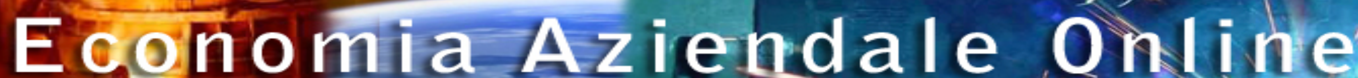

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Studying Social Tendencies. The Evolution of the Gun Rights Debate in the U.S.: Interpreting the Second Amendment in a Changing Historical Context

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ABSTRACT

There is generally a combination of factors that account for a social issue remaining relatively “dormant” for a period only to emerge to capture the attention of society and produce a fault line separating the opposing camps. In the U.S., there are a number of ”hot button”, polarizing issues that pit Americans staunchly on one side or the other. Gun rights is one of them. Trying to understand why this has become such a divisive topic over the last couple of decades requires an examination of the more reasoned legal and Constitutional debates regarding the Second Amendment, including a look at the historical context of its drafting and its textual and linguistic nuances, as well as a consideration of the contextual background in the country against which the developments in this on-going debate have played out. Among the latter, this article will examine the ideological transformation of the NRA since its inception in 1871 and the increasing affirmation of *Movement Conservatism* beginning in the mid-20th century, two factors that, in turn, are interrelated.

C'è generalmente una combinazione di fattori che spiegano che una questione sociale rimane relativamente "dormiente" per un periodo solo per emergere per catturare l'attenzione della società e produrre una linea di faglia che separa i campi opposti. Negli Stati Uniti, ci sono una serie di questioni polarizzanti che mettono gli americani saldamente da una parte o dall'altra. Il diritto alle armi è uno di questi. Cercare di capire perché questo è diventato un argomento così divisivo negli ultimi due decenni richiede un esame dei dibattiti legali e costituzionali più ragionati riguardanti il Secondo Emendamento, compreso uno sguardo al contesto storico della sua stesura e alle sue sfumature testuali e linguistiche, nonché al contesto nel paese su cui si sono svolti gli sviluppi di questo dibattito in corso. Tra questi ultimi, questo articolo esaminerà la trasformazione ideologica della NRA dal suo inizio nel 1871 e la crescente affermazione del *Movement Conservatism* a partire dalla metà del 20° secolo, due fattori che, a loro volta, sono correlati.

Keywords: Second Amendment, Founding Fathers, gun rights, hot button issues, National Rifle Association, Movement Conservatism,

Federalists, militias, *Heller* case, bear arms, Revolt at Cincinnati, National Firearms Act, Gun Control Act

1 – Introduction

The U.S. today is deeply divided on a number of polarizing issues carrying strong emotive impact: abortion, voting rights, the threat to democracy, immigration, crime, and the drug epidemic. Perhaps none is so emotionally charged as gun control and the related debate over the extent of the individual's right to possess firearms. This issue is characterized by the ebb and flow of an attention cycle that is synchronized with individual mass-shooting incidents; a cycle whose amplitude has increased hand in hand with the dramatic increase in mass shootings in America. There is also a perverse logic to this issue: each additional mass shooting increases the calls for sensible gun control laws from the vast majority of Americans while at the same time "immunizing" the citizenry to the shock of future tragedies, thereby reinforcing the sense of resignation that anything of substance will ever be done to curb the violence.

This paper tries to explain how the gun rights debate in the U.S. has arrived at where it is today, characterized by the seeming paradox of a country most of whose citizenry favors common-sense gun control laws, yet whose government has done very little in this regard over the last 30 years. A cross-disciplinary approach will be taken that considers the factors behind this development, which will encompass a legal analysis of relatively recent Supreme Court decisions and a discussion of the more "revolutionary" nature of these rulings compared to those in the past. A textual/linguistic examination of the Second Amendment is also presented to provide context for the increasingly heated debate about the original intent of the Founding Fathers on the issue of the right to bear arms. Finally, societal, political, and ideological factors will also be presented, with a particular focus on how these have come together to produce the gradual ascendancy of Movement Conservatism.

