THE UNITED STATES SUPREME COURT and GUN CONTROL

Whenever the question of gun control is broached in the United States the pro- gun lobby invariably invokes the Second Amendment to the Constitution (the Second Amendment) as giving the untrammeled right to own and possess guns of whatever number and type.

The meaning and limits of the Second Amendment are of course matters for determination by the courts. The United States Supreme Court is the final arbiter respecting the Constitution. (The US Supreme Court exercises supervision of Federal Courts in all matters but has no supervisory role over State Courts save in matters involving the Constitution.)

It is useful at this point to give some brief American history. On the Fourth of July 1776 the thirteen American colonies declared their independence from England. On seventeen September 1787 the Constitution was signed; and on fifteen December 1791 the Second Amendment came into effect. Thus the Second Amendment was promulgated only some fifteen years after independence. Amendments one to ten are known as the Bill of Rights.

The Second Amendment reads:

> A militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

Rather than leaving it to the courts to interpret the Second Amendment the Constitution could be amended, either to repeal the Second Amendment, or to spell out whatever might be considered appropriate restrictions. Like the Australian Constitution, the American Constitution contains within its terms the method by which this is to be done. Thus, Article V says:

> 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.

Given the power of the gun lobby and the fact that too many Americans seem wedded to guns and gun ownership, there seems little likelihood that gun control can be effected by an amendment to the Constitution. Amending the American Constitution would seem to be as difficult as amending the Australian Constitution, given the requirements to be satisfied.

In 2008 the United States Supreme Court delivered a seminal opinion on the interpretation of the Second Amendment in the case of *District of Columbia v Heller.* [1] (*Heller)* (Decisions of the US Supreme Court are called 'opinions'.) The District of Columbia banned handgun possession by making it a crime to carry an unregistered firearm and prohibited the registration of handguns. Further, no person could carry an unlicensed handgun, but the police chief was authorized to issue 1 year licences. The law also required residents to keep lawfully owned firearms unloaded and dis-asssembled or bound by a trigger lock or similar

[1] 554 U.S.570 (2008).

device. Mr. Heller, a special policeman (employed to protect a Federal Government building), applied to register a handgun he wished to keep at home, but was 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 prohibited carrying an unlicensed firearm in the home; and the trigger-lock requirement insofar as it prohibited the use of functional firearms in the home. The court of first instance dismissed the suit, but on appeal this was reversed , the appeal court holding that the Second Amendment protected an individual's right to possess firearms; and that the City's total ban on handguns, as well as its requirement that firearms in the home be kept non-functional, even when necessary for self-defence, violated that right.

The United States Supreme Court, by a five-four majority, upheld the constitutional challenge. Each of the majority and the minority was highly critical of the reasoning of the other. Justice Scalia delivered the opinion of the Court. (Chief Justice Roberts and Justices Kennedy, Thomas and Alito joined in that opinion.) Justice Scalia observed:

> The two sides in this case have set out very different interpretations of the Amendment. Petitioners and today's dissenting Justices believe that it protects only the right to possess and carry a firearm in connection with militia service. … The Respondent argues that it protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home. [2]

It is worth noting at this point that Justices of the United States Supreme Court are appointed for life. Justice Scalia died on 13 February 2016 aged 79 and, somewhat ironically, it was reported that he died whilst on a hunting trip.

The majority opined that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning;' [3] and the '[n]ormal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.' [4]

It is suspected that if persons in the street were asked what the words of the Second Amendment meant, divorced from any preconceptions and bias, most would say they thought it permitted citizens to have the right to own firearms for the purpose of service in the militia for the protection of the state. This would seem to be a natural reading of the words. (As the discussion in the opinions shows, 'state' means the individual states in the union.)

There is nothing in the Second Amendment which expressly refers to the right of the people to keep and bear arms for the purpose of self defence. How then did the majority conclude that its core purpose was to enable the public to own weapons for personal self- defence, and this was a fundamental right?

The majority noted that the Second Amendment contained a prefatory clause-'a militia, being necessary to the security of a free state*';* and an operative clause-'the right of the people to keep and bear arms, shall not be infringed'

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[2] *District of Columbia v Heller* 554 U.S.570, 567 (2008).
[3] Ibid.570,576–7,
[4] Ibid.

The majority considered that the phrase 'to bear arms' implicitly connoted the carrying of arms for the purposes of offensive or defensive action, unconnected with 'participation in a structured military organization.' [5] This, they said, following a review of founding era sources, was the meaning the phrase also had in the eighteenth century. They drew further purported support for their view from eighteen and early nineteen century state constitution analogues of the Second Amendment, yet the examples they cites expressly provide for the right to bear arms '*in defense of themselves and the state.'* As observed there is no express right to bear arms for the purpose of self defence in the Second Amendment, unlike the state examples cited by the majority.

The majority also said the phrase 'to bear arms' had an idiomatic meaning-'to serve as a soldier, do military service, fight.' [6] It bore this meaning, so it was said, only when it was followed by the preposition 'against,' and the object of the action was specified. The Second Amendment does not seek to qualify the right by the addition of the preposition 'against', and the absence of such a qualification means the majority believes the phrase does not have an idiomatic meaning.

A further reason why the Second Amendment does not relate only to bearing arms for service in a militia is, according to the majority, to be found in the meaning of 'people.' After a consideration of the word in other provisions of the Constitution it concluded that it had a wider import then a militia, which it said comprised a subset of the population. Therefore, *'* people' as used in the Second Amendment, comprehended a set of persons beyond those eligible to serve in a militia.

