscious process. Although the word "consent" is not uttered inside the Constitution itself, in the records of the ratification debates there is endless talk about what it means "to consent," "to compact," "to contract," "to make a social compact."

Thus, for example, the Virginia instruments of ratification 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 'We the people of the United States. . . .'"

This same kind of explicit acknowledgement of contract-making occurs in the other state ratifications as well. The most eloquent testimony to the distributive element within the right to bear arms is the fact that it comes into being along with the other nine amendments during this actualization process, actualization acquired from sheer proximity to so many people willing, by their endorsement, to lend the speculative recommendation some of their own material form. More precisely, they lent it their endorsement in exchange for an eventual alteration in the contract, the promise of appended amendments. During the New York convention in the summer of 1788, Madison wrote letters to Edmund Randolph expressing dismay over the uncertainty of ratification. "The best informed," he said, "apprehend some clog that will amount to a condition." That "clog" or "condition" became the Bill of Rights.

The fact that the right to bear arms gains constitutional standing

through the agency of the ratification debates is critically important because the Amendment replicates three attributes of the ratification process. First, its function as a distributive mechanism. Second, the immediacy and self-consciousness of the contracting act. And third, this one unexpected, the beneficent role played in the work of validation by the phenomenon of materiality, or to use Madison's idiom, the phenomenon of "clogging."

Let me elaborate just one, the distributional fact. Article I Section 8 and the Second Amendment are each themselves distributive. The participants in the ratification debates sometimes saw their own pressure for the distribution of military power as a decentering of the authoritarian arrangements provided by the Federal Assembly in I-8. In fact, what they actually did was amplify or magnify the distributional tendency that was already present within the proposed contract. That is, the Federal Assembly had decided to make the overseeing of war the responsibility of the largest possible group within the federal sphere. In deciding who should declare war, they explicitly rejected the President, as well as either the House or the Senate acting alone; they took instead the full Congress, the House and the Senate acting collectively. So, too, at the moment when it goes to the population, the second location, responsibility for the authorization of war is again envisioned as belonging to the largest possible unit within the province of those ratifiers. In each case, the people prescribing the rules take both the largest possible unit and a unit whose size is coterminous with their own. 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 the action of contract-making.

I began by specifying five features of the Second Amendment that bear on the problem of nuclear arms, and have so far given a partial sketch of only the first. The second through fifth attributes (which I now give in thirty seconds) together clarify the insistent linking of the distributional and the contractual with the principle of materialization. Once all five attributes are unfolded—the task to which I am committed in the long manuscript version of this talk—what finally becomes apparent is an important similarity between constitution-making and war-making: the structure of each entails a double location of authorization. Statutory law requires the positive vote of Congress to go into effect. When a new constitutional law, in contrast, receives a positive vote in Congress, it has only the status of a "proposal"; it must then go out to the population for substantiation. The provisions of war-making follow precisely the same model: they require first a Congressional "declaration" or proposal (I-8) and then a distributional period during which the declaration passes through many numerical gates in order to go into effect (Second Amendment). The Congress—as the famous revision in constitutional wording underscores—only "declares" the war that the population finally

“makes,” just as Congress proposes the Constitution whose “making” is reserved to the people. I think it is this grave kinship between constitution-making and (constitutionally sanctioned) war-making that led Joseph Story to call Article I Section 8 “the highest act of legislation” and that has led to the continual reappearance of the same legislative language throughout several centuries of discussion of the right to bear arms.

#### SELECTED QUESTIONS

*Question:* I want you to clarify once more the relationship between substantiate, materialize, and actualize.

*Response:* I think it may be helpful to look at those words in a three-part structure. First, the way in which the ratification itself is exposed as a process of materialization. And, then, the way in which the right to bear arms was similarly talked about as a process of materialization. Then third, the fact that there is *no* principle of materialization in the present nuclear situation.

The last of the three I can say quickly: the absence of materialization in our longstanding provisions for presidential first use. During the impeachment proceedings, Nixon said, “I can go into my office and pick up the telephone, and in twenty-five minutes seventy million people will be dead.” The comment is probably less significant regarding Nixon than in pointing out that there cannot be structural provisions by which one person can actually authorize and bring about that level of death. Usually there is a framing ratio between the number authorizing widespread injury and the number putting themselves at risk. That comment led, even within the government, to a genre of questioning that is most cogently phrased by George Quester who asks, “how many intervening layers of possibly resistant humanity” are put between the President and the actualization. Quester goes on in a somewhat reassured way to say actually three or four people are involved. An entire species of argument within nuclear literature is devoted to quieting fears about five persons with the assurance that a launch requires ten, as fears about ten are calmed with assurance that it is actually twenty. But what the Constitution contemplates is first, the scrutiny of what would today be the five hundred of Congress. That would only be the beginning. Then, if it were conventional war, we would have what Alexander Bickel called the continual referenda of having to go back to the population. The numbers would vary, depending on whether we took the fourteen percent estimated to have participated in World War I or the three percent of seventeenth and eighteenth century war. Using these percentages (far smaller than the World War II figures) the numbers would fall somewhere between six million and thirty-one million persons. In other words, it is simply a species of category error to have these discussions in which we say, well,

really, there are twenty people involved or twenty-five. That is not what the contract imagined.