While it is not difficult to find articles concerning each of these factors individually, there has not been a lot written about the interplay among these elements and how this has contributed to ratcheting up the debate on common sense gun laws and the right to possess firearms. The present paper considers the gun rights issue within a longer time frame and across several dimensions in an effort to provide a more coherent explanation of the present state of the debate.

2 – The Second Amendment

There are several factors that have led the U.S. to where it is today on the firearms question: differing interpretations of the Second Amendment to the Constitution, the evolution of the National Rifle Association (NRA), the growing influence of the "originalist" doctrine in the Supreme Court, the development of Movement Conservatism, and culture wars. Any attempt at explaining the present state of the gun rights debate is further complicated by the fact there is no linear chain of cause and effect, with the above factors themselves all interconnected.

The starting point is the wording of the Amendment itself and what the Founding Fathers had in mind when they drafted it. Unfortunately, James Madison is not here today to provide clarity, which leaves no alternative for legal scholars other than to engage in mental time travel as they go back 230 years to undertake a textual and linguistic analysis of the one-sentence Amendment while considering the social and political context in 1791, the year the Amendment was written.

The Amendment reads, with deceptive simplicity: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed". The term "bear Arms" is a key point of disagreement regarding the Founding Fathers' intent. Opponents of stricter gun controls interpret the Amendment as saying that all individuals have a right to bear arms, while advocates of common-sense gun controls argue that, given the historical context, the Founding Fathers were referring to members of the state militias. The issue here is whether the Second Amendment refers to the individual right to possess firearms or the collective one.

The historical context is key here (Charles, June 2023). The Constitution was the result of a give-and-take between the Federalists, who were in favor of a strong central authority given the "chaos and mob violence" that had broken out after the Revolution, and the anti-Federalists, who feared the central government would create a standing army of professional soldiers and disband the state militias, which were seen as a protection against tyranny. While today there are no modern-day equivalents to these militias, at the time the Constitution was drafted, every white man between the ages of 16 and 60 was automatically enrolled and required to possess a musket or other military weapon (Waldman, 2014). The pro-gun control camp maintains, therefore, that the wording of the Amendment guarantees the right to bear arms to the individual *in relation to* his association with a "well regulated militia", and not to the individual citizen *per se*.

The narrow, less universal interpretation of the term "to bear arms" is reflected in a statement by the Supreme Court of Tennessee, which wrote in 1840 that "a man in the pursuit of deer, elk, and buffaloes might carry his rifle every day for forty years, and yet it would never be said of him that he had borne arms; much less could it be said that a private citizen bears arms because he has a dirk or pistol concealed under his clothes, or a spear in a cane" (Heather Cox Richardson, 2022). Colonial Americans were expected to bear arms for the safety and defense of the state, thereby constituting a sort of universal draft reflecting a philosophy of an armed citizenry where "every citizen is a soldier and every soldier a citizen", principles subsequently codified in the Second Amendment (Charles, July 2023).

Although the idea that individuals have the right to possess a firearm for personal protection has increasingly taken deeper root in American culture, there was no real legal framework in this regard until the Supreme Court's decision in the 2008 *District of Columbia v. Heller* case, the first in a series of decisions that have sought to interpret the intent of the Founding Fathers. The Heller ruling "marked the first time the Supreme Court affirmed an individual right to gun ownership that was separate from the "militia clause" in the Second Amendment" (Neuman, 2022).

The Court stated in its ruling that "The Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home". According to the Court, the prefatory clause: "A well regulated Militia, being necessary to the security of a free State,…", while stating a purpose for the possession of a firearm, "does not limit or expand the scope of the second part, the operative clause [i.e., "the right of the people to keep and bear Arms, shall not be infringed"]. The operative clause's text and history demonstrate that it connotes an individual right to keep and bear arms" (Cornell Law School, 2008). [See below how a purely syntactic analysis can, however, produce a contrasting interpretation]. The Court does note, however, that "Like most rights, the Second Amendment right is not unlimited. It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose…The Court's

opinion should not be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms" (Cornell Law School, 2008).

