



Dipartimento di Scienze Politiche

Cattedra di Comparative Public Law

AMERICAN CONSTITUTIONAL STIFFNESS:
AMENDING THE SECOND AMENDMENT

RELATORE

Prof. Giovanni Rizzoni

CANDIDATO

Alice Zandrino

Matricola n. 625252

CORRELATORE

Prof. Gregory Alegi

ANNO ACCADEMICO 2015/2016

ACKNOWLEDGMENT

Before getting to the heart of this research, I would like to mention and thanks some people who have supported me in this long journey.

First of all, my supervisor, Professor Gregory Alegi, who, despite the short notice he received, has made a great contribution to my work, encouraging me to do always better. Moreover, he was an outstanding professor, often hobnobbing after History of the Americas lectures with his students, debating on the most diverse topics, from politics to culture, being always friendly and helpful.

Professor Cristina Fasone, who has followed me throughout all my academic research, began more than a year ago. She drove me with patience, addressing me towards a more extensive search than the initial one. She supported me pushing me to participate to the competition ban to conduct the thesis abroad, convinced that this would be an enriching experience for me. And she was definitely right. Furthermore, she has forgiven my mistakes and gave me confidence, proving to be not only a great mentor, but a great person.

Finally, I have the greatest thanks to a person who, without even know me, has done everything possible to support my thesis. Mr. Richard Albert, Professor at the Boston College Law School, helped me to be taken in consideration for the Visiting Scholar program, underlying my skills and personally supervising the contents of my research, analyzing every aspect with me. He gave a personal and original contribution to my research, always trying to understand my point of view without judging my ideas. The reason of my thanks to this person, concern especially the promptness and diligence with which he has lavished in the months of “epistolary” relationship before I arrived in Boston. I believe it is reassuring nowadays, to find someone who is willing to invest in your project, without knowing you. This research, if on one side enriched me and made me grow, on the other side, made me more hopeful and trusting in people.

INDEX

ACKNOWLEDGMENTS.....	2
INTRODUCTION.....	4

PART I

CONSTITUTIONAL RIGIDITY IN THE US

CHAPTER ONE

1. THE UNITED STATES CONSTITUTION, THE BILL OF RIGHTS AND THE CRITICS

1.1 The Origins.....	11
1.2 The Features of United States Constitution.....	13
1.3 The Bill of Rights.....	15
1.4 The Critics.....	18

CHAPTER TWO

2. THE ENDURANCE OF A RIGID CONSTITUTION AND THE ARTICLE V: FORMAL V. INFORMAL AMENDMENT PROCEDURE

2.1 Giving the Floor to the People.....	20
2.2 Changes in Progress: the case of Thirteenth Amendment.....	21
2.3 The Article V – Formal Amendment Procedure	22
2.4 Informal Amendment Procedure.....	25
2.5 Returning to the People.....	32

CHAPTER THREE

3. A MATTER OF INTERPRETATION: LITERAL OR NON TEXTUAL MEANING?

3.1 Semantics and Interpretative Theories.....	35
3.2 Constructive Criteria.....	36

3.3 Constitutional Interpretation in Judicial Review.....	39
3.4 Historical Legal Cases.....	44

CHAPTER FOUR

4. PRINCIPLES AND DEVICES TO AMEND THE US CONSTITUTION - A COMPARATIVE PERSPECTIVE

4.1 Democratic or Undemocratic Constitution?.....	49
4.2 Different Ploys, One Goal: Amending the Constitution.....	54
4.3 A Comparison that Comes from the East.....	58
4.4 A Domestic Spectator: The Italian Constitutional Referendum.....	65

PART II

THE AMBIGUOUS SECOND AMENDMENT: A CASE STUDY

CHAPTER FIVE

5. THE WILL OF FOUNDING FATHERS IN CHANGING TIMES: AN INTERPRETATIVE DISCUSSION

5.1 Assumption.....	68
5.2 Textual Analysis.....	69
5.3 Historical Background.....	73
5.4 How Many Interpretations?.....	77

CHAPTER SIX

6. THE US SUPREME COURT INTERPRETATION IN CONTENTIOUS LEGAL CASES

6.1 United States v. Cruikshank (1875).....	84
6.2 United States v. Miller (1939).....	87

6.3 District of Columbia v. Heller (2008).....	89
6.4 Caetano v. Massachusetts (2015) and the Temporal Escalation Theory.....	93

CHAPTER SEVEN

7. POLITICAL INSTITUTIONS ON THE SECOND AMENDMENT

7.1 Amendment or Slogan?.....	97
7.2 A Polarized Society.....	100
7.3 Second Amendment and Executive Power.....	103
7.4 Offenses, Enemies and Conspiracy Hypothesis.....	106

CHAPTER EIGHT

8. WHERE ARE WE HEADING?

8.1 The Enduring Constitution.....	110
8.2 The Blind Belief of the American People.....	112
8.3 Constitution and the Second Amendment: a Kaleidoscopic Interpretation.....	115

CONCLUSION AND POSSIBLE SOLUTIONS.....	118
--	-----

BIBLIOGRAPHY	123
--------------------	-----

RINGRAZIAMENTI.....	133
---------------------	-----

Introduction

United States Constitution has always been the comparison mirror to evaluate how much a new fresh Constitution could at the same time be democratic and people-based. Since the beginning of Constitutionalism, doctrine has labeled and recognized several classifications of Constitutions. Founding Fathers decided to create a document that lasted in times but that was also interpretable according to the different federal State laws of every Member State. They basically realized necessities are mutable issues in times.”As societies and their underlying conditions change over time, institutions must adjust with them to be effective”.¹ “hence the wisdom of leaving the door to future constitutional amendments wide-open”.²

However, our purpose here is not to demonstrate how flexible is the United States Constitution, but, on contrary, how this Constitution reveals its rigidity, especially for what concerns the possibility to amend it. One crucial element regards the relative lack of formal amendments to the US Constitution, especially in recent past. Several Commentators see this process in a positive way, affirming that this improves the stability of the political system, but at the same time they see the lack of amendment as confirming the inevitability of the Court’s role in adapting an eighteenth century Constitution to new circumstances.³

Everybody is aware more or less of the Article five and the formal “iter” to amend the Constitution that fundamentally involves different processes, but these mechanisms sound to be most of the time obstructionist and not effective. The aim of the Research is questioning about the reasons why these procedures result to be so tangled and unsuitable for times that require an increasingly dynamic legal framework. “What are the rules to change the constitutional game?”⁴ In particular

¹ Tom Ginsburg and Rosalind Dixon, *Comparative Constitutional Law*, Edward Elgar Publishing, 113, 2011

² Akhil Reed Amar, *America’s Constitution: A Biography*, Random House, 285, 2006

³ Dawn Oliver, Carlo Fusaro, *How Constitutions Change: A Comparative Study*, Hurt Publishing, 361-362, 2011

⁴ Richard Albert, *Amending Constitutional Amendment Rules*, Boston College Law School, 2, 2015; see principles of Intertemporality and Relativity.

it is paramount to wonder if subsisted some ploys to make easier this strenuous method and to entrench the rules that govern the amendment system. Some scholars tried to identify interesting principle to guide constitutional designers⁵ in this delicate mechanism. Others, locate the constitutional amendment process as a system able to pledge a democratic dialogue between citizens and courts:⁶ “by offering up the deepest synthesis of the past constitutional achievements of which they are capable, the Justice provide today’s Americans with a dialectical mirror, as it were, in which to look at themselves.(...) Has it come time again to mobilize our political energies to transform our fundamental principles?”⁷ To build the discussion on constitutional endurance, it will be essential to create a strong historical background and to also make a comparative analysis, taking on sample several different constitutional amendment rules.⁸

The intent of the second part will be to try to deeply inspect and melt the bows around the ambiguity of the Second Amendment, taking this ancient right as Case Study to prove the endurance of United States Constitution. Of course, we found ourselves in a minefield. This because we are going to evaluate a right that is not only intensely rooted in the Constitution from 1791,⁹ but it is also deep-seated in the United States culture exactly as others fundamental rights such as Free Speech or Religion. They are all “rights of the people”, they are individual rights.¹⁰ The question is:” What is the proper way to interpret this Amendment? Is it something about history or something that simply lies in the words “undressed” from its historical background?¹¹ Ironically, there is a Latin prophecy written by Alberico delle Tre Fontane in his “Chronicon” that, in a certain way, could recall the above-mentioned Amendment: “Ibis Redibis non Morieris in Bello”¹². This sentence is extraordinary and infamous for its ambiguity and perfectly underscores how much

⁵ Richard Albert, *Amending Constitutional Amendment Rules*, Boston College Law School, 4 (2015)

⁶ Rosalind Dixon, *Constitutional Amendment Rules: A Comparative Perspective*, The Law School, The University of Chicago, 98 (2011)

⁷ Ackerman B., *We The People*, Foundations The Belknap Press of Harvard University Press 161-162 (1993)

⁸ Ref. Japanese and Indian Constitutions.

⁹ *1791 is the year in which was officially drafted Second Amendment.*

¹⁰ Howard I. Schwartz, *A Right To Bear Arms? Ambiguity in the Second Amendment*, 2014 available <http://www.howardischwartz.com/a-right-to-bear-arms-ambiguity-in-the-second-amendment/>

¹¹ See Scalia A., Gutmann A. ed., *A Matter of Interpretation: Federal Courts and the Law*, Princeton 1997

¹² Alberico delle Tre Fontane, *Chronicon*, 1241

a comma can be relevant for a correct interpretation. And this seems to be the case. “No one has ever described the Constitution as a marvel of clarity, and the Second Amendment is perhaps one of the worst drafted of all its provision.”¹³ This Research will make a comparative analysis between the most contentious legal cases reached up to the US Supreme Court, including *District of Columbia v. Heller* (2008), observing changes and improving about the interpretation of the Second Amendment during trials.

Nowadays it is impossible not to consider the tight bond between the several massacres in the latest year¹⁴ and the right to bear arms, but the purpose remains to comprehend how much the interpretation of this Amendment is supported by politics and United States culture and, according to the first part of the thesis, to understand how the Constitutional Endurance had influenced the attempts to amend it. Finally, I’d like to make a brief reflection about a topic as contemporary as relevant: the evolution of regulation about arm’s detention, especially for what concerns “Firearms Regulation” in the latest Obama’s mandates. In particular, I’d like to focus the attention on the “Executive Action on Gun Control”¹⁵ promoted by the current President in 2016 and a tiny digression about the Presidential Election and including a possible future scenario for what concerns amendability of US Constitution caused by the “Trump Effect”. Are we glimpsing a changing glimmer about this right or is this just a “brief bracket” in US historical continuity?

¹³ Sanford Levinson, *The Embarrassing Second Amendment*, Yale Law Journal, Vol 99, 643-644 (1989)

¹⁴ See Columbine High School Massacre, Sandy Hook Elementary School Shooting, Virginia Tech Shooting.

¹⁵ *The aim is to improve background checks on gun buyers, community safety, mental health treatment and smart gun technology.*

Part. I Constitutional Rigidity in the US

1. The United States Constitution, the Bill of Rights and the Critics

1.1 The Origins

“In a letter to his sister, Benjamin Franklin wrote, “We have however done our best and it must take its chance.”¹ With these few words, one of the Founding Fathers² of United States, delivered the Supreme Law to the American citizens. Between 1775 and 1783, when the Colonies opposed to the mother country struggling for their independence, few of them imagined to be the advocates of a new nation that would become an example for many other governments. For the purposes of this research, It’s not essential but it will be important to mention the harsh road undertaken by the Continental Army to reach the independence from the British “slavery”.

After the start of the clashes with the battle of Lexington, Concord, Lincoln, Menotomy and Cambridge in 1775, the Continental Congress encouraged the individual former colonies to ratify their constitutions which, in essence, reflected the former colonial papers. What appeared to be necessary at the time, was a government that would represent in full all thirteen colonies. Meanwhile, those grueling eight-year war, had proclaimed George Washington as the savior of the fatherland. “On June 12th, 1776 the Continental Congress appointed a Committee of Thirteen (one from each state) to draw up a Constitution. After a month’s debate the committee produced a draft constitution – the Articles of Confederation. After a long discussion between nationalists and loyalists, on July 4th, 1776 was drafted

¹ Robertson David B., *The Original Compromise, What The Constitution Framers were really thinking*, Oxford University Press, 229, 2013

² Founding Fathers are that group of men considered to be the United States creators. They led American Revolution against British Crown, they are also the signers of the Declaration of Independence and they took part in drafting the Constitution of United States. According to history, it is possible to identify as Founders: John Adams, Benjamin Franklin, Alexander Hamilton, John Jay, Thomas Jefferson, James Madison and George Washington.

and ratified the Declaration of Independence signed by all thirteen Member States.”³ Only in 1781, following ratification by each State, "Articles of Confederation" entered into force. They established a "league of mutual friendship" between the Member at and, at the same time, they sanctioned the ideological alliance, politics and war that had brought them to freedom. But not everything was perfectly working under the Articles of Confederation. In particular, there were serious inconsistencies concerning the form of government and the power to enforce the payment of taxes. The model adopted by the Confederation, markedly diverged from that chosen by the Member States particularly as it was not planned separation of powers. The new system provided for only one body, the Continental Congress, in which the individual states had between two and seven representatives but a single vote, and, not being provided neither a court nor an executive branch, Congress was the repository of all powers. In this scenario, Congress had to face very soon, serious institutional problems. The Union, in fact, suffered a strong influence from the States. After few years, Congress was blocked and, within a decade, the delegates were convinced that the new States needed a permanent and stable arrangement.⁴

The Convention of Philadelphia represented the turning point between the people’s will and the needs of a new fresh powerful State. “On January 1788, five states of the nine necessary for ratification had approved the Constitution – Delaware, Pennsylvania, New Jersey, Georgia and Connecticut. On February 6, Massachusetts, ratified by a vote of 187 to 168.”⁵ What basically was established at that time, were all those governing powers that should have to legislate on every Member State. “*Reflecting what they believed they had learned from their experience as subjects of the British empire, the Convention’s members rapidly agreed that the new governments they were designed should reflect Montesquieuan principles of separation of powers.*”⁶ Analyzing the idealistic roots of US Constitution, it’s possible to glimpse and to also appreciate the European mark that

³ Maldwin A. Jones, *The Limits of Liberty, American History 1607-1992*, 63/63, 1995

⁴ Maria Elisabetta De Franciscis, *Gli articoli della Confederazione e la Costituzione a Confronto*, Università degli Studi di Napoli Federico II, <http://www.federica.unina.it/scienze-politiche/diritto-pubblico-americano-e-comparato/articoli-confederazione-costituzione/>

⁵ *The Charters of Freedom*, http://www.archives.gov/exhibits/charters/constitution_history.html

⁶ Tushnet Mark, *The Constitution of United States of America, A contextual Analysis*, Hart Publishing, 11, 2006

characterized it. The strict bond between the Ambassador Franklin and the Neapolitan Filangieri⁷ have had a huge influence on the new American's structure. However, not every scholar recognizes this link as the interpretative key of US Document. Conferring a too much strong emphasis to the contribution of Eastern philosophy, is almost considered an issue for some Academics. American governmental structure should lie on a "genuinely distinctive pattern" deprived from a pure European's point of view⁸. Anyway, my purpose in this first chapter, is not to analyze every single aspect of this historical-interpretive nuance, but to create a framework by which is possible to identify merits and defects in this Constitution.

1.2 The Features of United States Constitution

Donald Lutz explains in a very concise manner this choice in governing powers. In the Principle of Constitutional Design he explained that *"What we now call separation of powers rested historically on a devolution of power away from strong-man rule (...) This devolution proceeded along one or more of the following paths from one political system to another. 1) Popular consent: Using cultural and/or political institution to limit the center of power to a range acceptable to "public opinion". 2) Separation of functions: Dividing power among multiple more or less specialized and independent entities or offices. 3) Representation: creating an elective body to share the exercise of power with the central governing agent, who now becomes an "executive". 4) Federalism: Moving significant power away from the center to other, more local arenas of decision making. These four historical movements eventually developed into two great principles of Popular Sovereignty and the Separation of Powers, which together undergird and define modern constitutionalism."*⁹

⁷ Gaetano Filangieri was an Italian jurist. He is considered as the Father of Neapolitan enlightenment. He entertained a long epistolary relationship with Benjamin Franklin who was particularly inspired by his writings.

⁸ Ackerman Bruce, *We the People, The Foundations*, The Belknap Press of Harvard University Press, 3,1991.

⁹ Lutz. Donald S., *Principles of Constitutional Design*, Cambridge University Press, 111, 2006

By 1787, was officially signed the United States Constitution: the Supreme Law of the Land. Despite of the great result, this constitutional path has required a long ideals struggle among the wisest men of the ancient times. But even if they represented the most incorruptible men of that era, in a certain way they had to deal and balance with ethics and interests. It worth now to make a premise about my assumption. In fact, I retain it would be definitely easy judging the work of the ancestors with hindsight. Founding Federalists lived in an era built on great ideals but also contradictions. As Bruce Ackerman points out in his writing “*We The People*”, is important to remind that a luminary man like James Madison was also a slaveholder.¹⁰

However, this research is not about ethics and morality; it doesn’t want to pass judgment on the advocates of US, but it’s essential to establish right way that even the most influential jurists of the past have had to deal with social and human issues and, as with every human being, Madison finds himself in the condition to raise his interest with the common good. He “showed a resolute dedication to a republican national government throughout the Convention, and the Virginia Plan reflected this dedication; but the Virginia plan also corresponded to Virginia’s interest and Madison’s ambition.”¹¹ Travelling on this road, it is possible to affirm that *Great Compromise* was one of the most important step achieved at that time. Representation became a pivotal issue, and in the same way, it constituted the searing matter between the biggest and the smallest Member States. Some proponents of New Jersey Plan wished and fought for an equal representation in the Senate, but at the same time other representatives such as Delaware, felt that structure as an under-represented solution. What was clear at the time, was the necessity to seek a compromise between the parties. Sherman’s Compromise¹² “provided for proportional representation in the House, equal State representation in the Senate, and the House control of initial tax and spending proposal.”¹³

¹⁰ Ackerman Bruce, *We the People*, The Foundations, The Belknap Press of Harvard University Press, 5,1991.

¹¹ Robertson David B., *The Original Compromise*, What The Constitution Framers were really thinking, Oxford University Press, 230, 2013

¹² Great Compromise took its name from Robert Sherman, the first person that proposed this solution.

¹³ Robertson David B., *The Original Compromise*, What The Constitution Framers were really thinking, Oxford University Press, 94, 2013

This brief chronological overview presents a context that didn't seem so amenable at the beginning and that, at the end, obtained a really strong value because, on one side, underlined the initial struggles and the many attempts for the arrangement of the Constitution and, on the other side, stressed the accuracy of the final result. Nowadays, some scholars complain United States Constitution is too vague, some others say it's too short. Mark Tushnet "paints" it with three qualities: "old, short and difficult to amend."¹⁴ "However, he gives an interesting explanation about these apparently negative shades. His elaboration is based on a temporary and interpretative factors that the author compares to those of UK. Tushnet finds the main difference in the prevision of US Constitution's versatility. Using his own words: *"the written Constitution's words must somehow be adapted to deal with problems of governance that have arisen since 1789, and the provision for formal amendment are too cumbersome to serve as the primary mechanism for adaption."*¹⁵

1.3 The Bill of Rights

Having "navigated" through the first structure of the US Constitutionalism, it's paramount now delving into the very identifying aspect of this country: *the People*.

What about people's rights in United States Constitution? According to Lutz, *"The inherent logic of constitutional design results from humans, on the one hand, seeking to create a supreme power that allows an expanded pursuit of self-preservation, liberty, sociability and beneficial innovation and, on the other hand, seeking to prevent that supreme power from itself threatening these pursued values."*¹⁶ *Jefferson must have had some feeling of personal satisfaction when he was able to announce officially the ratification of the first ten amendments.(...) Adding the Bill of Rights to the Constitution was a step which convinced many men*

¹⁴ Black E., Constitution nearly impossible to amend: Is the bar too high? <http://www.minipost.com/eric-black-ink/2012/12/constitution-nearly-impossible-amend-nar-too-high>,

¹⁵ Tushnet Mark, The Constitution of the United States, A contextual Analysis, Hart Publishing, 1, 2009

¹⁶ Lutz. Donald S., Principles of Constitutional Design, Cambridge University Press, 145, 2006.

that the republic was not, after all, headed down hill”¹⁷ “During the debates on the adoption of the Constitution, its opponents repeatedly charged that the Constitution as drafted, would open the way to tyranny by the central government”. Surely at this point, it’s important to keep in mind that Article 1 of the Constitution, establishes the composition of two chambers and one of these represents the population’s will. “George Mason envisioned the House as the ”*grand depository of the democratic principle of the Government*,”¹⁸ The House of Representatives, elected by the people and for the people, granted citizens to have a voice in Constitutional matters. “The Virginia Plan proposed that voters would directly select their representatives in the people’s house, and that House of Representatives would play the pivotal, driving role in the new Government.”¹⁹ But “representation alone would not be enough.(...) The Representation themselves might be corrupt, for example.(...) Hamilton and Madison urged the people to ratify the Constitution in the form it was proposed, and promised that once the new government was in place they would immediately introduce a Bill of Rights to be added to the Constitution as amendments.”²⁰ “Fresh in their minds was the memory of the British violation of civil rights before and during the Revolution. They demanded a "bill of rights" that would spell out the immunities of individual citizens”.²¹ By treaties and conventions, Founding Father recognized the necessity to give to the population a specific *modus vivendi* applying the “Supreme Law of the Land”²² but, after the laborious Independence, appeared also essential to guarantee United States population a paramount importance over their own Land. “(...) Federalists argued that the Constitution did not need a bill of rights, because the people and the states kept any powers not given to the federal government. Anti-Federalists held that a bill of rights was necessary to safeguard individual liberty.”²³

¹⁷ Allen Robert R. The Birth of the Bill of Rights 1776-1791, The University of North Carolina Press Chapel Hill, 219, 1955

¹⁸ Robertson David B., The Original Compromise, What the COnstitution’s Framers Were really Thinking, Oxford, 81, 2013

¹⁹ Robertson David B., The Original Compromise, What the Constitution’s Framers Were really Thinking, Oxford, 82, 2013

²⁰ Tushnet Mark, The Constitution of United States, A contextual Analysis, Hart Publishing, 17, 2006

²¹ The Charter of Freedom, http://www.archives.gov/exhibits/charters/bill_of_rights.html

²² *Ref to the Constitution*. Akhil Reed Amar, *America’s Constitution: A biography*, 300, 2010.

²³ Bill of Rights of The United States of America, <http://www.billofrightsinstitute.org/founding-documents/bill-of-rights/>

At the time of the entry into force in 1789, the Constitution contained few specific rights guarantees: protection against states impairing the obligation of contracts (Art.1 Section 10), provisions that prohibit both the federal and state governments from enforcing ex post facto laws and provisions barring bills of attainder.²⁴ Around 1791, were created and promulgated the first Ten Amendments. They were meant to be the solemn Protection's Declaration of all people born on the American territory and they constituted the Bill of Rights. From this point of view, is really stimulant making intertwine the Constitution and the Bill of Rights as they were part of an anatomic body. It could sound quite unusual comparing United States Constitution to the organs of a human being in order to clarify the interaction that govern their relationship, but this explication fits perfectly to better clarify this interplay. Starting with the assumption that Preamble symbolizes the skeleton of the Country, creating the protective structure, it's possible to affirm that Articles constituted the brain of this "governing body" ruling and regulating organs decisions and movements. To ensure that organs interact properly with each other, Representatives are essentials. They constitute bloodstream comprehending veins and arteries that connect the most distant and different organs (Member States) allowing a full and correct interaction between them. Finally, we have people. In this scientific description, people represents the different cells in the organs. Each Member State, however small, poses a fundamental contribution to this governing body (the country). Without people there is no State to regulate, without people, there is no country to protect. And this is the "heart" of the interaction. As the Amendments are a prosecution of the Articles, it's possible to consider the Articles as the answer of the Amendments. In this way, the power to edit the Document, should lie in the People's hands. "There is a logic that says that if a constitution rests on popular consent, and thus on popular control, amending the document should return to the level of popular control that created it."²⁵

²⁴ Exploring Constitutional Conflicts. <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/billofrightsintro.html>

²⁵ Lutz Donald S., Principles of Constitutional Design, Cambridge University Press, 146, 2006

1.4 The Critics

Keeping now in mind all the centuries passing to improve United States Constitution, it's also essential to recall that "not all that glitters is gold".

Is it correct to consider United States Constitution as an interpretable document, adapting it to the passing time? Or maybe it should be more appropriate to "engage in a National conversation about its adequacy rather than automatically to assume its fitness for our own times."²⁶ Before to deepen the discussion on the "amendability" of the Constitution, it's relevant to make an assumption. Time passes, governments change, but, before to edit something, people should strongly believe that something needs to be edited. So what are the major flaws of the US Constitution? Is it something unwritten between the lines of this ancient Document? According to Akhil Reed Amar, what seriously is to analyze, is not the plain words of the Constitution but is the background. "Words like *slavery* (...) never even appear in the Constitution, but their impact on the Constitution is clear in the Convention debates. Some delegates, at the beginning of the Constitutionalist Plan, like George Mason, called attention to these ambiguities and condemned the Constitution because of them."²⁷ Was totally right to create a Bill of Rights in the name of the people and at the same time possess slaves expropriating to them the meaning of People?

"Consider the Constitution's Ninth Amendment²⁸, which affirms the reality of various rights that are not textually "enumerate(ed)" - rights that are concededly not listed in the document itself. To take this amendment seriously, Americans must

²⁶ Levinson Sanford, *Our Undemocratic Constitution*, Oxford University Press, 5, 2006

²⁷ Robertson David B., *The Original Compromise, What the Constitution's Framers Were really Thinking*, Oxford, 236, 2013

²⁸ The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people".

go beneath and beyond the Constitution's textually enumerated rights."²⁹ This example really fills the bill and for our purpose, this kind of analysis will be essential because, as I am going to consider later in chapters, it will provide the counter balance to amend the Constitution. Everything can be contextualized with a positive or negative interpretation. No one wants to discuss the effectiveness of United States Constitution, but at the same time it's impossible ignoring that this Constitution has been amended so few times in centuries. "Some men look at the Constitution with sanctimonious reverence, and deem them like the arc of the covenant, too sacred to be touched."³⁰ I couldn't be more agree with Thomas Jefferson. It is neither an aberration, nor a sacrilege wonder why some governments devices work and some others don't work anymore. This discussion should arise both from people, but in particular from governments. According to Mark Tushnet, "the world changes and constitutions must adjust to those changes. An old constitution that is difficult to amend formally is a prescription for disaster or a candidate for replacement. (...) The United States uses constitutional interpretation for that job."³¹

The concept of Democracy is not a unitary concept, it is something subjective, but behind every modern constitution, should be a constant and in depth review. And this is the reason why I find myself so close to Levinson idea's about a new National Convention on Constitution. This digression, helps to get better into the heart of discussion. What's wrong with United States Constitution? And why are we living into the shadow of a past that doesn't fit anymore with the present necessities?

²⁹ Akhil Reed A., *America's Unwritten Constitution*, Basic Books, 2012.

³⁰ Levinson Sanford, *Our Undemocratic Constitution*, Oxford University Press, 2006

³¹ Tushnet Mark, *The Constitution of United States, A contextual Analysis*, Hart Publishing, 242, 2006

2. The Endurance of a Rigid Constitution

Article V: Formal v. Informal Amendment Procedure

2.1 Giving the Floor to the People

In the last chapter we left with an interrogative relating to the effectiveness of today's US Constitution. I wondered how was it possible to feel comfortable in 2016 living under laws written two hundred twenty-seven years ago. People's necessities are subject to change during a lifetime. Think, therefore, what should happen to the needs of entire generations. Another element to consider in this research, is the shock that this country has suffered and incurred as a result of battles, wars, bombings and presidential disputed issues on its soil. The constant of all these events has always been the Constitution, remained almost *immaculate* after its entry into force.

So what are the devices to guarantee a proper application of citizen's right to edit this Document? Consider US Constitution as a dynamic and evolving machine would be a chimera, but at the same time it would be wrong to affirm that there are no devices to amend it. Before delving into the mechanisms that regulate this system, we should mention the First Amendment¹, which represents the origin and also the bulwark of this right. A big mistake in this analysis, would be recognize the Amendments creation as a mere consequence of the Articles of the Constitution. Virginia Declaration' Rights was written in 1776 and it depicted the first Charter based on people expression. In this way, It's not surprising to find in the First Amendment those rights already granted to the population in the Independence's

¹ "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances".

Declaration. Despite some laws enacted during the 20th century², the right of expression has always been considered a cornerstone of American society. According to my rational discourse, it is possible, therefore, that people feel the need to change the document written by the federalists Fathers, and, at the same time, they can freely express this need through some specific procedures. Based on the first amendment, this is perfectly legal.

2.2 Changes in Progress – the case of Thirteenth Amendment

Before moving into the dispute of Article V procedure, I would like to illustrate an example of Amendment which has corrected and modified a law practice protected for a long time by jurisdiction, trying to combine the change of the society with the need for a constitutional amendment. First of all, we should remind that US Constitution has been amended twenty-seven times from its entry into force. To create an explanatory link with the Second Amendment, which I am going to discuss later in chapters, I will consider a right characterized by a strong social and civic value. The Thirteenth Amendment³.

Issued in 1864, it envisaged the abolition of slavery and, along with the next Fifteenth Amendment, secured the right to vote to former slaves. Why I decided to take this into consideration? Well, I think this Amendment more than many others, demonstrates that change in American society may take centuries, but which is, in any case, a human need to ask whether the jurisdiction is always in accordance with civil rights protections. And, if this doesn't happen or does not happen anymore, it's essential wondering what possible remedies applying. Owning slaves was a lawful and permissible custom, just as it's now the right to bear arms. If we ever questioned any American between 1700s and 1800s, we would have probably got

² Ref. Alien and Sedition Acts. Laws enacted to remove aliens that threatened peace and restrict frightful speech of the government.