The right to bear arms, it was said by the majority, was not a creature of the Second Amendment, but rather was a pre -existing right codified by it. The *'right'* was said to have had its genesis in the English *Bill of Rights Act 1689.* This Act was a milestone in English constitutional law. It was enacted upon the succession of William and Mary to the English throne in place of the late Stuart King, James II. The preamble recites that,

> by the Assistance of diverse evill Councellors Judges and Ministers imployed by him [he] did endeavour to subvert and extirpate the Protestant Religion and the Lawes and Liberties of this Kingdome [b]y Assumeing and Exerciseing a Power of Dispensing with and Suspending of Lawes and the Execution of Lawes without Consent of Parlyament.

Amongst the complaints made against the Stuart King, expressed in the preamble to the *Bill of Rights Act 1689,* was that he caused 'severall good Subjects being Protestants to be disarmed at the same time when Papists were both Armed and Imployed contrary to Law.' Consequently, one of the provisions of the Act of 1689 declared '[t]hat the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law.' [7]

This Act confirmed the supremacy of the English Parliament, and declared the rights and liberties of the subjects, provided of course that they were Protestants. Importantly, it also settled the succession to the Crown.

[5] Ibid. 570, 584.
[6] Ibid. 570, 586.
[7] Article VII.

The majority observed that,

> what the Stuarts had tried to do to their political enemies, George III had tried to do to the colonists. In the tumultuous decades of the 1760's and 1770's, the Crown began to disarm the inhabitants of the most rebellious areas. That provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms. [8]

Having concluded on the basis of both text and history that the Second Amendment conferred an individual right to keep and bear arms for self defence and not just for purposes of a militia, the majority addressed how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century. It did this under the following headings:

1. Post ratification commentary
2. Pre-civil war case law (that is before April 1861)
3. Post-civil war legislation (that is after April 1865)
4. Post-civil war commentators

At the end of the day, however, it is for the Court to decide what the Second Amendment means. Looking at the historical foundations of the amendments as well as how earlier scholars and learned commentators viewed it may assist current judges in coming to a conclusion as to the proper construction of it. The Court may well agree with what learned commentators have said, and approve and adopt their reasoning, but the simple fact that particular commentators considered the Constitution to have a particular meaning cannot of itself determine the issue. Moreover, as Justice Stevens observed in his dissenting opinion in the case of *McDonald v Chicago,*

> the Framers enabled the Constitution to 'endure for ages to come.' … they 'wisely spoke in general language and left to succeeding generations the task of applying that language to the unceasingly changing environment in which they would live.' [9]

In other words the Constitution should be a 'living instrument' capable of finding application in, and adapting to a modern world. This is not, it would seem, the view of Justice Scalia. His approach to interpreting the Constitution is illustrated by a speech he gave at a conference in January of 2002. He said:

> As it is, however, the Constitution that I interpret and apply is not living but dead, or as I prefer to call it, enduring. It means today not what current society, much less the court, thinks it ought to mean, but what it meant when it was adopted. [10]

In other words Justice Scalia's construction is determined by what he considers a reasonable person living at the time of the adoption of the Constitution and its Amendments would take the ordinary meaning of their text to be. It is for this reason that he places great store on historical writings and commentary.

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[8] *District of Columbia v Heller* 554 U.S.570, 594 (2008).

[9] 130 S.Ct. 3020, 3099 (2010).

[10] Conference organised by the University of Chicago and the Pew Research Center—Religion and Public Life: A Call for Reckoning : Religion and The Death Penalty, Session Three: Religion, Politics and the Death Penalty.

None of the pre-civil war case law referred to in the majority's opinion involved decisions by the United States Supreme Court so any views expressed as to the meaning of the Second Amendment cannot bind the US Supreme Court.

After the civil war the constitutional rights of the newly freed slaves assumed prominence, and some of the states enacted legislation denying them the right to bear arms for any purpose. Because of this there was discussion at that time centred on whether such restrictions were constitutional, and '[i]t was plainly the understanding in the post-Civil War Congress that the Second Amendment protected an individual right to use arms for self-defense ' [11], so said the majority. Again the comment is made that the United States Supreme Court should not abnegate its responsibility to construe the Constitution to the opinion of others, even if 'the others' are members of Congress.

Justice Scalia cited what was said by that 'most famous … judge and professor, Thomas Cooley ' [12] in his 1868 *Treatise on Constitutional Limitations.* What he said in the passages cited by Justice Scalia was:

> Among the other defences to personal liberty should be mentioned the right of the people to keep and bear arms ... The alternative to a standing army is 'a well-regulated militia,' but this cannot exist unless the people are trained to bearing arms. How far it is in the power of the legislature to regulate this right, we shall not undertake to say, as happily there has been very little occasion to discuss that subject by the courts.
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> It might be supposed from the phraseology of this provision [the Second Amendment] that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. The militia, as has been elsewhere explained, consists of those persons who, under the law, are liable to the performance of military duty, and are officered and enrolled for service when called upon. But the law may make provision for the enrolment of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those enrolled, the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms; and they need no permission or regulation of law for the purpose. But this enables government to have a well- regulated militia; for to bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; in other words, it implies the right to meet for voluntary discipline in arms, observing in doing so the laws of public order. [13]

There is nothing in these comments, it is suggested, that supports the notion that the right to bear arms is other than connected with having a well- regulated militia. There is nothing in these comments, it is suggested, that sustains an argument that the right to bear arms is a personal right for the purpose of self defence. True it is that the comments suggest that a militia does not have to be in existence, and an individual a member of it, before the right to bear arms exists. It recognizes, however, that if an occasion arises necessitating a militia then there must be persons available familiar with firearms to form an effective militia. This can be accomplished by permitting the appropriate persons (the people from whom the militia must be taken*)* the right to bear arms and to become experienced in their use pending a

[11] *District of Columbia v Heller* 554 U,S, 570,616 (2008).
[12] Ibid. 570 , 616.
[13] Ibid. 570 , 616–8.

possible need for a militia. Cooley's views would seem to give rise to an obvious limitation, namely, that the right to bear arms is restricted to persons eligible to serve in a militia.