In the *Heller* case, however, the Supreme Court did not say what criteria would be used to determine whether an individual's right to possess a firearm had been violated. In June 2022, a case was brought before the Supreme Court concerning a New York State law regarding the public carry of firearms. Until then, the law required an individual to show proper cause for a permit to carry a concealed weapon in public. However, the law was vague regarding what constituted proper cause, thereby leaving a good deal of latitude to law enforcement in deciding on individual cases.

The Supreme Court ruled in *New York State Rifle & Pistol Association v. Bruen* that New York State law violated the Second Amendment right guaranteeing the public carry of firearms (as well as violating the 14th Amendment), an interpretation which had never been made in precedence. The Court also set up a test to determine in future whether the Second Amendment has been violated, which considers "texts, history, and tradition", thereby taking the pro-gun rights ruling in the *Heller* decision one step further (Sharfstein, 2022).

3 – Unravelling the grammar and syntax of the Second Amendment

In addition to trying to make sense of the Founding Fathers' intent in writing the Second Amendment and how this is related to the nature of American society at that time, the actual wording of the amendment has come under scrutiny, thereby adding another layer of uncertainty both in terms of grammar and semantics.

Regarding the latter aspect, constitutional scholars have focused on the term "Militia", questioning whether this refers literally to militias or whether "[it] can…also apply to a suburban mom who wants to exercise her inalienable right to bring a Ruger to church" (Marantz, 2023). Likewise, the terms "well regulated", "security", "the people", "Arms", and "infringed" are also legitimate subjects for debate. For example, the term "arms" clearly has a different meaning today given the array of weaponry that did not exist back in 1791. In fact, in the *Heller* ruling, the Supreme Court did concede that possessing a firearm "is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose". Regarding the concept of "infringement", one could argue that James Madison and his peers would not consider some of today's gun control proposals (for example, background checks, raising the minimum age for firearm possession, or the banning of automatic assault weapons) as an "infringement" of the right to possess a firearm. And what about the phrase "the right of the people": does this refer to an individual right, as the Supreme Court interpreted the phrase in the *Heller* case, or to a collective one? (Luu, 2018).

In terms of the syntax of the Amendment, though the sentence sounds stilted and unnatural to modern native speakers of English, there is nothing ungrammatical about it. Nevertheless, a syntactic analysis may give rise to differing conclusions. A key factor here is the relationship of the prefatory clause to the operative one. Like all educated people of that era, the Founding Fathers were well-versed in Latin and Ancient Greek, which was reflected in their compositional style (Linguistics Research Center, U. of Texas, 2012). Although it can be argued that the clause "A well regulated militia being necessary to the security of a free state,…" is, grammatically speaking, independent from the operative clause it precedes, it is not without significance for

the sentence as a whole. It can be compared to the ablative case in Latin and considered an *absolute construction* that functions like the ablative case in Latin, which indicates the function of the noun in the sentence. The noun in the absolute construction (here "Militia") has no grammatical function; however, since Latin requires every noun to have a case, it includes the absolute construction in the ablative case (Linguistics Research Center, U. of Texas, 2012). But while the absolute construction has no grammatical function, it does have meaning in relation to the operative clause that follows, providing the "conditions under which the rest of the sentence is valid (Linguistics Research Center, U. of Texas, 2012). In other words, not infringing on the right of the people to bear arms is justifiable *given* the need to maintain a "well regulated militia" to ensure "the security of a free state". Viewed in this way, the meaning of the Amendment would be: "Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed." No one would argue that today the "security" of the U.S. is ensured by an 18th-century-like "militia". Therefore, absent the circumstances in the introductory clause, what then? For example, since private paramilitary activity is illegal in all 50 states, no one could maintain that the Proud Boys and Oath Keepers are "well-regulated" and necessary for the security of the country, and that, therefore, they have an inviolable Second Amendment right to possess firearms.