³ *Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.*

an answer that appealed that right to the Law. They had the right to hold slaves. It was a right so ingrained in the culture and in society as now seems to be the right to self-defense. This confutation requires, however, a fundamental clarification. The US Constitution has never declared the detention of slaves as a necessity for the citizens. This was a practice which has never been written in the Constitution and, most of all, it had nothing to do with tyranny's prevention. Mostly slaveholders used to see that kind of trade as a system to save money and enrich their patrimony, since slaves were not considered neither part of the civilian population, nor almost humans. But still, it was consider a people's right.

The right to bear arms is a necessity allocated to every American citizen deems violated or threatened their safety in accordance with those that are the federal laws of each state. And Second Amendment leaves the possibility that another tyrannical government takes possession of the Motherland. Both practices are born with different purposes and motivations, but the one as the other, has always been protected by law (until Thirteen Amendment). One has to wonder now if this distinction is a crucial part of the analysis, or you can say that, like slavery has touched its dead center in the late 1800s, the Second Amendment is reaching a turning point in our time. And, according to this mechanism, it can therefore be held that, tying the Second Amendment to the Constitution as it is written, it's a practice that is falling into desuetude. What I'm trying to demonstrate with this rebuttal, is the fact that not always our rights don't infringe someone else's rights and that both Thirteen Amendment and Second one touch the civil rights sphere. When I assert that times change, I refer to the fact that human rights, as we understand them today, are not those intended by our ancestors and that a general review of those rights should be made with regard to the Second Amendment as soon as possible. But I will discuss about this topic later.

2.3 The Article V

Formal Amendment Procedure

Without any doubt, the most efficient mechanism through which the United States Constitution can be modified is article V. The question is: “Who controls this vital document? Who has the authority to amend the United States Constitution? The simple and most legitimate answer to this question is that “the people” utilizing the Article V procedure outlined in the Constitution have the authority to amend that fundamental law embodied by United States Constitution.”⁴ This Article states:

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

Article V has the right to give an enormous power to both the Congress and to the population through Representatives elections. Madison and the Founding Fathers had envisaged immediately that maintaining a wide open door towards the possibility of revising the Constitution, would be necessary to allow the country to fully implement the concept of Democracy and this is one of the reasons why we often refer to this document as a “living” one. The will of the ancestors was thus establishing a system in which there were two possibilities to amend the Constitution. The first, “*Whenever two-thirds of Both houses Shall deem it Necessary*”, provides for the opportunity to propose constitutional amendments by the Congress, the second predicts that, through a referendum, more properly defined National Constitutional Convention, 3/4 of the member states can call for a

⁴ Darren Patrick G., *Perfecting the Constitution, The case for the Article V Amendment Process*, Lexington Books, 2013.

Convention in order to amend the Constitution. The decision to establish two alternative pathways to amend the Document, undoubtedly reflects the American legislative footprint. Federalists Fathers wanted to ensure a Check and Balance system, including for what concerns the revision of the Constitution. I am not referring to the fact that the congress may have the right to amend the law, but I'm simply underlining that this double route allows citizens, if they consider it appropriate, can submit themselves new amendments to the Constitution after having called a Con Con⁵. Supervision by the people, would have prevented the government from taking arbitrary decisions concerning constitutional amendments.

“It rooted the amending process in the Founders’ unique concept of structural federalism based on the dual sovereignty of the state and national governments.”⁶

Again we are putting citizenship on a pedestal so that they had the final say. Even before there was a Constitution, William Penn⁷ had glimpsed what could be defined as the first democratic glimmer in American society. He not only had an open view and a deep sense of integration, but was the first to mention the amendability process. After him also the homeland’s Creators had the same feeling: that it was necessary to guarantee future generations the possibility of adapting the law to various times. In the *Federalist Paper No. 43*, Madison, applying the model of balance that we mentioned previously, explained the reason for such ambivalent choice. It was important that there was the possibility to revise the Document, but that this was not so easy and quick to implement. Despite the achievement of a common plan between the proponents of Article V, initially there was no full agreement about the form of this article. In particular, they blame about quorum and about the disparity that was creating between the Congress and the people.⁸ And unfortunately, what they had predicted about the problematic nature of this article, it’s still perceivable today. As explained so far, this article would seem a

⁵ Abbr. for Constitutional Convention

⁶ Spalding Matthew, Article V: Congress, Conventions and Constitutional Amendment, The Heritage Foundation, 2011. <http://www.heritage.org/research/reports/2011/02/article-v-congress-conventions-and-constitutional-amendments>

⁷ William Penn was the founder of Province of Pennsylvania, the advocate of Democracy and Freedom of Religion and he was the first to envisage an European Parliament.

⁸ Spalding Matthew, Article V: Congress, Conventions and Constitutional Amendment, The Heritage Foundation, 2011. <http://www.heritage.org/research/reports/2011/02/article-v-congress-conventions-and-constitutional-amendments>

total guarantee of transparency and democracy for the USA jurisdiction. But, at a logistics and application level, it presents several inconsistencies.

The United States of America is composed by fifty States, each one, according to the Supreme text, redefines and adapts its federal laws according to the unique great jurisdiction. Despite numerous attempts by associations and institutions to shape an only key of application, it is legitimate and evident, that each state interprets the Constitution according to their own shape. And, similarly, it would be unthinkable not attribute the same importance within the voting quorum. Then why, for example, the State of Alaska and California find themselves sharing the same weight in the political ascendancy level.⁹ Analyzing the failures collected during the last decades, it seems clear that convening a national convention remains today more than ever a *utopia*. The reasons why this does not occur are several, one of the most obvious, is the small number of citizens that can block the will of all the others. But Article V is clear. Amending the Constitution requires more than 37 States are in concordance. How is it possible in this way to fulfill the will of the Founders? In a letter by Thomas Jefferson to Madison he stated:

*“No society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation...Every constitution, then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force and not of right.”*¹⁰

According to this, each failed attempt to amend it takes us further and further away from the concept of democracy. How it's possible therefore to get a change legally acceptable if Article 5 results to be totally prohibitive? One solution could be implementing a system that some use to call informal amendment.

2.4 Informal Amendment Procedure

⁹ State of Alaska is the less populous with just three Representative, while California is the most populous with fifty-three Representatives.

¹⁰ Thomas Jefferson (in a letter to James Madison from Paris, September 6, 1789)

As we have seen, apart from very rare cases, amending the constitutional text turned out to be a real brain teaser in past. Regarding the use of formal and informal amendment, there has always been a heated debate among the most authoritative scholars in this field that has been growing in recent years. Some believed that Article V remains the only bastion of amendability procedure as wanted and enshrined in the Constitution itself, others see it as one of the biggest flaws that undermine the democratic nature of US legal system. The proponents of this second theory often push for the use of informal mechanisms that depart from the official document, believing it to be obstructionist in some practices.¹¹ Through these *informal adaptations*, it is possible to bypass the text implementing a revision or a partial modification of the law. The informal process to amend the constitution, consists of different stages and possibilities. I'm going to make a brief description of these devices and, at the end of this series, I shall question on a possible solution to this dilemma.

Legislative Acts

The first procedure through which it's possible to edit the Constitution informally, is the Legislative Act. Congress had the power to implement changes in two ways: by passing different laws with the proposal to specify and by making more understandable and enforceable laws in different states. This system has made it quite justifiable the implementation of several provisions that have refined and explicit the already existing rules. For example, we could mention the Judiciary Act which came into force in 1789. This Act represents a Statute and it is considered a full source of law, a real primary source. Judiciary Act totally embodies the case of informal amendment, which we mentioned, because, according to Article III Section I, it has been determined that the judiciary power lies in hands of a Supreme

¹¹ Darren Patrick G., *Perfecting the Constitution, The case for the Article V Amendment Process*, Lexington Books, 11, 2013

and a Lower court, but no other indication was given on other minor or ancillary Courts. And exactly here we find the crux of the matter. This vagueness has given free will to posterity for the implementation of corrections that led to interpretations which led to the creation of new legislative and executive branches. As in the brightest democratic processes, even for this Act there was a great debate. Opponents, namely Non-Federalists, did not take kindly to all the attention and importance that was given to the judicial branch, and for a long time there was a doggedness against these legislative acts. But what most interested, it indicates this act as the first case of informal amendment by the Congress. It is necessary, however, points out to the reader that, through this kind of gimmick, Congress man have freely made use of the powers that Constitution implicitly attributed to them. In which way? Consider the controversial Commerce Clause placed in Article I Section 8.¹² Through a simple and short sentence, was attributed to the Congress the power to establish laws and resolve trade issues with respect to foreign countries, federal states and Indian tribes. Based on this Clause, it would appear that the Founding Fathers placed a lot of confidence in both the Representatives and the Senate. Unfortunately, they do not have bequeathed an instruction booklet to interpret ambiguous articles. For what concerns Article I section 8, is the implicit power to be able to take appropriate measures regarding some provisions. What is not expressly provided by this clause, it is sent back to the interpretation of the Congress.

Executive Acts

One of the most interesting tools to circumvent Constitutional provisions, is the power of the executive branch. The President in fact, has the right to outperform the will and the decisions of the Congress taking legally binding decisions. The way he uses his powers can generate informal amendments and, at the same time, can increase the powers of the same executive branch. This happens first of all thanks to the inherent powers that guarantee to the president position to tighten *executive*

¹² The Congress shall have Power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

agreements with other countries. This is granted by the decision of the Supreme Court. According to this reasoning it's possible affirm that, if the President would use the clause of the executive agreement, he could bypass the Senate approval and in this way to approve the decisions he considers most fair. Both as regards the stability of the country, but also and above all, as regards the war. Do not forget that President of United States, as reported in Article III, Section II, Clause I is the Commander in Chief, the army Chief of the land and sea of the Nation and, as the guarantor of the security of the homeland, he is responsible to take decision about military action. This fact, over time, may have caused disagreements between the presidential figure and that of the Senators and Representatives, but on balance, it is one of informal means to implement changes to the Constitution. Regarding the non-formality of the executive, it is important to remember that the Constitution states in article I section 8 clause 11 that only Congress can declare war, but, as we have just explained, this seems to be one of those cases that falls in the extraordinary executive amendability. In total, over the centuries, the President has clung to this right around two-hundred times in conflict times. Numerous attempts have been made in history to scale the absolute freedom of this executive power regarding war. In 1973, coinciding with the war in Vietnam, it was issued the Wars Power Resolution. This decree laid down a time threshold within which the President had to limit its decisions. He should have notified to the Congress his decision 48 hours before military action. Under prior authorization of Congress, his decision would be effective. Despite these measures, the presidential power remains untouchable and is a tangible testimony of the informal amendment procedure.

Judicial Review

One of the most important tools of amendability, out of Constitution draft, it is definitely the one possessed by the Supreme Court. Mark Tushnet define it as a *separate body from the others, not influenced by political parties and made up of independent judges that through judicial review ensure that law remained the most*

*faithful to the original Text.*¹³ The power of this Court, more than anything else, bases its work on the interpretation of the Constitution according to the federal laws. Among all those seen so far, it is probably the most important for this research since relies not on the legitimate powers of government bodies, but on the methodology by which it is possible shaping the Constitution nowadays. The most important function that this organ carries is the “*unconstitutional*” Judicial Review by which analyzes and interprets the laws in the task of resolving disputes between People, States... in order to step over some quibble tied to the epistemological interpretation of the Supreme Law. Article III provides that the duty of the court is primarily about solving issues that do not concern the mere reinterpretation of the Constitution. This is the reason why, when it does, it is acting in an unconstitutional manner. Another factor not to be underestimated is the ethical value that it offers. The Supreme Court is taken into consideration as the guarantor of the Law, the organ that protects and controls that each rule are applied with balance and diligence. So what would happen if the Supreme Court showed to have personal interests? A small mistake of the judiciary body could make bring down public confidence placed in an institutional bulwark like this. That's why I believe that in my analysis this step had a more prominent importance. We are considering whether the US Constitution still has the requirements to be defined a living and evolving document. It has reached a point of no return in which is paramount to figure out which direction to take to make acceptable a real change. If the Supreme Court is the protector of the law and it is the most impartial organ of the American legal system, who can control its behavior? I strongly believe that the gist of the matter lies in this sentence. If this court lacks of morality, we still regard it as the bulwark of incorruption? Without being hysterical, we should consider the difficult position in the judicial review process.” It is the Constitution, not the Supreme Court, which is the Supreme Law of the Land”.¹⁴ One of the most symbolic case that I mention with respect to judicial review is the legal proceedings Marbury vs Madison. This was the first case in which an Act was declared unconstitutional by the Supreme Court. Judge Marshall

¹³ Tushnet Mark, *Weak Courts, Strong Rights, Judicial Review and Social Welfare Rights in Comparative Constitutional Law*, Princeton University Press, 19, 2008

¹⁴ Warren Michelsen, *The Constitutionality Crisis, The Supreme Court and Judicial Review*, Constitutionality.US <http://constitutionality.us/SupremeCourt.html>

played a decisive role and had a great responsibility. In fact, the verdict would not only decreed the reason for one of the parties, but it also established the preponderance of the legislative sources. As it is known, the decision for the Chief Justice was also difficult because the parties were represented by well-known personalities: Marbury and the same Marshall were part of the same political party. Finally, he decided to base his decision on a pure epistemological interpretation of the content of the Constitution. It remained the Supreme Law of the above which state laws could not get the better, and the government would have remained within the limits set by the Constitution.¹⁵

Influence of Party Practices

US Constitution does not make any kind of reference to political parties and the legislative role they must play. In any case, they play a vital role in American society. We can put ourselves in the shoes of today's political thinking to act always for the better, believing that our arguments are non-partisan, but, in the same moment we think, we are taking a choice. And without cataloging our ideas into political parties, we are tending for a specific orientation. Washington was one of the Founders who had got wind of this human characteristic, and he was scared about it. His position was skeptical about the formation of several political parties. Thinking that sooner or later the influence of these camps would have affected legislative decisions was a legitimate fear. Republicans and Democrats have become not only the two opposing factions within the system, but they have gained an ascendant that allows them to determine really important decision such as the choice of the President. Through the strong impact of party decisions, they can amend the constitution. The key to the informal amendability of the political formations lies in the huge appeal they have gained over the centuries and in the strong influence that they exercise in legislative and executive fields. If on one hand I hold to be true this is as natural factor for humans, as it is natural having own idea and manifest it publicly, on the other, there is a risk that the various factions

¹⁵ Bill of Rights Institute, Marbury v. Madison <http://billofrightsintstitute.org/educate/educator-resources/lessons-plans/landmark-supreme-court-cases-elessons/marbury-v-madison-1803/>

do tip the balance towards the own interests. In this way, we can't consider the government as an incorruptible steel system, disinterested and impartial. And this is probably the "cross" of the informal amendment of political parties. If we consider this system as a method of constitutional amendment, we should be prepared to notice a shift in the government and be able to associate the influence of political parties to the expenditure of the State. For example, Republicans will push for investments on strengthening the defense, while the Democrats will leverage the financing for social welfare. Is it a gamble to allow the political factions maneuvering legislative and executive decisions or is it something that we should accept as natural that both Congress and Senate consist of politicians? Probably to answer this question we must first determine whether our governments live the same issue or are free from partisan's hindrance. It is in any case undeniable that this is one of the strongest testimonies of informal amendment procedure.

Customs

The constitutional amendment dictated by customs has become over time a strong change device. The costumes are totally unwritten, but unlike the party practices, the Founding Fathers did not think of having to warn the people of a possible threat in this matter. They were created over time, through the experience of the men and they have shaped legislation with faint changes or improvements. In this fourth kind, it is hard not to notice the temporality's issue. In fact, what distinguishes it from the others, is the fact that the customs and habits cannot be changed in the "blink of an eye". These transformations take years, sometimes centuries before they become a tradition and an informal amendment and therefore it is really hard both implement them and entrust them to posterity. An example will make more clear the concept. One of the clearest model to be mentioned concerns the appointment of the President. Starting from a historical background, Washington, the first Commander in Chief of the United States, settled a period of two consecutive terms for presidents. He created a strong tradition based on the concept of democratic turnover in which the President would have two terms in order to implement his own policies. Adopting this tradition, he found along the

rest of the government and, as it has been demonstrated by the custom, even the successive governments. History teaches us, however, that Theodore Roosevelt had a term that lasted eighteen years: the equivalent of less than four terms in a row. Despite his figure became one of the most famous in history, he broke the tradition that until then have had a large follower. How to avoid this custom would be missed? Roosevelt never saw the end of his fourth term, then the Congress decided to came back to the old custom restoring the famous two-terms limit. This was handed down until 1951 when it was drafted and became the twenty-second amendment that made this tradition a rule in effect. The practice for what concerns the amendability of the Constitution, in a nutshell, is a form of custom law that is recognized by all as a result of its repeated implementation and by the extensive common acceptance. These two aspect are typically framed in Civil Legal system and, if we tried to insert Amendment by Customs in civil Law context, we would recognize the first aspect as *usus diurnitas* and the second as *opinion iuris ac necessitatis*. Then we could attribute to this process the value of *consuetudo praeter legem*: a custom that is implemented in Legislative system but that it's not purposely written in the Constitution.

2.5 Returning to the People

In light of this, what seems clear is that the article V has been completely bypassed in recent years both for its fiddly process, and because have been came to light many more effective methods that don't require authorizations. So now we know that, amending the Constitution at the informal level is possible and, some more than other organs, are working to ensure that this happens. We have previously seen the actions that may be emanate from the Legislative branch, those of the President, the Supreme Court and political parties. A question arises at this point: what about the People? The citizens have no role in this smart process? Americans may feel threatened on one side by the weight of the choices that don't affect their well-being and, on the other, by the decisions that they don't choose.

And by a National Constitutional Convention the power of supreme bodies would be extinguished to finally give a voice to the people. We are perfectly aware that thanks to Article V, if was reached the established quorum, the Congress would be obliged to accept the agreement and neither the President nor the Supreme Court might oppose.¹⁶ The only problem is to reach to the Congress.

Considering a country that has built its official document on its population, it appears unusual that they have no say in the matter. Considering one country acting on its citizens, would not be fair that they could play a greater role in these decisions? From the analysis conducted so far it seems that people are mere spectators of the decisions and that changes are taken only by the “upper floors”. In a utopian land of perfect democracy, a citizen should feel protected by the legislative and judicial bodies and not feel puppet of other people's decisions. This analysis does not want to misrepresent the administration of the American system of government, but it wants to reflect on the role of the population in the amendability process. Instead to get around the rules that the Founding Fathers precisely explicate more than two hundred years ago, it would be more appropriate to build a system around which everyone feels truly represented.

We discussed earlier the numerical problem of the states and how some of them, despite their small size, can stop emendation proceedings. One of the key principles in the US system is the equal representation, especially the political weight that all member States possess. Is very positive, however, that every State, whether big or small, has the same influence on legislation. This becomes complicated when a small number of citizens who gathers it with his vote the will of all others. We can consider this “veto power” as the highest form of democracy, but unfortunately, this is also the reasons why it is so harsh to implement Article V. But how can we forget that the American population is represented in Parliament? When we affirm people have no say about amendability process, we forget the fundamental role of House of Representatives. If there was any change, it would behoove that it came from Representative’s sphere: those who have been chosen to give voice to different

¹⁶ Malcolm John, Consideration of a Convention to Propose Amendments Under Article V of the US Constitution, The Heritage Foundation, 2016 <http://www.heritage.org/research/reports/2016/02/consideration-of-a-convention-to-propose-amendments-under-article-v-of-the-us-constitution>

States. Quoting the words of a wise man, we got to a point where it seems necessary a “*democratic coup d’etat*” by the House of Representatives. Nothing that has to do with armed struggle, but rather to a legislative breakthrough embraced by those who represented the guarantors of popular right with the purpose to avoid democratic paralysis.¹⁷ The direction to take, as it seems unreachable, it is probably trying to establish a mechanism to settle the majority of the population by creating the conditions to allow to satisfy the desires of change that the States need, keeping as much as possible close to the law delivered by Federalists Fathers and respecting the will of all people. We are aware that just a minimum number of amendments have come so far in the Congress, and even fewer have seen the “light of the sun”. The bureaucratic system has so far made the obstructionist amendability process¹⁸ but this can’t be the only reason why the mechanism is so impracticable. The interpretation that we often use to provide ourselves an “*escamotage*” to implement the amendment system, in this case has very little to do. The only possible solution to the problem that we placed would therefore amend Article V based on the thresholds it poses. It could be a risky proposal, or the only way to legitimize the role of the people.

¹⁷ Levinson Sanford, *Our Undemocratic Constitution*, Oxford University Press, 169-170, 2006

¹⁸ *Ref.* Equal Rights Amendment that passed both the Chamber of the Congress in 1972 but that was never ratified due to the expiration’s span.

3. A Matter of Interpretation: Literal or Non Textual Meaning?

3.1 Semantics and Interpretative Theories

I chose to name my third chapter “Literal or Non textual meaning” to give a wider cut to two classic categories in which it is usual to frame the critical constitutional interpretation: originalists and not originalists. However, it is good to develop the concept of semantics and cultural meaning and see how they complement each other in the study of the US Constitution: how they “are two faces of the same coin.”¹ By definition, we know that semantics is the science that deals with the meaning of words, letters, or texts. What drives me to analyze this concept has nothing to do with its Greek (*σημαντικός*) or French (*sémantique*) origin, the focal point is the branch of this word that can bring the discussion on two very different planes. People’s idea when it comes to semantics is that this is just the study of the meaning of the words in its strictest and literal sense, but, as it is shown by the studies, it is however clear that this concept opens with two important distinctions: diachronic and synchronic semantics.

In the first case, there is an analysis of interaction between the words in a given space located always in the present timeline. The second case, concerns with the conduct of passing time and it search for the deeper meaning of the texts according to a report in time. Obviously this preamble is designed to address the two definitions of semantics in the ordinary classification of who see in the original words of the Constitution the only key to its interpretation (originalists) and those who instead identified a strong relationship between its meaning and societal transformation. (promoters of the living Constitution).

Following the guideline used so far, it is clear that the synchronic semantic concept, outlines what I highlighted in the previous chapter. Assuming that this

¹ Jack M. Balkin, Framework originalism and the living constitution, Northern University Law Review, 1, 2009.

discussion wants to prove the need to “unravel” the American Constitution from its static position, we still have to consider very carefully the originalist theory, as it counterbalances the idea of a living constitution with the original plan of the Founding Fathers. *“Debates over Originalism have been a central focus of contemporary constitutional theory for three decades. One of the features of this debate has been disagreement about what originalism is”*² On the other side, if we mention the living Constitution, we can capture a different variety of shades definitely less formal. Unlike the research carried out by Professor Lawrence Solum³, in this analysis I do not consider semantics as an *unicum*, as a single concept on the first meaning given at the drafting time, but, around this word, I will try to keep well separated the concepts of diachronic and synchronic semantics comparing the theories of various scholars in this field. This discussion will provide also the basis of interpretative research for the Second Amendment.

3.2 Constructive Criteria

Having making a distinction between synchronic and diachronic interpretation of the Constitution, it is good to be careful not to fall into a simplistic attitude about this diversity. Asserting, in fact, that Thomas Jefferson leaved the politics in the hands of the living and not the dead, is not enough to give today carte blanche to the advocates in legislative changes and, in this way, it would be wrong to think that originalist theory takes the easy way by irrevocably appealing to the initial written for not addressing the cultural and social change. In fact, originalism is not used to justified choices closer to the first meaning of the Constitution. For many scholars, has a great relevance to identify a birth date of the Originalism theory. Some like Paul Brest⁴, use to locate it between 1980 and 1983, others recognize Justice Antonin Scalia as the first one having mentioned this world during

² Lawrence B. Solum, What is Originalism? The Evolution of Contemporary Originalist Theory, Georgetown University Law Center, 2011

³ Ref. Lawrence B. Solum, Semantic Originalism, Georgetown University Law Center, 2008.

⁴ Paul Brest is an American Constitutionalist and he’s considered to be the pioneer of Originalist theory

a judgment in 1995. More recently, Originalism came out in 2005 during a trial patronized by the Chief Justice Steven.⁵ The dynamics that have led some Supreme Court justices and many scholars to defend this hypothesis is not situated in a choice of convenience, but it is built on a precise well justified pattern.

But first of all a question: what are the criteria for interpreting the Constitution? I do not think it is an objective matter identifying the main key points by which to join constitutional interpretation. As for the evaluation of any issue, every individual is more akin to some elements than others. The interpretation is therefore subjective in selecting the most appropriate criterion. Nevertheless, we could take at least five keys as models. The priority that is given to them may change depending on the theory that we decide to embrace, but at the end, they do not change. First of all, it is essential to analyze the exact words of the text, how to make grammatical and logical analysis to identify not so much the goal, but an object of sense task and a correlation between the elements that compose it, thus obtaining an initial diachronic study.

The second criterion, without which we would not have this kind of discussion, concerns the intent of the constitutional document, the ultimate goal of the Founders regarding the implementation of the Articles. In this lineup, it is good to keep in mind that, since we are in a legal system characterized by Common Law, we always have the right and duty to consult prior decisions to determine the most appropriate way to proceed with the construction of our interpretation. *Stare Decisis* establishes a paramount criterion to the analysis of both the Articles and State Laws; through this cardinal principle, it is possible to find an earlier vision of our interest legislation and evaluate the allocated interpretation in previous cases. We talk about a constructive legacy around which to create a stimulating debate by placing it in this time and space. Although many scholars use to see this criterion as a distinctive feature of originalism theory, I believe that, if rightly contextualized, it can instead embody a perfect synchronic semantic. Like the previous criterion in fact, it not based on the static nature of the legal formula, but it has been inspired by settling a

⁵ Grant Huscroft and Bradley W. Miller, *The Challenge of Originalism, Theories of Constitutional Interpretation*, Cambridge University Press , 15 ,2011.

related but not identical dispute. On this starting point we can make “breathe” the will of the Federalists Fathers in a wider degree of discretion with regard to the criterion of the purpose, and also shaping our interpretation on the principle of Stare Decisis. The optics of who interprets an ancient and important document like the Constitution, must look to the past having care to maintain the decisions laid down by the Homeland Fathers, and, at the same time, it should also estimate the impact that his/her analysis could have on more levels.

Obviously, this theory is not shared by everyone; according to Justice Scalia: *“It is the Law the governs, not the intent of the lawgiver”*⁶ I will try to make it clear by an example. If it was established in a given State to modify or made a slight change to one of the Amendments, this would definitely impact not only on the Constitution. Normally we based unconstitutionality on that law working against Constitution, and, as a consequence, suddenly, this law loses its effectiveness. Beyond the mere jurisdiction in fact, the effects would impact both in the social field and in the economic one. This is one of those reasons why we have to deal with the extreme delicacy about constitutional interpretation. The balance so far established, has ensured that the system had a political and social stability, although, as we want to ascertain with this discussion, they have neglected the national cultural matter that has proven to be overwhelmingly in change. Again, we are at a crossroads. Again, time becomes the leader concept in the debate. If we decide to take randomly the same Amendment or Article and interpreting it changing its shape in a different time period, and I am sure that someone has done, it would have a stronger impact in some historical periods and a much milder impact in others. That amendment would be acclaimed by some political sphere rather than in another, and so on. How could we adapt the interpretation following the instructions of ancestors respecting the twenty-first century society? This is a challenge still on the table.

Finally, I come to treat one of the most controversial theory in the field of interpretation: Natural Law.⁷ Is it reliable an analysis like this during the judicial

⁶ Shelley L. Dowling and Mary C. Custy, *The Jurisprudence of United States Constitutional Interpretation: An Annotated Bibliography*, Fred B. Rothman Publications, 232, 1999.

⁷ *Exploring Constitutional Conflicts, Theories of Constitutional Interpretation*, University of Missouri Kansas City,

review process? According to the Locke's law of nature: "*we each own our own bodies*".⁸ The author of this quote wrote an ambitious essay defending the idea of constitutional interpretation moved by the Natural Law in aspiration to a good society. I served some passages of this paper to contextualize this criterion in the analysis of interpretation since it is considered negligible by many skeptics. The aforementioned theory, is associated with the natural rights with which every human being is born. It is an inalienable law. Michael Moore⁹ uses this principle to create a connection with the work of legal machinery of the judges in the judicial review. We assume that these natural rights were born before the establishment of the Constitution and that this is the result of those who own these rights, it comes natural think that the constitutional analysis must submit to the people's will. Assuming that the work of judges is based on citizens' rights protection and that therefore the interpretation of the Constitution must be followed to guarantee the inviolability of those rights of nature, the connection is created by itself. And in this connection lies the moral right. The interpretation should go beyond the originalism of the text and should follow the moral lines of which we all have been endowed by birth.¹⁰ Certainly for many, this explanation will not fully meet the survey; on contrary, I think that goes to look at the depths level the moral origin of the written text, drawing its content from a philosophy which has inspired the US legal system.

3.3 Constitutional Interpretation in Judicial Review

Judicial review and constitutional interpretation are certainly two inextricable concepts. In fact, those who at the end of the day have the final say on the nuances of a legal dispute, are the S.C¹¹ judges. Regarding this, according to Ackerman, exists a sort of dualism: ordinary politics and constitutional scholars.

<http://law2.umkc.edu/faculty/projects/ftrials/conlaw/interp.html>

⁸ Michael S. Moore, Justifying the Natural Law Theory of Constitutional Interpretation, Fordham Law Review, 2001.

⁹ Michael S. Moore is a Professor of Law and Philosophy at Illinois University.

¹⁰ *Ivi*, p 2115.

¹¹ Supreme Court.