The majority said that '[a]ll other post-Civil War 19th-century sources we have found concurred with Cooley'.[14]

The majority then turned its attention to whether any earlier United States Supreme Court decisions precluded it from reaching the conclusion it had as to the meaning of the Second Amendment. It considered and discussed these cases, and held that these did not require it to find other than as it did. (The majority noted that the case before the Court was in fact the 'first in-depth examination of the Second Amendment'[15] by it.)

The discussion in the first case it considered was *United States v Cruickshank* 92 U.S. 542 *(Cruickshank)*. Here the Court vacated the convictions of members of a white mob for depriving blacks [16] of their right to keep and bear arms, and held that the Second Amendment does not by its own force apply to anyone other than the Federal Government. It was held in *Cruickshank* that the States were free to restrict or protect the Second Amendment right under their police powers, because the right was simply one that could not be infringed by Congress. Citizens must look to their state's police powers for protection against violation of their Second Amendment rights. Justice Scalia noted that the State government had in fact disbanded the local militia the year before the mob attack. This, he thought, meant it made little sense if the discussion in *Cruickshank* referred only to a right to bear arms in the local militia. This would appear to be a subjective inference drawn by Justice Scalia. Moreover, *Cruickshank* did not, so said Justice Scalia, discuss the Second Amendment at any great length.

The second case discussed, (*Presser v Illinois* 116 U.S. 252 (1886) (*Presser),* held that the Second Amendment was not violated by a law that forbade bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law. According to Justice Scalia *Presser* said nothing about the Second Amendment's meaning or scope, beyond the fact that it does not prevent the prohibition of private paramilitary organizations**.** [17]

The third and last case the majority discussed was the 1939 decision in *United States v Miller* 307 U.S. 174 (1939) *(Miller),* a decision upon which the majority said the minority placed *'*overwhelming reliance*'*.[18] The judgment in this case denied a Second Amendment challenge to two men's federal convictions for transporting an unregistered shotgun with a short barrel in interstate commerce, in violation of the *National Firearms Act.* The majority held that 'Miller stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons.*'* [19]

[14] Ibid.570, 618.
[15] Ibid.570,625.
[16] This is the word used in the opinion.
[17] *District of Columbia v Heller* 554 U,S, 570, 620–1 (2008).
[18] Ibid.570, 621.
[19] Ibid.570, 623.

The rationale for this view was what the US Supreme Court said in Miller as noted by Justice Scalia, namely,

> In the absence of any evidence tending to show that the possession or use of a [short-barreled shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear *such an instrument*. [20]

The majority considered what types of weapons Miller permitted. It read ' Miller to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.' [21] It went on to say:

> It may be objected that if weapons that are most useful in military service--M-16 rifles and the like--may be banned, then the Second Amendment right is completely detached from the prefatory clause. But as we have said, the conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right, [22]

The majority said that the right to bear arms was not an unlimited one, and nothing

> should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.[23]

The majority also recognized another limitation, namely, what it said was the historical tradition of prohibiting the carrying of dangerous and unusual weapons. [24]

In the result the majority held that a ban on the possession of handguns in the home as well as the disabling of other guns preventing their immediate availability for self defence violated the Second Amendment and was therefore invalid.

The majority recognized the problem posed by guns but did not accept that the Court was part of the solution for it said:

> We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many amici who believe that prohibition of handgun ownership is a solution. The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns. … But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self- defense in the home. Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct. [25]

[20] Ibid.570,622.(emphasis in original)
[21] Ibid..570,625.
[22] Ibid. 570,627–8
[23] Ibid. 570, 626–7.
[24] Ibid. 570, 627.
[25] Ibid.670, 636.

The 'variety of tools' referred to are what the majority said were the 'longstanding prohibitions on the possession of fire arms' identified above, these being prohibitions on the possession of firearms by felons and the mentally ill, laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, laws imposing conditions and qualifications on the commercial sale of arms and a prohibition on the carrying of dangerous and unusual weapons.

Justice Stevens delivered a dissenting opinion in which Justices Souter, Ginsberg and Breyer concurred. Justice Breyer also delivered some comments of his own. (Justice Souter retired in 2009; and Justice Stevens retired in 2010.)

Justice Stevens said:

> Guns are used to hunt, for self-defense, to commit crimes, for sporting activities, and to perform military duties. The Second Amendment plainly does not protect the right to use a gun to rob a bank; it is equally clear that it does encompass the right to use weapons for certain military purposes. Whether it also protects the right to possess and use guns for nonmilitary purposes like hunting and personal self-defense is the question presented by this case. The text of the Amendment, its history, and our decision in United States v. Miller, 307 U. S. 174 (1939), provide a clear answer to that question. The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms. Specifically, there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution. [26]

Justice Stevens considered that the preamble to the Second Amendment identified its object and governed the meaning of the remainder of the text. The preamble, he said:-

- identifies the preservation of the militia as the Second Amendment's purpose;
- explains that a militia is necessary to the security of a free state; and
- recognizes that a militia must be 'well regulated'.

He said the Court:

> tries to denigrate the importance of this clause of the Amendment by beginning its analysis with the Amendment's operative provision and returning to the preamble merely 'to ensure that [the Court's] reading of the operative clause is consistent with the announced purpose'.[27]

Justice Stevens considered the right of the people ' [a]s used in the Second Amendment, … [does] not enlarge the right to keep and bear arms to encompass use or ownership of weapons outside the context of service in a well-regulated militia'. [28] He noted that the Court construed the phrase 'to keep and bear arms' as meaning a right 'to possess and carry weapons in case of confrontation,' [29] an interpretation which '[n]o party or amicus urged'. [30]

[26] Ibid.570, 636–7.
[27] Ibid.570,643.
[28] Ibid.570,646.
[29] Ibid.