4 – The creation and development of the NRA

The *Heller* case was the first time the Supreme Court had affirmed that the Second Amendment guaranteed the individual's right to own a gun, thereby breaking with every previous decision in this matter. In fact, on four occasions between 1876 and 1939, "the U.S. Supreme Court declined to rule that the Second Amendment protected individual gun ownership outside the context of a militia" (Waldman, 2014). The interpretative change that occurred in 2008 did not occur in a political and ideological vacuum but was "the product of public argument and political maneuvering" (Waldman, 2014). Two key driving forces behind this were the change in focus of the National Rifle Association and the growth of Movement Conservatism beginning in the 1970s, with the former in many ways a consequence of the latter. Long before the *Heller* case came before the Court, the ideological ground had been well-prepared by gun rights advocates. As Michael Waldman writes: "The pro-gun movement may have started with scholarship, but then it targeted public opinion and shifted the organs of government. By the time the issue reached the Supreme Court, the desired new doctrine fell like a ripe apple from a tree" (Waldmanj, 2014).

The NRA was created in New York in 1871, spearheaded by a group of Union Army officers led by Colonel William C. Church and Gen. George Wingate, who were "dismayed that so many Northern soldiers, often poorly trained, had been scarcely capable of using their weapons." The fledgling organization also sought to improve marksmanship and promote the British sport of elite shooting in the U.S. The NRA's mission was "to educate a new generation of marksmen, whether for war or hunting or recreational target shooting" (Rothman, 2015).

Rifle clubs slowly spread across the country, and although the NRA supported the citizens' right to possess rifles and handguns – in large part a reflection of the myth of the frontier and of the cowboy – it did so in a responsible manner, advocating for law-abiding citizens to have this right, not criminals or the mentally ill. Indeed, some of the actions of the NRA during its first 100 years of existence read more like the platform of today's gun-control advocates: in 1931, the NRA supported federal laws to limit concealed weapons; keep guns out of the hands of

criminals, the mentally ill, and children; and require that dealers be licensed and that background checks precede delivery. It also supported the 1934 National Firearms Act and part of the 1968 Gun Control Act (Heather Cox Richardson, 2022).

The positions adopted by the NRA since its inception have mirrored broader trends in American society, its stances evolving and becoming more nuanced to reflect the concerns historical events have caused among the populace. Three Presidents were assassinated during the last 35 years of the 19th century, and one, Theodore Roosevelt, survived a gunshot wound at close range (Elving, 2017). The NRA took part in the ensuing debate on these occasions regarding the availability of guns and the need for restrictions. Similarly, during the Prohibition era, there was concern about the use of shotguns and the fully automatic Thompson in cities around the country by robbers and warring gangsters. And during the 1960s, marked by the assassinations of John and Robert Kennedy and Martin Luther King, the NRA cooperated with Congress and the White House to enforce the restrictions imposed by the National Firearms Act and the Gun Control Act (Elving, 2017).

5 – Movement Conservatism and the political activism of the NRA

In the mid-1970s, a seismic shift occurred in the leadership of the NRA that led it to a more strident pro-gun platform and to greater influence on American politics. This transformation should be viewed against the backdrop of the continued ascendancy of Movement Conservatism, "the political movement that rose to combat the business regulations and social welfare programs that both Democrats and Republicans embraced after World War II" (Heather Cox Richardson, 2022). Movement Conservatism can be a confusing movement to define. There is no umbrella organization that controls it or any specific institutional structure that one can focus on. Moreover, it has gone by several names that have changed over the last 70 years to reflect changes in society and differences in focus (e.g., economic, social, religious). Given the scope of the present article, a brief presentation will suffice to show its importance in the NRA's transition to political activism in the mid-1970s.