*“Judges, as faithful agents of the “We the People”, act more democratically than so legislators, who serve special interest and escape people attention during the extended period of ordinary politics”.*¹² In this specific discussion, we are obviously dealing with judges of the Supreme Court. Their decisions must always be *super partes* and follow the instructions given by the Supreme Law. If they can or not distance from the official document making changes or trying to trick the Constitution, it is a subjective choice that is not always well received. Woodrow Wilson¹³ captured the essence of the Supreme Court in describing it as *“a kind of Constitutional Convention in continuous session.”*

This for some is considered an outrageous act against Law. Over the years, the Court has developed a large body of constitutional doctrine whose content derives neither from the text of the constitution nor the intent of the framers.¹⁴ On theories that have created a fierce debate on originalism and not, the needle of the balance is not so far neither a tendency nor for the other. Leaving aside the thought of scholars, judges and professors, is still an open case the theory to follow for the right interpretation. It is likely that the answer lies between these two opposing pathways and is more temperate than we think. Surely, as we have already said, some corners of the US Constitution appear to be particularly dark and ambiguous. For some, this ambiguity is the key that leads to an open and current judicial review. For others, the unwritten words have an intrinsic meaning during the review and these latter, seek a whisper or suggestion that came from those who first contributed to the drafting of the Supreme Law. But the legal process that nowadays we know as judicial review, has always been linear from the entry into force to date?

According to the research conducted by Christopher Wolfe¹⁵, the judicial review has undergone dramatic changes in the arc time basis. The first period that the author identifies goes after entry into force of the Constitution until the nineteenth century and he calls it “traditional era”. It is natural to think that, at the

¹² Grant Huscroft and Bradley W. Miller, *The Challenge of Originalism, Theories of Constitutional Interpretation*, Cambridge University Press, 21, 2011

¹³ Thomas Woodrow Wilson was the President of United States between 1913 and 1921. Furthermore, he became Dean of Princeton University and he also received Nobel Prize for Peace in 1919.

¹⁴ Jeffrey Shaman M., *Constitutional Interpretation: illusion and reality*, Greenwood, 3, 2001

¹⁵ Christopher Wolfe is a Professor of Political Science at Marquette University.

beginning, revision was almost non-existent. But what appears from the research carried out, is that there was a strong interpretative current at the time of the Founding. The Document was hot off the press and interpretive interest was based mainly on the text and, as pointed it out by Wolfe, on the contextualization of it. The intent with which the provisions had been issued, remained a point on which they particularly didn't worry at the time. What most characterized the first period of interpretation, has been the category of people who dealt with it. In fact, at the beginning, was the Congress to be involved in the interpretative matter and the issues to be discussed were mainly focused on slavery and on federalist structure.

One of the legal cases most egregious at the time, was that of Dred Scott. It was important not only because it was considered as one of the first cases in which constitutional interpretation had great importance, but also because it defined territorial boundaries that weighed on the majority of states in favor of slavery. The case significantly escalated tensions between the abolitionists and slaveholders, whereas, when it was brought before the Supreme Court the first time, Chief Justice Taney stabled the unconstitutionality of the Missouri Compromise being Dred Scott not a US citizen but a black slave. This case law was certainly of great importance, because, apart from slavery, it dealt with discussions on the form of government. The central fact of the matter was Federalism that, just born, was first questioned and then elaborated. In any case it would be an exaggeration to say that there was a heated debate on constitutional interpretation during the traditional era.

About the first expression of judicial review, however, as already mentioned in the previous chapter, the first and also the most striking of this procedure, came with the cause "Marbury vs Madison" which was the promoter of the first conflict between a Federal Law and the Constitution itself. Furthermore, those who judged the process as undemocratic, would have had to think again in front of a scheme that gave voice to the people. The second period identified in this analysis is called Transitional Era which is characterizes by the "substantive due process" and it is placed near the end of the nineteenth century. Quoting Wolfe, this procedure *regulated the substance of law as well as legal procedure to protect property rights*

*and economic liberty*¹⁶. Nowadays it is hard to think that judges have ever had a purely transitional role. Considering the great power and responsibility that lies in their hands today, believing that they have been, for a specified period, mere executors of the law, makes the idea difficult to swallow. There is no evidence that they were playing or trying to change the Constitution, they did abide by the law in accordance with the founding document.

Reaching the Modern Era, it's a common perception how the role of judges has changed and how they have embraced the idea of an interpretation looking at the purpose of the text. Interpretation is experiencing times in which can be very easy to lose the necessary balance for constitutional analysis: the balance rightly mentioned by Wolfe. He sets the priority that must always be taken into account in this analysis: first of all, we should consider the individual asserted rights that arise with the case in question, considering also the government's interests and finally where and when these interests may affect the case in question. On judicial review, today, we are witnessing a real skirmish between the faction of conservatives and those who are fighting for a switched on judicial activism. Some Supreme Court Justices, have made clear their support for a theory or another, still others seek a balance between the parties. We know many examples both of the ones and others and, to clarify the concept, forward, I'm going to take two important cases that have contributed to outline the two theories.¹⁷ Reclaiming the initial assumption of this section, namely that the only way out of the excessive propensity between originalism and not textualism lies in a balanced third way, it remains unclear what is it.

Despite the theories so far exhibited proved to be defined in their boundaries, we are anyway talking about borders. The risk of these currents of thought, unfortunately, is always to remain confined to the narrow limits, thus becoming totally end in themselves. What we might find useful, is a kind of concept which is

¹⁶ Christopher Wolfe, *From Constitutional Interpretation to Judicial Activism: The Transformation of Judicial Review in America*, 2006 http://www.heritage.org/research/reports/2006/03/from-constitutional-interpretation-to-judicial-activism#_ftnref4

¹⁷ *Ibidem*

not bound by these limits, a “controlled activism”:¹⁸ a tool that takes into account the contours of words but at the same time contextualizes the speech in a current semantic framework. Through this short cue, it is possible to open a broader discussion explaining and justifying the concept of controlled activism. People tend to think of having to take the words written by the Founding Fathers “transplanting” them in some forced way in our century, very often obtaining a heavy and contrived solution. But if we try to see the issue in a different light from black or white, no doubt we would get more benefits from this dispute. If you are taking good the root of words in the constitutional text, taking for granted the purpose with which were issued, but by varying the semantic aspect, you might have a key for a more homogeneous and faithful meaning of the written text.

First of all, to carry out this procedure, it is necessary to recognize that the meaning of words, although morphologically intact, has dramatically changed with the passage of centuries. Surely, this change is related to a cultural and contextual factor, but it is undeniable that, for example, the value of the word *companion* in the last years of the nineteenth century, was very different from the value that took the word *comrade* in half of the twentieth century in the United States. Words change in “chameleon” way, change with fashion and change with times, but this fact has not been considered by many scholars. In fact, both activists and conservatives, often have a very rigid system of analysis, despite their brilliant arguments. With these sentences, it is certainly not my intention to invent a process of interpretation, but it is natural to wonder if, before every intuition, should be right to restore semantic analysis that considers the context of the historical period in which we live. To conclude, I would mention the First Amendment of the United States Constitution on the part that concerns the freedom of expression. Over centuries, there has always been a harsh debate about this right, if there was a limit to the possibility to spread their thoughts and when this limit offended the country, and morality. Initially, I believe that Founding Fathers, faced with the freedom of expression, had given carte blanche assured that this would not cause such heated disputes in their society. But, following the semantic theory mentioned previously,

¹⁸ Martin H. Redish, Matthew B. Arnould, Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a “Controlled Activism” Alternative, Florida Law Review, 2013.

the right of expression today has assumed such different and iridescent shades, as to create a wide range of differentiation followed by hundreds of legal cases. We live in a changing world, where the most important words are often posted on social networks, and not enacted in courtrooms. Communication has changed the basis of the expression, and to return to the freedom of speech, what it meant in the nineteenth century has now changed significantly look. So you can understand why in the twenty-first century, the freedom of expression has led to libel suits¹⁹, causes of sedition and incitement against the State²⁰. This analysis brings to light the dark side of contextualization of the text. We can't remain within a rigid doctrinal scheme, when we are the first to experiment on ourselves global change day by day, continuing to behave as "prigs" with those who want to see a constitutional dynamism.

3.4 Historical Legal Cases

According to the Legal Dictionary, interpretation is "*the art or process of determining the intended meaning of a written document, such as a constitution, statute, contract, deed, or will.*"²¹ Let's see now, how and how influential have been, the different interpretative theories in two key legal cases. First of all, I'm going to consider, inserting it in a textual interpretation, the verdict "Marsh v. Chambers²²": a landmark case which took place in 1983. Summarizing the background and motivations of the lawsuit, the Nebraska State senator Ernie Chambers brought this case in the Federal District Court because, in his opinion, paying a salary to the chaplain who use to begin the legislature's opening session, violated the Establishment Clause of the First Amendment and was therefore unconstitutional. This clause regards the prohibition of the Government to impose

¹⁹ Ref. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988)

²⁰ Ref. Whitney v. California, 274 U. S. 357 (1927)

²¹ The Free Dictionary, <http://legal-dictionary.thefreedictionary.com/Interpretation>

²² Ref. Marsh v. Chambers, 463 U.S. 783 (1983)

any official religion on the US territory and, at the same time, it prohibits the government from favoring a religion.²³

What interests our analysis is not so much the resolution taken, but the interpretation given by the Chief Justice that led to the final judgment. In any case, to be more clear, what has brought forth the dispute, lies in the fact that, the Nebraska jurisprudence, allows a chaplain to perform a religious ritual before starting the legislative session, but it also states that he must be paid without State funds. And here lies the issue. Chief Justice Burger decided to interpret the words of the First Amendment considering several factors.

Firstly, the work of the chaplain flanked a state job. In fact, he used to open State's legislative sessions. Second, the practice that we are quoting, is a customary practice held in Nebraska for over fifteen years. The state has established the aforementioned practice in an official ritual and then, for the Tenth Amendment²⁴, this is valid. Final point, and according to this study the most important, Chief Justice did not consider that there was a threat to the Establishment Clause of the First Amendment. He stressed the fact that the Founding Fathers would not find threatening to pay a chaplain for a brief rite of initiation to the legislative session and that therefore there was no violation.²⁵ This judgment, which many like to describe as an originalist case interpretation, has found several dissenting opinions. Fully associating these dissident voices, I exhibit my motives in this regard. If we were to judge and interpret following the originalist current, definitely our judgment should be on the opposite side to that of Burger. the establishment clause, as earlier evaluated, states that the US government does not encourage to take a position with regard to an official religion, which is why we should already estimate the practice of the chaplain as unconstitutional. Assuming this is a custom accepted and

²³ Establishment Clause, Legal Information Institute, Cornell University Law School, https://www.law.cornell.edu/wex/establishment_clause

²⁴ *The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.*

²⁵ Lewis F. Powell Jr., *Marsh v. Chambers*, Washington & Lee University School of Law Scholarly Commons, http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1451&context=casefiles&sei-redir=1&referer=https%3A%2F%2Fscholar.google.com%2Fscholar%3Fq%3D%2522Marsh%2Bv.%2BChambers%2522%2BOR%2B%2522463%2BU.S.%2B783%2522%26as_sdt%3D2006#search=%22Marsh%20v.%20Chambers%20OR%20463%20U.S.%20783%22

established by the state of Nebraska, the crux of the matter lies in the way it is financed. The State in question, in fact, establishes that the practice is justified by the fact that the funds did not come from the State's coffers, while we know however not be so. Furthermore, the Tenth Amendment, which underlines that what is not explicitly established by the US government is at the discretion of the States, collides again with the First Amendment in which the will is expressly stated not to propose or impose a religion of state. And with regard to minorities? If we considered a more suitable religion than another to open a legislative session, US could be still considered a secular country? Religious minorities would feel certainly denigrated and may sue that State for religious discrimination. Despite the different opinions on the subject, this case is regarded as a judgment of originalist interpretation and to this interpretation, for the reasons already mentioned, we adhere.²⁶

Second case law that will conclude the interpretive discourse is the cause *Griswold v. Connecticut*.²⁷ This dispute is distinguished for the interpretation that has been given by the Chief Justice Earl Warren who used the right to privacy and the penumbra law²⁸ to settle the case. Before rattling off stages of the case in question, must make a necessary premise. In 1873 was enacted Comstock Law, a law which established immoral and illegal a lot of items such as contraceptives, erotic items, abortifacients and sex toys. Anyone who was found in possession of such tools or had sold them, would be liable to imprisonment. Under this provision, it was forbidden then ingest drugs with the aim of causing the interruption of pregnancy or with contraceptive aim. It is clear that in 1950, the year of the dispute, only Massachusetts and Connecticut still maintained this law into force. Estelle Griswold was a doctor who provided advice and contraceptives methods to her patients or to the families, even pro bono, devoting her time helping women who could not afford the treatments. Following the discussion so far done, it seems clear what was the motivation of the complaint lodged against her. And it is probable

²⁶ Douglas O. Linder, *Theories of Constitutional Interpretation, Exploring Constitutional Conflicts*, 2016.
<http://law2.umkc.edu/faculty/projects/ftrials/conlaw/home.html>

²⁷ *Ref. Griswold v. Connecticut*, 381 U.S. 479 (1965)

²⁸ Penumbra Law is considered to be a group of rights that implicitly derive from another group of rights explicitly defined in the Bill of Rights.

that, literally according to the text of Comstock law, the decision would be unfavorable for the Griswold. The turning point of the Chief Justice had taken a different turn to the process. Firstly, it was proven that the above federal law violated the Fourteenth Amendment that enshrines freedom of the individual person. Paraphrasing, each woman was free to decide for herself. Asserting that, the use of contraception was a personal choice and was also something related to the intimate sphere, it was also guaranteed a right to privacy that could not be broken by the government. The interpretation to settle the case was far from textual originalism used for the last. The judgment *Griswold v. Connecticut*, experienced the use of penumbra law: the law that gave the possibility to extrapolate implicit rights from Amendments already enforced. And this was exactly the case. The interpretative cunning in this case remained in being able to exploit a combination of explicit rights and including the right of privacy as one of these implicit rights enshrined in the Bill of Rights. It would be more appropriate to call this practice “interpretative ploy”. Despite the machinations that for some seems forced,²⁹ this case gave rise to a series of posthumous customs, which took inspiration from the judgment.

²⁹ Ref to Justice Hugo Black and Potter Stewart.

4. Principles and Devices to Amend the US Constitution

A comparative Perspective

As previously mentioned, the debate on constitutional stiffness and the methods in which it is possible to bypass it, has led the most distinguished scholars, to take different positions and, in different ways, groped for a solution to what has become clearly a big issue. Continuing to build a road toward the amendability of the US Constitution, it would seem appropriate to try to compare the legislative tools of the above document, with those of other famous constitutions in the world, which have adopted similar procedures in time.

In this fourth chapter, I will try first to identify a key in the analysis carried out by some scholars on the subject: Rosalind Dixon, Akhil Amar, Richard Albert and Sanford Levinson. Each of the authors quoted, has made a strong contribution to the search for a democratic and alternative way to work around the endurance of Article V. Secondly, I'll go in depth in the study of the Japanese and Indian Constitution as yardstick with US one, building the amending procedures on a historical and legal casuistry, trying to figure out whether there might be a constant or not with which we could create a new theory of constitutional change. This analysis will offer both a comparison between the different points of view of several scholars in constitutional law and also a comparative analysis between amendability systems in different countries.

However, before entering into the benchmarking alive, I would be pleased to make a brief digression on a subject very dear to me, but that often turns out to be particularly controversial and difficult to treat: constitutional democracy. Every time we move forward the subject of constitutional debate in fact, we try to define the different Supreme Laws, considering that their criteria are universal and universally accepted. I think for this analysis is very important to show that, despite some constitutions are considered democratic by definition, they tend to be guilty of some objective defects. Through the following paragraphs, I'd like to test this theory, creating an interaction between the structure of these documents and their

amendability procedures. I started from the assumption that US Constitution is, according to the principles I have chosen, a democratic constitution, but it is necessary to address some key points to proceed with this debate.

4.1 Democratic or Undemocratic Constitution?

The meaning of the word democracy, despite its Greek etymology (δημοκρατία), is a concept born for different social factors consisting in: free elections, active participation of citizens, rule of law, protection of human rights, but with one mind: to put the fate of the government in the hands of its citizens and to share with them political decisions¹. Democracy seems to have been invented more than once and in different places. The right conditions occurred in different areas and eras.² Around 500 BC, a small crowd of people would begin to create systems of government that gave enough ample opportunities for participation in the group's decisions. The primitive democracy, we might say, was reinvented in more advanced forms. Prime examples are commonly found in Europe: three along the coasts of the Mediterranean, the other in Northern Europe.³

However, this does not pretend to be a study on the democratic phenomenon, but a study on the concept of democracy of the North American Constitution. To develop this study, I will need some basic criteria to determine whether it reflects the democratic canons. These criteria are obviously not the same for all countries and for all citizens; the idea, in fact, is subjective and does not follow a defined pattern. And it would be highly unrealistic to think that there is a country that boast all the qualities required standing up as a model for the others. But first of all, a question arises: is it a mathematical law that a so-called democratic country is endowed with a democratic Constitution? It came first the chicken or the egg? By establishing the type of government of a State, we determine its shape to legislate,

¹ What is Democracy?, Lecture at Hilla University for Humanistic Studies, January 21, 2004
<https://web.stanford.edu/~ldiamond/iraq/WhatsDemocracy012004.htm>

² Ref to the Norwegian Thing: decision-making assemblies created by Viking population in 600 B.C.

³ Robert. A. Dahl, On Democracy, Yale University Press, 9, 1998.

we enforce the laws and we legislate the treatment of its people. According to this structure, State and Constitution should be strictly complementary to one another. In this way, applying a democratic Constitution, we could get a country with a democratic government. This is definitely a *utopia*. A country which has behind itself a solid official document, does not necessarily will be the bulwark of this principle, while a State with an outdated and retrograde Constitution, could implement correct and balanced laws and policies, in respect of its citizens. Before analyzing two practical examples, I should firstly illustrate the coordinates through which it will be easier to determine if and when a democratic Constitution exists.

According to a research conducted by the Center for Civil Education⁴, we can define a Constitution democratic if it meets these criteria: popular sovereignty, majority rule and minority rights, limited government and institutional and procedural limitations on powers.⁵ Obviously, these principles are considered the skeleton for a homogeneous and balanced construction, but are not the only necessary fields to define the nature of a Constitution. For example, if we wanted “picking at” US Constitution, we could say that, on one hand, it embodies each criteria mentioned so far, but in some places, it also contradicts. 1787, was a year that marked the real launch of the federalists United States of America under the auspices of an agreed Constitution, formalized and blessed by the most illustrious men of that era, that would later be renamed the Founding Fathers. The document started in this way: *We The People*. But where were the People at that time? Americans were totally unaware that at that moment, someone was drawing up the Supreme Law for their good, establishing a nine on thirteen majority quorum to legitimate the new document. Secrecy was in fact one of those constraints to whom the Fathers had to submit in Philadelphia debate. We should ask now, how a Constitution written in the most complete secrecy, but acting on behalf of the people, is still to be considered democratic. Secondly, we should consider what the word people meant at that time. In fact, if we decided to focus on this aspect, we should recognize that the so-called people of the preamble, represented a small

⁴ The Center for Civil Education is a no profit organization that deals with promotion of democratic principle of US.

⁵ Constitutional Democracy, Center for Civic Education, Resource Materials, Charles N. Quigley
<http://www.civiced.org/>

circle of white born on American soil or descendent of those men arrived from England with Mayflower. Indians and slaves were not certainly included in this preamble. The analysis carried out above, fits perfectly with the argument made in the previous chapter about the semantics of words, contextualizing them in the official document of a nation. If the American Constitution still perceived this word as a wall between its inhabitants, the United States would not be considered an example for young constitutions today. Although I have "unearthed" these limits to the democratic nature of the US Constitution, someone discovered more constraints than me. No rage on Framers of the document, but it comes natural a grimace, in front of the time elapsed before it was recognized a law on universal suffrage. The female citizens who have lived the American Revolution, those who have attended to the creation of a nation, those who raised the proponents of progress, have not received formal recognition until 1920, year of the nineteenth Amendment issue⁶. Is this democratic? Some would say that I am confusing the democratic principles with those of civil rights, but I repeat once again that democratic concept is not a one-sided concept.

Passing to those principles already cited as a guarantors of stability in the country, even on them we could expose some perplexities. First of all, the choice of the President, a man who among others, was supposed to shine for wisdom and righteousness, and, in the end, was reduced to a dispute of political forces that have made the balance. Secondly, the appointment of senators became a deal just between state Legislatures and not between people. Moreover, they had available a term of six years in spite of the House Representatives who remained in office for two years until a new election. A limit already mentioned about the other Article V and the possibility of amending the Constitution, lies in the equal representativeness of the federal States. As I already pointed out, this factor puts US States in the same position in importance, but on balance, limits disproportionately some legislative acts. Finally, it would be impossible not to mention the judicial review: the power that has been given to judges to take decisions about constitutional interpretation.

⁶ The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. Congress shall have power to enforce this article by appropriate legislation.

This power is neither limited, nor balanced.⁷ The same person who could challenge the inclusion of democracy, political institutions, system of government and civil rights in the same group, should change idea because all three things appear to be closely related. And this happens because all three species have to deal with a constant: the people. The same people whose American Constitution praises. Obviously, this seemingly bleak picture, is saved from temporality. Through the centuries and through the numerous legal cases that have marked the most important changes in the legislative and judiciary American system, limitations and imperfections that the Founding had not considered or feared, have been ironed out through a temporal development.

Emphasizing the analysis of those countries in which the Constitution and its implementation do not match, it would be fair to try to bring two examples that make clear the concept. Clearly, this analysis will be carried out according to the criteria developed so far and it will focus on few important factors: justice and human value. I'd like to first consider an old, for certain traits obsolete Constitution, to prove that in Comparative Law, most of the time, we can't judge a book by its cover. On May 16th, 1814, Norwegian Constitution entered into force, one of the oldest document that was inspired by the American Declaration of Independence and the French Revolution. This document, over time, has seen alternating: the ensemble with Denmark (later ended in 1904), two referendum proposed for the European Union entrance and important cultural transformations. Despite this, one factor that has never change in time is the language of the Constitution. In 1903, government underwent a slight linguistic revision, which, apart from a few words, left it unchanged in the Danish tongue. We are therefore talking about a very old Constitution, which has struggled to abandon a language that is not even the official one. Despite some attempts to change the interpretation and writing, it is still the same of a century ago. Although the linguistic scenario looks disheartening, the Norwegian State boasts the supremacy in terms of human rights, equality, corruption and care of crucial issues such as justice and the environment's issues.

⁷ Robert A. Dahl, *How Democratic is the American Constitution?*, Yale University Press, 17-18, 2002

In terms of legitimacy in fact, quoting John S. Dryzek⁸, Norway has implemented many successful policies concerning the following fields: *acceptance, moral rightness, freedom, transparency, and competence in the process of acceptance*.⁹ What really hits about this ancient country, is the intrinsic value of the people who inhabit it. Mainly, it is surprising to discover that participation in the parliamentary voting is free: every citizen can take part in discussions and deliberations. Just as surprising that political participation reaches very high levels: 80% of the population every four years use to go to the polls to choose the government. It thus seems perfectly follow the principles of Dahl's democracy. Another important issue to consider, is the justice matter; Norway has shone in fact for giving life to a very important figure: *Ombudsman*. This person, whose definition is civic defender, is a legal mediator who is questioned by those people who have suffered injustice during the process. A security of justice for the people with the purpose to rebalance power between who judges and who is judged. The UN has used as model the ombudsman figure to challenge suits against human rights. In conclusion, we can say that this Constitution, even though it is dated and not very understandable to its citizens, allowing, through egalitarian and social values, the application of high democratic values.

The second which I consider young, recent and drafted with a highly noble and democratic words, is the Indian Constitution. It belongs to a recent "vintage", came to the world only after the end of World War II, most exactly in 1949 and, entered into force, a year later. What stands out of this Constitution and, at the same time, makes it quite controversial, is primarily its preamble. It is a mirror of US one, that Indian government has kept steady over time, to emphasize the value and the importance of the population. But how much is a life in India? It depends on who you are and into which caste you are placed. In fact, the second longest Constitution in the world¹⁰, (more than 4000 articles), presents an initial impressive framework.

⁸ John S. Dryzek is a professor at Centre for Deliberative Democracy and Global Governance at the University of Canberra's Institute for Governance and Policy Analysis.

Karen Gammelgaard, Eirik Holmøyvik, Time and the World: Interdisciplinary Studies in Cultural Transformations : Writing Democracy : The Norwegian Constitution 1814-2014, 9, Berghahn Books, 2014

¹⁰ The longest Constitution in the world is the Alabama Constitution. Even if it's not a national Constitution, it boasts more than 310,296 words.

Its assumption praises and guarantees freedom, equality, justice and fraternity, inspired by the highest characteristics of democracy. However, Indian government, faces a daily reality that could not be more far from the one painted by the official document. The same people protected by the principle of equality, are relegated to prohibitive castes that, even 50 years, have been able to tarnish. Religion and folklore in this country are mixed, resulting in strong beliefs that influence the legal system, creating a world of low human consideration. People lives close to the poverty limits as not the right policies are implemented to the development and, furthermore, corruption is a commonplace. (Seventy-sixth place in the world).¹¹ The factor that appears to be the most problematic, is precisely the principle of justice: the first value mentioned among those listed in the Constitution. If we based this analysis on numbers, we should consider that, in this current year, India holds outstanding three million causes and seven hundred thousand pending cases awaiting trial for more than ten years before the Supreme Court. Bureaucracy is definitely considered a crucial factor in settling these lawsuits, which sometimes are discussed for five-minute period before judgments.¹² Is this way the right procedure in which India applies the values of its Constitution? Distancing myself from issuing verdicts on these countries, the breakthrough research, has shown in these few lines, how much the gap between democratic constitution and democracy can be exorbitant. Surely, the factors that affected the application of constitutional values on life of a country, do not depend only on the social historical and geographical sphere and it is not the purpose of this discussion raised or demolish the Constitutions in force in other democratic states, but, to show that, when we define a democratic Constitution, we are not describing a pre packed concept, but we are analyzing the features of a State that can be light years away from our idea of democracy.

4.2 Different Ploys, One Goal: Amending the Constitution

¹¹ Corruption Perception Index 2015, <https://www.transparency.it/indice-percezione-corruzione-2015/>

¹² Nicola Grolla, Oltre i Marò, la giustizia in India è un gigantesco caos, Linkiesta, 2016
<http://www.linkiesta.it/it/article/2016/05/04/oltre-i-marò-la-justizia-in-india-e-un-gigantesco-caos/30221/>

In the previous paragraph, I mentioned some of the limitations present in the American Constitution, probably moving away from the main concept of the discussion: the tortuous process of amendability made hostile by Article V. In any case, I think I touched on some essential points to make it more clear for the readers the different concept of a democratic constitution and democracy. The main focus remains the possibility that we have today to make amendments to those parts that we feel weak. If we feel there is something to be changed in the text, then this should be done. And thus we return to the initial issue. How to change something when the opportunity to edit it verges on zero? And where we could seek the tools to achieve this purpose? Article V seems to have become an *iron cage*.¹³

The sharp analysis made so far, leads to a bleak conclusion, which for Sanford Levinson is comparable to terminal condition illness, for which we have little chance of survival. In this case, and, he says, at this very moment, there is nothing we can do but accept it or not to accept it and continue to groped new roads. In any case, the only way out seems to be valid, is to call for a new constitutional convention, to ensure that the Supreme Law is adapted to the current times.¹⁴ As far as I can find without any doubt, the proposal of this brilliant author, ambitious and suitable, I feel I can say that in recent years, something has changed. Social change and policies about social well-being, led to think that people could become aware of a new legislative framework. So many scholars have glimpsed a glimmer of light between the lines of the constitutive document and from this, they have created a new stream of constitutional theories. The idea from which we start is always the same: United States based their power on popular sovereignty, the government sets the rules and the amendments lay down the rules to change the game when it's necessary.¹⁵

On the basis of this assumption, I would like to deepen two concepts such interesting as essential, to strengthen the amendability tools at our disposal: the

¹³ Sanford Levinson, *Our Undemocratic Constitution*, Oxford University Press, 165, 2006

¹⁴ *Idem*, 173

¹⁵ Richard Albert, *Amending Constitutional Amendment Rules*, Boston College Law School, 3, 2015

intertemporality and relativity.¹⁶ It is a feature that goes beyond a limited point of time, but that evaluates the will and decisions of people in a more relaxed period. This principle can be triggered by a growing approval. Relativity is a concept that involves the importance threshold that should have rules governing the Constitutional amendability compared with the other amendments. Having first assumed that governments are free to determine the laws of a country, but the country (population) should be able to appeal to amendment rules to change the rules of a State, these two principles embody perfectly so far explained. As explained by Professor Richard Albert, they can be used in two ways, unfolding them with two different theoretical combinations. The first, deals with combining the two principles together, reinforcing their strengths, while the second, greatly expected to entrench the power of judicial review over the amendments. The most important process to achieve through these principles, is raising the protective threshold on amendability rules against ordinary amendments, which in the presence of a supermajority, could significantly adversely affected. As I mentioned previously, the concepts closer to the Constitution, namely the principle of democracy and popular sovereignty, are timeless concepts, or better to say, their values perpetuate over time. Exploiting a sequential approval method of multiple types votes over multiple years, we can find a ploy to entrench the rule amendment in front of the ordinary amendments. This type of approval is born to gain time and to reaffirm or reject legislative acts and dilute constitutional changes. The ideal “incubation” period, specified in the query, is equivalent to five years. This is important because, if were applied to this case a too short period of time, there would be not enough temporal space to create a debate and to have a deliberation; on the contrary, if the time was too long, this could create a gap between the proposal and the timing.