That notion of the “intervening layers of possibly resistant humanity” is present both in Constitutional ratification and in constitutionally sanctioned war-making. In ratification, it is visible not only when Madison complainingly says there is a “clog,” but also when the people arguing for the appended amendment do so by pleasurably announcing themselves as a clog: they repeatedly express their resistance to an unamended Constitution by calling attention to their materiality, as when Patrick Henry says, “I am made of incredulous materials.” Throughout the Virginia State Ratification Convention, the participants repeatedly refer to the proposed Constitution as “that piece of paper on the table over there”; they call attention to the fact that it has no substantial weight yet and can only acquire that weight by annexing their own materiality. Their bodily language is constant and graphic: the Constitution will only become law, they say, if we put a hand to it, if we put our heart to it, if we stand behind it. The principle of materiality embedded in distributional and contractual issues leads within the right to bear arms discussions to a startling emphasis on the material attributes of the weapons themselves. If they are evenly distributed, their materiality relieves the necessity of any other material attribute such as gender or class or geography from determining whether you get to be fully politically enfranchised. Because their material uniformity eliminates the need for any other uniformity, your being politically enfranchised does not depend on occupying a certain material geography or having a certain class. What is made constant is the material attributes of the weapons themselves. But this perhaps anomalous appearance of the principle has the virtue of calling attention to the very deep materiality of the notion of bearing arms.

*Question:* So are you saying, then, that part of the way mass mobilization makes sense is that the masses lend their bodies towards actions they mean to substantiate?

*Response:* That is right. Alexander Bickel (if I may cite him once more) spoke about Vietnam as an incredible sharpening or exercising of our powers of consent through demonstration. But as a matter of fact, in almost every conventional war, there have been moments of rebellion or near rebellion that make visible (if only by inversion) the ongoing practice of consent by soldier and citizen: the draft strikes in the Civil War, the refusal to institute the draft in the War of 1812, and during the First World War, the widespread rebellions in France and other countries. Once you hear the details of one of these narratives, the clogging procedure is very overt. At one moment in France, for example, some soldiers rebelling took a thousand hungry horses waiting in the fields to be fed and set them loose on a country road so that no one could pass through that road. It is obviously our materiality that is at stake on the injuring side.

The issue is to get materiality also onto the authorizing side so that decisions about war are submitted to the judgment of the many, many people.

#### BIBLIOGRAPHIC NOTE

The lecture and discussion draw on the following readings:

Akhil Amar, "Our Forgotten Constitution: A Bicentennial Comment," *Yale Law Journal* 97 (1988): 281, 289, and "Of Sovereignty and Federalism," *Yale Law Journal* 96 (1987): 1425.

Alexander Bickel, *The Morality of Consent* (New Haven: Yale University Press, 1975), 102-3.

Dieter Conrad, "Gandhi's Conception of Human Rights, Civil Disobedience as Satyagraha, and Constitutional Legality," (unpublished manuscript), 137, 139, 140 n.48.

John Dunn, "Consent in the Political Theory of John Locke," in Gordon J. Schochet, *Life, Liberty, and Property: Essays on Locke's Political Idea* (Belmont, Cal.: Wadsworth, 1971), 154.

Jonathan Elliot, ed., *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, Yates's Minutes, Congressional Opinions, Virginia and Kentucky Resolutions of '98-'99, and other Illustrations of the Constitution* (Philadelphia: Lippincott, 1861), 2:412, 3:656, 5:573.

Mahatma Gandhi, *An Autobiography or The Story of My Experiments with Truth*, part 5, ch. 27, trans. Mahadev Desai, in *The Selected Works of Mahatma Gandhi*, ed. Shriman Narayan (Ahmedabad: Navajivan, 1927), 2:666.

Thomas Hobbes, *Behemoth; or, The Long Parliament*, ed. Ferdinand Tönnies, 2d ed., introd. M.M. Goldsmith (New York: Barnes & Noble, 1969), 59.

Merrill Jensen, *The Making of the American Constitution* (Princeton: Van Nostrand Co., 1964), 141-46.

Immanuel Kant, "On the Proverb: That May be True in Theory, But Is of No Practical Use" (1793) in *Perpetual Peace and Other Essays on Politics, History and Morals*, trans. and introd. Ted Humphrey (Indianapolis: Hackett, 1988), 88.

Don B. Kates, Jr., "Handgun Prohibition and the Original Meaning of the Second Amendment," *Michigan Law Review* 82 (1983): 204, 246-254.

John Locke, *Second Treatise of Government*, ed. and introd. C.B. Macpherson (Indianapolis: Hackett, 1980), 8, 46, 47, 66-88, 101-124.

James Madison, *The Writings of James Madison: Comprising His Public Papers and His Private Correspondence, Including Numerous Letters and Documents Now for the First Time Printed*, ed. Gaillard Hund (New York: Putnam, 1906), 6:93.

Pierre Poitevin, *La Mutinerie de la Courtine* (Paris: Payot, 1938), 149-56.

George H. Quester, "Presidential Authority and Nuclear Weapons," in Appendix, *First Use of Nuclear Weapons: Preserving Responsible Control: Hearings before the Subcommittee on International Security and Scientific Affairs of the Committee on International Relations, House of Representatives*, 94th Cong., 2d Sess., March 16, 18, 23, 25, 1976, p. 218.

Bernard Schwartz, *The Bill of Rights: A Documentary History* (New York: Chelsea House, 1971), 2: 781, 809, 813, 821, 823, 826.

Joseph Story, *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*, ed. T. Cooley, 4th ed. (Boston: Little, Brown, 1873), 2: 87, 620.

Roy G. Weatherup, "Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment," in *The Right to Keep and Bear Arms: Report of the Subcommittee on the Constitution of the Committee of the Judiciary, U.S. Senate*, 97th Cong. (Feb. 1982), 130, 163, 164-69.