Conservative historian George H. Nash defined American conservative thought as "a unique blend of three main impulses: libertarianism, anti-communism, and traditionalist conservatism. According to Nash, while elements of each strand existed throughout the century, it was not until after 1945 that they gathered enough form and strength to be considered a viable movement" (Burns, 2004). Two more "impulses" would be added in the 1960s: neoconservatives and the religious right (Wikipedia, Movement Conservatism, 2023). In the beginning, this movement had in its crosshairs FDR's New Deal with its social welfare policies and focus on business regulations. In its initial manifestation, the movement belonged to the New Right, which had as its mouthpiece William F. Buckley's *National Review*, first published in 1955. In the 1960s, the movement continued its ascendancy in opposition to Kennedy's Great Society and the Civil Rights movement, and in response to the decade's social upheavals.

Nobel Prize-winning economist Paul Krugman gives greater contour to the movement by dividing it into several phases: the conceptual phase, most notably exemplified by the *National Review* and its espousal of a pro-business, anti-union, anti-Communist stance (which also hinted at elements of white supremacy); the development of a popular base in the 1960s through exponents such as Barry Goldwater and Ronald Reagan; the development of a business base, with its anti-regulation and anti-union platform; and the development of an institutional and political infrastructure that included think tanks such as the American Enterprise Institute, the

Heritage Foundation, and the Cato Institute (Wikipedia, Movement Conservatism, 2023). Krugman believes that Movement Conservatism, which he defines as "the interlocking network of media organizations and think tanks that serves the interests of right-wing billionaires and has effectively taken over the GOP [Republican Party]", was the impetus behind the shift to the political right in the 1970s (Elwes, 2020). As touched on above, today's NRA is not your grandfather's NRA. Since its formation in 1871, it has gone through three phases: initially concerned with marksmanship and the sport of elite shooting, in the 1930s it began cooperating with the government, playing a constructive role in gun safety restrictions. This latter phase lasted up until the mid-1970s when the group became the powerful political force we see today (Spitzer, 2018). To illustrate the extent of the transition in the NRA, the "mantra" of the individual's right to bear arms constantly bandied about by the group today was never mentioned in the 166 pages of congressional testimony leading to the passage of the 1934 Gun Law. And until the revolt in the NRA's leadership at its 1977 convention, the group supported waiting periods for the purchase of handguns (Spitzer, 2018).

The precursor to the changing of the guard in the NRA's leadership was the rising crime rate and the racial riots in American cities during the late '60s, causing many in America to purchase guns for personal protection. This situation led to increasing pressure on the NRA to take a leading role in advocating for gun ownership. The first lobbying group was created in 1975: the Institute for Legislative Action, and its head, a Texas lawyer named Harlon Carter, soon was in open conflict with the Old Guard. Things came to a head during the so-called Revolt at Cincinnati at the 1977 Convention, with Carter becoming the de facto leader of the NRA. From that point on, the group has engaged in a multi-pronged campaign to shift the country's stance toward the Second Amendment and the gun rights debate. Aided by lax campaign finance laws, they have become a major donor for candidates in national and state politics (Republicans in particular) as well as becoming increasingly involved in litigation involving gun rights issues. Illustrative of this, in 2018 the NRA legal fund approved $360,000 to back a series of lawsuits involving gun rights, which paid off in the 2008 *Heller* case and in the landmark June 2022 Supreme Court decision in *New York State Rifle & Pistol Association v. Bruen* regarding the carrying of concealed weapons (Van Sant, 2022).

The NRA's persistence in firearms advocacy since the Cincinnati Convention is the main reason the Second Amendment, which had been known as the "lost amendment", has jumped to the forefront of public debate topics (Lopez, 2018). "*The NRA shifted the country from the view that the Second Amendment is about the federal government's role in state-run militias to one that it's really about individual Americans' right to bear arms. Through this constitutional shield, America's gun rights enthusiasts have been able to tilt the country's politics dramatically to the right on this issue*" (Lopez, 2018). Though some federal gun safety legislation has been passed since the late '70s, it has become increasingly difficult to do so, even in the aftermath of the recurring mass shooting incidents. The 1994 Assault Weapons Ban was allowed to lapse in 2004 under President Bush, and although President Biden signed into law the first major gun safety legislation passed in decades in June 2022, it did not ban any weapons, even though it did include funding for school safety and state crisis intervention programs (Tucker, 2022).