The second alternative involves the leading role of the Supreme Court in the judicial review proceedings. It is likely that this road has not been undertaken by many, as it could undermine the democratic nature of the amendability procedure. Putting in the hands of the court a responsibility like this, however, could also be

¹⁶ Idem, 22

an extremely smart solution. In fact, this scheme would see not only the centralization of amendability power concentrating it in a single organ, but it could streamline the procedures that hinder the constitutional amendments and hold responsible the Supreme Court on this topic. Another concept that made extremely dynamic the concept of constitutional amendability, has been explicated by Rosalind Dixon. Reading one of her research, I focused on the notion of democratic dialogue: a way in which it would finally be possible to build a path through the amendment rules. Why is it necessary that this dialogue takes place? Definitely it helps off by a textual level a viable degree of change, mediating with the Courts regarding the interpretation of the document. Secondly, it also would break down agency costs and give more control and power to popular sovereignty.¹⁷ We have so far examined a number of opportunities with regard to amendability methods offered by the text of the Constitution. We found that the role of the Supreme Court may be the key to resolution to the obstacles of the written text and once again we have stressed the importance of popular sovereignty in connection with the temporality of the amendment discipline.

But if what we were looking for, was not into a sentence, into a word or between two commas in the syntax, but it was something that on balance ... is it not in the text? Some tend to argue this theory reporting that what does not appear visible to the eyes, is the key to resolve the intentions of the Founding Fathers. This would lead us to meditate on the fact that the habits, customs and tradition have created a constituent substrate. This explanation, despite justify why the political traditions have become so ordinary, it does not appear to be exhaustive for many constitutionalists. If we gave for granted that, by common customs can be changed at informal and even formal level an article of the Constitution, this would lead to confusion and chaos, though some would dare to say that this is already happening. Moreover, as argued by Professor Akhil Amar in the work entitled *America's Unwritten Constitution*, the possibility of giving voice to an invisible Constitution made of subjective interpretation, it is not criteria that can be legitimized. If quoting Rosalind Dixon we have put trust in dialogue with members of the Supreme Court

¹⁷ Rosalind Dixon, *Constitutional Amendment Rules: A Comparative Perspective*, The Law School, The University of Chicago, 98, 2011

on the basis of the Constitution's text, in the case of a text based on customary assumptions, this is a risk we can't take. If we were to follow this principle, in fact, we run the risk of leaving ample space in its own interests, to decisions taken out of context or extremely biased. Amar defines such proceedings as a creation of some judges to give free rein to their constitutional fantasies. He, however, does not take neither the sides of those who want the application word for word of the text, defining however himself as a conservative, nor with the liberal reformists who want a constantly fluctuating Constitution. (Emphasizing the two concepts). The right approach should be derived from documents that have created the basis for the modern crib, those manuscripts that have become the government's Bible, and that are rooted in American history. He argues that it is wrong and alienating searching in the comma of a sentence, the meaning of an intention and that instead, it is the task of the constitutional experts today, ensure proper interpretation while maintaining the compact set of words.¹⁸ However, as I am going to support in the next chapter, sometimes the problem is all enclosed in a comma.

4.3 A Comparison that Comes from the Far East

What makes stimulating Comparative Public Law, is the study of the different constitutions, what makes them different from each other, their amendability processes, their history, the cultural influence and the paths taken by their governments to make these documents updated. As a result of these investigations, we are most of the time surprised facing countries that we did not believe so similar to our own, surprised in discovering different traditions that have adopted a government scheme taking our as a yardstick, taking our Constitution as a model or vice versa.

In light of this, I'd like to consider two fundamental aspects in this comparative paragraph: the first concerns the amendability process used in different

¹⁸ Ref. Akil R. Amar, America's Unwritten Constitution, Basic Books, 2012

countries and the rules that governing it, in the second place, I'd like to estimate how much the population is considered in this process. Considering how popular sovereignty has always been exalted by the constitutions in force nowadays, I think it is important to understand whether it is fully respected the right of people to be able to change what was created on their image and for them.

I will start the development of this discussion by analyzing a relatively recent text: Japanese Constitution. The first time I read this document, I could not help but notice the similarity with the US Constitution. Some key concepts are almost identical, these concepts also represent the same ones that I set out to analyze: the popular sovereignty closely related to the search for happiness and the amendability procedure. So I decided that these similarities least deserved an historical explanation. As it is well known, the Japanese Constitution is born at the end of World War II, to be more precise, it is the product and the result of the American occupation of 1946. If we find in the drafting some clear references to liberal democracy, this happens because, according to the Potsdam Declaration, the Allies wanted to ensure a radical improvement, leaving the Emperor's figure remaining unchanged with an almost purely representative role. According to the Proclamation Defining Terms for Japanese Surrender Issued at Potsdam, on July 26th, 1945, the *"Japanese Government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people"*.¹⁹ Despite the excellent result that has been achieved thanks to the cooperation between Americans and Japanese, there was not few objections and controversy to the new text. In fact, considering the twisting of the Meiji Constitution, Japanese government try to draw a sketch for a new text; however, they did not find the support of MacArthur²⁰ staff. Before entering into the merits of the famous Article 9 of the Japanese Constitution²¹, I would like to refer to an article very dear to this discussion: Article 96. For Japanese, one of the most important thing, it was not to

¹⁹ Nihon Gaiko Nenpyo Narabini Shuyo Bunsho : 1840-1945" National Diet Library vol.2, 1966

²⁰ General Douglas MacArthur was a US army strategos. He became an important figure during the Second World War and the Korean War.

²¹ Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

put into question, bicameralism form of government. They did not accept the idea of maintaining a single chamber and so they settled two chambers. The national Diet would be so composed: by the House of Representatives and House of Councilors. And now we come to what really interests us. Article 96 of the Japanese Constitution states:

*“Amendments to this Constitution shall be initiated by the Diet, through a concurring vote of two-thirds or more of all the members of each House and shall thereupon be submitted to the people for ratification, which shall require the affirmative vote of a majority of all votes cast thereon, at a special referendum or at such election as the Diet shall specify. Amendments when so ratified shall immediately be promulgated by the Emperor in the name of the people, as an integral part of this Constitution.”*²²

Thanks to this Article, we can draw some conclusions. First, the Japanese government recognizes the possibility of amending its constitution. The majority to reach is definitely a factor that does not encourage the choice to take this path and, the final word, goes to a referendum decided by the people. But what about the initial word? It seems very clear that the people mentioned in the long list of this young Constitution, do not have the slightest chance of giving birth to this proceeding. The only bodies that have the possibility to groped the way of legislative amendment are the two chambers. The conclusion leads us to argue that it has never been amended since its entry into force. As the American Constitution, however, Japanese adopted an alternative system to circumvent the rigidity of its amendatory system. This procedure is represented by an institutional body called the Cabinet Legislation Bureau. Its role is to give opinions on legal issues and analyze the validity of treaties by interpreting the law. This has proven to be an informal amendment to the Japanese Constitution, which over the last few years, have changed, through the interpretation of the Supreme Law, some Articles and constitutional provision, overstepping the rigidity form represented by the amendability procedure.²³

²² Chapter IX, Amendments, Article 96, Comma I,II, Japanese Constitution

²³ The Caninet Legislation Bureau, <http://www.clb.go.jp/english/about.html>

Most of the time, we hear they say that history is written by the winners; in the case of Japan, the fairest phrase would be: Constitution is written by the winners. Considering the initial objections of the Nipponese government, it would be foolish to give the Japanese a chance to easily amend the new Supreme Law as soon as the Americans had “turned the corner”. And, in all probability, Article 9 would have been the first to be changed. Another aspect really uncommon about the incompleteness of Article 96, is the total lack of an additional article that regulates a possible referendum. It is as if this Article was created to be just a label, but in the end, it makes the amendment process a totally obstructionist procedure.²⁴ So far, however, the only progress made by this country towards a change, has been made by Prime Minister Shinzo Abe, who for over two terms, deployed himself in favor of a process to amend or abrogate Article 9²⁵: one of the most characterizing feature of Japan. He is pursuing his political battle by relying on the dispute arising from this article and Self-Defense Forces. This contradiction has created controversies and debates but, under Article 96, there are more compelling discussions to talk about. Regarding the latter, I consider, however, it is necessary to count that in 2014 the prime minister has proposed a form of reinterpretation of Article 9 to allow the military to use force alongside other national militaries, regaining part of the defense force lost with the surrender of World War II.²⁶

First of all, if the ultimate goal is to amend the Constitution, it would not be more appropriate to focus on the hurdles that do not allow to achieve the desired result? Secondly, we must ask ourselves the real role that citizens have in this decision. The Japanese Constitution stands to give considerable importance to the population. Chapter III of the Constitution, contains 30 articles on the duties and rights of citizens. It protects individuals and equates men and women on the basis of a no discriminatory policy based on equality of the sexes. This makes the document one of the most democratic of all time, but it remains inconsistent

²⁴ Sayuri Umeda, Japan: Amendment of Constitution, Article 9, Law Library of the Congress, 28, 2006

²⁵ Article 9 of the Japanese Constitution is committed to promote Japanese as a peaceful and non-belligerent State and it also grants to not constitute any kind of military force promoting international peace and cooperation.

²⁶ Sheila Smith, Reinterpreting Japan's Constitution, Forbes Asia, 2014

<http://www.forbes.com/sites/sheilaasmith/2014/07/03/reinterpreting-japans-constitution/#54bf85ac2fae>

regarding proper formal amendability procedures. We can hope for a brighter future not focused on reconstitution of an army, but on constitutional reconstruction.

The second State which I am going to discuss, is India. I've already used this country as comparison, but, in this case, I'll deal exclusively with the constitutional amendment process and the role of its citizens. Firstly, it is important to recognize that the amendment process of the Indian Constitution is rather intricate. I will not elaborate the historical path that brought this country to the choice of its government or the federal structure, but I will go immediately to analyze the structure of the amendments and articles that govern it. The Article the governs the procedure for amending the Indian Constitution, is within the section XX and, more precisely, is the Article 368. As it's known, the bicameral system of this country, based on a check and balance system, allows that the motion be initiated by one of the two Chambers, Rajya Sabha and Lok Sabha²⁷, that composed the Parliament. The long Article 368 states:

“Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.” 3[(2)] An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, 4[it shall be presented to the President who shall give his assent to the Bill and thereupon] the Constitution shall stand amended in accordance with the terms of the Bill: Provided that if such amendment seeks to make any change in— (a) article 54, article 55, article 73, article 162 or article 241, or (b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or (c) any of the Lists in the Seventh Schedule, or (d) the representation of States in Parliament, or (e) the provisions of this article, the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States 5 by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to

²⁷ Respectively Council of States and House of the People.

the President for assent. 1[(3) Nothing in article 13 shall apply to any amendment made under this article.] 2[(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article [whether before or after the commencement of section 55 of the Constitution (Fortysecond Amendment) Act, 1976] shall be called in question in any court on any ground. (5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.]

As it is marked in the first part of the Article, the only organ that can take an amendment or revision procedure it is the Parliament. One of the key principles to keep in mind during the process, is the Basic Structure Doctrine: an element that limits through restrictive rules, to amend or repeal certain fundamental features of this country. These properties represent some pillars on which rests the constitutional and legislative system and, to be more clear, I will quote at least two of them: the first is made up of those inalienable rights that belong to the people, the second, is the right of the Supreme Court to reject proposals for amendment of the Chambers where they were in conflict with the Supreme Law. If we were to risk a comparison with the Italian Constitution, we could say that the basic structure of “our country”, as cites Article 139, is the Republican form of government²⁸, as interpreted by the Constitutional Court²⁹. Of course, this comparison must be taken very far, because, the biggest difference between the two, is the fact that the Basic Structure it is originated from the decisions taken during the legal cases and it became a sacred constitutional principle, while the constitutional guarantees Article 139, represents a bulwark principle from the entry into force of the Italian Constitution in 1948. Another difference that should be considered, is the fact that the two constitutions belong to different categories. The Italian one, in fact, is a rigid document, while the peculiarity of the Indian one, is that it can be rigid or flexible depending on the majority required to amend a specific section.³⁰

²⁸ Title VI, Sec.2, Article 139, Italian Constitution.

²⁹ Corte Costituzionale, Sentenza 1146/1988, GIUDIZIO DI LEGITTIMITÀ COSTITUZIONALE IN VIA INCIDENTALE, 15/12/1988 <http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=1988&numero=1146>

³⁰ The Constitution is rigid when it deals with a special majority to amend it and it flexible when it is necessary simple majority to amend it.

Mentioning the origin of the Indian main structure related to the amendability procedures, it is necessary to mention the case considered the founding father of this scheme: *Kesavananda Bharati v. State of Kerala*³¹. Because of a prosecution for a suit linked to the property restriction, Indian government will find itself in front of a decision concerning the future of the constitutional structure. But before an assumption is required. Around 1950, were declared unconstitutional certain laws on the reforms on the land, and below, the Constitution was amended to implement the new ones adopted provisions. These same reforms were brought in front of the court *Sankari Prasad v. Union of India* in 1951 and with *Kesavananda Bharati v. State of Kerala* in 1973. Supreme Court, at that time, spoke in favor of two different practices regarding the judicial review on the amendments: through the use of Article 13³², they are subject to revision (expressed limits) and, at the same time, they must stay within the restrictions imposed by the basic structure doctrine (implied limits).³³ What was clear at the end of the key case for the decision on the amendments rules, it was that, according to the Supreme Court's decision, the Parliament could not amend those which were believed to be the hallmarks of the constitutional framework. What is interesting, is how these traits have gone taking shape gradually, year after year, through legal cases.³⁴ However, the most stimulating factor for this research, is not the power of the chambers or the limited power of the President in the amendability process, but is the void power of citizens. If we look at the US Constitution, that Japanese and Indian in succession, we would notice that it has been created a descending climax with regard to the value of people in the emendatory process. And still, if we look carefully, we may notice a proportionally inverse climax; below, I explain why.

These three constitutions, are characterized by giving people, a strong popular sovereignty. Within each document, they have praised the rights and duties of citizens, but the key concept is that people remains the fundamental pivot gear. In

³¹ Case Law discussed on April 24th, 1973

³² *Ref.* Laws inconsistent with or in derogation of the fundamental rights.

³³ Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine*, Oxford Scholarship Online, 2011

³⁴ Kalyan Nuguri, *Amendment of the Indian Constitution*, 2013 <http://www.kalyansir.net/2014/01/amendment-of-indian-constitution.html>

assessing the emendatory proceedings of these three documents, it is impossible not to notice how, during this procedure, the importance of the population has an increasingly marginal role. This role, that relegates people to the borders of each decision, is evident above all in Article 368 of the Indian Constitution in which there is any kind of reference to a popular decision. We know that, in Japan, people are not able to move for first proposals for constitutional amendability, but they have an important role thanks to the votes of the mandatory referendum promoted by Article 96. In the US, people, could have a strong influence choosing the Representatives and starting a National Constitution Convention paving the way for ratification of a new legislative document. In light of the comparison carried out above, it is alarming to think that the citizens of a country do not consider the idea of a change that starts from the needs of those who live there and not by the interests of those who govern over there. On the other hand, the history of every civilization, geographical and political conquest, have generated the results of the constitutions we know today, also including the Italian one. The only thing left to do, is implementing the true meaning of the documents that our ancestors have signed for us, not on the basis of what we would like to read, but on the basis of what is actually written.

4.4 A Domestic Spectator: The Italian Constitutional Referendum

To conclude this chapter, I'd like to deal briefly with a subject that is particularly near and dear to me: Italian constitutional Referendum which will take place on 4 December 2016 on the Constitutional Reform Bill amending the Second part of the Constitution³⁵. But firstly a premise. Italy, as stated in Article 1, first part of the Constitution, is a democratic republic founded on work.³⁶ And this fact is very important for my analysis. Popular sovereignty in fact, is treated, but in a

³⁵ Part II, Title I, Sect. I/Sect. II, Title III Sect. III, Title V, Title VI Sect. II

³⁶ Fundamental Principle, Art. 1, Italian Constitution

second time in the first Article³⁷. Despite of the long list of people's rights enumerated in Italian Constitution, there is no preamble about the people as the source of the Supreme Law. The article regulating the procedure that can amend the Constitution, is Article 138. It provides that:

“the laws amending the Constitution and other constitutional laws are adopted by each House after two successive debates at no less than three months and are approved by absolute majority of members of each House in the second voting.

The laws are submitted to a popular referendum when, within three months of their publication, such request is one-fifth of the members of a House or five hundred thousand voters or five Regional Assemblies. The law submitted to referendum shall not be promulgated if not approved by a majority of valid votes.

We shall not be held to a referendum if the law was passed in the second voting by each of the Houses by a majority of two thirds of its members”³⁸

We can certainly assert that, if the result of the December referendum will be positive, our Constitution appears totally different from now. This is a very important step that people will have to deal with responsibility and conscience by voting for or against a law and not for or against a politician. One may ask anyway, how did we get to this point. Why Italians are called to vote? Are we deal with a right guaranteed by the Constitution or is this the consequence of a majority that did not found favor with all sides? In the last bars of the preceding paragraph, I allowed myself to reach the conclusion that some countries should give greater importance to the people that they say to protect and represent. And my country is not an exception. In fact, according to the same Article 138, the referendum takes place not automatically, but only if there are some conditions. In order it occurs, it is necessary that there is a request for one fifth of the members of a chamber, five hundred thousand voters or five regional councils. To return to the initial question then, is not mandatory that citizens are called to vote. What makes the December vote rather rare, is in fact, the object and the ultimate goal. The law is meant to

³⁷ According to Article 1 of the Italian Constitution, Italy is a Republic based on work. Just in the second part in specified that sovereignty belongs to the people.

³⁸ Constitutional Guarantess, Sec.II, Revision of the Constitution, constitutional laws, Art. 138, Italian Constitution

enact, presents several ambitious aims. Italy in fact, will cease to be a perfect bicameralism country in which the two chambers have the same importance and influence. The Senate, as I already mentioned, will change its appearance. It will be drastically reduced the number of senators who will act as a liaison with the regions in order to give more value to these organizations. In every way you think, my intention in this section, is not to give my opinion or a future prediction, but I would like to mention a relationship between constitutional rigidity, with the participation of the electorate in the review process. In the Italian constitutional history, this appears to be the third case of pending amendment. The first case occurred in 2001 with a referendum required by the majority, the latter in 2005, advanced by the opposition, that turned out to be unsuccessful. The purpose of this reform, appears to be of particular importance as it aims is to act vigorously on Article 138, thus streamlining the so called “shuttle process” requiring any changes or constitutional amendment. If a majority of the votes of those who voted will be positive, Italy could face a legislative process improvement. On the other side, fear of a negative impact, is that Italy deviates from the democratic idea within which it was born, leaving only room for one voice about the revisions and amendments. Moving to the role of the electors, we could draw two different pictures of the development of the Referendum. As I have already states, people has a great responsibility in this political decision and, one of the biggest predictions, is that this vote became an objection vote. Faced with this prospect, then, should we ask ourselves an important question: political participation, in relation to the constitutional amendment, will create a risky and obstructionist mechanism or, by exercising the vote, people will seize the opportunity to be leaders of the democratic construction? As regards previous chapters, the biggest fear that emerged, it was that people was removed from the political debate. Now, at least in my country, they will have the chance to give a voice to direct democracy system. According to the two options early treated, I think only the result of the Constitutional Referendum will disclose if population have chosen one road or another.

Part. II The Ambiguous Second Amendment: A Case Study

5. The Will of Founding Fathers in Changing Times:

An Interpretative Discussion

5.1 Assumption

The chapters treated so far, have paved the way to get up to the contentious Second Amendment. It might seem a not pertinent choice for many, but, from my point of view, this couldn't be more apt for my purpose. Taking up what I said in the abstract of this thesis, I believe there are concepts which must be analyzed because politically and economically interesting, but, what I want to demonstrate with my research, is the importance of social and human looking of the Constitution. I spent a lot of words in the fourth chapter extolling the rights of people, hoping to have instilled the importance that people have when they take decisions about their governments.

Coming to the choice of subject and, the correlation between the constitutional amendability and this Amendment, my thesis will attempt to show that, despite the great work done from 1791 until today, both on the interpretation and on the revision of this text, the limits on the interpretation and citizens ignorance, have undermined the possibility to create a common acknowledgment and framework on this topic. The controversy and ambiguity of this right is merciless. In a few lines, it grants a power to the people that is wider than which conferred by the Preamble. Why has this topic led a debate so heated among scholars? And why are we not still came to a full stop on this issue?

The reason is given by a fine muddle of historical, geopolitical and social issues which, through an analysis that I hope being exhaustive, I will try to settle. The key concept will be based essentially on the transitive property that states in

this right: whenever Second Amendment = the individual subjectivity to act on the lives of others and subjectivity = derangement, then also Second Amendment = derangement. Of course, my theory is not intended to be a mathematical law, but it represents the path that I will engage in this second part of my research. The first section will be crucial, as it will be resumed on the interpretation of the constitutional theories by applying them on this Amendment, and furthermore, through the development of numerous legal cases on this subject, I will try to create a hypothetical constitutional change based on the written text, according to theories conducted by scholars previously cited.

5.2 Textual Analysis

I retain that, to begin, it is important to keep in mind what we're talking about. Second Amendment of the US Constitution states:

“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.”¹

And from here, the deluge of hypotheses. Officially, as we all recognize, the Second Amendment was ratified in 1791, but I'm sure that, making an effort, it is possible to conclude that it was born at least twenty years earlier. In fact, during 1775², the population, living in the territories English owned, decided to rebel creating a real armed revolution that led to independence. This factor is crucial, because, in that precise moment, the population was not just writing their history, but they were also drawing up an important piece of the Constitution.³ British colonization, the taxes imposed to the inhabitants of the new continent and a total lack of consideration and respect, leading people to reject with force that colonist government and to promise themselves than ever in the world such a thing could

¹ United States Constitution, Bill of Rights, Amendment II, 1791

² American Revolution beginning.

³ David C. Williams, *The Mythic Meanings of the Second Amendment: Taming Political Violence in a Constitutional Republic*, Yale University Press, 1, 2003

have happened again. The war for independence led ordinary men to bear their rifles and drive away the enemy. In light of the American Revolution, can we continue to say that a militia and an armed population can be the result of an idea of Philadelphia Convention? Or should we think that, put this right pen to paper has been a natural consequence of what had freed them from oppression?

Whichever way you think, in front of the questions, sometimes contradictory, of the Scholars, the Framers didn't leave a guideline to follow in the application or interpretation of the Bill of Rights; we must base our assumptions on some wording drafted in a decade after 1780, trying to glean their basic features for our research. First, however, I'd like to give a literal sense this Amendment solely based on its text analysis, tracking down the elements that make it controversial. It soon becomes blatant that there is a deliberate ambivalence in this sentence. It is clear that the govern legitimize the existence of a well-regulated militia for the security of a free nation. And when we talk about militia, we must be careful not to get confused. According to the dictionary definition in fact, the word has Latin etymology and its meaning includes a body of citizens enrolled for military service, called out periodically for drill but serving full time only in emergencies. Another meaning is a body of citizen soldiers distinguished from professional soldiers.⁴ One thing is immediately apparent: Framers did not refer to an expert army chosen by the government.

According to Article 1, Section 8, one of the powers of Congress, is to be able to call this armed group to fend off uprisings in the government of the United States. In summary, the right concerns with a group of well-regulated (to control or direct by a rule, principle, method, to adjust to some standard or requirement as for amount, to adjust so as to ensure accuracy of operation, to put in good order armed citizens)⁵ who can be called to fight to stop a coup or an enemy invasion. This was valid in 1791 and is still a mainstay in 2016. Moreover, the militia in the bill of rights, appeared for the first time in the federalist papers 29, 1788 which stressed: *"the power of regulating the militia, and of commanding its services in times of*

⁴ Militia Definition <http://www.dictionary.com/browse/militia>

⁵ The Meaning of the Words in the Second Amendment, 2013 <http://www.guncite.com/gc2ndmea.html>

insurrection and invasion are natural incidents to the duties of superintending the common defense, and of watching over the internal peace of the confederacy (...)”⁶

This fact confirms further the argument that the First Amendment was incubated a lot longer time than we think. It is not simply the consequence of the historical facts, but was sketched and designed by the Founding Fathers with the idea of continuing through the centuries. Considering the part that concerns the security of a free state, there would be different definitions to give. A free state may refer to a state in which its citizens have the same rights and, therefore, the solution could be expressed in the First Amendment or, by following one of the Volokh’s commentaries, the meaning could be reported to the security of one free federal state against federal oppression.⁷ And finally we come to the crux of the matter, the damn point that has boggled the mind of the most celebrated constitutionalist in the country, falling into a continuous syntactic trap. The cruelty lies in the fact that we can’t give a real sense and accomplished in this sentence, both from a strictly textual point of view or not. It means the right of citizens to bear arms shall not be infringed because they compose the militia defending a free state? Or maybe the militia can’t be removed, as it is able to defend a free state and people have right to bear arms. We could stare at it for hours, but probably a comma and a phantom verb would remain a dilemma.

Analyzing the cryptic punctuation of the Second Amendment, I was reminded of a Latin sentence that has taken a symbolic meaning in the syntactic interpretation. The famous phrase was written by a Cistercian monk, Alberico Delle Tre Fontane, in a work called *Chronicon*. “*Ibis redibis non morieris in bello*” is still used today to indicate a sentence that can take an ambivalent meaning and create a riddle. Alberico tells the story of a young soldier, going to see Sibyl⁸ asked her if he would return from battle. She gave him a really ambiguous answer. The first interpretation that could be attributed to the prophecy, if we placed a comma before “*non*”, means: you will go, you will come back and you will not die in war, but if we put the comma after the denial, the meaning becomes: you will go, you will not

⁶ Alexander Hamilton, Federalist Paper No 29, Concerning the Militia, 1788

⁷ Eugene Volokh, The Volokh Conspiracy, Free State, 2007 http://volokh.com/archives/archive_2007_03_04-2007_03_10.shtml#1173488580

⁸ Oracle. Virgin with prophetic virtues that in the ancient world, Greek and Roman, it was believed to predict the future.

come back and you die in war. The example is useful because, with its simplicity, expresses the frustration of those trying to make sense of a sentence that lacks of text or punctuation. Back to the Amendment that is gripping our discussion, at this point of the textual analysis, we are faced with two verbs: to keep and bear. I think this deserves an explanation.

Why the Fathers wanted clearly establish the possibility both to keep weapons and to bear them? According to the historical reasons why this ancient Amendment is born, we can say that the meaning of these two verbs is well-defined and distinct. Keeping arms has a purely individual meaning and gives the right to all people, to be able to buy a gun and keep it in the house privately. In this regard, we can sum up an old correspondence that explains what was the primary intention to hold a rifle. This correspondence belongs to an exchange of letters between Samuel Nesson, an Antifederalist and George Thatcher, a Federalist Representative from Massachusetts; I mention just a few short sentences among the most important:

*(...) the right to keep arms for Common and Extraordinary Occations such as to secure ourselves against the wild Beast and also to amuse us by fowling and for our Defence against a Common Enemy(..)*⁹

What makes interesting this epistle, it is first of all, the reference to hunting as a pastime painted with words as it portends a danger, but what mostly affects our research, is the invocation that these weapons are taken to turn them against a hypothetical foreign enemy. I am struck in a certain way, because, between the lines, I do not see any reference to a hypothetical self-defense. Moving to the right to bear arms, the assumption changes and becomes broader the range of interpretation. Robert Sherman¹⁰, who was considered one of the great Founders, was the first to give a different indication of the Second Amendment (which at the time was not yet officially born). During a house consideration of militia bill in

⁹ Samuel Nesson to George Thatcher (July 9, 1789) <http://consourse.org/document/samuel-nesson-to-george-thatcher-1789-7-9/>

¹⁰ He was a lawyer and a statesman. He is considered to be a Founder of United States.

1790, he asserted that every citizen has the right to bear arms and use it if they feel their property and freedom rights violated, no matter by whom the offense comes.¹¹

In the sentence of the Bill of Rights, there is not a clear reference to the chance to bear a weapon to defend some personal interests, and it seems that the initial aim was not that, but, in the light of the words of Sherman, would seem that he had given a sort of clearance for the development of a new and different interpretation. Still remains the word arm to clarify the whole. Although this may seem like a simple concept, it is one of the most controversial ones. For what concerns the 1800 weapons, in fact, the message seems pretty clear. Citizens have the right and sometimes the duty, to hold their rifles, leave their houses and drive away the enemy, whoever he is. The matter is complicated today. After more than two hundred years of increasingly technological inventions, cutting edge and thin, it is optimistic to think to get out from this debate with a satisfactory solution. If I followed to the letter my reasoning, I would find myself in agreement with those who willingly accepts all types of weapons inside the group specified in the Second Amendment. The real problem is that we are not in possession of a list of weapons legally accepted by the Founding Fathers, the only way to settle the issue, is found in the legal casuistry information that helps to take a final position; but in the next chapter, I will elaborate more on this topic.

5.3 Historical Background

For the purpose of this research, the historical background is extremely important; in fact, not only it allows me to create a link with the ancestors, giving a broad overview of the subject I am dealing with, but, more importantly, history allows to investigate the intentions of the past to see if they are still valid and contextualized in the present. If we were starting from antiquity and literature, surely we will find considerable classical ideas that could have inspired the creation

¹¹ The Meaning of the Words of Second Amendment, Gun City, <http://www.guncite.com/gc2ndmea.html>

of a similar Amendment. Many of the classical authors have written about arms, regulated militia and the right to self-defense (Plato, Aristotle, Cicero...) ¹² But, if we really want to identify which population has had a greater influence on the Bill of Rights, we must create a flashback of a few years. It is necessary at this point, to make a flight across the ocean, when the Second Amendment was not “on site”.