His Honour , like Justice Scalia, noted that ' to bear arms ' had an idiomatic meaning, namely, ' to serve as a soldier, do military service , fight, ' [31] '*unless* the addition of a qualifying phrase signals that a different meaning is intended. ' [32]

Justice Stevens discussed the various States ratification conventions leading up to the finalization of the Constitution. He noted the fear of the states that a federal standing army was a threat to liberty and to the sovereignty of the states. It seems clear enough from his discussion that it was this fear that informed the formulation of the Second Amendment – consequently Congress did not retain the power to disarm State militias by reason of that amendment.

As for the English Bill of Rights, Justice Stevens said:

> The Court may well be correct that the English Bill of Rights protected the right of some English subjects to use some arms for personal self-defense free from restrictions by the Crown (but not Parliament). But that right--adopted in a different historical and political context and framed in markedly different language--tells us little about the meaning of the Second Amendment. [33]

These comments are plainly correct. The English Act was a response to the particular political circumstances existing in England at the time, and cannot be taken to have given rise to a universal mandate for all its citizens to keep and to bear arms.

Further, Justice Stevens thought that the ' Court's reliance on Blackstone's Commentaries on the Laws of England [was] unpersuasive for the same reason as its reliance on the English Bill of Rights. ' [34], as he noted Blackstone's reference to the right of having and using arms for self-preservation and defence referred specifically to Article VII in the English Bill of Rights. (Sir William Blackstone's *Commentaries on the Laws of England,* was the leading treatise on English common law authored in the eighteenth century and still referred to with deference today in countries which adopted or inherited a common law legal system, such as the United States.)

With respect to post-enactment commentary relied upon by the Court his Honour thought it was of limited value in construing the Second Amendment as the commentators ' tended to collapse the Second Amendment with Article VII of the English Bill of Rights, and they appear to have been unfamiliar with the drafting history of the Second Amendment. ' [35] He made particular reference to the work of Joseph Story, an authoritative legal luminary who was a nineteenth century United States Supreme Court justice. In 1833 he authored *Commentaries on the Constitution of the United State,* the leading treatise at the time on the US Constitution. The majority also referred to the work of Story in support of its opinion. It did not, however, refer to a passage cited by Justice Stevens.

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[30] Ibid.
[31] Ibid.
[32] Ibid, 570, 649. (emphasis in original)
[33] Ibid. 570, 664–5.
[34] Ibid. 570, 665.
[35] *District of Columbia v Heller* 554 U,S, 570 ,666–7 (2008).

The passage reads as follows:

> The importance of [the Second Amendment] will scarcely be doubted by any persons who have duly reflected upon the subject. The militia is the natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses with which they are attended and the facile means which they afford to ambitious and unprincipled rulers to subvert the government, or trample upon the rights of the people. The right of the citizens to keep and bear arms has justly been considered as the palladium of the liberties of a republic, since it offers a strong moral check against the usurpation and arbitrary power of rulers, and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them. And yet, though this truth would seem so clear, and the importance of a well-regulated militia would seem so undeniable, it cannot be disguised that, among the American people, there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burdens, to be rid of all regulations. How it is practicable to keep the people duly armed without some organization, it is difficult to see. There is certainly no small danger that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by the clause of our national bill of rights. [36]

There is simply nothing in these words that supports the idea that the Second Amendment protects the right of the people to bear arms for personal self defence.

Justice Stevens discussed *Cruickshank* and observed that whilst the '*Cruikshank* Court explained that the defective *indictment* contained such language, [namely, that the right protected by the Second Amendment was the right to bear arms for lawful purposes] … the Court did not itself describe the right, or endorse the indictment's description of the right'. [37]

Dealing with *Presser* he said:

> *Presser,* therefore, both affirmed *Cruikshank*'s holding that the Second Amendment posed no obstacle to regulation by state governments, and suggested that in any event nothing in the Constitution protected\the use of arms outside the context of a militia 'authorized by law' and organized by the State or Federal Government. [38]

As for *Miller* he said:

> After reviewing many of the same sources that are discussed at greater length by the Court today, the *Miller* Court unanimously concluded that the Second Amendment did not apply to the possession of a firearm that did not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia.' [39]
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> The majority cannot seriously believe that the Miller Court did not consider any relevant evidence; the majority simply does not approve of the conclusion the Miller Court reached on that evidence. Standing alone, that is insufficient reason to disregard a unanimous opinion of this Court, upon which substantial reliance has been placed by legislators and citizens for nearly 70 years.[40]

[36] Ibid. 570, 667–8.
[37] Ibid. 570, 673. (emphasis in original)
[38] Ibid. 570, 674–5.
[39] Ibid. 570, 676–7.
[40] Ibid. 570, 679.

Justice Stevens said of the majority's opinion:-

> Until today, it has been understood that legislatures may regulate the civilian use and misuse of firearms so long as they do not interfere with the preservation of a well-regulated militia. The Court's announcement of a new constitutional right to own and use firearms for private purposes upsets that settled understanding, but leaves for future cases the formidable task of defining the scope of permissible regulations. Today judicial craftsmen have confidently asserted that a policy choice that denies a 'law-abiding, responsible citize[n]' the right to keep and use weapons in the home for self-defense is 'off the table.' … Given the presumption that most citizens are law abiding, and the reality that the need to defend oneself may suddenly arise in a host of locations outside the home, I fear that the District's policy choice may well be just the first of an unknown number of dominoes to be knocked off the table. [41]

Justice Breyer, whilst concurring in Justice Stevens' opinion, also delivered an opinion of his own. [42] (in which the other dissenting Justices also concurred) He considered the majority was wrong for two reasons:-

1. Firstly, for the reasons advanced by Justice Stevens leading to the conclusion that the Second Amendment protects militia related interests and not self defence; albeit having the right to keep arms would mean that these arms could incidentally be used for self defence. (under the common law)

2. Secondly,

> the protection the Amendment provides is not absolute. The Amendment permits government to regulate the interests that it serves. Thus, irrespective of what those interests are--whether they do or do not include an independent interest in self-defense--the majority's view cannot be correct unless it can show that the District's regulation is unreasonable or inappropriate in Second Amendment terms. This the majority cannot do.[43]

His Honour directed his attention to the second of his reasons.

