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Gun control measures face new legal landscape

By: Robert Barnes - December 18th, 2012

If the rhetoric about a legislative response to the Newtown, Conn., school shootings actually turns into legislation, it will do so in a legal landscape changed by the Supreme Court's 2008 decision that Americans have a constitutional right to gun ownership.

It is territory still vigorously contested by the two sides in the gun control debate, and one in which the justices have not provided clear direction.¹⁴

The court's landmark decision in *District of Columbia v. Heller* wiped out D.C.'s virtual ban on handgun ownership and said the Second Amendment provides an individual the right to possess a gun that is unrelated to military service.

But, as Justice Antonin Scalia wrote for the majority in the 5 to 4 *Heller* decision, "Like most rights, the right secured by the Second Amendment is not unlimited." The ruling made clear that a handgun kept in the home for self-defense was protected, but did not cast doubt on restrictions such as keeping guns from the mentally ill or out of sensitive areas such as schools.

The half-full, half-empty opinion has kept lower courts busy ever since — and they largely have upheld gun restrictions against a barrage of legal challenges. One unanswered question — whether the right to gun possession exists outside the home as well as within — may be the next challenge for the high court.

And any new federal legislation — such as reviving the ban on so-called assault weapons advanced by Sen. Dianne Feinstein (D-Calif.) and endorsed by President Obama — will be evaluated in the new and uncertain world *Heller* created.

Retired Justice John Paul Stevens told gun-control supporters in October that they should be heartened by the court's narrow 2008 ruling.

"Even as generously construed in *Heller*, the Second Amendment provides no obstacle to regulations prohibiting the ownership or use of the sorts of automatic weapons used in the tragic multiple killings in Virginia, Colorado and Arizona in recent years," Stevens said at a luncheon of the Brady Center to Prevent Gun Violence.

"The failure of Congress to take any action to minimize the risk of similar tragedies in the future cannot be blamed on the court's decision in *Heller*," he said.

Of course, Stevens was a fierce dissenter in the decision and worried at the time that “the District’s policy choice may well be just the first of an unknown number of dominoes to be knocked off the table.”

In his speech, Stevens pointed to language in Scalia’s opinion noting laws banning “dangerous and unusual weapons” as “important limitations.”

Adam Winkler, a UCLA law professor who wrote “Gunfight: The Battle Over the Right to Bear Arms in America,” said he thought *Heller* allowed an assault-weapon ban, because the decision protected only weapons commonly used for self-protection; Scalia said handguns were the weapons of choice for Americans for self-defense in the home.

“An AR-15,” Winkler said, referring to the rifle allegedly used by Adam Lanza in the shootings at Sandy Hook Elementary School, “is not a self-defense weapon.”

But David Kopel, a law professor at the University of Denver and a scholar at the Cato Institute, said the weapon is the “best-selling rifle in this country” and would clearly meet the court’s description of being in common use.

“Different people use different guns for self-protection,” he said. He also noted that Connecticut’s assault-weapons ban did nothing to stop the tragedy there.

Jonathan E. Lowy, director of the Brady Center’s Legal Action Project, said gun manufacturers should not be able to protect a type of weapon simply by manufacturing and selling more of them. He believes that *Heller* leaves much room for Congress to act on categories of weapons, ammunition and background checks.

Last year, Lowy’s organization produced a report that said lower courts have turned away hundreds of legal challenges to gun restrictions since *Heller*, leaving it for the Supreme Court to decide whether there is to be an expansion of gun rights.

The most likely issue for the justices to tackle next is whether the right to a gun for self-protection includes the ability to carry it outside the home.

Last week, a divided panel of the U.S. Court of Appeals for the 7th Circuit cited *Heller* in striking down Illinois’ ban on carrying concealed weapons. Judge Richard Posner wrote that self-defense is not limited to the home.

“A Chicagoan is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment on the 35th floor of the Park Tower,” he wrote.

Gun rights supporters have lost battles against restrictive concealed-carry laws in other circuit courts, which could provide a setup for the Supreme Court to clarify what *Heller* means for such laws.