In 1689, in the Great Britain, was issued the British Bill of Rights: a document with a fully binding value that sanctioned the rights and the duties of the people. The country was going through a strong period of instability since the king ¹³ was ruling without the support of Parliament and, on the other hand, Catholicism was losing foot while the Protestants in the country were going to grow exponentially. James II, the king who had ruled according to its fervent Catholicism, was overthrown in favor of William III and his wife Mary II (during the Glorious Revolution). Under new auspices, it was created a document, which would sum up rights of the Protestants who had been marginalized during the previous government. After the Revolution and, by means of the Bill of Rights that proclaimed de facto the Declarations of Human Rights, it was also restored the right of Protestants to keep arms according to the old Law. Or rather, the text of the Declaration, concerned the prohibition of the Crown, to expropriate the Protestants of this right, which the British considered to be a natural one. ¹⁴ Even if is not my intention returning on the matter already treated previously on the rights of nature, I would still consider this important aspect in my analysis. In fact, according to the British Empire, the right to bear arms was a law of nature that every person possessed from birth and could not be denied. At this point, it seems legitimate to consider the Amendment taken into consideration so far, as a mere consequence of the English example, although not all authors seem to agree.

For some, the fundamental difference between the two bills, lies in the fact that the Founders wrote that document from nothing, creating it on the basis of new rights of the population, while the English one, was only the drafting of rights

¹² Earl R. Kruschke, *The Right to Keep and Bear Arms, A continuing American Dilemma*, Charles C Thomas Publisher, 4, 1934

¹³ Ref. to James II

¹⁴ Warren Freedman, *The Privilege to Keep Arms, The Second Amendment and Its Interpretation*, Quorum Books, 44, 1989

already guaranteed. In any case, it would be useless to deny the huge British empire's influence on future United States of America. This was especially felt in the beginning of 1760, when, in many areas of the new continent, English colonies lived sympathizing and being loyal to the Crown. A little later, a Civil War would break out and the inhabitants of those lands would have become familiar with blood and weapons. American history has been marked by a turbulent start that has left its mark on the Constitution. Although many still tend to justify this Amendment with a reason that could be called preventive, in the light of the analysis above conduct, we know that it has come to light because of the great influence that the colonizers had on its creation. A particularly important aspect about the birth of the Second Amendment, is to be found in Antifederalist representation. In this regard, it is necessary to add to that which has already been said in the previous paragraph, that this right has not only been created with the intent to defend US against a public enemy, but, contrary to what one might think today, it was born to defend citizens from the power of their government.

The bitter dispute between federalists and anti-federalists, led to a system of protection against the fear that the federal government could become tyrannical. A lot of people began to clamor a system that would protect from political violence and hence the demand for a law that would guarantee the prevention from a despotic government. This became a classic example of check and balance system that sanctioned de facto, the right of the population to take up their arms whenever the Congress had taken a tyrannical tendency. James Madison, overcome his reluctance in making amendments, drew up a dozen amendments who proposed to the Congress and they came to compose what would become the Bill of Rights¹⁵. A controversial but very interesting matter that is offered by history, it is the establishment of a real armed force at the beginning of the birth of the United States. Initially, in fact, it created a huge fuss on the real need to engage the specific forces that were not part of the aforementioned militia by the Second Amendment. Reasoning on the matter now, it is not often easy to understand the concept of community policing in a society that gives citizens the right and duty to cold execute

¹⁵ David C. Williams, *The Mythic Meanings of the Second Amendment: Taming Political Violence in a Constitutional Republic*, Yale University Press, 40, 2003

possible enemies. In 1792, during the first session of the Second Congress, it was enacted a Law that recognized and legitimated an armed militia standing to defend the states.

*(...) each and every free able-bodied white male citizen of the respective States, resident therein, who is or shall be of age of eighteen years, and under the age of forty-five years (except as is herein after excepted) shall severally and respectively be enrolled in the militia, by the Captain or Commanding Officer of the company, within whose bounds such citizen shall reside, and that within twelve months after the passing of this Act. (...)*¹⁶

If we now ask ourselves about why it is so difficult to establish a similar line for all countries under the same Supreme Law, we should consider how was it difficult for the Fathers of federalism. Those who have had the responsibility and, at this point I would say, trust, to put in the hands of ordinary civilians, weapons in order to defend the homeland, the family and their home. Since, as it is evident, nor the Supreme Court has given a firm answer to questions on the interpretation of this Amendment, neither the scholars have yet agreed on the theory to follow, I am forced to base myself on Federalist Paper, trying to draw from these ideas for a more correct analysis. After all, who better than those who drafted the Constitution could help solve the mystery of how to read it?

The argument of Alexander Hamilton in Federalist Paper No 29 is convincing and refined. He draws attention to a militia that serves one purpose even if serving a different federal state from another. In addition, because of the dispute over the power of Congress and the possibility that it may become tyrannical, he spends concise words on the need to establish a well-trained militia, recruited by government offices from the Congress laws. Against the most critical with respect to a well-regulated state militia, Hamilton reassures stating that this *will reduce the need for large standing Armies*¹⁷, that could threaten individual freedom under the First Amendment. He also mentions the law of the *posse comitatus*, which is the

¹⁶ Militia Act of 1792, Second Congress, Session I. Chapter XXVIII, Passed May 2, 1792, providing for the authority of the President to call out the Militia, Section 1.

¹⁷ Alexander Hamilton, The Federalist Paper No 29, Concerning the Militia, January 10, 1788.

authority of Magistrate to enlist the service of able bodied men to assist him to enforce the law. That specific authority in Hamilton's discussion, granted to Congress to pass the necessary legislation and to exert its power. The Hamiltonian's figure appears very persuasive in this paper by transmitting the concept and the idea that militia should be an extension of the population to be able better to defend it from enemy invasions.¹⁸ Instead, what is even a prime time, is that again there is no explicit reference type or veiled it to the self-defense right. The militia of Hamilton, does not have the role of defending the people by the people, it just has to fight for the people against a possible invasion, against a revolution or against a dictatorial government. Were his words misinterpreted? As I stated in the previous paragraph, the discordant voices began to come from other constitutional advocates, who began to spread the thought that everything that was related to the freedom of the person, was to be defended with arms. One thing remains solid and well founded, however: the words and intent of Alexander Hamilton, were different.

5.4 How Many Interpretations?

If we consider the real issue that has been created by the drafting of this Amendment, then we must focus our attention on the interpretation which it has been awarded from 1791 until today. Historians, judges, academics, politicians and journalists have attempted to give an original response to the intent of the Founding Fathers, trying to actualize this ancient law. Different theories, unfortunately, despite their validity, do not seem to have found a common line, and also the Supreme Court seems to confirm this thesis through the divergent decisions taken by the various legal cases. Some believe that, according to the unamendability of the Second Amendment, it is necessary to resign ourselves, trying to dab with restrictive policies regarding the possession of weapons. As for my research, I will

¹⁸ The Federalist Paper Summary and Analysis of Essay 29, GradeSaver, <http://www.gradesaver.com/the-federalist-papers/study-guide/summary-essay-29>

closely examine these policies, but I will keep a key analysis totally different from this one.

What I believe we need to work on today, are not adjustment policies, but should be constitutionally binding laws, calling on the original construction of the text with a purpose totally different from what is presented today. I would like to start considering the correlation between the number of constitutional amendments. The moment we decide to study one in particular, we must not make the mistake to take it alone doing a one-way analysis, but it is important instead compare it with how many possible amendments, to understand its true meaning. In this regard, I would like to make two considerations. The first, relates to the interaction of the Second Amendment with its "neighbors". In particular, for the moment, I would like to focus attention on the third one.

“No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”¹⁹

This text, just like the one reported by the previous Amendment, was born from the idea of defending the rights of citizens in the light of what had happened during the British colonization. In fact, in 1765, it was issued the *Quartering act*: British law that stipulated that the American colonists had a duty to accommodate and provide board to British soldiers any time, both in peacetime and in wartime. This was obviously a measure that forced obedience settlers and was felt by them as a real abuse of their liberty and property. Moreover, the British Empire was planning to subsidize with the Americans taxes, the return home and the retirement of some French and Indian veterans.²⁰ In those years, therefore, were quartered several soldiers in North America, that people saw no positively for two factors: first of all the establishment of a standing army worried the settlers who had more confidence and greater fear of a militia made up of ordinary citizens who would then dismantled over the crisis, and, secondly, they could not bear the substantial taxes increase imposed by the Mother Land²¹. The general discontent, flowed in

¹⁹ United States Constitution, Bill of Rights, Third Amendment, 1791.

²⁰ Ref. Seven Years War, 1756 - 1763

²¹ Ref. to British Empire.

1766 into a strong opposition from New York, that categorically refuse to continue to subsidize with the contributions of citizens, the British army.²²

In the light of the historical facts, the Third Amendment appears to have become the bulwark erected against the abuse of the British imperialist government power and also a deterrent from the possibility that such an Act could be enacted in the future. Why this Amendment should be interesting for my research and how can have it a correlation with the Second? The reason is twofold and it's the answer to a question that confirms my thesis. First: Third Amendment, like the Second, was born in response to a real crisis that led to a revolution. Both of them, represent the protective cover of a new and young society, no longer subject to a domineering Empire, but to a free population. That's why I would say that the intent of the birth of these two civil rights belong to the same set: they are born with the aim to deter any new state to propose legal and social restrictions on the American colonists. It seems clear, for the moment, that the interpretation of the Second Amendment reflects this desire. It would seem to give the right to people to conquer their nation from the enemy by putting its own laws. A correlation that could be found by the most braves, lies in the connection between the soldiers quartered in the homes of citizens and the strong property right. In fact, according to some, the right to take up their weapons against the enemy could mean, in reference to the third amendment, take up arms against the man who is the invader of private property.

No matter how justified this theory, as analyzed in the light of the third amendment as a consequence of the second, I think it is somewhat cumbersome; because, the verb quartered, is used to refer to a British law that saw the temporary stalling of the soldiers in the houses and there is no reference to the violation of the property, which seems to be a concept of more late origin and of a different value. Once again, no mention about self-defense. Another amendment useful to my research, is the First one. But it needs to be put into context in the time period. First Amendment states:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the

²² United States History, Quartering Act (1765). <http://www.u-s-history.com/pages/h641.html>

press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”²³

How is it possible that the text above has a connection with the text of the Second Amendment? Quoting a great author, I could enclose the meaning of this link in this sentence: ballots and the First Amendment can prevent bullets and Second Amendments.²⁴ Assuming that the right in discussion was born not only to defend the citizens from the possibility of an insurrection or foreign invasion, but also to protect people from the possibility that Congress will become tyrannical and outclasses the popular sovereignty, the First Amendment is the basis of such decisions. The United States of America were born in a time when the statement of power and boundaries, was given mainly by military campaigns that took place in the name of colonization and submission. Each victory or defeat was punctuated by blows of a firearm which followed each other agreements and written treaties. Governments based their set on the drafting of their constitutions that were new and democratically inspired. If the ruling class showed weakness, inability to govern or showed its own ambitions clashing with the people’s rights, the latter (according to the Constitution under consideration), were free to overwhelm the authority established to bring again the Country to the ancient values. And saying this, I make clear reference to the possibility of creating a militia and stop the government with weapons.

Two hundred twenty-five years have passed since American citizens felt soothed by an Amendment which protected them from the abuse of power, which united them as a people, despite racial and gender disparities. Now we live in a century in which I believe, more than appeal to the Second Amendment, it is important to rely on the First one. In front of the power of freedom of expression, there is nothing that people should look elsewhere. The answer we seek, is written right in the text that we use to argue and the people, in an age where the words seem to stop even the coups, should have a key role in the battle towards a country characterized by the values of democracy and freedom. The First Amendment directs on this path in

²³ United States Constitution, Bill of Rights, First Amendment, 1791.

²⁴ Akhil R. Amar, *The Second Amendment as a Case Study in Constitutional Interpretation*, Yale Law School, 896, 2001

clear and explicit terms. People have the right to present petitions to the government for redress grievances. In the text, it is not specified who must reach these grievances and, appealing to the connection with the Second Amendment, we could say that the Congress itself would commit mistakes or crimes. The time for weapons and cold-blooded duels should have left room for healthy and peaceful dialogue with which people can interact with their government through the representatives they choose. In this way, governments should put pressure on the importance that today covers the First amendment from the Second. This would certainly be a solution that will not put all agree, but that would call itself to the good sense of the people, and at the same time, the constitutive text. A kind of analysis that I have not proposed yet, but that, dealing with this subject must not miss in the list, concerns the actual consequences and no more the rhetorical application of this “holy” Amendment.

This investigation is primarily concerned with the actual given interpretation, rather than the historical and ideological ones. The truth is that, the implementation of this right, has led to the disappearing of thousands of lives over the centuries and this is a factor we can't ignore. Whereas, therefore, what is called a Prudentialist theory²⁵, a theory considering the current costs in lives, we can't but agree with the speech of Justice Lewis Powell²⁶, who has publicly stated how difficult it is to recognize the Second Amendment as a right of the people when it is also the basis of many brutal murders.²⁷ Recovering a sentence written in the previous chapter, but contextualized in this one, how much is a life in the United States? Paraphrasing, are citizens paying now for the ambiguity of two hundred years ago? And how to remedy this confusion? As far as I'm concerned, we can't just continue to avoid the problem by trying a subjective interpretation of the Amendment and apply it to every different case law. As I said earlier, this has created an unpleasant transitive property that led to the total degeneration. This is because the government entrust the objective judgment in the hands of citizens who act according to their subjectivity. Who determines when it ends our subjectivity and begins the law? The

²⁵ Sanford Levinson, The Embarrassing Second Amendment, Yale Law Journal, Vol 99, 655, 1989

²⁶ Lewis Powell was an Associate Justice of the Supreme Court of US. His term lasted fifteen years at the end of which he retired.

²⁷ Lewis Powell, Capital Punishment, Remarks Delivered to the Criminal Justice Section, ABA 10, 1988

biggest problem of interpretation is that there are so many different forms of it, which has done nothing but add fuel to the fire and, through the legal casuistry, I will try to prove this argument.

6. The US Supreme Court Interpretation

in Contentious Legal Cases

In the previous chapters, I listed, relying on more than anything on a historical and doctrinal theory, the different kinds of interpretation about the Second Amendment. I have considered and examined the most solid and even the most imaginative beliefs, trying to extrapolate a common key. As I've already mentioned, the confusion on the subject has led the greater expert to collide with each other, creating a never-ending debate. The main role in this intellectual "circus" seems to be that of the Supreme Court, which holds the power to direct the interpretation into a define doctrine or another. Whereas through a decision of the Supreme Court are established those procedures that have an impact on future legal cases, the judgments are very important plangent in courts.

The most landmark legal cases on the subject, led to the birth of two different schools of thought: one that sees the individual endowed with a self-defense right: theory of individualistic right, and one that sees instead the collective good as the most important and the only to be considered: the common good's doctrine. As it is possible to deduce, the first refers to the right that is drawn from the individualistic interpretation of the constitutional text and which today is also the most widespread and the most valuable in legal cases arriving in the Supreme Court. The second, which is the collective right, is taken from history and it claims to be extrapolated from the written text. The balance today, seems to be shifting towards the first argument.

A new aspect to be considered, that for some scholars should not be neglected at all, is the social aspect, also remarked by Professor Francis Fukujama¹. He pointed out that the last two generations of young Americans, have greatly cracked their relations with government. Considering the social problem, the value of the

¹ Yoshihiro Francis Fukuyama is an American Political Scientist.

Second Amendment, in this case, is overwhelming because many young people would approach to arms to balance the lack of authority and to counter the power so established. The desire for release against the State, leads the balance to tilt towards the supporters of the individual right to bear arms. Other valuable authors, such as Nadine Strossen, the President of the American Civil Rights Liberties Union, rejects the social context to define the interpretive theories. According to her ideas, the highest way to honor the common good is to protect individual rights, considering the two things closely related.² These two doctrines, are the fundamental branches on which today Justices struggle for the resolution of causes. In this chapter, I'll use several legal cases got up to the highest Court, first of all to consider how it has evolved the interpretation of the Second Amendment in the centuries in courts, and secondly, how these rulings have given a positive or negative contribution to the cause. In particular, I will focus on a Case Law that has become a beacon for subsequent law suits. The dispute concerns the District of Columbia vs. Heller, a verdict that has left a mark also among scholars, confirming the individual right above the collective.

6.1 United States v. Cruikshank (1875)

Investigating the case law above mentioned³, I realized right away that, for many legal Scholars, this is considered to be one of the worst decisions ever taken by the Supreme Court. Firstly, contextualizing this event in a historical context, it should be specified that it took hold in the Reconstruction period: a period rather agitated in the United States. In particular, quoting the words of a great historian, the real problem arose from the impact of the end of slavery and the replacement of the workforce.⁴

² Film Media Group, University of Notre Dame, The Good of the Many Gun Control and Individual Rights, ALMA BC, 1996 .

³Ref. United States v. Cruikshank, 92 U.S. 542 (1875)

⁴ Eric Foner, The Supreme Court and the History of Reconstruction -- and Vice-Versa, Columbia Law Review, 2012 <http://ericfoner.com/articles/SupCtRec.html>

Those who were considered the former slaves, during this new period, trying to reach real consideration, especially by the State. They demanded new laws and amendments in order to see applied their freedom and feel equal to the rest of American citizens. In response to this new circumstance, the government decided to enact a series of laws that recognize the equality of African Americans and the right to vote also in the South. One of these, was the enforcement act of 1870⁵ which provides for the extended vote to all citizens and fighting and abolishing all forms of racism against the principles erected by the Ku Klux Klan⁶. They moved the first steps towards a democratic Reconstruction and, during this new route, the Supreme Court gained an important role. This brief introduction, it gives me the opportunity to enter into the debate about the case under review. This cause, piqued my interest for several factors, but I could be severely criticized because, although it has to do with the Second Amendment, it does not process directly the interpretation of it. To justify my choice, I'm going to exhibit the causes that have brought me to analyze it.

Chiefly, it was the first legal case to legislate on a lawsuit related to the use of firearms. As I mentioned a moment ago, it does not base its nature on the right to bear arms, but, what I would try to do, as I have already tried in the previous chapter, it is to correlate the Second and Fourteenth Amendment. In addition, in light of what has been finally decided by the judges of the Supreme Court, in this case we see the presence of a strong social factor related to civil rights, a very dear factor for this research. The events that occurred in those years, are proof of the little changes at the end of the Civil War. The blacks of the South, remained in a total position of submission and, *United States vs. Cruikshank*, it is the evidence. The brutal assault took place on Easter Sunday of 1873 in Colfax, Louisiana, when a white militia, attacked a group of former slaves who were exercising their right to vote. Not only the attackers hurled against blacks who reacted shouldering their weapons, but, after the frontal assault, many of them were prisoned fates only to suffer summary execution. More than three hundred freedmen died that day.

⁵ Enforcement Act was a federal law that appealed to the first part of the 15th Amendment and prohibited discrimination in voting for race and color.

⁶ Ku Klux Klan is an extremist group that promotes the white supremacy. The first movement was born around 1866 and died ten years later.

Looking this case law from outside, it would seem today, an elementary resolution. Reality instead and the final judgment, however, were shattering and echoed to these days. The focus was on an old Federal Louisiana law that did not foresee any kind of conviction for the murder of a former black slave. However, according to the first section of the Fourteenth Amendment ratified only in 1868:

*“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”*⁷

As the jurisdiction acting today in the US courts, and the one that should have acted in 1875, the Constitution, according to the Supreme Law, invalidates a federal law that opposes it or is jarring to it. The decision of the Supreme Court, however, floored the general ideas. It was determined that the offenders could not be sentenced for the killing of the freedmen according to the same Amendment words that would have to frame them. The judges settled that was the government (the State), that could not infringe the right to life, to the freedom and the property and not the other people. For this reason, and based on the federal law that ruled on that State, there was not a condemnation. This case has aroused quite a stir and, even today, it provokes the indignation of many scholars. It is clear that the influence on the decision, was made on the basis of a historical and social context, but it is certainly not my intention to justify a decision relied only on the pure text, extrapolating it completely from the moral and human dimension. as I mentioned previously, I decided to analyze the cause even if not directly related to study of the Second Amendment. A very interesting aspect, however, is the Supreme Court's analysis which was given to the case in relation to the Fourteenth Amendment. The theory used by the judges is collective, which considers only the action undertaken by the State against citizen, while the one who we would tend to consider today, far more obvious, is that individualism for which, if a man kills another man, that man

⁷ United States Constitution, Bill of Rights, 14th Amendment, Sec I, 1868.

pays the consequences. The paradox that emerges between the Second and Fourteenth Amendment, is the right achieved by Negroes in order to arm themselves and to represent the militia of their own country rushing to its defense if necessary and, at the same time, the wrongdoing that is done to them by the State that set them free, denying them the right to life. It is undeniable that, at least in 1800, not all the Amendments composing the Bill of Rights had the same legal relevance. According to the values and priorities that society imposes nowadays, I would not be surprised if someone says that the same thing still happens today.

6.2 United States v. Miller (1939)

I decided to examine, as a second lawsuit, the case that has seen the dispute of United States v. Miller in 1939⁸. I could analyze many other causes on the use of firearms, causes that probably have had a greater global resonance, but I think, among many, this is one of the few to promote collectivist theory. First of all, this was the first to obtain an interpretation which was directed to the Second Amendment, and it was also discussed at a time when the first restrictive weapons legislations were applied. Just one of those regulatory acts, was the reason of the cause. In the light of the tragic events that took place around 1929⁹, the government made a commitment to draw up an act which ruled possession, use and trade of firearms. It was therefore enacted the National Firearms Act in 1934 which provided for a series of restrictions. The most important, concerned the imposition of a large tax on detention and transportation of guns (around 200\$), mandatory registration to the secretary of Treasury, including shotguns and rifles having

⁸Ref. United States v. Miller, 307 U.S. 174 (1939)

⁹ Ref to the infamous St. Valentine's Day Massacre during which were murdered, in cold blood, men of a Chicago mafia clan.

barrels less than 18 inches in length, certain firearms described as “any other weapons,” machineguns, and firearm mufflers and silencers.¹⁰

The development of the story itself, would be quite simple to explain, but what really matters to my thesis, is the judgment and interpretation that has been given by the Chief Justice. According to the defendants Miller and Layton, this legislation, limited and made it impossible the implementation of the rights enshrined in the Second Amendment, and it was to be considered, for these reasons, unconstitutional. Heartsill Ragon, the judge responsible for legislating in the district Court, considered this disposition as unconstitutional, certain that, if the case arrived at the Supreme Court, the defendants would not have been presented as delinquents. When the matter came to the Supreme Court, the main points to be treated were basically: the reason why the two defendants were accused, clarifying whether the commercial transport of those weapons was legal in those specific States, according to the precepts of the Second Amendment. And, in light of an accurate interpretive analysis, declaring whether subsisted the criteria to declare that Act unconstitutional. Despite the absence of the two accused, the Supreme Court proceeded with the case. Justice Clark McReynolds played a key role in the resolution of the case, his opinion was that overwhelming.

As I predicted, this was the first cause and also and the only to provide an explanation for the basic concept of the Second Amendment until Heller’s dispute. And the resolution of the dispute, in a certain way, can be considered as one of the few judgments in favor of an idea of the common good on individualism. Judges declared the full constitutionality of the Act and therefore the prosecution. Miller and Layton, did not possess any kind of gun registration that they were detaining and, even more serious, they were transporting from one State to another breaking the regulations on the arms trade. Another factor that had a strong weight to the decision, concerns the extent and the type of weapon carried by the two defendants. Judge McReynolds decreed, in accordance with the text of the Second Amendment, which had not been shown a different weapon from pistols and that for this reason,

¹⁰ National Firearms Act, ATF Bureau of Alcohol, Tobacco, Firearms and Explosive <https://www.atf.gov/rules-and-regulations/national-firearms-act>

the charge was applied in all its terms. The real fineness of verdict, however, was not in establishing the length of a gun or a barrel¹¹ or apply the firearms act under the state jurisdiction, but was in having interpreted the Second Amendment right to the historical reason for which it was born. The Chief Justice, assuming that the Second Amendment concerns the composition of a defensive militia of the State and the citizen in defense from the State, he did not find acceptable to consider this act as completing part of that Amendment. The most of the interpretation in fact, was based on a purely common good theory referred to the militia. Certainly, an explosive barrel, was not part of that law and there wasn't a real correlation between the Amendment and the offense made by Miller and his partner. It is very interesting to note that the defenders of guns in America, tend to rise this cause as a bastion of the right to own weapons.

However, I find that this cause, representing the opposite of the individualism that everyone has the right to defend themselves from any form of offense and violence, constitutes the primordial bulwark idea of the Second Amendment: the seed from which it was born, one of the stronger shrubs of the Bill of Rights, and from which they have thinned more disparate ideas, sometimes very distant from the original intent. For this reason, *United States v. Miller*, is fundamental to this thesis. It is considered one of the few, perhaps the only one, to have given an interpretation totally in favor of the militia that serves the people and not in favor of the person serving the person.

6.3 District of Columbia v. Heller (2008)

The case law, *District of Columbia v. Heller*¹² is considered to be the most important law suits regarding the interpretation of the Second Amendment since *Miller* and *Layton* times.¹³ Although over the years have followed numerous cases

¹¹ The cause *United States v. Miller* considers a length of 12-gauge shotgun and barrel less than 18 inches long.

¹²*Ref.* *District of Columbia v. Heller*, 554 U.S. 570 (2008)

¹³*Ref.* *United States v. Miller*, 307 U.S. 174 (1939)

concerning firearms and their regulation, I consider these two cases as the interpretative keys of this Amendment. Both have strongly outlined the theoretical lines to be followed, but leaving pending a common explanation. Although I have let to transpire in my thesis about a personal more correct view on this Law, the Supreme Court today tends to endorse the individualistic doctrine, which provides for the personal right of defense related to the violation of freedom of liberty and property.

But, going in order, I would like first of all to consider the reasons that led to this lawsuit from the Court of Appeal to the Supreme Court. Despite the story is very similar to that of Miller for its dynamics, it is necessary to be more specific. As in the previous paragraph, here the premise has to do with a firearms regulation, enacted in 1975. This act of regulation, is to be considered as the most incisive and tough of history, in fact, the District of Columbia established with that law, that no citizen of that land could hold weapons of any kind, could not possess unregistered arms and, for those that had bought before 1975, and for the police, there was also a condition for which they would have to keep those discharges and dismantled weapons at home.¹⁴ The reasons that had prompted the Council to approve such a restriction on weapons and on the conduct of citizens was twofold. First of all, they wanted in this way to give a clean cut to crimes related to the use of firearms in Washington and, secondly, they wanted to be able to monitor the purchase and the trafficking of the guns on the urban territory.¹⁵

When Dick Heller, a police officer of the District of Columbia, saw denied his right to keep his gun at home as he usually did in his office, he filed a lawsuit and, like him, five other people¹⁶ in Washington who complained roughly similar reasons. It was obvious that the Firearms act of 1975, despite drastically reduced crimes and murders, did not find a positive response from everyone. When the case

¹⁴ Council of District of Columbia, Firearms Control Regulation Act of 1975. It entered into force on September 24, 1976. (Washington DC)

¹⁵ Edward D. Jones, The District of Columbia's "Firearms Control Regulations Act of 1975": The Toughest Handgun Control Law in the United States-Or Is It?, *Annals of the American Academy of Political and Social Science*, Vol. 455, Gun Control., 138, 1981 <http://pdba.georgetown.edu/Security/citizenssecurity/washington/documents/Edward.pdf>

¹⁶ Shelly Parker, Tom G. Palmer, Gillian St. Lawrence, Tracey Ambeau, George Lyon.

ended up in the Court of Appeal, the only case to be examined was that of Dick Heller, as it was considered to be the one who owned all the criteria to be heard.

The interpretation of the Judges, confirmed the individualistic theory and definitely established the unconstitutionality of the law enacted by the District of Columbia. They re-established the principle that everyone was entitled to hold a weapon for their personal defense. According to this ruling, it would seem that the cause has had a beginning and an end with the Court of Appeal, but rather the process not ended. The defendants in fact, have requested the opportunity to make a certiorari verification, to assess whether, on the basis of textual dispositions of the Second Amendment, there was a violation. The Supreme Court, by granting reviewing the case, decided to hear again the complaining. The case of the District of Columbia v. Heller became of media coverage and saw the deployment in the field of different political and legal forces. The Supreme Court was composed by the most distinguished Jurists of our time.¹⁷

The final decision was established on a majority of 5 votes to 4 and sanctioned de facto the interpretive footprint for subsequent cases. The Court confirmed the personal right to own weapons in any circumstance as a constitutional desire according to some criteria that were established and defended especially by Justice Scalia. The main interpretation was based on: a prefatory clause providing for the use of weapons to organize a militia, but that is not restrictive to citizens, as confirmed by the second part of the Amendment. The history of this Text confirms that in three states at the time of ratification, they were discussing and required this right as a personal and individual one. Furthermore, according to the Supreme Court, there was not a precedent in favor on which to base an argument to the contrary. In fact, they were reading the sentence of Miller as a miscellaneous decision, legislating only on the type of weapons for the militia purpose.¹⁸ Although reading and interpretation of this case have been clear and comprehensive, many

¹⁷ Associate Justices, John P. Stevens, Antonin Scalia, Anthony Kennedy, David Souter, Clarence Thomas, Ruth Bader Ginsburg, Stephen Breyer, Samuel Alito and John G. Roberts as Chief Justice.

¹⁸ Legal Information Institute, SUPREME COURT OF THE UNITED STATES v. DISTRICT OF COLUMBIA, et al., PETITIONERS v. DICK ANTHONY HELLER, on writ of certiorari to the united states court of appeals for the district of Columbia circuit, June 26, 2008. <https://www.law.cornell.edu/supct/html/07-290.ZO.html>

judges, lawyers and scholars, have criticized and written several possible conclusions about it. The debate on this lawsuit, has raised some and scared others.