In interpreting and applying the Second Amendment he promulgated four propositions as his starting point. [44] **Firstly**, the amendment protects a right that is separately possessed and may be separately enforced, that is it is an 'individual right'. **Secondly**, '[a]s evidenced by its preamble, the Amendment was adopted "w]ith obvious purpose to assure the continuation and render possible the effectiveness of [militia] forces." ' **Thirdly**, the amendment must be applied having regard to the '*obvious purpose'* for which it was adopted. **Fourthly**,*'* the right protected by the Second Amendment is not absolute, but instead is subject to government regulation.*'*

Justice Breyer noted that the US Supreme Court has found public safety concerns *'*sufficiently forceful to justify restrictions on individual liberties*'* [45] in a wide variety of constitutional cases. He considered gun regulation would turn into an interest balancing enquiry, namely, interests protected by the Second Amendment verses governmental public safety concerns. The conflict is resolved, he said, by deciding whether the regulation at issue impermissibly burdens the former in the course of advancing the latter.

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[41] Ibid.570, 679–80.
[42] Ibid.570, 681–723.
[43] Ibid.570, 681.
[44] Ibid.570, 682–3.
[45] Ibid. 570, 689.

The first restriction thrown up by the impugned legislation required a licence from the chief of police to carry a handgun anywhere in the District. Such a licence would be granted to the respondent if he met the statutory requirements. There was no challenge to its constitutional validity. Like the majority, Justice Breyer felt no need to comment further upon it.

The second restriction required a lawful gun owner to keep the weapon dis-assembled or secured with a trigger lock, unless at a place of business. The District of Columbia conceded that a common law self- defence exception was imported into the legislation, and this, Justice Breyer said, avoided the constitutional question raised by the second restriction.

The third restriction prohibited the registration of handguns, and since there could be no lawful possession in the absence of registration, the ownership of handguns was effectively prohibited. In considering whether this infringed the Constitution the question was, ' whether the statute imposes burdens that, when viewed in light of the statute's legitimate objectives, are disproportionate. ' [46] Justice Breyer examined the reasons why the District enacted the legislation and considered in some detail statistics and academic and professional articles relating to the extent of death and injury caused by handguns in America. The burden imposed by the law was not considered by him to be disproportionate to its legitimate purpose, namely the intention to reduce death and injury caused by handguns.

There was disagreement amongst the parties and their amici as to whether a ban on handguns would in fact lead to a reduction in deaths and injuries from gun violence. Of interest was the argument put in support of Mr. Heller by an amicus, ' that handgun bans cannot work; there are simply too many illegal guns already in existence for a ban on legal guns to make a difference. In a word, … given the urban sea of pre-existing legal guns, criminals can readily find arms regardless. ' [47] This argument was rejected by Justice Breyer on the grounds that a legislature might want to ' try to dry up that urban sea, drop by drop. And none of the studies can show that effort is not worthwhile. ' [48]

He said he was puzzled by the prohibitions the majority considered to be constitutional. (These being prohibitions on the possession of firearms by felons and the mentally ill; laws forbidding the carrying of firearms in sensitive places such as schools and government buildings; laws imposing conditions and qualifications on the commercial sale of arms and the prohibition on the carrying of dangerous and unusual weapons.) He asks, 'why these?' [49] He answers rhetorically,

> Is it that similar restrictions existed in the late-18th century? The majority fails to cite any colonial analogues. And even were it possible to find analogous colonial laws in respect to all these restrictions, why should these colonial laws count, while the Boston loaded-gun restriction (along with the other laws I have identified) apparently does not count? [50]

His Honour said that,

> The decision [of the majority] will encourage legal challenges to gun regulation throughout the Nation. Because it says little about the standards used to evaluate regulatory decisions, it will leave the Nation

[46] Ibid.570, 693.
[47] Ibid. 570, 703 (emphasis in original)
[48] Ibid.570, 703.
[49] Ibid. 570,721.
[50] Ibid. 570, 721–2.

> without clear standards for resolving those challenges. … And litigation over the course of many years, or the mere specter of such litigation, threatens to leave cities without effective protection against gun violence and accidents during that time. [51]
>
> …
>
> Nor is it at all clear to me how the majority decides *which* loaded 'arms' a home owner may keep. The majority says that that Amendment protects those weapons' typically possessed by law-abiding citizens for lawful purposes.'... This definition conveniently excludes machineguns, but permits handguns, which the majority describes as ' the most popular weapon chosen by Americans for self defense…in the home.'... But what sense does this approach make? According to the majority's reasoning, if Congress and the States lift restrictions on the possession and use of machineguns, and people buy machineguns to protect their homes, the Court will have to reverse course and find that the Second Amendment *does,* in fact, protect the individual self-defense-related right to possess a machinegun. On the majority's reasoning, if tomorrow someone invents a particularly useful, highly dangerous self-defense weapon, Congress and the States had better ban it immediately, for once it becomes popular Congress will no longer possess\the constitutional authority to do so. In essence, the majority determines what regulations are permissible by looking to see what existing regulations permit. There is no basis for believing that the Framers intended such circular reasoning. [52]

In 2010 the US Supreme Court considered gun prohibition laws promulgated by the City of Chicago in the case of *McDonald v Chicago* [53]. These laws effectively banned the possession of handguns, and this was done in the belief that it would help protect persons from death or injury and help prevent loss of property. They were laws not dissimilar to those considered by the Court in Heller. Chicago argued its laws were constitutional because the Second Amendment did not apply to the States. Whether this was so depended on a consideration of the Fourteenth Amendment which, relevantly for the purposes of the arguments before the Court, provides no state shall make or enforce any law which shall abridge the privileges or immunities of citizens; nor shall any state deprive any person of life, liberty, or property, without due process of law.