6 – Conclusion

A perfect storm of factors has come together over the last 50 years to inform and heighten the debate on the Second Amendment. Until the late '70s, the vagueness of the Amendment itself

and its difficult syntax was not enough to lead legal scholars to question whether the "right to bear arms" was a collective right or an individual one. That changed as the political environment became increasingly confrontational and polarized, with a number of "hot-button" issues – abortion, gun politics, separation of church and state, privacy, homosexuality, censorship – creating an ideological divide in America that only seems to be growing. The sociologist James Davidson Hunter reintroduced the notion of "culture war" (which had first appeared in the 1920s when urban and rural American values clashed (Wikipedia, Culture War, 2023)) in 1991, defining it as "political and social hostility rooted in different systems of moral understanding" (Hincker, date unavailable). The growing influence of Movement Conservatism helped to shift the debate on the Second Amendment into the culture war sphere and further away from a strictly Constitutional issue. As noted above, an important influence in this regard was the NRA's shift toward political activism.

The Supreme Court does not deliberate in an ideological bubble; like any institution, it is made up of individuals who have come to the court with their own worldview. Americans expect their justices to lay aside their ideologies and beliefs and put on their impartial, legal hats when they adjudicate an issue. But it has become increasingly difficult for justices to be sheltered from the social, religious, and ethical tendencies of the moment. In fact, political observers are constantly referring to the ideological makeup of the Court and using this to predict how it will decide on an issue, or as a basis for surprise when a decision does not reflect the Court's ideological leanings.

In the case of the Second Amendment, the divisions in the country are exacerbated by the actual language (syntax and terminology) of the Amendment and the difficulty in evaluating the historical context of its drafting at a distance of 250 years. Constitutions are static by nature, reflecting the era in which they were written. They are not forward-looking. Amendments are meant to ensure the Constitution keeps pace with the flow of history. However, it is not easy to pass an Amendment to the U.S. Constitution: there have only been 27 added since it was written, and 10 of these occurred at one time: in 1791, as the Bill of Rights.

In many ways, it is an unenviable task for the Supreme Court to interpret the Second Amendment from a modern-day perspective. If a case is brought before it concerning the issue of gun rights for personal protection, how should the Court rule? The Amendment offers no guidance in this regard (Linguistics Research Center, U. of Texas, 2012). In the 2008 *Heller* case, Justice Scalia followed the example of many conservative constitutional scholars in using "textualist" or "originalist" principles to support his interpretation of the law, without really considering other contextual evidence (for example, the problem the Amendment was trying to solve at the time of its writing, previous drafts of the Amendment, etc.) (Luu, 2018).

Originalism first appeared in the 1970s as an "obscure legal theory […] that believes the Constitution has a fixed meaning and that it should be interpreted as it would have been back in the 1700s"; today, this judicial concept is at the center of the debate about Supreme Court decisions that, in addition to the Second Amendment, also include abortion and the primacy of state legislatures as the ultimate arbiter of the presidential elections (the so-called Independent Legislature theory) (Ponzini, 2022, pp. 704-05). In the end, one may agree or disagree with decisions such as that in the *Heller* case, but under the circumstances, such rulings in no way represent Constitutional voodooism.

In "How to Save a Constitutional Democracy," Tom Ginsburg and Aziz Z. Huq write about the two-edged sword that is the U.S. Constitution. When used by those who wish to expand

democracy, it is a "salutary tool"; but it becomes a dangerous weapon when used by those who seek to undermine democracy. Huq writes:

> The document is sufficiently old and terse that you can, if you really want to, make a credible-sounding argument for almost anything. What has stopped this from descending into total farce, so far, is a shared political and legal culture, a sense of propriety and self-enforced boundaries. The happy story you can tell about that is that it has held back the tide for as long as it has. The less happy story is that there is no way to guarantee that it will last (Marantz, 2023).

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