The meaning of the judgment can be seen in two ways. According to Reva Siegel, a law professor at Yale, some may consider the interpretation as originalist, as extrapolated from the original text. According to the reasoning so far explained in this research, I think it is more appropriate to place the doctrine followed in the Supreme Court as a living and evolving constitutionalism. In this second school of thought, seems preponderating the desire of the Court to get closer to pro weapons movements that seem to have become the real drivers of whole masses.¹⁹ I decided to take inspiration from these statements, to make some observations. First of all, defining this interpretive theory as originalist, we should have a certain definition of the purpose of the Amendment, and, considering the utterance exact words, this doctrine would decay by itself. Secondly, I make a reflection. We really want to consider that the Supreme Court gives life to the Constitution through the influence of the movements pro weapons? According to the Siegel's theory, the Second Amendment's twentieth-century history shows how political conflict can both motivate and discipline the claims that mobilized citizens make on the text and history of the Constitution. These are certainly very strong and impactful words, and many do not remain amazed at reading them. The evolution does not always have to be positive of course, but, according to the massacres we see every day, I would not risk thinking of the Constitution as a document that is bartered for the interests of the political majority, and my argument, despite I will consider this theory in the next chapter, does not want to certainly demonstrate its total veracity. The case law *District of Columbia v. Heller*, represents a breakthrough in the centuries-old doctrine of interpretation and also a choice of great importance of the Supreme Court judges who have had an influence on the legal world of our times, creating a balance and an indestructible precedent. To those who object that decision, it will be even more difficult to demonstrate opposite positions to the ruling issued in 2008. As for my thesis, according to the arguments I have given so far, I can certainly find myself in full agreement with the ruling, but, on the other

¹⁹ Reva Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, Yale Law School, 192, 2008

hand, as Reva Siegel, I think the pressure of our time has a strong influence on the final decision.

6.4 Caetano v. Massachusetts (2015) and the Temporal Escalation Theory

I would like to conclude this analysis, with a case that probably not everyone will find of great importance, but it is necessary for this research, to complete the final comparative processing. The event taken into consideration, is that of *Caetano v. Massachusetts*²⁰, which has seen starring Miss Jaime Caetano. The cause it is developed primarily around what appears mainly to be a case of stalking. The girl, who also represents the indicted, fearing for her safety because of intrusiveness and persecution of her former boyfriend, have had a stun gun as a gift from a friend and, one night, she had shown it to his persecutor to intimidate him. Not entering into the merits of the legislative question on the crime of stalking, femicide and restrictions of this kind, I will just analyze it, based on the analysis made of the Second Amendment.

A very interesting aspect of this case, is the discrepancy between the judgment of the Supreme Court of the Massachusetts and the judgment of the Supreme Court of United States. The first verdict, in fact, seemed to interpret the Amendment according to a purely historical aspect blaming the girl to hold a weapon that did not exist at the time of the Founding Fathers, therefore, a weapon which, as legislated the federal law, was not legal in that State. On the other hand, the verification and the opinion of the highest court was unsettling. Appealing to the ruling issued seven years before about the case of *Dick Heller*, the judges condemned the law of Massachusetts as unconstitutional for the total violation of the Second Amendment. This right in fact, extends to all arms physically bearable, even if not in existence at the time of the Constitution's built. Furthermore, the

²⁰ *Ref. Caetano v. Massachusetts*, 577 U.S. (SJC-11718) (2015)

Court also held that, in regard to the use of the stun gun in the army, this was a usable tool for all purposes. In this way, the judgment of the Federal Court has been totally squeeze upset. All reasoning and correlation of the Supreme Court Judges were originated from the former *District of Columbia v. Heller* sentence.

And here is my reflection. In this chapter, I reported four legal cases that have all treated or interpreted the Second Amendment. In each event, there has been a courageous and meticulous elaboration of the text, the history, the purpose and the concrete reality, then even though the verdict was very different from one another. The truth is that I have not analyzed these causes in a purely chronological order to give the search a tidier appearance, but for a reason which I'll call temporal escalation. I started by analyzing a case in which there was almost total constitutional interpretation absence. A cause which based its rationale on a sad misunderstanding of the text of the Fourteenth Amendment and on the total cancellation of the rights earned by African Americans. Leaving this event representing that part of my dissertation with a right flush to the protection of human rights, I've showed the real escalation, in the last three cases: without repeating the conduct and the verdicts of the last three cases, I will prove that the that the Second Amendment has undergone, over the centuries, evolutionary interpretation that has crippled its original structure. *United States v. Miller*, dated 1939, showed the attachment of the Supreme Court to values instilled by the Founding Fathers, concerning an armed militia, seeking to defend the country and not to act as a personal claim. In that judgment, in fact, there seems to be no reference to a need to bring their own weapons to protect themselves from the enemy, but only to take them to create an army of citizens. Some would disagree stating that the Supreme Court has legislated only on a question of the type of weapon, but I feel I can say that the interpretation, has gone far beyond just the caliber of the gun or the barrel.

The phase of escalation, foresees a period of eighty years. In these years, the social and political balance led a strong climate of interpretive change. This change, in my theory, is confirmed by the judgment given in favor of *Dick Heller* about the possibility or not to freely carry weapons anywhere without strong restrictive limits, going against all types of Federal Firearms Legislative Act. Not only this cause has wiped out all previous rulings in favor of an armed population only in order to

defend the country from a foreign enemy or tyrannical government, but it has created a strong precedent, allowing everyone to arm themselves and defend at will their home, their family, their property from anyone they consider an "enemy," perhaps a neighbor. Coming to the last case has been handled in this chapter, let's see how it has arrived at the peak of escalation. In the legal case *Caetano v. Massachusetts*, there is no even more the will to interpret the Second Amendment on the basis of a historical vision, the concern that seems to grip the Supreme Court is an object identified as a weapon. We are not worried about the fact that a woman is forced to wear a danger object in her purse, but the question is whether that object is considerable as a weapon based on the precedent *Heller* case. We do not find in this judgment any trace of interpretation. Walking armed, nowadays, seems a matter of fact, an inalienable right, our only concern should be given by the choice of the arms we prefer to use. I think the concept of temporal escalation is now perfectly clear to readers. Certainly, according to the studies of my research, this theory sees a strong interpretive evolution, which is slowly leading to the disappearance of the concept of constitutional interpretation. The reader should now to determine whether this escalation is considered positive or negative.

7. Political Institutions on the Second Amendment

Reached this point in my analysis, I would like to focus more, on a less rhetorical and more concrete aspect of the Second Amendment. The idea that I have studied and proposed up to now, is based on a historical perspective and a comparative legal analysis. One factor that, until here, has been deliberately neglected, concerns the political forces in field and the role they have played by the constitutional ratification. This statement certainly does not mean to deny the importance of the Supreme Court, which remains a beacon of interpretation, but, as I already mentioned in the previous chapter, we can't underestimate the influence of political parties and lobbies when referring to this topic.

My research does not want to enumerate or statistically analyze the massacres that have occurred over time, but its purpose is to assess how this Amendment was subject to profit from organizations and politicians campaigning. As the government has been able to influence and raise awareness on this sensitive subject and how much more there is still to do. The tug of war between those who would like a stiff regulation and among those who promote the unregulated sale of weapons of all kinds, has led to the creation of two opposing sides. A common misconception that people can easily fall, is to believe that these two opposing factions fully reflect the two major parties of the United States: Democrats and Republicans. Surely, on many occasions, we have seen how moderation democratic faction had raised the issue and the Presidencies until now, have amply reflected this theory. On the other hand, it must consider that this theory is not the rule. There are several Democrats completely in favor of a wide distribution of weapons in all fifty Federal States¹, because the focus of the issue is not more based on the doctrinal interpretation of the Second Amendment. The question is how to fight crime with the Second Amendment.

¹ Ref. to Senator Jon Tester, senior United States Senator from Montana from 2007; Ref. to Representatives Michael Avery Ross: member of the Democratic Party for governor of Arkansas.

In this chapter, I would like to illustrate a further interpretive change regarding the Amendment that I am studying, trying to understand how it has gone from being a right to an advertising slogan and the influence that the associations and the media have had on this development. As I have stated earlier, I will not elaborate on the slaughters and massacres occurred in recent years which represent an inexhaustible source of argument but also exposed to suffering. Instead I'll take two different cases of two women who have been victims of an armed aggression that have taken very distant positions on the use of weapons in America. the question is interesting in that they are not two ordinary people, but two former members of Congress who have been miraculously saved by two shootings: Gabrielle Giffords² and Suzanna Gratia Hupp³. After considering the party influences in the interpretation of the Second Amendment and how much the political faction really conditioned the choices of citizens, I will dig deeply in the last acts of regulation on the possession of weapons in accordance with the statement by the Supreme Court in recent case law. Especially, I will concentrate on reforms and the attempts of reforms implemented by the Obama's administration, the obstacles to be faced to implement more restrictive policies on gun's detention and a hypothetical future vision of a passage of the scepter to the Trump's administration in 2016.

7.1 Amendment or Slogan?

One sentence struck me and shocked at the same time: "The only way to stop a bad guy with a gun is a good guy with a gun."⁴ These are the words of Vice President of the NRA, the National Rifle Association, one of the most powerful pro guns associations of the United States. In the light of the words spoken by LaPierre

² Gabrielle Gifford is a Democratic American Politician. She is a former Arizona House of Representatives.

³ Suzanna Gratia Hupp is a Republican American Politician. She is a former Texas House of Representatives.

⁴ Wayne LaPierre, National Rifle Association Press Conference, Washington, Dec 21, 2012.

to a week from Newton massacre⁵, it would seem clear the message to the Nation. Every kid has the right, under the Constitution, and also the duty, to defend the State from possible mentally unbalanced guys, who, at parity of years and moneys, have the same right sanctioned by the same Constitution. And, according to what the Americans have read into the Constitution, this is perfectly legal. One aspect that I would like to consider before entering into the merits of the matter, is the responsibility factor. Too often the supporters of this right have emphasized the importance of educating without considering the responsibility. The moment you think to put a weapon in the hands of a young boy, you're putting his life in his hands and that of other people. Whether you are a bad or a good guy, if no one gives you the knowledge of what you're doing and why you should do it, you constitute a danger in both cases. This statement would certainly be challenged by the promoters and defenders of the right to bear arms to protect their freedom, those who are in the line of thinking with 'Association mentioned a moment ago: NRA. Now, let us ask ourselves, if this group of industrious activists is born with the purpose of arousing the masses in favor of an awareness. One that will seem strange to many, has come to know that this association is born with recreational purposes, we could say that at the beginning actively promoted the activities outdoors, hunting and teaching the discipline handed down from parents to children.

Some will be even more surprised to find out that the first presidents and members of the NRA, were not deployed to the rampant arms trade, indeed, they held a cautious position and collaborated in order to create a regulated system on the subject. But, as I have tried previously, times have changed history that changed people. Since its creation in 1871, it will greatly change its appearance. During the early years of nineteenth, it begins to expand its mission to college students and young proud Americans, who came to the association as usually people get closer to a youth program.⁶ The real twisting of its goal, only came in the early seventies, when the political nuances, became more and more pronounced. The NRA began to be a political springboard especially for what concerned the conservative class of Congress. An author has made me reflect on the social aspect of this lobby: the

⁵ Ref. Sandy Hook Elementary School Shooting, Dec.14, 2012.

⁶ A brief History of the NRA, National Rifle Association, <https://home.nra.org/about-the-nra/>

factor of masculinity related to the use of firearms. Despite many pro arms organizations aspire to a full inclusion of both gender, the fundamental concept of their membership, is in the proclamation of virility established through the use of weapons.⁷ Basically, according to a sociological investigation, the shooters use guns and violence to resolve their masculine identity crises and create celebrity for themselves through acts of violence.⁸ If we consider the historical aspect, it is possible that there is a rather primitive connection between the events of the American Revolution and the NRA.⁹ Were men to stain their hands with blood and not women. This would tie the association's message to a people almost entirely male. If you do not want to take up a pistol to defend your property, then your manhood will suffer.

The real moment in which this organization has done its coming out alongside and supporting the policy, is with the Bush junior electoral campaigning. At that point, they were clarified some concepts that now, in 2016, seem elementary. From that moment, the people directly linking the actions of the NRA with those of the Republicans, and vice versa. Where there was the support of the Conservatives, there was the support of arms, through the support of events and conferences, in spite of the brutal massacres that were the backdrop.¹⁰ It also confirmed its role as a lobbyist, strongly working against the nomination and the election of Barack Obama, using a strong campaign demotivating that costed around \$10 million. So nowadays it is not only natural, but also justified by the facts, thinking that the distribution, sale and rampant gun ownership, are issues endorsed by Republicans. It is understandable figure out which candidate is supporting this association for the 2016 elections.

The main purpose of this paragraph, is not to do all the same brush, but lead the reader to wonder about why we took distance from the constitutional

⁷ Scott Melzer, *Gun Crusaders, The RNA Culture's War*, NYU Press, 29, 2009.

⁸ Jackson Katz and Douglas Kellner, *A conversation between Jackson Katz and Douglas Kellner on Guns, Masculinities, and School Shootings*, *Fast Capitalism*, 2008 http://www.uta.edu/huma/agger/fastcapitalism/4_1/katzkellner.html

⁹ The message of Rifle National Association is now extending to the women with a specific "pink website", called NRA Women.

¹⁰ Film Media Group, *Gunned Down*, Public Broadcasting Service, ALMA BC, 2015 http://fod.infobase.com.proxy.bc.edu/p_ViewVideo.aspx?xtid=114687

Amendment. As can be seen from what I have written in these lines, the Second Amendment, seems almost disappear when we face the question of the associations for the gun's rights. Hence the clarification is made. It is no longer the rights of the people, it is not more than freedom, it becomes almost like a chant about the rights of the arms, as if they had control over our lives, and not vice versa. From what people defend themselves nowadays? And what is an objective concept of offense, invasion of property and limit the freedom? Later in this chapter, I will try to analyze the difference between infringement and offense and I also try to figure out if the chaos in which we live today is the consequence of this lack of understanding. In the light of the two major factions that have come to create in these years, and specifically not for or against the Second Amendment, but for or against guns, I'd like to conclude this section with a sentence, just like I started at the beginning. "Something is wrong in this country when a child can grab a gun, grab a gun so easily, and shoot a bullet into the middle of a child's face (...)"¹¹ I believe the words of this father, better than any theoretical concept, explain the discomfort of many American citizens.

7.2 A Polarized Society

"Congress on Your Corner". This was the name given by Gabrielle Giffords, a former Arizona House of Representatives, to a constituent conference held near Tucson in 2011. Due to a shooting during the meeting, six people died, and the deputy was seriously injured. This was one of many cases of fanatics, mentally disturbed fixed on a political or public figure to target. The American people are now accustomed to this kind of massacres and presidential history is an example. Every time events like that happen, it turns on a strong debate after which these issues, most of the time, seem to remain unchanged.

¹¹ Tom Mauser, Father of Daniel Mauser died during Columbine Assault in 1999.

My intention in any case, is not to analyze the story of the shooting itself, but consider the stance of this woman and a possible change of orientation on policies post-accident. Obviously, starting by affirming her democratic position, it is important to consider whether and how it has changed. After her resignation in 2012, the deputy has engaged in a partnership with her husband to promote the cause in favor of arms control: Americans for Responsible Solutions: a non-profit organization that donates funds to gun regulation in America. Thanks to her courage, this woman has always indicated the population for prudence and responsibility, and she used to fight for the cause of restrictions on the possession of weapons even before the shooting.

In fact, Gabriella Giffords, has always given a strong political impact on the issue of arms and self-defense. In 2008, for example, she has openly aligned contrary to the maintenance of the pistols in the house in the District of Columbia. Many will be familiar with the connection of the date and place.¹² What is surprising in this story, are the deep roots of her ideas both before and after the accident. If it happened to anyone of us, it is likely that we would abandon our values and our ideas for a sense of anger and injustice. Recalling that in the shootout six people died, including one as young as nine years old, it is very difficult to stand firm on an anti-gun position. Giffords, however, promised to make the United States a safer country from violence and, if this does not happen, she promised to do all that is in her power to have a different Congress that puts in first place the good of the community instead of the gun Lobby's.¹³ We just analyzed the experience of a woman, a former Democratic Representative, who, in the light of the involvement in a massacre, has intensified her convictions on the regulations to be implemented against the uncontrolled proliferation of arms.

The second witness of a brutal assault against a deputy is laid in 1991 at Luby's Cafeteria, in Texas. Suzanna Gratia Hupp was with her family there, when at one point, a gunman, had burst shooting at bystanders and killing both the woman's parents. The former Republican Representative, always supported self-

¹² Ref. District of Columbia v. Heller, 554 U.S. 570, 2008

¹³ Gabrielle Giffords, Take Gabby's Pledge, Americans for Responsible Solutions, <http://americansforresponsiblesolutions.org/stand-with-gabby/>

defense, had decided that day to leave her gun in the car, removing it from her purse. A decision she strongly regretted. Because of a law on the detention of weapons in Texas that stated to not bring gun into the cafeteria, she was forced to let the pistol outside. After the massacre, she began a real legislative battle for Hupp, who made the interpretation of the Second Amendment, her mission. As before the shooting, she continued to support her idea on the personal defense of citizens, focusing the discussion on the second part of the Amendment, the one that concerns the right of people to own weapons that must not be infringed. After being elected as a Texas House of Representatives in 1996, she saw one of her biggest dreams come true. Bush government promulgate a law on the possession of weapons in public: the concealed weapons bill, which it made legitimate and legal, carrying visibly weapons outside from the private property.¹⁴ Despite some restrictions towards people mentally disturbed, convicts and students with loans, this act seems to give the green light to the more unbridled possession of guns in US. As for the Texas law, in 2016, there has been further liberalization of possession of weapons in the State. A step forward for Suzanna Gratia Hupp and for all supporters of self-defense and gun's rights. This paragraph is not intended to tell the tragedy experienced by two parliamentarians from two opposing political parties, but its intention, is mostly to highlight a plague created by the American society. In light of the events described and the incredible intensification of the Giffords and Hupp ideologies after the shootings, it is clear an alarming factor.

Interest groups that have built up around the debate on weapons, have only further sharpened the asperities in society today, creating a chasm between Democrats and Republicans on this delicate topic. Those who were convinced before suffering aggressions that a harsh regulation of the weapons was a solution, after the dramatic events of recent years have convinced even more of their ideas. On the other hand, those who before the assault were for free trade and possession of arms, now they have the certainty that it is a right and even a duty to defend themselves from enemies. As if, according to the reasoning of the deputy Gratia Hupp, she had the certainty that she could defend her family without causing greater

¹⁴ Brian Montopoli, House passes concealed carry gun bill, CBS news, 2011 <http://www.cbsnews.com/news/house-passes-concealed-carry-gun-bill/>

damage to the shootings. These differences, heightened by the terrible events of the last twenty years¹⁵, have led to a strong political and social polarization, and have created a strong disagreement between the parties. It is clear that, if we continue on this road, ideas will radicalize more and more and never will find a fixed point on the issue.

7.3 Second Amendment and Executive Power

“Today we need a nation of minute men; citizens who are not only prepared to take up arms, but citizens who regard the preservation of freedom as a basic purpose of their daily life and who are willing to consciously work and sacrifice for that freedom. The cause of liberty, the cause of America, cannot succeed with any lesser effort.”¹⁶

These are the words of one of the most popular Presidents in American history: John Fitzgerald Kennedy. The extract above, represents only a part of that speech done by JFK in 1961. On investigating them entirely, we will immediately realize the purpose of his words and also the position of the President on this topic.

The ancestors, according to his interpretation, created the Second Amendment with the intention that every healthy and strong citizen, could take part in a well-regulated militia, to fight for freedom. Asserting this, Kennedy acknowledged during his tenure, the importance of this right as a fundamental and necessary to the defense of the homeland. The fact that he belonged to the Democratic wing, definitely could affect his mindset, but he never rejected the Second Amendment.

The paradox that is impossible not to mention in this historical analysis, is the murder that saw him as the victim in Dallas two years after that speech. Like

¹⁵ Ref. Sandy Hook Elementary School, Columbine High School, Orlando Shooting...

¹⁶ John F. Kennedy, President Kennedy's Commemorative Message on Roosevelt Day, January 29, 1961

him, many others in history have died at the hands of their own system.¹⁷ The paradox lies in the fact of continuing to defend a system, claiming to defend ourselves, but ending completely victim of its cruel game.

I think that living in a nation where it is so easy finding a weapon, can bring people, even those with the best intentions, from being victims to executioners in a few seconds. Another US President who in history went through an experience similar to Kennedy due to the free circulation of guns, was Ronald Reagan. Almost twenty years later, he was involved in an attack along with his press secretary, an intelligence agent and a police official services. Reagan, as a good Republican, never denied his inclination to support the rights of weapons for self-defense, although in 1975, probably in the wake of that times, announced that the Gun Control Act in 1968, definitely had substantial grounds for existence, forcing voters to considering the restrictions on the possession of weapons. His vision on the Second Amendment, however, can be seen as disillusioned and a bit simplistic because, he considered immutable crime in the United States, with or without restrictions. Although he maintained that: *the right of the citizen to keep and bear arms must not be infringed if liberty in America is to survive*, in 1986, he did enact the Firearms Owners Protection Act, which resumed several restrictions of the 1968 Act declared unconstitutional. Despite this, he never took a strict position on the matter, but remained in a limbo between the possession and trade of weapons and the resumption of some laws limiting.¹⁸ The assassination attempt against President Reagan, led a few years later, the enactment of a law on preventive check before the sale of arms. The law was named one of the men wounded during the shootout Washington: Brady Handgun Violence Prevention Act in honor of James Brady. To tell the truth, the law passed under the Clinton presidency in 1993. Thanks to this provision, were made more selective and careful checks on gun buyers, by giving notice of at least five days before the bought weapon withdrawal and then having confirmation from the National Instant Criminal Background Check System a branch of FBI.

¹⁷ Ref. Martin Luther King, Robert Kennedy...

¹⁸ Ben Garrett, Gun Rights Under President Ronald Reagan, About News
<http://civilliberty.about.com/od/guncontrol/a/Gun-Rights-Ronald-Reagan.htm>

But, coming to the present day, the real promoter of the regulations on weapons is the current President of the United States Barack Obama. He, in recent years, have had to defy the opposition and sometimes even the pressure of their own party to issue acts with law force with respect to the legislation on weapons, often using the veto power of the executive. The reality today, puts us in front of dramas of all kinds: domestic violence, suicide, mass murder. And, as has often stressed the President in office, the United States is the only advanced nation with such a high death rate. In January 2016, he promised a new binding Act that created a very harsh restrictive field on weapons: Executive Order on Gun Control. This executive act not only set limits to those who buy weapons, but also to those who sell including web sites that sponsor the different stores or brands. Each vendor, will have to be officially registered, so that it is more easily traced to his person. They also have to conduct the strict controls on buyers before selling weapons and will have to record every individual, no exemption.¹⁹

Walking through the main stages of the relationship between the Presidents who have made the history of the United States, and the dreaded Second Amendment, it is clear that they have made substantial changes without row against it. This is probably because of the way of thinking that, if the wind blows so contrary, the only way to survive is to be carried in the same direction. The progress and the steps taken so far, have shown the respect for a text that, despite the ambiguity, remains “chaste” since 1791. Nevertheless, the opposition to these policies is not lacking, and probably a wind of possible change is already in the air. What will happen with the elections of October 2016, will have a strong impact and echo on the reforms concerning the detention of weapons in the country. Despite strong Trump candidate's position, he has always maintained a rather bumpy position, stating before being in favor of the liberalization of the weapons, and then detach from the NRA after the Orlando shooting. As for the prospect of this research on its position, I tend to keep in the good one of the last sentences issued in this regard about the position of his competitor on the White House:” Maybe Second

¹⁹ Alex Nabaum, Barack Obama: Guns Are Our Shared Responsibility, The New York Times, 2016 http://www.nytimes.com/2016/01/08/opinion/president-barack-obama-guns-are-our-shared-responsibility.html?_r=0

Amendment People Can Stop Clinton's Supreme Court Picks”.²⁰ I think his position is clear.

7.4 Offenses, Enemies and Conspiracy Hypothesis

To conclude this cultural-political chapter, I would like to make some observations. The Second Amendment has become and is still becoming a dangerous double-edged sword.

Let's try now to create a brief connection between this Amendment and one of the strong and inviolable right of the American society, the right to private property, I try to do an analysis of how subjective is its meaning. I consider these two concepts to be one the shield of the other, in a certain way. What is private property? *"A property right is the exclusive authority to determine how a resource is used, whether that resource is owned by government or by individuals"*²¹ Thus a citizen has the right to use that particular resource as he better retains, even attributing it to a third person. In United States Constitution, this right is mentioned and also granted in two Amendment: Fourth and the Fifth.²² Of course, the delicate interplay between the Amendment and the strong property's right, has brought controversy. In some federal States, for example, people are entitled to carry concealed weapons, but this practice is forbidden in other people's houses.²³ The problem can be greater when you find yourself in the private property of someone, endowed with strong and stiff rights and also a gun with which defend them. I place

²⁰ Candace Smith, Adam Kelsey, Veronica Stracqualursi, Trump Says Maybe '2nd Amendment People' Can Stop Clinton's Supreme Court Picks, abc news, 2016. <http://abcnews.go.com/Politics/trump-2nd-amendment-folks-stop-clintons-supreme-court/story?id=41239648>

²¹ Armen A. Alchian, Property Rights, The Concise Encyclopedia of Economics, <http://www.econlib.org/library/Enc/PropertyRights.html>

²² Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures and requires any warrant to be judicially sanctioned and supported by probable cause. The Fifth Amendment protects the right to private property in two ways. First, it states that a person may not be deprived of property by the government without "due process of law," or fair procedures. In addition, it sets limits on the traditional practice of eminent domain, such as when the government takes private property to build a public road.

²³ Ethan T. Stowell, Top Gun: the Second Amendment, self-defense, and private property exclusion, Regent University Law Review, 532, 2014

a practical case. Sam and Adam are friends, but they live in a controversial relationship of jealousy and ups and downs. They do not get along on many things and often tend to fight hard for the values they believe in. Adam, holder of a legally registered gun, decides to invite to dinner his friend Sam to make peace, but the situation gets out of hand. Sam begins to offend with heavy tones his friend and Adam, in response, shoots him. The issue we're facing, would seem simple at first sight, but instead, for the Constitution and US laws, it is terribly complicated. Adam, shooting Sam, is protected by the rights established by the Supreme Law. He was attacked in his home. He believes in fact, that it has suffered a real aggression and, as evidenced by the Second Amendment and numerous legal cases, it is his duty and right to defend himself. Despite precedents between the two "friends" and the various federal securities laws, we realize that in this general vagueness, there's risk to commit several errors of assessment.

What does it means violation of property? If we consider our body, our mind and our territory as elements of property, then we must not be surprised if misunderstandings arise on the term offense, violation and assault. the ambiguity sometimes attributed to the word aggression, very often is defined by the context, from the perspective that we tend to see things. That's why the second amendment becomes deadly when mixed in the same "cocktail" of property, liberty and the violations. They are concepts which, despite set by the constitution, are definitely interpretable. According to this reasoning, and according to the law, according to the Adam's deposition, he is innocent and, for many, an exemplary citizen. From the moral of this hypothetical story, we can draw some lessons: Second Amendment, as it is interpreted today, mixed with other civil and human rights, can become a dangerous weapon. Its ambiguity, therefore, is a social issue: it polarizes the political parties, it creates a disservice between police force and citizens and brings forth dramatic misunderstandings, putting at risk the citizen's lives. The most important role in this process is definitely represented by the Supreme Court. The power and the responsibility arising from the verdicts, create interpretive precedents that have a huge burden on the provisions applied by the federal states. In taking decisions, judges must consider the effects on the long term. Heller's case v. District of Columbia represented a symbol and the proof lies in the fact that today, more

than any other, it is taken as a sample in the United States. Another element that I have to deal with in this paragraph is the word enemy. In the dictionary, to this voice, it is this definition: *"a person who hates or opposes another person and tries to harm them or stop them from doing something."*²⁴ We live in an era of total ambiguity and political, media and cultural confusion. We are not bombarded with nuclear weapons, but we are bombarded with information, sometimes distorted and sometimes biased. With this statement, I would like to demonstrate that the Second Amendment may be misinterpreted also following the original intent theory. If Americans though to create a militia today against a public enemy, against who they would refer? Surely the last years have led to think that the country should be defended by an enemy of Islamic womb; unscrupulous individuals who use to hide among the integrated people and waiting to take action against the Country. Fear and panic in America are having the upper hand. It is estimated an imminent mass attack. The reality could not be more distant. On a percentage of 1.71²⁵ of Muslim citizens living in North America, only fifty-six have thought of emigrating to endorse the cause of jihad, thirty-seven with the intention to get as Syria, Libya or Iraq, twenty-eight of them were arrested in US territory, only five were able to reach the destination, but later captured and finally three joined to ISIS. Three people on fifty-six.²⁶ This factor embodies the big gap between what people believe and what really happens. But, thinking of the average citizen, the spectator of the coarse facts that are served up day after day, it is normal to get some idea of what is the looks like of the enemy. The same citizen who decides to hold his weapon only to defend his country, could be the same one that enlists a well regulated militia to set free America from foreign citizen who lives there. I think this passage makes clear the danger that we run now with a generic and subjective interpretation of this Amendment.

What about the government? In this chapter, I dealt with the social and political problems that originated from the interpretative attempts over the years. In this total ideological chaos, if on the one hand the media feed this constitutional

²⁴ Enemy, Cambridge Dictionary, <http://dictionary.cambridge.org/dictionary/english/enemy>

²⁵ Muslim Population in the World, America, <http://www.muslimpopulation.com/America/>

²⁶ Karen Yourish and Josh Williams, ISIS in America, The New York Times, 2016
http://www.nytimes.com/interactive/2016/02/04/us/isis-in-america.html?_r=0

anarchy, the government, on the other, should be redressed in stability and cohesion. However, this does not occur with particular constancy. The debates on arms, in fact, are lifted and moved by the Congress member, that address the campaigns on the wave of marketing and non-profit organizations. In this regard, a consideration comes spontaneously.