The Court struck down the ordinance by a five-four majority. The majority opinion was delivered by Justice Alito with whom Chief Justice Roberts and Justices Scalia, Kennedy and Thomas concurred. (Justice Scalia also offered comments of his own which consisted of a vitriolic attack on the dissenting reasoning of Justice Stevens. Justice Thomas also offered comments of his own.) Justice Breyer delivered a dissenting opinion, with which Justices Ginsburg and Sotomayor concurred.

Justice Alito observed that, ' [f]or many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause. ' [54] He considered there was no good reason to depart from this practice.

The majority held that the Second Amendment right to keep and bear arms was incorporated into the concept of due process in the Fourteenth Amendment, and this was predicated on the belief that the right to keep and bear arms 'is fundamental to *our* scheme of ordered

[51] Ibid. 570, 718.
[52] Ibid. 570, 720–1.(emphasis in original)
[53] 130 S.Ct. 3020 (2010).
[54] Ibid. 3020, 3030–31.

Liberty' [55], or 'deeply rooted in this Nation's history and tradition.' [56] Thus the states were unable to interfere with this 'fundamental right.' Justice Thomas, whilst concurring in the result, based his reasoning on the immunities and privileges provisions in the Fourteenth Amendment.

The dissenting Justice Stevens said:

> The question in this case, then, is not whether the Second Amendment right to keep and bear arms (whatever that right's precise contours) applies to the States because the Amendment has been incorporated into the Fourteenth Amendment. It has not been. The question, rather, is whether the particular right asserted by petitioners applies to the States because of the Fourteenth Amendment itself, standing on its own bottom. [57]

He noted that the petitioners argued that the Second Amendment should be 'incorporated' into the Fourteenth thereby establishing a constitutional entitlement, enforceable against the States, to keep a handgun in the home. Relevantly, he said:

> The notion that a right of self-defense *implies* an auxiliary right to own a certain type of firearm presupposes not only controversial judgments about the strength and scope of the (posited) self-defense right, but also controversial assumptions about the likely effects of making that type of firearm more broadly available. It is a very long way from the proposition that the Fourteenth Amendment protects a basic individual right of self-defense to the conclusion that a city may not ban handguns. [58]

The United States, like Australia, is federation. The significance of this was recognized by Justice Stevens, and he noted the Second Amendment 'is a federalism provision'[59], and

> [i]t was the States, not private persons, on whose immediate behalf the Second Amendment was adopted. Notwithstanding the *Heller* Court's efforts to write the Second Amendment's preamble out of the Constitution, the Amendment still serves the structural function of protecting the States from encroachment by an overreaching Federal Government. [60]

Speaking of the majority's opinion in his concluding comments, Justice Stevens observed:

> Although the Court's decision in this case might be seen as a mere adjunct to its decision in *Heller,* the consequences could prove far more destructive—quite literally—to our Nation's communities and to our constitutional structure. Thankfully, the Second Amendment right identified in *Heller* and its newly minted Fourteenth Amendment analogue are limited, at least for now, to the home. But neither the 'assurances' provided by the plurality… nor the many historical sources cited in its opinion should obscure the reality that today's ruling marks a dramatic change in our law—or that the Justices who have joined it have brought to bear an awesome amount of discretion in resolving the legal question presented by this case. [61]

Justice Breyer considered Justice Stevens had 'demonstrated that the Fourteenth Amendment's guarantee of ''substantive due process'' does not include a general right to keep and bear firearms for purposes of private self-defense.' [62]

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[55] Ibid. 3020 , 3036. (emphasis in original)
[56] Ibid. 3020 , 3036.
[57] Ibid. 3020 , 3103.
[58] Ibid. 3020 , 3107. (emphasis in original)
[59] Ibidc, 3020, 3111.
[60] Ibid.
[61] Ibid, 3020 , 3109–20.
[62] Ibid.3020 , 3120.

Justice Breyer's opinion centred on the question of ' incorporation.'

He said:

> In sum, the Framers did not write the Second Amendment in order to protect a private right of armed self- defense. There has been, and is, no consensus that the right is, or was, 'fundamental.' No broader constitutional interest or principle supports legal treatment of that right as fundamental. To the contrary, broader constitutional concerns of an institutional nature argue strongly against that treatment. Moreover, nothing in 18th-, 19th-, 20th-, or 21st-century history shows a consensus that the right to private armed self-defense, as described in Heller, is 'deeply rooted in this Nation's history or tradition' or is otherwise 'fundamental.' Indeed, incorporating the right recognized in Heller may change the law in many of the 50 States. Read in the majority's favor, the historical evidence is at most ambiguous. And, in the absence of any other support for its conclusion, ambiguous history cannot show that the Fourteenth Amendment incorporates a private right of self-defense against the States. [63]

In 2015 the US Supreme Court denied a petition for a writ of certiorari with respect to a Second Amendment case – *Jackson v City and County of San Francisco, California (Jackson)* [64]

Something should be said of the Court's practice and procedure. There is no right of appeal to the US Supreme Court. (Rule 10 of the *Rules of the United States Supreme Court* prescribes the criteria for the grant of a petition for a writ of certiorari.) If the Court denies a petition it does not give any reasons. If it grants a petition it means it will review the decision, and of course this will lead to a precedent creating opinion. A denial means the lower Court decision stands but does not create any precedent. In the event that the Court is equally divided, the appealed decision stands, and no precedent is created.

