

## Locked Liberties

New D.C. gun rules show that the battle for Second Amendment rights is far from over.

BY ILYA SOMIN

The Supreme Court may have endorsed an individual right under the Second Amendment to bear arms. But the District of Columbia certainly isn't leaping to implement that right.

After its defeat in *District of Columbia v. Heller* (2008), the D.C. Council responded by adopting new gun-control regulations that are only marginally less restrictive than the ones invalidated in *Heller*. Undoubtedly, the new regulations—and similar ones in other jurisdictions—will be challenged in court. It is the outcome of these future cases that will determine whether *Heller* has any truly significant impact.

History shows that mere judicial recognition of a right doesn't guarantee that the right will get meaningful protection. It is especially unlikely if the right is supported by jurists on only one side of the political spectrum. Judicially recognized rights also can get short shrift if the Supreme Court defines their scope narrowly.

To the delight of some and the distress of others, both these factors may limit the impact of the newly recognized individual right to bear arms.

### A NARROW RIGHT?

Justice Antonin Scalia's majority opinion in *Heller* firmly establishes the Court's recognition of an individual right to bear arms. Yet it also outlines a large number of "presumptively lawful regulatory measures" restricting gun rights. These exceptions to the right to bear arms could potentially swallow the rule.

Most importantly, the presumptively valid "laws imposing conditions and qualifications on the commercial sale of arms" could easily be drafted in ways that make the purchase of firearms prohibitively difficult or expensive for most ordinary citizens.

The exception for "prohibitions on the possession of fire-

arms by felons and the mentally ill" could also be used to undermine the scope of *Heller*. Many states, as well as the federal government, define a wide variety of minor, nonviolent offenses as felonies.

The Scalia opinion seems to accept laws forbidding the carrying of firearms in "sensitive" locations such as schools and government buildings. A government might define a large number of areas as "sensitive," including, for example, entire neighborhoods with high crime rates.

The opinion also emphasizes that the right to bear arms is historically rooted in the right to self-defense. State and local governments could potentially enact laws requiring would-be gun purchasers to provide extensive specific evidence that they really do need a firearm for self-defense before allowing them to purchase guns.

Governments could also act to limit gun ownership by imposing prohibitively burdensome requirements on gun registration, a type of regulation not considered in *Heller*.

In short, *Heller* potentially leaves a lot of room for legislators and lower courts to eviscerate the individual Second Amendment right that the Supreme Court has recognized.

### EXPLOITING EXCEPTIONS

The District of Columbia has done exactly that. The new regulations enacted by the D.C. Council seem designed to exploit a wide range of *Heller* exceptions, with the ultimate objective of making it virtually impossible for D.C. residents to exercise their newly recognized rights.

Previous regulations that remain in force already impose severe burdens. Indeed, according to a July 18 *Washington Post* article, D.C. residents will have a long wait to buy a gun because of the lack of gun dealers in the District. Purchasing a gun outside the District will also be difficult because handguns newly purchased by D.C. residents from

gun dealers in other jurisdictions need to be shipped to a licensed gun dealer in the city for pickup. Currently, no such dealers are available. Moreover, the District might attempt to use its zoning power to restrict any future gun stores. Such regulations effectively take advantage of the *Heller* exception for laws regulating the purchase of firearms.

The District has also adopted an extremely burdensome 12-step registration process for new guns—another effort to exploit a possible loophole in *Heller*. The process could take eight weeks or even longer, according to the D.C. police.

Even if a D.C. resident does manage to obtain a gun, the new D.C. regulations make it almost impossible for her to use it in self-defense. They require that guns stored in the home be kept unloaded and either disassembled or locked up (by trigger lock, safe, or the like), except when there is a threat of “immediate harm” to the owner within the home. In a break-in, it is highly unlikely that the owner will be able to assemble and load the gun in time to use it.

The new regulations also generally require the handguns to be kept in the owner’s home or office—which eliminates the possibility of using them in self-defense elsewhere.

So far, *Heller* applies only to the District of Columbia and other territories controlled by the federal government. At this point, the Supreme Court has not yet decided whether the Second Amendment applies to state governments, though it most likely will conclude in the future that it does.

Many states permit widespread gun ownership with little regulation, and that is unlikely to change. But state and local governments with more restrictive laws are likely to imitate the District’s approach and perhaps come up with novel ways of exploiting *Heller*’s exceptions.

Eventually, federal courts might strike down some of the more restrictive new regulations in the District and elsewhere. But given the broad exceptions built into the Scalia opinion, we may end up with only marginally less gun control than exists today.

Such an outcome becomes more likely because judicial intervention to protect gun owners’ rights is vehemently opposed by most liberal judges.

### SPLIT BY IDEOLOGY

It is extremely difficult to establish strong protection for any constitutional right supported by jurists on only one side of the political spectrum. Any new justices appointed by a president from the opposite party may vote to undermine that right. And if jurists on one side of the political spectrum overwhelmingly oppose a right, any division among its supporters is likely to be fatal in a closely divided case.

In *Heller*, the four liberal justices made clear their strong opposition to any meaningful protection for individual rights under the Second Amendment. Thus, at least in the short term, protection for gun rights depends on the five conservative justices sticking together. As on many other issues, Justice Anthony Kennedy may turn out to be a crucial swing vote. And it is unknown whether he is willing to uphold gun rights against any but the most extreme infringements on them.

The ideological division on the Court also leaves any gains vulnerable to future reversal if a Democratic president is elected. Even if he doesn’t pick his nominees with the specific objective of undermining *Heller*, the fact that he will choose generally liberal nominees is likely to mean that they will oppose gun rights as well. He will also likely choose lower-court judges who will interpret *Heller*’s scope narrowly.

### RECALL PROPERTY RIGHTS

The fate of recent efforts to obtain stronger protection for constitutional property rights sheds light on the possible post-*Heller* fate of the right to bear arms. This experience suggests it may be very difficult to convert judicial recognition of a right into meaningful protection.

Over the last 25 years, property rights advocates have sought to persuade the Supreme Court to provide more protection for those rights—protection that had been largely gutted between the 1930s and 1970s. In several cases, the Court has emphasized that it recognizes constitutional property rights, even stating in 1994 that they would no longer be a “poor relation.”

But the Court has defined those rights so narrowly as to give them very little real protection. For example, it has always held that property cannot be condemned unless the taking is for a “public use” under the Fifth Amendment. Purely “private” takings are forbidden. But in *Kelo v. City of New London* (2005) and earlier cases, the Court defined “public use” to include virtually any conceivable benefit to the public, even ones that might never materialize. As a result, government can still condemn virtually any property for virtually any reason.

The effort to strengthen judicial protection for property rights was greatly hampered by the near-total opposition of the Court’s liberal justices. This strong liberal opposition ensured that property-rights claims could prevail only if the conservatives were united. In several key property rights cases, including *Kelo*, the right in question was denied meaningful protection because conservative swing voters such as Kennedy sided with the liberal bloc.

In sum, judicial recognition of a constitutional right is only the beginning of the struggle to provide effective protection for that right.

Of course, that reality is not always a bad thing. The difficulty of providing strong protection for constitutional rights makes it hard for a narrow Supreme Court majority to abuse its power.

Yet it also makes it hard for the Supreme Court to strengthen protection for constitutional rights that have long been ignored. And it leaves room for a constitutional right to suffer at the hands of other government bodies.

To paraphrase Winston Churchill, *Heller* is not the end of the battle over Second Amendment rights, or even the beginning of the end. It is the end of the beginning.

---

*Ilya Somin is an assistant professor at George Mason University School of Law in Arlington, Va.*