Whereas, one of the main reasons for the creation of the Second Amendment, unseat and stop a tyrannical government, I wonder if people are not deliberately distracted by fruitless debates. No rallies on the possession of weapons have never considered the possibility of a revolution against a corrupt or a despotic government. Politicians may have thus created ideal conditions to ensure that the dog continues to bite its tail, without finding a way out. This theory turns out to be complicated and definitely conspiratorial, but if we want to do a proper analysis of all the possible interpretations, I don't think is to overlooked the advantage that the government grasps from this internal battle. In this regard, I would like to conclude with a sentence of Poul Anderson, a famous contemporary writer, that particularly impressed me about the government and the citizen freedom that I think it's reflected in this latest concept of the chapter: *"If the price I must pay for my freedom is to acknowledge that the government was granted the power to infringe on them, then I am not free."* Contextualizing this sentence in the paragraph just discussed, I would like to emphasize how people tend to thank their country for the rights it guaranteed as to defend their own interests and their own family. But, on the other hand, if people remain in ignorance that this law was created to prevent the government from using the power to overwhelm the population, then they have not known true freedom.

8. Where are we heading?

And here we are at the epilogue of this research. I started by telling the story of the birth of the United States, considering the basic steps that led to the Constitution. I have analyzed the will of the Founding Fathers and the will of the Founders according to different theories.

In the first part of the thesis, I focused on finding a formal or informal tool that would lead itself to amend the US Constitution, considering the possibilities already identified by theorists and scholars. In the second part, I worked out the ideological and controversial interpretation of the Second Amendment, that has represented an inexhaustible source of contradiction and debates and I also analyzed the government bodies that have heavily weighed on this process. But how the first and the second part interact with each other? How to ensure that Article Five ever edited the Second Amendment? Surely, with this search, I do not get to show that in the near future the Second Amendment will be deleted, but I would lead the reader to think that a change is a possible concrete hypothesis. Especially in light of the upcoming elections. In addition, according to the study done on the Constitution, I would like to make some observations about the difficulty of amending it, especially regarding the social and cultural influence.

8.1 The Enduring Constitution

I built so far a discourse based on the concept that the US Constitution is a rare gem: an ancient document that is persisting for over two hundred years. Everybody, somehow, takes for granted that there is a reason why this document is one of the most resistant. However, many people, use to question daily on the reasons. Why some constitutions tend to last longer over time, while others slowly disappear? If we consider the Supreme Law according to the living tree theory,

compare it to a human life, is a spontaneous deduction. A human life has a certain average length which consider the development of an embryo in a child who becomes boy who becomes a man, who, after the seniority, dies. Why then is it so difficult to let go the past in order to embrace a future more similar to our generation? To give an answer to our questions, we must first have a clear idea of the characteristics that must have a Constitution that lasts over time and, secondly, to try to understand if this one possesses that characteristics. At that point, only after studying its intrinsic qualities, we can ask ourselves about its endurance.

According to a theory defined Renegotiation theory, which combines different criteria such as constitutional formation, adjustment and endurance, a Constitution that persists over time must possess certain specific features: inclusion, flexibility, and specificity.¹ Inclusion, is considered to be the full participation of people in the constitutional drafting, deliberating on the shape of the document and on its entry into force.² Taking into account the United States Constitution, as I have discussed earlier, I couldn't state it possesses this quality. This conclusion is given by the total exclusion of citizens from the discussion on the drafting of the document and the non-democratic process in which it was written, getting ahead the consensus of most of the Confederation's states. As regards the flexibility, this factor certainly reflects the soul of the writing we are speaking and, at the same time, emphasizes the problem. The Constitution, amended a few times, has seen the use of Article V becoming fruitless and obsolete. From the prerogative of its initial elasticity, it has changed shape, it became more and more stiffened, turning into stone and not leaving much space for a glimmer of change. Flexibility, definitely does not represent the best of this Constitution. The last criterion which should ensure long life to a constitutional document, is the specificity. What does it mean?

In the light of the research conducted, I believe that if the supporting feature was the ambiguity, the US Constitution would totally embody it. The study of the Second Amendment has uncovered a worrying ambivalent factor, represented by a lack of clarity, periods that are not directly connected to each other and

¹ Zachary Elkins, Tom Ginsburg and James Melton, *The Endurance of National Constitutions*, Cambridge, 66, 2009

² *Idem*, 78

interpretation to say the least subjective. But this problem, not only regards the right to bear arms, the vagueness with which it was written, is an element that occurs frequently and that has led us to define with the greatest certainty the US Constitution as a totally unspecific one. These elements described above, characterize in a particular way, the Supreme Law, naming it not inclusive, rigid and unspecific. At this point the question arises: according to theory mentioned a moment ago, how is it possible that since 1787, American people and society live under the rights established by this paper? I tried to find the reasons to give a valid answer to this question. During the drafting of my research, I wanted to find an answer between the lines of the Federalist Papers, I wanted to hear whispering a solution in the intentions of the Federalists Fathers, but unfortunately, it didn't happen. Two hundred twenty-seven years. The years in which, so far, the US Constitution has endured, bending numerous attempts to amend it, breaking down the barriers of time, new needs and technology, trying adapting to new trends; immutable as distant from the shape it is characterized from.

8.2 The Blind Belief of the American People

I think it is time, to try to give an answer to the many questions posed in the previous seven chapters. According to the analysis developed a while ago, I established the American Constitution to be a document that presents the characteristics to be defined obsolete and to be filed. It is essentially rigid, with a few thrusts to the amendment procedures, it is ambiguous, creating endless debates and it is not inclusive: tends not to take into account the people for whom it lives. Despite this, people defends it, they praise it and they invoke it when they die. Talking about the Constitution with the average American citizen, most of the time, it is like talking about America itself: the loyalty and devotion bordering on religion. As religion has shaped the population, cradling generations in the true and blind belief of its principles, the Supreme Law of the United States, has connected under the same faith, different states and different legislation, leading people through the centuries. As in a religious discussion, it is likely that some have found

unusual, methodical and devoid of reason, this constitutional faith. In this regard, I would like to tell something that happened to me during my period of research in Boston.

I was curiously wandering in the Government's Center area, in search of the famous Quincy Market: a cute and quaint compound of small houses used as an indoor food market. I decided to sit down on a bench to enjoy what seems to be a delicious claims chowder, when a lady sitting next to me. We start talking and, between a soup spoon and the other, I find out that the lady is a republican, nurse, without health insurance, dissatisfied with the government and concerned about the future of her country. I listen carefully, trying not to interrupt her speech that seems to carry on with diligence and, at the end, I allow myself to point out that things could change, and through a National Constitutional Convention could renegotiate the constitutional document, as guaranteed by Article five. She looks at me, opens her eyes and asks me if I'm kidding. The kind lady, seems to have the slightest idea of what the content of this article and does not even seem to know that, through the request of thirty-eight Federal States, can be called a convention to re-discuss the fundamental feature of the Supreme Law. Although she has so well argued her frustration and the will to change the system, she ignores that there is a way to do it. I decided to tell this brief episode, not to show a fury against the Constitution's knowledge of the American people; basically, I think that, if I conducted the same survey in Italy or Japan, I would get the same answers.

A man once said: *"The best argument against democracy is a five-minute conversation with the average voter."*³ I find this quote of great talent and at the same time I think it has a strong bond with the treated theme, because, in today's society, it seems that improvised reforms and poorly informed voters, have taken over the knowledge and democracy. As I said, with this research, I did not want to emphasize a worrying aspect of the American electorate, but I would rather raise the issue on constitutional endurance. It is quite clear that the issue is deeply rooted in a cultural factor and not in a political and legal one. Why defending and idolizing a document that people even doesn't know? Scholars from around the world, have

³ Sentence usually referred to Winston Churchill.

wondered for a long time why of the longevity of the US Constitution, despite its creation *sui generis*, its seniority, its stiffness and ambivalence. In another context, probably in another country in the world, it would have already expired.

In the light of the elaborated facts, the analysis brought me before a framework depicted between disquieting and romantic: disquieting, as reveals blind faith of US citizens, without they neither have full knowledge of constitutional document, nor they are aware of a reason to love and protect it so much. Romantic in a certain way, because people from which everything has been originated, the people mentioned in the Preamble of the Constitution, are still the brave soldiers who defend wholeheartedly the unitary principle founded by Federalists Fathers. However, on this last statement, some might disagree. And, the unitary principle that I have just mentioned, could be the reason why United States citizens, have little knowledge about the document that governs them. In this thesis, I analyzed one of the most controversial countries at cultural and ethnic level.

The United States, in fact, is composed by 79% of white people, 12.85% black, 4.43% Asian, 0.97% of Amerindian and Alaska Native, 0.18% of native Hawaiian and other Pacific islander 0.18% and 1.61% of two or will more races.⁴ Every individual who is accepted as a new US citizen, recites an oath in which he/her claims to be loyal and defend the new homeland and never betray it. Most of them are between 25 and 50 years old, and probably, they have always lived in a family with different origins and traditions. These different roots, have led citizens to feel a sense of belonging limited by social problems and, surely, have led to a minor interest in the constitutional document and its amendability procedure. This ethnic analysis, could reveal a crucial factor both on constitutive endurance and on the limited approach of the people in this thematic. I think it is important to recognize that the two motives are of great weight and, at the same time, constitute the balance that is making endured the US Constitution in time.

⁴ United States People Stats, Nation Master, <http://www.nationmaster.com/country-info/profiles/United-States/People>

8.3 US Constitution and the Second Amendment: a Kaleidoscopic Interpretation

As I have already pointed out several times, I have been studying this subject in order not to demonstrate that the Second Amendment should be struck out by the Constitution or that anyone has ever tried to repeal it. I have pursued this battle (perhaps lost it), to process all the changes and nuances of interpretation that the Constitutional Court and the constitutionalists have attributed to this right, lavishing it as an advertising slogan, using it to achieve consensus, but rarely respecting it in its full function. Based on the reasons for which I established the US Constitution be so difficultly amendable, I'd like to apply those motivations to this Amendment, considering the turn that they have taken over time. Finally, I'd try to predict an hypothetical future post elections scenario.

The United States has drafted its official text on the belief that no State could ever again defeat them or submit them, and they put in writing that this would be really hard also thanks to the useful Second Amendment. It is the essence of the American population, it has an intrinsic value as federalism itself and from two hundred twenty-seven years, it protects citizens by the immense power of the government, forcing them into its limits. In fact, according to the declaration of independence, the government is established by men and from these latest it draws its origin. If the government become authoritarian, men can abolish or alter it.⁵ If the power of Congress does not respect the most democratic canons, the Second Amendment can be used to restore order. The question arises only when the subjective interpretation becomes more important than the original intent. No one has the right answers to this question, but what we are seeing in recent years, is a columnist tendency with respect to the living and dynamic reading both of the Constitution, and the Amendment in question.

The word responsible and guilty for the debates that are taking place in recent years, is always interpretation. *“Anything can be interpreted charitably, including*

⁵ Akhil Reed Amar, *America's Constitution, A Biography*, Random House, 10, 2005

Mein Kampf, but this does not guarantee that one will in fact find plausible a reading worthy of respect.” We can try to think about it, we can look for solutions in history, to make the process of intentions, but today we are victims and perpetrators of a limitless interpretation, that, officially, it is in the hands of nine people. Important and fundamental issues such as civil rights, equality, and social well-being, can be read or not read between the lines of the Constitution, can be analyzed in a totally different manner depending on the perspective from which you look at them. And this is the biggest problem today. Let’s consider the constitutional document like a kaleidoscope, an instrument made of little mirrors glass which, depending on your perspective, changes color and shape. People can look inside and, according to their idea, they will see something different. This obviously happens not only to ordinary Americans that every day decide to give voice to their opinions, but also to those who occupy the highest institutional role: Judges of the Supreme Court.

This conclusion does not doubt the good faith of this organ, but simply emphasizes the human factor influenced by politics, ideology and culture. And, pragmatically speaking, if they are not brought to a originalist interpretation, this will not change until the end of their mandate, for which the Constitution provides for an office for life. How to see a glimmer of change through this stiffness blanket? I conducted this research in a very special time for the people and for the US policy that, in two months, will have a new Head of State. Although many think that the beginning of a new mandate is a time of adjustment and confusion in which to consolidate its stability is of prime importance, not all share this theory. Some do think that, if was Hilary Clinton⁶ to win the presidential elections, this could mean a rapidly constitutional amendment procedure.⁷ The contribution of her policy in fact, could give a strong impact on two fronts: first, could demolish that conservative structure rooted within the walls of the Supreme Court with a very progressive approach; secondly, the former first lady has promised an aggressive campaign to support the constitutive amendability and implement it at the same

⁶ Democratic Candidate for US Presidential Election 2016 and Former First Lady. (Ref. Bill Clinton presidency.)

⁷ Ref. Richard Albert’s article on Trump Effect: With a Victory, Hillary Clinton Could Eventually Amend the Constitution, The Huffington Post, 2016

time. This will be made possible thanks to the Trump⁸ effect, the political and media storm generated by the Conservative candidate, who is moving away from the Republican Party victory.⁹ With my final analysis certainly I do not want to forewarn the future, nor I will take a firm stance on the future president, but I think it's time to be able to believe in a real and tangible change on constitutional amendability. This decision, taken at the executive level, could also make a strong contribution to all the constitutional ambiguity and perhaps put an end to discussions on the Second Amendment.

⁸ Republican Candidate for US Presidential Election 2016.

⁹ Richard Albert, The Trump Effect: With a Victory, Hillary Clinton Could Eventually Amend the Constitution, The Huffington Post, 2016

CONCLUSION AND POSSIBLE SOLUTIONS

On July 4th 1776, the Declaration of Independence marked a turning point on the end of a forced relationship between the mother country and the colonies. From that moment, it would be born a balanced government, similar to the people and depending on justice, tranquility and wellness pursuit.¹⁰ Citizens would defend with pride that empire, making it unique through a peer review system among its governing bodies. More than two centuries have passed since that day and still people swear allegiance to the United States, exporting democracy and the vanguard abroad.

This thesis was aimed, among others, to bring to light what is not said in the Constitution and in particular, what it is not written. Starting by clarifying that the preamble referred to the people, excluding a huge slice between blacks and women, my search has reflected a theme that I, a student of international relations, is particularly close to my heart: the inclusion of people in the constitutional project. It was a path started more than two years ago, when I chose to treat the Icelandic Constitution for my bachelor thesis. I found stimulating the project brought forward by the Icelandic citizens as a result of the 2008 banking crisis and their desire to write a new constitutional document most similar to the times and the needs of new generations. While that project then foundered because of political frictions, I was impressed by the dedication and work that a motivated community can carry on. I decided, for this search, to do the same.

I tried to investigate thoroughly about the impact of the US government on its citizens and what citizens have perceived from their country in the last centuries. This path has led me to identify right away what were the critical aspects of the US Constitution. The difficulty in amendability process, made a real headache by the majorities in the field, the low participation average voter, the lack of inclusion through formal and informal procedures and erroneous beliefs about the bill of rights, by taking as an example one of the most rooted amendments in American

¹⁰ Ref. Preamble of US Constitution.

culture: the Second. I must admit that I was lucky because, thanks to the whispers and studies of many scholars before me, I have been guided in this constitutional journey through two hundred twenty-seven years of history, military wars, economic and civil battle that have made a strong contribution to my work.

Before starting writing it, I had a precise idea of criticism that I wanted to move, but as soon as I began to study the basic features of North America, I realized that it was necessary most of my simplistic pre-packaged injury to take a broad and enlightened overview of the history of the Founding Fathers. After an investigation carried out on the introductory first steps of constitutionalism in the United States, I began to perceive that the change and transformation were already in the air during the drafting of the Supreme Law. The Federalists, had predicted that the Constitution, included the Bill of Rights, would represent a temporary phase of the legal and cultural development of the Nation. But, after a short period of reforms focused on civil rights¹¹, there seems to be no more relevant changes. The last time the Constitution was changed, to be clear, the euro was not yet in circulation¹². What was interrupted in that progressivism glimpsed by the Fathers of the fatherland?

From the study on the constitutional amendment structure, it became clear that, in recent years, the formality has given way to the legal ruse and free interpretation. Having recognized Article V as an obstructionist element, institutional bodies have embarked on a parallel course, considered, for some, unconstitutional, through the subjective interpretation of the written words and of those deductible from the text. The interpretation and the theories generated by the most prominent scholars such as Akil Reed Amar, Rosalind Dixon, Richard Albert, Tom Ginsburg, Bruce Ackerman, and Mark Tushnet, have illuminated a new path, creating debates and making reflect the new generations. But unfortunately, these doctrines have not consolidated a thought or a single and comprehensive system to surpass the limits of constitutional amendability. Taking a naturalistic comparison, we might consider the progressive theories as a series of different branches of the same mountain spring, that flow and throw themselves in the same sea. This sea is,

¹¹ *Ref.* Reconstruction Amendments, Thirteenth, Fourteenth, Fifteenth Amendments

¹² *Ref.* To the Twenty-Seventh Amendment

in this thesis, represented by the constitutional interpretation and by the Supreme Court. The hierarchical pyramid that we tend to regard legitimate nowadays, is the one that sees the judges of the Supreme Court as those who hold power and, through the various legal cases that have occurred over the years, establish and mark legal history day by day. It was important to be able to create this historical and legal background, to emphasize how in 2016, citizens have a marginal role in the society in which they live and how hard it is to give them a voice, especially in the United States.

In this regard, the comparative analysis carried out about the constitutional amendability of Japan and India, has led to what I have called a descendant climax of the role and the power that citizens have in the process of constitutional change. How to draw people out of the corner in which they have taken refuge? To help creating a broader framework, I decided to study the Second Amendment in a full spectrum analysis, elaborating the history, case law and interpretation. The new aspect of this second part, was the American political and cultural influences that have played a pivotal role in the study of the Bill of Rights. I decided to concentrate my research on the Second Amendment, because among all, I think is one of the most tangible at the human level, and one of those that people are convinced that they know. At the same time, it is necessary also recognizes that it is one of the most controversial Amendment that still has not found a single and unique interpretation. In light of a synchronic and diachronic analysis, I could not but disagree with those who have taken a most dangerous road just because more convenient. And it is at this point that the political analysis has become outweighs legal analysis. The interpretation without any agreed fees, has become a more dangerous weapon than guns, and it is always the interpretation, originalist or not, that creates today, inconvenience and massacres throughout North America.

How to resolve the issue once and for all? Based on the collected data and the research carried out, I feel especially close to an author who, through his irreverence and originality, suggested a peaceful and legitimate resolution. Sanford Levinson, in his famous book entitled *Our Undemocratic Constitution*, closes the troubled speech with a proposal: to call a new National Constitutional Convention. With the achievement of the required thirty-eight Federal States, Congress would

be forced to give voice to change and face a new constitutional ratification. This solution is not only democratic and legitimate, but, now more than ever, it seems really close. In fact, for now, it seems that twenty-nine states¹³ have already signed up for the quorum and the number, as confirmed by the article on Hillary Clinton and Donald Trump, is predicted to grow. Through a moment that could become historical, citizens and their representatives, would have a way to express perplexity and new demands with regard to a rigid and obsolete Constitution. Regarding my thesis, that could represent a moment in which would be possible to change the text of the Second Amendment making it less ambiguous and, in the words of the founders, draw it up again, protecting the population from the distortion that the subjective interpretation created. I believe that, in the air, there is a strong smell of change, I think it's time that the average voters think and act considering the past but in a present and a future function, without getting trapped in power games and deliberate ignorance. The solution, therefore, should be eradicating that faith that has instilled the seed of blindness in people, in favor of a common consciousness kept alive by those who have been elected by the citizens. With this conclusion, I would therefore enhance the Member States' representatives to spread awareness and to commit themselves to really take into account the real needs of the American people. After all, the Constitution was created for both, ensuring that the will of every citizen of every social class and ethnicity is respected.

¹³ States With a Standing Call for a Constitutional Convention, Constitutional Convention & Conference of States, 2016
http://www.sweetliberty.org/standing_calls.htm

BIBLIOGRAPHY

- AKHIL R. A., *America's Constitution: A Biography*, Random House, 2010
- AKHIL R. A., *America's Unwritten Constitution*, Basic Books, 2012
- AKHIL R. Amar, *The Second Amendment as a Case Study in Constitutional Interpretation*, *Yale Law School*, 2001
- ALBERICO DELLE TRE FONTANE, *Chronicon*, 1241
- ALEXANDER HAMILTON, *Federalist Paper No 29*, Concerning the Militia, 1788
- ALLEN ROBERT R. *The Birth of the Bill of Rights 1776-1791*, The University of North Carolina Press Chapel Hill, 1955
- BRUCE ACKERMAN, *We the People, The Foundations*, The Belknap Press of Harvard University Press, 1991
- DARREN PATRICK G., *Perfecting the Constitution, The case for the Article V Amendment Process*, Lexington Books, 2013
- DAVID C. WILLIAMS, *The Mythic Meanings of the Second Amendment: Taming Political Violence in a Constitutional Republic*, *Yale University Press*, 2003
- DAWN O., FUSARO C., *How Constitutions Change: A Comparative Study*, Hurt Publishing, 2011
- EARL R. KRUSCHKE, *The Right to Keep and Bear Arms, A continuing American Dilemma*, Charles C Thomas Publisher, 1934
- ETHAN T. STOWELL, *Top Gun: the Second Amendment, self-defense, and private property exclusion*, *Regent University Law Review*, 2014
- FILM MEDIA GROUP, University of Notre Dame, *The Good of the Many Gun Control and Individual Rights*, ALMA BC, 1996.

GRANT HUSCROFT AND BRADLEY W. MILLER, *The Challenge of Originalism, Theories of Constitutional Interpretation*, Cambridge University Press, 2011

JACK M. BALKIN, *Framework originalism and the living constitution*, *Northern University Law Review*, 2009

JEFFREY SHAMAN M., *Constitutional Interpretation: illusion and reality*, Greenwood, 2001

JOHN F. KENNEDY, *President Kennedy's Commemorative Message on Roosevelt Day*, January 29, 1961

KAREN GAMMELGAARD, EIRIK HOLMØYVIK, *Time and the World: Interdisciplinary Studies in Cultural Transformations: Writing Democracy: The Norwegian Constitution 1814-2014*, Berghahn Books, 2014

LAWRENCE B. SOLUM, *What is Originalism? The Evolution of Contemporary Originalist Theory*, *Georgetown University Law Center*, 2011

LUTZ DONALD S., *Principles of Constitutional Design*, Cambridge University Press, 2006

MALDWIN A. JONES, *The Limits of Liberty*, American History 1607-1992, 1995

MARTIN H. REDISH, MATTHEW B. ARNOULD, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative*, *Florida Law Review*, 2013.

MICHAEL S. MOORE, *Justifying the Natural Law Theory of Constitutional Interpretation*, *Fordham Law Review*, 2001

NIHON GAIKO, NENPYO NARABINI, SHUYO BUNSHO: *1840-1945 National Diet Library*, vol.2, 1966

REVA SIEGEL, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, *Yale Law School*, 192, 2008

RICHARD ALBERT, *Amending Constitutional Amendment Rules*, *Boston College Law School*, 2015

ROBERT A. DAHL, *How Democratic is the American Constitution?* Yale University Press, 2002

ROBERT. A. DAHL, *On Democracy*, Yale University Press, 1998

ROBERTSON DAVID B., *The Original Compromise, What The Constitution Framers were really thinking*, Oxford University Press, 2013

ROSALIND DIXON, *Constitutional Amendment Rules: A Comparative Perspective*, The Law School, The University of Chicago, 2011

SANFORD LEVINSON, *Our Undemocratic Constitution*, Oxford University Press, 2006

SANFORD LEVINSON, *The Embarrassing Second Amendment*, *Yale Law Journal*, Vol 99, 1989

SAYURI UMEDA, *Japan: Amendment of Constitution, Article 9*, *Law Library of the Congress*, 2006

SCOTT MELZER, *Gun Crusaders, The RNA Culture's War*, NYU Press, 2009

SHELLEY L. DOWLING AND MARY C. CUSTY, *The Jurisprudence of United States Constitutional Interpretation: An Annotated Bibliography*, Fred B. Rothman Publications, 1999

SUDHIR KRISHNASWAMY, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine*, *Oxford Scholarship Online*, 2011

TOM GINSBURG AND ROSALIND DIXON, *Comparative Constitutional Law*, Edward Elgar Publishing, 2011

TUSHNET MARK, *The Constitution of United States of America, A contextual Analysis*, Hart Publishing, 2006

TUSHNET MARK, *Weak Courts, Strong Rights, Judicial Review and Social Welfare Rights in Comparative Constitutional Law*, Princeton University Press, 2008

WAYNE LAPIERRE, *National Rifle Association Press Conference*, Washington, Dec 21, 2012.

WARREN FREEDMAN, *The Privilege to Keep Arms, The Second Amendment and Its Interpretation*, Quorum Books, 1989

ZACHARY ELKINS, TOM GINSBURG and JAMES MELTON, *The Endurance of National Constitutions*, Cambridge, 2009

SITOGRAPHY

Alex Nabaum, Barack Obama: Guns Are Our Shared Responsibility, The New York Times, 2016 http://www.nytimes.com/2016/01/08/opinion/president-barack-obama-guns-are-our-shared-responsibility.html?_r=0

Armen A. Alchian, Property Rights, The Concise Encyclopedia of Economics, <http://www.econlib.org/library/Enc/PropertyRights.html>

Ben Garrett, Gun Rights Under President Ronald Reagan, About News <http://civilliberty.about.com/od/guncontrol/a/Gun-Rights-Ronald-Reagan.htm>

Bill of Rights Institute, Marbury v. Madison

<http://billofrightsinstitute.org/educate/educator-resources/lessons-plans/landmark-supreme-court-cases-lessons/marbury-v-madison-1803/>

Bill of Rights of The United States of America,

<http://www.billofrightsinstitute.org/founding-documents/bill-of-rights>

Black E., Constitution nearly impossible to amend: Is the bar too high? <http://www.minipost.com/eric-black-ink/2012/12/constitution-nearly-impossible-amend-nar-too-high>

Brian Montopoli, House passes concealed carry gun bill, CBS news, 2011 <http://www.cbsnews.com/news/house-passes-concealed-carry-gun-bill/>

Candace Smith, Adam Kelsey, Veronica Stracqualursi, Trump Says Maybe '2nd Amendment People' Can Stop Clinton's Supreme Court Picks, abc news, 2016.