In *Jackson* there was a challenge to a provision of the *San Francisco Police Code* which provided that no person shall keep a handgun within a residence owned or controlled by that person unless:-

- the hand- gun is stored in a locked container or disabled with a trigger lock that has been approved by the California Department of Justice; or

- The handgun is carried on the person of an individual over the age of 18 or under the control of a person who is a peace officer under Californian law.

A writ of certiorari was denied. It was argued that the law was unconstitutional because it may prevent **immediate** recourse to a handgun at a time of greatest need by a person when faced with an armed intruder in the home. Fear and panic may impede the homeowner from being readily able to access his or her weapon in a gun safe, or being quickly able to remove a trigger lock. Thus, the law supposedly violated the core purpose of the Second Amendment, namely, the right to bear arms for self- defence in the home by unreasonably burdening the right. This argument found favour with dissenting Justice Thomas, with whom Justice Scalia concurred.

[63] Ibid. 3020, 3136.
[64] 576 U.S.___(2015). Slip.op.

Justice Thomas said:

> We warned in Heller that '[a] constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.' … The Court of Appeals in this case recognized that San Francisco's law burdened the core component of the Second Amendment guarantee, yet upheld the law. Because of the importance of the constitutional right at stake and the questionable nature of the Court of Appeals' judgment, I would have granted a writ of certiorari. [65]

In accordance with Court practice, no reasons were offered for its refusal to grant a writ of certiorari by the plurality.

In 2015 the US Supreme Court also considered another challenge under the Second Amendment in the case of *Friedman v City of Highland Park, Illinois. (Friedman)* [66] The petition for a writ certiorari was denied. Justice Thomas again delivered a dissenting opinion in which Justice Scalia joined.

In *Friedman* the City of Highland Park, Illinois, banned manufacturing, selling, giving, lending, acquiring, or possessing many of the most commonly owned semiautomatic firearms, which the City branded 'assault weapons'. The ordinance criminalized modern sporting rifles (e.g., AR-style semiautomatic rifles), which many Americans were said to own for lawful purposes such as self-defence, hunting, and target shooting. The City also prohibited 'large capacity magazines', a term the City used to refer to nearly all ammunition feeding devices that accepted more than ten rounds. The City gave anyone hitherto legally possessing an assault weapon, or one having a large capacity magazine, 60 days to remove these items outside city limits, to disable them, or to surrender them for destruction.

Justice Thomas in his dissent reiterated that it was decided in *Heller* [67] and *McDonald* [68] that the Second Amendment guaranteed the individual right to possess and carry weapons in case of confrontation; and excluded from protection only 'those weapons not typically possessed by law-abiding citizens for lawful purposes.' [69] According to Justice Thomas the Seventh Circuit, from which the appeal came, erred in the findings it made as follows:

1. It read *Heller* as forbidding only total bans on handguns used for self defence in the home – All other questions about the Second Amendment should be defined by the political process and scholarly debate. Justice Thomas contended *Heller* repudiates that approach , because ' Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.' [70]

2. It thought the question to be asked was whether the banned firearms were common at the time of ratification of the Second Amendment in 1791. This approach was wrong because Justice Thomas observed that *Heller* decided that the Second Amendment extended, prima facie, to all instruments that

[65] Ibid.6.
[66] 577 U.S___(2015). Slip.op.
[67] *District of Columbia v Heller* 554 U.S. 570 (2008).
[68] *McDonald v Chicago* 130 S.Ct. 3020 (2010).
[69] *Friedman v City of Highland , Illinois* 577 U.S. ___(2015) slip.op.3.
[70] Ibid. 4.

constituted bearable arms, even those that were not in existence at the time of the founding. [71]

3. It asked did the banned firearms relate to the preservation or efficiency of a well- regulated militia? Justice Thomas reiterated what was held in *Heller,* namely, the right to keep and bear arms, was an independent, individual right whose scope was defined not by what the militia needed, but by what private citizens commonly possessed. [72]

4. Notwithstanding the ban did law- abiding citizens retain adequate means of self-defence? This, said Justice Thomas, misunderstood *Heller*. Rather, *Heller* asks whether the law bans types of firearms commonly used for a lawful purpose regardless of whether alternatives exist. According to Justice Thomas roughly five million Americans own AR-style semiautomatic rifles; and the overwhelming majority of citizens who own and use such rifles do so for lawful purposes, including self-defence and target shooting. That, he said, was all that was needed for citizens to have a right under the Second Amendment to keep such weapons. [73]

5. It applied an ' interest balancing' test – did the benefits of the ban outweigh the restrictions resulting from it? This approach to the core protection guaranteed by the Second Amendment of being able to own a firearm for personal self - protection was, said Justice Thomas, forbidden by *Heller.* [74]

In the result Justice Thomas said of the Court's refusal to grant certiorari:-

> The Court's refusal to review a decision that flouts two of our Second Amendment precedents stands in marked contrast to the Court's willingness to summarily reverse courts that disregard our other constitutional decisions. [75]

On 21 March 2016 the US Supreme Court decided in favour of a petition for a writ of certiorari directed to the Supreme Judicial Court of Massachusetts– *Caetano v Massachusetts*[76]. (*Caetano)* The Massachusetts Court had rejected an appeal whereby Caetano was found guilty of possessing a stun gun in violation of a law that prohibited possession of any portable device or weapon from which an electrical current, impulse, wave or beam may be directed, which current, impulse, wave or beam is designed to incapacitate temporarily, injure or kill. A stun gun is designed so that electrodes on the device are applied directly to the person delivering a disabling electric shock. (In contrast *tasers* used by law enforcement agencies shoot out wires upon which electrodes are attached, although they can also be applied directly to the person in the manner of a stun gun.)

