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Précis Paper

Gun Control in USA and Australia - Part 1

US constitutional lawyer Dr Harry Melkonian and New South Wales Council for Civil Liberties President Stephen Blanks discuss the legal and cultural aspects of gun control both in the USA and Australia - Part 1.

Discussion Includes

- Is there a constitutional right to keep and bear arms in the United States?
- What is the historical basis and attachment to the right to bear arms in the United States?
- What did the Supreme Court of the United States decide in District of Columbia v Heller 554 US 570 (2008) and McDonald v Chicago 561 US 742 (2010)?
- What can the Federal and State Governments now do in the United States to regulate the right to keep and bear arms?
- What are the levels of scrutiny applied to judicial review in the United States?
- Where to now for gun control in the United States?
- What is the position on gun control in Australia?

Précis Paper

Gun Control in USA and Australia - Part 1

1. In this edition of BenchTV, Dr Harry Melkonian (Solicitor) and Stephen Blanks (Solicitor) present on the current status and historical basis of gun control in the United States and Australia. Dr Melkonian is a lawyer and legal educator with significant expertise in United States constitutional law, media and defamation, and private international law. Stephen Blanks is president of the NSW Council for Civil Liberties.

The Development of the United States Position on Gun Control

2. It is an often perpetrated misconception that, ab initio, the United States (US) has recognised a constitutional prohibition on the restriction of an individual's right to possess a firearm. In fact, the limitations provided by the Second Amendment to the US Constitution do not extend to preventing most kinds of firearms regulation nor were they unambiguously recognised until the recent Supreme Court decisions of *District of Columbia v Heller* 554 US 570 (2008) and *McDonald v Chicago* 561 US 742 (2010).

3. The Second Amendment states:

AMENDMENT II:

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.

4. Prior to 2008, and the cases mentioned above, the specific wording of the amendment had created confusion as to its proper interpretation and legal significance. The initial clause referring to a "militia" has evinced the suggestion that the purpose of the provision was to provide legal justification for the maintenance of some form of armed forces. It was not thought that the Constitution said anyone could simply have a gun.

5. This perception was further solidified by a consideration of the context in which the amendment was inserted into the Constitution via the Bill of Rights in 1791. Commentators had perceived both the Second and Third Amendments of the Constitution to be relics of the American Revolution which had immediately preceded their formulation. The Third Amendment states:

AMENDMENT III:

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.

6. During the revolutionary wars and whilst the Americas were a British colony, the British Crown often housed soldiers without the consent of the owner and removed firearms from the Americans. The relevance of this provision to contemporary life in the 21st century (or a time other than the Revolution) has been virtually non-existent and the perception that the Second and Third Amendments were linked seems understandable.

7. Dr Melkonian opines that proponents of this 'collective view' suggest that, if anything, the Second Amendment justifies the maintenance of the National Guard (a "militia"), which serves in a quasi-military capacity, usually under the control of a State Governor for the purpose of responding to floods and other emergencies. It would follow from such a view, that the Second Amendment would not restrict the legislative power of governments to limit the availability of firearms, other than to such a collective force.

District of Columbia v Heller (2008)

8. The majority (5:4) decision of the US Supreme Court in *District of Columbia v Heller* 554 US 570 (2008) clarified the legal position in relation to the Second Amendment as vastly different and was instrumental in establishing the jurisprudential leg that organizations such as the National Rifle Association (NRA) have heavily leaned on in the time since. The case concerned legislation passed by the District of Columbia barring the registration of handguns, requiring licenses for all pistols, and mandating that all legal firearms must be kept unloaded and disassembled or trigger locked. Heller, a D.C. special policeman, applied to register a handgun he wished to keep at home, but the District refused. He filed suit seeking, on Second Amendment grounds, to enjoin the city from enforcing the ban on handgun registration, the licensing requirement insofar as it prohibits carrying an unlicensed firearm in the home, and the trigger-lock requirement insofar as it prohibits the use of functional firearms in the home.

9. The Court agreed with Heller. Five of the nine justices (with Justice Scalia delivering the opinion of the court) considered that the Second Amendment protects an individual's right to possess a firearm unconnected with service in a militia, and to use that firearm for traditionally lawful purposes, such as self-defence within the home.

10. The majority considered that the "militia" (prefatory) clause announced a purpose but did not limit or expand the scope of second (operative) clause of the amendment. They determined

that the prefatory clause explains that the amendment was inserted in response to a fear that the Federal government would disarm the people as a means to deny further individual liberties. The founder's purported response was to deny Congress power to abridge the right of individuals to keep and bear arms, so that the ideal of a citizens' militia would be preserved.

11. In terms of the specific violations, the majority were partial to arguments that handguns fall into a "protected class" of firearms as they are overwhelmingly the weapon chosen for the lawful purpose of self-defence. As such, to largely ban handguns in homes, as was pursued by the District, was considered unconstitutional. Similarly, the requirement that any firearm be disassembled or bound by a trigger lock was found in violation of the amendment because it would significantly undermine the use of these weapons in a self-defence capacity – being that it would take longer to lawfully respond to a threat.