<http://abcnews.go.com/Politics/trump-2nd-amendment-folks-stop-clintons-supreme-court/story?id=41239648>

Charles N. Quigley Constitutional Democracy, Center for Civic Education, Resource Materials, <http://www.civiced.org/>

Corte Costituzionale, Sentenza 1146/1988, GIUDIZIO DI LEGITTIMITÀ COSTITUZIONALE IN VIA INCIDENTALE, 15/12/1988
<http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=1988&numero=1146>

Cristopher Wolfe, From Constitutional Interpretation to Judicial Activism: The Transformation of Judicial Review in America, 2006
http://www.heritage.org/research/reports/2006/03/from-constitutional-interpretation-to-judicial-activism#_ftnref4

Douglas O. Linder, Theories of Constitutional Interpretation, Exploring Constitutional Conflicts, 2016.
<http://law2.umkc.edu/faculty/projects/ftrials/conlaw/home.html>

Edward D. Jones, The District of Columbia's "Firearms Control Regulations Act of 1975": The Toughest Handgun Control Law in the United States-Or Is It?, Annals of the American Academy of Political and Social Science, Vol. 455, Gun Control., 138, 1981
<http://pdba.georgetown.edu/Security/citizenssecurity/washington/documents/Edward.pdf>

Eric Foner, The Supreme Court and the History of Reconstruction -- and Vice-Versa, Columbia Law Review, 2012 <http://ericfoner.com/articles/SupCtRec.html>

Establishment Clause, Legal Information Institute, Cornell University Law School, https://www.law.cornell.edu/wex/establishment_clause

Eugene Volokh, The Volokh Conspiracy, Free State, 2007
http://volokh.com/archives/archive_2007_03_04-2007_03_10.shtml#1173488580

Exploring Constitutional Conflicts, Theories of Constitutional Interpretation,
University of Missouri Kansas City,
<http://law2.umkc.edu/faculty/projects/ftrials/conlaw/interp.html>

Film Media Group, Gunned Down, Public Broadcasting Service, ALMA BC, 2015
http://fod.infobase.com.proxy.bc.edu/p_ViewVideo.aspx?xtid=114687

Gabrielle Giffords, Take Gabby's Pledge, Americans for Responsible Solutions,
<http://americansforresponsiblesolutions.org/stand-with-gabby/>

Jackson Katz and Douglas Kellner, A conversation between Jackson Katz and
Douglas Kellner on Guns, Masculinities, and School Shootings, Fast Capitalism,
2008 http://www.uta.edu/huma/agger/fastcapitalism/4_1/katzkellner.html

Kalyan Nuguri, Amendment of the Indian Constitution, 2013
<http://www.kalyansir.net/2014/01/amendment-of-indian-constitution.html>

Karen Yourish, Josh Williams, ISIS in America, The New York Times, 2016
http://www.nytimes.com/interactive/2016/02/04/us/isis-in-america.html?_r=0

Legal Information Institute, SUPREME COURT OF THE UNITED STATES v.
DISTRICT OF COLUMBIA, et al., PETITIONERS v. DICK ANTHONY
HELLER, on writ of certiorari to the united states court of appeals for the district
of Columbia circuit, June 26, 2008. <https://www.law.cornell.edu/supct/html/07-290.ZO.html>

Lewis F. Powell Jr., Marsh v. Chambers, Washington & Lee University School of
Law Scholarly Commons,
http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1451&context=casefiles&sei-redir=1&referer=https%3A%2F%2Fscholar.google.com%2Fscholar%3Fq%3D%2522Marsh%2Bv.%2BChambers%2522%2BOR%2B%2522463%2BU.S.%2B783%2522%26as_sdt%3D2006#search=%22Marsh%20v.%20Chambers%20OR%20463%20U.S.%20783%22

Malcolm John, Consideration of a Convention to Propose Amendments Under
Article V of the US Constitution, The Heritage Foundation, 2016

<http://www.heritage.org/research/reports/2016/02/consideration-of-a-convention-to-propose-amendments-under-article-v-of-the-us-constitution>

Maria Elisabetta De Franciscis, Gli articoli della Confederazione e la Costituzione a Confronto, Università degli Studi di Napoli Federico II, <http://www.federica.unina.it/scienze-politiche/diritto-pubblico-americano-e-comparato/articoli-confederazione-costituzione/>

Maurizio Brambatti, Il Referendum Costituzionale in Cinque Punti, Il Post, 2016 http://www.ilpost.it/2016/05/23/referendum-ottobre/#steps_3

Militia Definition <http://www.dictionary.com/browse/militia>

National Firearms Act, ATF Bureau of Alcohol, Tobacco, Firearms and Explosive <https://www.atf.gov/rules-and-regulations/national-firearms-act>

Nicola Grolla, Oltre i Marò, la giustizia in India è un gigantesco caos, Linkiesta, 2016 <http://www.linkiesta.it/it/article/2016/05/04/oltre-i-marò-la-justizia-in-india-e-un-gigantesco-caos/30221/>

Richard Albert, The Trump Effect: With a Victory, Hillary Clinton Could Eventually Amend the Constitution, The Huffington Post, 2016 http://www.huffingtonpost.com/entry/the-trump-effect-with-a-victory-hillary-clinton-could_us_57b6a698e4b029a9a4654591?platform=hootsuite

Samuel Nesson to George Thatcher (July 9, 1789) <http://consourse.org/document/samuel-nasson-to-george-thatcher-1789-7-9/>

Sheila Smith, Reinterpreting Japan's Constitution, Forbes Asia, 2014 <http://www.forbes.com/sites/sheilaasmith/2014/07/03/reinterpreting-japans-constitution/#54bf85ac2fae>

States With a Standing Call for a Constitutional Convention, Constitutional Convention & Conference of States, 2016 http://www.sweetliberty.org/standing_calls.htm

The Meaning of the Words in the Second Amendment, 2013 <http://www.guncite.com/gc2ndmea.html>

The Federalist Paper Summary and Analysis of Essay 29, GradeSaver,
<http://www.gradesaver.com/the-federalist-papers/study-guide/summary-essay-29>

The Free Dictionary, <http://legal-dictionary.thefreedictionary.com/Interpretation>

United States People Stats, Nation Master, <http://www.nationmaster.com/country-info/profiles/United-States/People>

United States History, Quartering Act (1765). <http://www.u-s-history.com/pages/h641.html>

Warren Michelsen, The Constitutionality Crisis, The Supreme Court and Judicial Review, Constitutionality.US

<http://constitutionality.us/SupremeCourt.html>

LEGAL CASES

Marbury v. Madison, 5 U.S. 137 (1803)

United States v. Cruikshank, 92 U.S. 542 (1875)

Whitney v. California, 274 U. S. 357 (1927)

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

Sankari Prasad v. Union of India, SC 455 (1951)

Griswold v. Connecticut, 381 U.S. 479 (1965)

Kesavananda Bharati v. State of Kerala, 4 SCC 225 (1973)

Marsh v. Chambers, 463 U.S. 783 (1983)

Corte Costituzionale, Sentenza 1146/1988

Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988)

District of Columbia v. Heller, 554 U.S. 570 (2008)

Caetano v. Massachusetts, 577 U.S. (SJC-11718) (2015)

Ringraziamenti

Agli amici di sempre, quelli della “famiglia” cuneese e quelli nuovi che hanno reso più leggero e spensierato il mio percorso verso la Laurea,

Alla mia mamma e al mio papà che mi hanno sostenuto in questi due anni, permettendomi di compiere le mie scelte senza mai forzarmi, perdonandomi gli errori e sostenendomi sempre, dimostrando di essere delle grandi persone,

Ad Ale che, supportandomi e sopportandomi ogni giorno, ha conferito un colore acceso alla mia esperienza, donandomi la parte migliore della sua Terra,

A mia sorella Fabiana che è sempre stata e sempre sarà, l'eroina di tutte le mie storie e la sorella migliore di una vita intera,

e per farti sapere che non ti ho mai dimenticato, neanche un giorno in questi due anni, questa è anche per te, Des Lys.

ABSTRACT

AMERICAN CONSTITUTIONAL STIFFNESS: AMENDING THE SECOND AMENDMENT

INTRODUCTION

United States Constitution has always been the comparison mirror to evaluate how much a new fresh Constitution could at the same time be democratic and people-based. Founding Fathers decided to create a document that lasted in times but that was also interpretable according to the different federal State laws of every Member State. However, my purpose here is not to demonstrate how flexible is the United States Constitution, but, on contrary, how this Constitution reveals its rigidity, especially for what concerns the possibility to amend it.

Despite the procedure of Article V, amendability mechanism, sound to be most of the time obstructionist and not effective. The aim of the Research, is questioning about the reasons why these procedures result to be so tangled and unsuitable for times that require an increasingly dynamic legal framework. To build the discussion on constitutional endurance, it has been essential to create a strong historical background and to also make a comparative analysis, taking on sample several different constitutional amendment rules. (Japanese and Indian Constitution)

The intent of the second part, will be to try to deeply inspect and melt the bows around the ambiguity of the Second Amendment, taking this ancient right as Case Study to prove the endurance of United States Constitution. This Research will make a comparative analysis between the most contentious legal cases reached up to the US Supreme Court, including *District of Columbia v. Heller* (2008), observing changes and improving about the interpretation of the Second Amendment during trials.

Finally, I am going to make a brief digression about how much culture and politics have influenced the average electorate on arms detention topic and I'll try to draw some

hypothesis about the Constitutional faith of the American people, in light of the Presidential elections.

CHAPTER I

The United States Constitution, the Bill of Rights and the Critics

“In a letter to his sister, Benjamin Franklin wrote, “We have however done our best and it must take its chance.”¹ With these few words, one of the Founding Fathers of United States, delivered the Supreme Law to the American citizens. For the purposes of this research, It’s not essential but it will be important, to mention the harsh road undertaken by the Continental Army to reach the independence from the British “slavery”.

After the start of the clashes with the battle of Lexington, Concord, Lincoln, Menotomy and Cambridge in 1795, the Continental Congress encouraged the individual former colonies to ratify their constitutions which, in essence, reflected the former colonial papers. What appeared to be necessary at the time, was a government that would represent in full all thirteen colonies. “On June 12, 1776 the Continental Congress appointed a Committee of Thirteen (one from each state) to draw up a Constitution. After a month’s debate the committee produced a draft constitution – the Articles of Confederation.² But not everything was perfectly working under the Articles of Confederation. The Union, in fact, suffered a strong influence from the States. The Convention of Philadelphia represented the turning point between the people’s will and the needs of a new fresh powerful State. By 1787, was officially signed the United States Constitution: the Supreme Law of the Land. The *Great Compromise* was one of the most important step achieved at that time. Representation became a pivotal issue, and in the same way, it constituted the searing matter between the biggest and the smallest Member States.

¹ Robertson David B., *The Original Compromise, What The Constitution Framers were really thinking*, Oxford University Press, 229, 2013

² Maldwin A. Jones, *The Limits of Liberty, American History 1607-1992*, 63/63, 1995

Having “navigated” through the first structure of the US Constitutionalism, it’s paramount now delving into the very identifying aspect of this country: the People. “(...) *Adding the Bill of Rights to the Constitution was a step which convinced many men that the republic was not, after all, headed down hill*”³ By treaties and conventions, Founding Father recognized the necessity to give to the population a specific *modus vivendi* applying the Supreme Law of the Land but, after the laborious Independence, appeared also essential to guarantee United States population a paramount importance over their own Land. Around 1791, were created and promulgated the first Ten Amendments. They were meant to be the solemn Protection’s Declaration of all people born on the American territory and they constituted the Bill of Rights.

Keeping now in mind all the centuries passing to improve United States Constitution, it’s also essential to recall that “not all that glitters is gold”. Is it correct to consider United States Constitution as an interpretable document, suitable to the passing time? Time passes, governments change, but, before to edit something, people should strongly believe that something needs to be edited. So what are the major flaws of the US Constitution? Everything can be contextualized with a positive or negative interpretation. No one wants to discuss the effectiveness of United States Constitution, but at the same time it’s impossible ignoring that this Constitution has been amended so few times in centuries. “Some men look at the Constitution with sanctimonious reverence, and deem them like the arc of the covenant, too sacred to be touched.”⁴ I couldn’t be more agree with Thomas Jefferson.

So what’s wrong with United States Constitution? And why are we living into the shadow of a past that doesn’t fit anymore with the present necessities?

CHAPTER II

The Endurance of a Rigid Constitution

³ Allen Robert R. The Birth of the Bill of Rights 1776-1791, The University of North Carolina Press Chapel Hill, 219, 1955

⁴ Levinson Sanford, Our Undemocratic Constitution, Oxford University Press, 2006

Article V: Formal v. Informal Amendment Procedure

What are the devices to guarantee a proper application of citizen's right to edit this Document? "Who controls this vital document? Who has the authority to amend the United States Constitution? The simple and most legitimate answer to this question is that "the people" utilizing the Article V⁵ procedure outlined in the Constitution have the authority to amend that fundamental law embodied by United States Constitution."⁶

Madison and the Founding Fathers had envisaged immediately that maintaining a wide open door towards the possibility of revising the Constitution, would be necessary to allow the country to fully implement the concept of Democracy and this is one of the reasons why we often refer to this document as a "living" one. William Penn⁷ had glimpsed what could be defined as the first democratic glimmer in American society. After him, also the homeland's Creators had the same feeling: that it was necessary to guarantee future generations the possibility of adapting the law to various times. In a letter from Thomas Jefferson to Madison he stated:

*"No society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation...Every constitution, then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force and not of right."*⁸

Some believed that Article V remains the only bastion of amendability procedure as wanted and enshrined in the Constitution itself, others see it as one of the biggest flaws

⁵ *The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.*

⁶ Darren Patrick G., *Perfecting the Constitution, The case for the Article V Amendment Process*, Lexington Books, 2013.

⁷ William Penn was the founder of Province of Pennsylvania, the advocate of Democracy and Freedom of Religion and he was the first to envisage an European Parliament.

⁸ Thomas Jefferson, Letter to James Madison from Paris, September 6, 1789

that undermine the democratic nature of US legal system. The proponents of this second theory, push for the use of informal mechanisms that depart from the official document, believing it to be obstructionist in some practices.⁹ Through these informal adaptations, it is possible to bypass the text implementing a revision or a partial modification of the law.

The first procedure through which it's possible to edit the Constitution informally, is the Legislative Act. Congress had the power to implement changes in two ways: by passing different laws with the proposal to specify and by making more understandable and enforceable laws in different States. Another mechanism through which is possible informally amend the Constitution is with Executive Acts. The President in fact, has the right to outperform the will and the decisions of the Congress taking legally binding decisions. The way he uses his powers can generate informal amendments and, at the same time, can increase the powers of the same executive branch. One of the most important tools of amendability, out of Constitution draft, it is definitely the one possessed by the Supreme Court. The power of this Court, more than anything else, bases its work on the interpretation of the Constitution according to the federal laws. The most important function that this organ carries is the "unconstitutional" Judicial Review by which analyzes and interprets the laws in the task of resolving disputes between People, States... in order to step over some quibble tied to the epistemological interpretation of the Supreme Law.

Republicans and Democrats have become not only the two opposing factions within the system, but they have gained an ascendant that allows them to determine really important decision such as the choice of the President. Through the strong impact of party decisions, they can amend the constitution. The key to the informal amendability of the political formations lies in the huge appeal they have gained over the centuries and in the strong influence that they exercise in legislative and executive fields.

Finally, the last system to amend US Constitution is represented by the Customs. They were created over time, through the experience of the men and they have shaped legislation with faint changes or improvements. One of the clearest model to be mentioned

⁹ Darren Patrick G., *Perfecting the Constitution, The case for the Article V Amendment Process*, Lexington Books, 11, 2013

concerns the appointment of the President¹⁰. The practice for what concerns the amendability of the Constitution, in a nutshell, is a form of custom law that is recognized by all as a result of its repeated implementation and by the extensive common acceptance.

CHAPTER III

A Matter of Interpretation: Literal or Non Textual Meaning?

By definition, we know that semantics is the science that deals with the meaning of words, letters, or texts. This concept opens with two important distinctions: diachronic and synchronic semantics. In the first case, there is an analysis of interaction between the words in a given space located always in the present timeline. The second case, concerns with the conduct of passing time and it search for the deeper meaning of the texts according to a report in time.

But first of all a question: what are the criteria for interpreting the Constitution? First of all, it is essential to analyze the exact words of the text, obtaining an initial diachronic study. The second criterion concerns the intent of the constitutional document, the ultimate goal of the Founders regarding the implementation of the Articles. The optics of who interprets an ancient and important document like the Constitution, must look to the past having care to maintain the decisions laid down by the Homeland Fathers, and, at the same time, it should also estimate the impact that his\her analysis could have on the present. The interpretation should go beyond the originalism of the text and should follow the moral lines of which we all have been endowed by birth.¹¹

According to the Legal Dictionary, interpretation is *“the art or process of determining the intended meaning of a written document, such as a constitution, statute, contract, deed, or will.”*

¹⁰ Washington, settled a period of two consecutive terms for presidents. He created a strong tradition based on the concept of democratic turnover.

¹¹ Michael S. Moore, Justifying the Natural Law Theory of Constitutional Interpretation, Fordham Law Review, 2001.

Over the years, the Court has developed a large body of constitutional doctrine whose content derives neither from the text of the constitution nor the intent of the Framers.¹² According to the research conducted by Christopher Wolfe¹³, the judicial review has undergone dramatic changes in the arc time basis. He divides these changes in three times: traditional era, transitional era and modern era. Every period is characterized by a different role and position of the Supreme Court and different interpretations of the constitutional document. People tend to think of having to take the words written by the Founding Fathers “transplanting” them into our century, very often obtaining a heavy and contrived solution. If you are taking good the root of words in the constitutional text, taking for granted the purpose with which were issued, but by varying the semantic aspect, you might have a key for a more homogeneous and faithful meaning of the written text.

CHAPTER IV

Principles and Devices to Amend the US Constitution

A comparative Perspective

As previously mentioned, the debate on constitutional stiffness has led the most distinguished scholars, to take different positions and. In this fourth chapter, I will try first to identify a key in the analysis carried out by some scholars on the subject.

Most of the times, Article V has proved to be an *iron cage*.¹⁴ So many scholars have glimpsed a glimmer of light between the lines of the constitutive document and from this, they have created a new stream of constitutional theories. On the basis of this assumption, I would like to deepen two concepts such interesting as essential, to strengthen the amendability tools at our disposal: the *intertemporality* and *relativity*.¹⁵ Relativity is a concept that involves the importance threshold that should have rules governing the

¹² Jeffrey Shaman M., *Constitutional Interpretation: illusion and reality*, Greenwood, 3,2001

¹³ Christopher Wolfe is a Professor of Political Science at Marquette University.

¹⁴ Sanford Levinson, *Our Undemocratic Constitution*, Oxford University Press, 165, 2006

¹⁵ Richard Albert, *Amending Constitutional Amendment Rules*, Boston College Law School, 22, 2015

Constitutional amendability compared with the other amendments, while intertemporality is a feature that goes beyond a limited point of time, but that evaluates the will and decisions of people in a more relaxed period. . The most important process to achieve through these principles, is raising the protective threshold on amendability rules against ordinary amendments, which in the presence of a supermajority, could significantly adversely affected.

Another concept that made extremely dynamic the concept of constitutional amendability, has been explicated by Rosalind Dixon. Reading one of her research, I focused on the notion of democratic dialogue: a way in which it would finally be possible to build a path through the amendment rules. Why is it necessary that this dialogue takes place? Definitely it helps off by a textual level a viable degree of change, mediating with the Courts regarding the interpretation of the document. Secondly, it also would break down agency costs and give more control and power to popular sovereignty.¹⁶

But if what we were looking for, was not into a sentence, into a word or between two commas in the syntax, but it was something that on balance ... is it not in the text? As argued by Professor Akhil Amar in the work entitled *America's Unwritten Constitution*, the possibility of giving voice to an invisible Constitution made of subjective interpretation, it is not criteria that can be legitimized. He argues that it is wrong and alienating searching in the comma of a sentence, the meaning of an intention and that instead, it is the task of the constitutional experts today, ensure proper interpretation while maintaining the compact set of words.¹⁷

What makes stimulating Comparative Public Law, is the study of the different constitutions, their amendability processes, their history, the cultural influence and social factors. In light of this, I'd like to briefly analyze two far east constitutions: Japanese and Indian one. Most of the time, we hear people say that history is written by the winners; in the case of Japan, the fairest phrase would be: Constitution is written by the winners. Japanese official document was draft after the end of the Second World War and it totally reflects the US one. For what concerns amendability procedure, Article 96 of the Japanese

¹⁶ Rosalind Dixon, *Constitutional Amendment Rules: A Comparative Perspective*, The Law School, The University of Chicago, 98, 2011

¹⁷ *Ref.* Akhil R. Amar, *America's Unwritten Constitution*, Basic Books, 2012

Constitution states that amendments shall be initiated by the Diet, through a concurring vote of two-thirds or more of all the members of each House and a special referendum confirms the modification of the Constitution. In case of positive response, the Emperor promulgates the amendment.

For what concerns India amendability process, the Article the governs the procedure for amending the Indian Constitution, is within the section XX and, more precisely, is the Article 368. As it's known, the bicameral system of this country, based on a check and balance system, allows that the motion be initiated by one of the two Chambers, *Rajya Sabha* and *Lok Sabha*, that composed the Parliament. One of the key principles to keep in mind during the process, is the Basic Structure Doctrine: an element that limits through restrictive rules, to amend or repeal certain fundamental features of this country.

Having taken into consideration this two different Constitution, I think it is necessary an hypothesis about the relationship between people and the modification system of their country. Considering US, Japanese and Indian Constitution, it would seem to face with a descending climax with regard to the value of people in the emendatory process. And still, if we look carefully, we may notice a proportionally inverse climax; below, I explain why. These three constitutions, are characterized by giving people, a strong popular sovereignty. But on balance, it would appear that the role of citizens is increasingly marginal in this process. In light of the comparison carried out above, it is alarming to think that the citizens of a country do not consider the idea of a change that starts from the needs of those who live there and not by the interests of those who govern over there.

CHAPTER V

The Will of Founding Fathers in Changing Times:

An Interpretative Discussion

The chapters treated so far, have paved the way to get up to the contentious Second Amendment. Coming to the choice of subject and, the correlation between the constitutional amendability and this Amendment, my thesis will attempt to show that,

despite the great work done from 1791 until today, both on the interpretation and on the revision of this text, the limits on the interpretation and citizens ignorance, have undermined the possibility to create a common acknowledgment and framework on this topic. The controversy and ambiguity of this right is merciless. The reason is given by a fine muddle of historical, geopolitical and social issues which, through an analysis that I hope being exhaustive, I will try to settle. Officially, as we all recognize, the Second Amendment was ratified in 1791 and he states that:

“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.”¹⁸

It soon becomes blatant that there is a deliberate ambivalence in this sentence. According to the dictionary definition, the word militia includes a body of citizens enrolled for military service, called out periodically for drill but serving full time only in emergencies. According to Article 1, Section 8, one of the powers of Congress, is to be able to call this armed group to fend off uprisings in the government of the United States. In summary, the right concerns with a group of well-regulated who can be called to fight to stop a coup or an enemy invasion. This was valid in 1791 and is still a mainstay in 2016.

Considering the part that concerns the security of a free state, there would be different definitions to give. A free state may refer to a state in which its citizens have the same rights, and, therefore, the solution could be expressed in the First Amendment or, by following one of the Volokh's commentaries, the meaning could be reported to the security of one free federal state against federal oppression.¹⁹ At this point of the textual analysis, we are faced with two verbs: to keep and bear. According to the historical reasons, keeping arms has a purely individual meaning and gives the right to all people, to be able to buy a gun and keep it in the house privately. Moving to the right to bear arms, the assumption changes and becomes broader the range of interpretation. In the sentence of the Bill of Rights, there is not a clear reference to the chance to bear a weapon to defend some personal interests, and it seems that the initial aim was not that.

¹⁸ United States Constitution, Bill of Rights, Amendment II, 1791

¹⁹ Eugene Volokh, The Volokh Conspiracy, Free State, 2007

http://volokh.com/archives/archive_2007_03_04-2007_03_10.shtml#1173488580

If we consider the real issue that has been created by the drafting of this Amendment, then we must focus our attention on the interpretation which it has been awarded from 1791 until today. Different theories, unfortunately, despite their validity, do not seem to have found a common line, and also the Supreme Court seems to confirm this thesis through the divergent decisions taken by the various legal cases.

Quoting a great author, I would linger on the link between the First and the Second Amendment: *“ballots and the First Amendment can prevent bullets and Second Amendments.”*²⁰ Assuming that the right in discussion was born not only to defend the citizens from the possibility of an insurrection or foreign invasion, but also to protect people from the possibility that Congress will become tyrannical and outclasses the popular sovereignty, the First Amendment is the basis of such decisions. Now we live in a century in which I believe, more than appeal to the Second Amendment, it is important to rely on the First one. In front of the power of freedom of expression, there is nothing that people should look elsewhere. The answer we seek, is written right in the text that we use to argue and the people, in an age where the words seem to stop even the coups, should have a key role in the battle towards a country characterized by the values of democracy and freedom.

CHAPTER VI

The US Supreme Court Interpretation **in Contentious Legal Cases**

In the previous chapters, I listed, relying on more than anything on a historical and doctrinal theory, the different kinds of interpretation about the Second Amendment. Whereas through a decision of the Supreme Court are established those procedures that have an impact on future legal cases, the judgments are very important plangent in courts.

²⁰ Akhil R. Amar, *The Second Amendment as a Case Study in Constitutional Interpretation*, Yale Law School, 896, 2001

The most landmark legal cases on the subject, led to the birth of two different schools of thought: one that sees the individual endowed with a self-defense right: theory of individualistic right, and one that sees instead the collective good as the most important and the only to be considered: the common good's doctrine. In this chapter, I'll use several legal cases got up to the highest Court, first of all to consider how it has evolved the interpretation of the Second Amendment in the centuries in courts, and secondly, how these rulings have given a positive or negative contribution to the cause.

United States v. Cruikshank²¹, took hold in the Reconstruction period: a period rather agitated in the United States. The government decided to enact a series of laws that recognize the equality of African Americans and the right to vote also in the South. This was the first legal case to legislate on a lawsuit related to the use of firearms. The brutal assault, took place on Easter Sunday of 1873 in Colfax, Louisiana, when a white militia, attacked a group of former slaves who were exercising their right to vote

The judges settled that was the government (the State), that could not infringe the right to life, to the freedom and the property and not the other people, according to the Fourteenth Amendment.²² The paradox that emerges between the Second and Fourteenth Amendment, is the right achieved by Negroes in order to arm themselves and to represent the militia of their own country rushing to its defense if necessary and, at the same time, the wrongdoing that is done to them by the State that set them free, denying them the right to life.

I decided to examine, as a second lawsuit, the case that has seen the dispute of United States v. Miller in 1939.²³ I think, among many, this is one of the few causes to promote collectivist theory. In the light of the tragic events that took place around 1929²⁴, the government made a commitment to draw up an act which ruled possession, use and trade of firearms. It was therefore enacted the National Firearms Act in 1934 which provided

²¹ Ref. United States v. Cruikshank, 92 U.S. 542 (1875)

²² *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

²³ Ref. United States v. Miller, 307 U.S. 174 (1939)

²⁴ Ref to the infamous St. Valentine's Day Massacre during which were murdered, in cold blood, men of a Chicago mafia clan.

for a series of restrictions. Two men were stopped and arrested for irregular arms detention.

The quality of this verdict is in having interpreted the Second Amendment right to the historical reason for which it was born. The Chief Justice, assuming that the Second Amendment concerns the composition of a defensive militia of the State and the citizen in defense from the State, did not find acceptable to consider this act as completing part of that Amendment. The most of the interpretation in fact, was based on a purely common good theory referred to the militia.

The case law, *District of Columbia v. Heller* is considered to be the most important law suits regarding the interpretation of the Second Amendment since *Miller* and *Layton* times.²⁵ When Dick Heller, a police officer of the District of Columbia, saw denied his right to keep his gun at home as he usually did in his office, according to a local firearm law, he filed a lawsuit complaining that was unconstitutional. The interpretation of the Judges, confirmed the individualistic theory and definitely established the unconstitutionality of the law enacted by the District of Columbia and creating a landmark case that marked all the constitutional interpretation theories on Second Amendment.

I would like to conclude this analysis, with *Caetano v. Massachusetts*²⁶, a case law that helped me to create an escalation theory. My purpose, it's not to enter in the merit of the events, but to underline how all these causes have created a strong theory. Suffice to say that this suit, concerns the detention of a stone gun belonging to a girl in Massachusetts: a State where, owning a weapon, is a break-in with the law.

And here is my reflection. In this chapter, I reported four legal cases that have all treated or interpreted the Second Amendment. The truth is that I have not analyzed these causes in a purely chronological order to give the search a tidier appearance, but for a reason which I'll call temporal escalation. I proved that the that the Second Amendment has undergone, over the centuries, evolutionary interpretation that has crippled its original structure. Based on this analysis, the interpretation of this right, led to the disappearance of the concept of constitutional interpretation.

²⁵ *Ref. United States v. Miller*, 307 U.S. 174 (1939)

²⁶ *Ref. Caetano v. Massachusetts*, 577 U.S. (SJC-11718) (2015)

CHAPTER VII

Political Institutions on the Second Amendment

My research does not want to enumerate or statistically analyze the massacres that have occurred over time, but its purpose is to assess how this Amendment was subject to profit from organizations and politicians campaigning. One sentence struck me and shocked at the same time: “The only way to stop a bad guy with a gun is a good guy with a gun.”²⁷

Despite this sentence, some will be surprised to find out that the first presidents and members of the NRA, were not deployed to the rampant arms trade, indeed, they held a cautious position and collaborated in order to create a regulated system on the subject. In 1900, the NRA began to be a political springboard especially for what concerned the conservative class of Congress, but the real moment in which this organization has done its coming out alongside and supporting the policy, is with the Bush junior electoral campaigning.

The ancestors created the Second Amendment with the intention that every healthy and strong citizen, could take part in a well-regulated militia, to fight for freedom. What seems a paradox, is the way in which a lot of Presidents and personalities, have fallen under the “malediction” of this Amendment. (John Fitzgerald Kennedy and his brother Bobby, Ronald Regan, Martin Luther King...).

Today, our perception, is a warm change during Obama’s office. He, in recent years, have had to defy the opposition and sometimes even the pressure of their own party, to issue acts with law force with respect to the legislation on weapons, often using the veto power of the executive. In January 2016, he promised a new binding Act that created a very harsh restrictive field on weapons: Executive Order on Gun Control.

CHAPTERS VIII

²⁷ Wayne La Pierre, National Rifle Association Press Conference, Washington, Dec 21, 2012.

Where are we heading?

I built so far a discourse based on the concept that the US Constitution is a rare gem: an ancient document that is persisting for over two hundred years. Why some constitutions tend to last longer over time, while others slowly disappear? According to a theory defined Renegotiation theory, which combines different criteria such as constitutional formation, adjustment and endurance, a Constitution that persists over time must possess certain specific features: inclusion, flexibility, and specificity.²⁸ US Constitution, doesn't seem possessing any of these quality.

At this point the question arises: according to theory mentioned a moment ago, how is it possible that since 1787, American people and society live under the rights established by this paper? I think the answer is to find in people. Talking about the Constitution with the average American citizen, most of the time, it is like talking about America itself: the loyalty and devotion bordering on religion.

People lives in a constant blind constitutional faith. They don't even know what it's written in the Constitution, but they blindly believe in it. The word responsible and guilty for the debates that are taking place in recent years, is always interpretation. Let's consider the constitutional document like a kaleidoscope, an instrument made of little mirrors glass which, depending on your perspective, changes color and shape. People can look inside and, according to their idea, they will see something different.

CONCLUSION

On July 4th 1776, the Declaration of Independence marked a turning point on the end of a forced relationship between the mother country and the colonies. In this thesis, I tried to investigate thoroughly about the impact of the US government on its citizens and what

²⁸ Zachary Elkins, Tom Ginsburg and James Melton, *The Endurance of National Constitutions*, Cambridge, 66, 2009

citizens have perceived from their country in the latest centuries. Before starting writing it, I had a precise idea of criticism that I wanted to move, but as soon as I began to study the basic features of North America, I realized that it was necessary most of my simplistic pre-packaged injury to take a broad and enlightened overview of the history of the Founding Fathers.

Having recognized Article V as an obstructionist element, institutional bodies have embarked on a parallel course, considered, for some, unconstitutional, through the subjective interpretation of the written words and of those deductible from the text. To help creating a broader framework, I decided to study the Second Amendment in a full spectrum analysis, elaborating the history, case law and interpretation. I decided to concentrate my research on the Second Amendment, because among all, I think is one of the most tangible at the human level, and one of those that people are convinced that they know.

How to resolve the ambiguity issue once and for all? Calling a new National Constitutional Convention. With the achievement of the required thirty-eight Federal States, Congress would be forced to give voice to change and face a new constitutional ratification. This solution is not only democratic and legitimate, but, now more than ever, it seems really close. In fact, for now, it seems that twenty-nine states have already signed up and, according to the Article of Professor Richard Albert²⁹, with the winning of Hilary Clinton, there will be a concrete possibility of new Amendments.

²⁹ Richard Albert, The Trump Effect: With a Victory, Hillary Clinton Could Eventually Amend the Constitution, The Huffington Post, 2016