Caetano argued that the law violated her Second Amendment rights, an argument rejected by the Massachusetts court but upheld by the US Supreme Court as follows:

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[71] Ibid.
[72] Ibid.
[73] Ibid. 5.
[74] Ibid. 5–6.
[75] Ibid 1,6.
[76] 577 U.S.___(2016). Slip.op.

1. The Massachusetts Court's holding that stun guns were not protected by the Second Amendment because they were not in common use at the time of its enactment was in direct conflict with *Heller* which held that the Second Amendment did extend to arms not in existence at the time of the founding.

2. The Massachusetts Court asked whether stun guns are 'dangerous per se at common law and unusual' picking up on a limitation on the right to keep and carry arms referred to in *Heller;* and it concluded that stun guns are unusual because they are a modern invention. This again was inconsistent with *Heller* which held that the Second Amendment applied not just to weapons in existence at the time of its enactment.

3. The Massachusetts Court concluded that stun guns were not readily adaptable for use in the military, but *Heller* rejected the proposition that only those weapons useful in warfare are protected.

The judgment of the Supreme Judicial Court of Massachusetts was vacated, and the case was remanded for further proceedings not inconsistent with the Court's opinion.

Caetano serves to further define the devices within the reach of the Second Amendment. It was decided on the basis that the reasoning of the lower Court was egregiously at odds with that in *Heller.*

Caetano stands in stark contrast to *Jackson* and *Friedman,* which cases both illustrate the uncertainty thrown up by *Heller* and foreshadowed by the dissentients in that case. It is hard to understand why *Jackson* and *Friedman* should survive a constitutional challenge in the face of the majority reasoning in *Heller*.

The decisions of the US Supreme Court as they currently stand do permit some restrictions and control on gun ownership. How far those restrictions may ultimately extend remains to be determined on a case by case basis.

The question of gun control inevitably arises whenever there is a mass shooting in America, something which occurs all too frequently. Usually the sense of outrage and disgust that follows seems never to be met with any meaningful action.

The death of Justice Scalia has further served to bring the issue of gun control into focus, particularly given that 2016 is an election year for the next US president. The President nominates a person to fill the vacant position on the Court, and the nominee must be confirmed by the US Senate.

As the Court is currently constituted it is said to be evenly divided, meaning that 4 of the 8 Justices are considered 'conservatives' who will ordinarily be expected to interpret the Second Amendment in line with the views of the late Justice Scalia. The remaining 4 are considered to usually adopt a liberal approach to the interpretation of the Constitution, and would be expected to follow the approach of Justice Stevens in construing the Second Amendment.

The construction placed upon the Second Amendment by Justice Scalia is the one that Republicans and the pro-gun lobby want to prevail.

The replacement for the late Justice Scalia may well consider that the minority reasoning in Heller is to be preferred, and this may lead to a reversal of the majority opinion. If this were to occur, it would no doubt be anathema to Republicans and the gun lobby, but would permit much needed tighter gun regulation and control.

President Obama has recently nominated the Chief Judge of the United States Court of Appeals for the District of Columbia Circuit, Judge Merrick Garland, as the replacement for Justice Scalia. He would appear from the media discussion of his nomination to be a worthy and well respected candidate for the position. Nonetheless, the Republicans, for reasons said to be based on precedent, have indicated they will not engage with him or give consideration to his nomination. They are of the view that a President should not make an appointment to the US Supreme Court during the last year of his presidency.

When it comes to the confirmation process the nominee is put through a vigorous vetting process. Both sides of politics seem keen to ensure the successful person is one who is likely to decide cases in line with their philosophical bent. History is replete, however, with instances where appointments have been made to public office in the belief that the appointee holds particular views only to have that person make decisions quite at odds with the appointor's perceptions as to how particular issues may be decided by the appointee.

The current race for the presidency has seen Republicans solemnly opine that the newly elected President must appoint a replacement for Justice Scalia who will 'defend the constitution.' This rather begs the question defend against what or whom. What is really meant is that the appointed Justice should be one who is believed will decide cases on the Second Amendment in line with the opinion of the majority in *Heller*.

Appointees to the US Supreme Court are required to take two oaths of office [77] before they assume their duties. Under the oaths a Justice does undertakes to *'support and defend the Constitution of the United States against all enemies, foreign and domestic.'* Whatever this may mean in practice, it certainly does not mean that the Second Amendment must be determined according to the ideology of any particular political party.

It is to be hoped that whoever succeeds Justice Scalia will, if the opportunity presents, consider the reasoning of the minority in *Heller* as leading to the proper construction of the Second Amendment, and that will then become the opinion of the Court. This would mean that the Second Amendment would be construed as not conferring a pivotal right to keep and bear arms for the personal right of self-defence as a fundamental right, but that the right is inextricably bound up with maintaining a state militia, something which modern times has

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[77] The two oaths may be combined, and in the combined form reads:

> *I, _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States; and that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.*

rendered otiose. American gun control and regulation may then become much tighter, although the power and influence of groups such as the National Rifle Association should not be underestimated. Moreover, as observed by an amicus in *Heller*, there are now so many guns in the United States that any effective control may well prove futile. Further, the US Supreme Court, before overturning a long-settled precedent, requires 'special justification,' not just an argument that the precedent was wrongly decided. [78] At what point will *Heller* become a long-settled precedent; and what would constitute 'special justification' in that circumstance justifying the overturning of that decision?

DAVID HENSLER
SOLICITOR

[78] *Halliburton Co v Erica P John Fund Inc* 573 U.S.___(2014). Slip.op, 1,4; D*ickerson v United States* 530 U.S. 428, 434 (2000).