12. The dissenting justices considered that the Second Amendment only protects the rights of individuals to bear arms as part of a well-regulated state militia, not for other purposes even if they are lawful. Justice Breyer further commented that even if possession were to be allowed for other reasons, any law regulating the use of firearms would have to be "unreasonable or inappropriate" to violate the Second Amendment. In Breyer's view, the D.C. laws were both reasonable and appropriate.

13. It should be noted that the decision in *Heller* only prohibited Federal legislation from infringing upon an individuals' rights to bear arms, without clarifying whether the prohibition extended to the States and municipal levels of government.

McDonald v Chicago (2010)

14. *McDonald v Chicago* 561 US 742 (2010) explained that the prohibition did indeed extend to all levels of government. A day after *Heller* was decided, McDonald brought suit against the City of Chicago and the Village of Oak Park that had similarly implemented laws prohibiting the possession of most handguns. In another 5:4 majority decision the Court decided that the Fourteenth Amendment's Due Process Clause makes the Second Amendment right to keep and bear arms for the purpose of self-defence applicable to the States.

AMENDMENT XIV:

Section 1.

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.

15. With Justice Alito writing for the majority, the Court reasoned that rights that are "fundamental to the Nation's scheme of ordered liberty" or that are "deeply rooted in this Nation's history and tradition" are appropriately applied to the States through the Fourteenth Amendment. The Court in *Heller* recognised that the right to self-defence was one such "fundamental" and "deeply rooted" right.

16. With *Heller* and *McDonald* a constitutional right for individuals to bear arms was firmly established. However, it must be noted that both decisions emphasized that the Second Amendment right was not unlimited. It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. For example, concealed weapons prohibitions, prohibitions for felons and the mentally ill, laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms remain valid. Moreover, in *United States v Miller* 307 US 174 (1939), the Supreme Court unanimously held that a Federal law requiring the registration of sawed-off shotguns did not violate the Second Amendment because such weapons did not have a "reasonable relationship to the preservation or efficiency of a well regulated militia."

Current Status

17. All levels of government in the US are subject to Second Amendment restrictions with respect to legislation on firearms. These restrictions ensure that the prohibition of entire classes of guns, and particularly handguns, is either impossible or very difficult. However, the restrictions do leave room for a degree of regulation. Dr Melkonian suggests that State governments testing the limits of this freedom to regulate might be the only plausible means of addressing the current epidemic of gun crime. According to the Newtown Foundation, since the Sandy Hook massacre in 2012, more than 90,000 Americans have been shot and killed by guns and there have been more than 1,000 mass shootings where four or more people have been shot at one time. A more unified, national legislative approach would likely be hampered by the efforts of powerful, pro-gun minority groups and the weight of precedent flowing from the two cited cases would similarly stifle any reversal in the courts.

<u>The Australian Perspective</u>

18. In 1996, following the Port Arthur massacre, the Federal government and the States and Territories agreed to a uniform approach to firearms regulation, including a ban on certain semiautomatic rifles and shotguns, with licence applicants being required to take a safety

course and show a "genuine reason" for owning a firearm, which could not include self-defence. The reasons for refusing a licence would include "reliable evidence of a mental or physical condition which would render the applicant unsuitable for owning, possessing or using a firearm." A waiting period of twenty-eight days would apply to the issuing of both firearms licenses and permits to acquire each weapon. As a result of these reforms, the Australian Institute of Criminology states that the "number of victims of firearm-perpetrated homicide (i.e. murder and manslaughter) has declined by half between 1989–90 and 2009–10 from 24 to 12 percent."

19. The presenters reflect on the intransigency of the US in implementing changes to their firearm regulations, particularly in light of the successful example of recent reform that Australia has represented. Aside from the clear constitutional impediments already mentioned, they agree that the prevalence of extreme views on either side of the US debate, combined with non-compulsory voting, have significantly contributed to an environment where the daily massacres we are witnessing will continue largely unimpeded.

BIOGRAPHY

Dr Harry Melkonian

Dr Harry Melkonian is admitted to practise in England, New York, California and NSW.

His scholarship includes expertise on the Constitution of the United States, and he has conducted over 1,000 jury trials in the United States.

He is now resident in Sydney, where he practises law specialising in media and defamation, constitutional issues and private international law.

He is a Faculty member of Macquarie University Law School and the author of *Freedom of Speech and Society: A Social Approach to Freedom of Expression and Defamation, Libel Tourism, and the Speech Act of 2010: The First Amendment Colliding with the Common Law*. He was the lead trial lawyer in a landmark case in which the right of gay people to serve in the US military was first established. He represented the Chief of Police during the aftermath of the Los Angeles riots following the Rodney King trial.

Stephen Blanks

Stephen Blanks was admitted as a solicitor in 1985. He has been the Principal of his practice, SBA Lawyers, since 1991, specialising in corporations law, intellectual property, commercial litigation and dispute resolution.

He has been the President of the NSW Council for Civil Liberties since October 2013, after previously serving as Secretary from 2005.

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