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Constitutional Law - Shocking Results: Upholding the Prohibition against the Civilian Possession of Electrical Weapons - Commonwealth v. Caetano, 26 N.E.3D 688 (Mass. 2015), Vacated and Remanded Sub Nom. Caetano v. Massachusetts, 136 S. Ct. 1027 (2016)

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CONSTITUTIONAL LAW—SHOCKING RESULTS: UPHOLDING THE PROHIBITION AGAINST THE CIVILIAN POSSESSION OF ELECTRICAL WEAPONS—*COMMONWEALTH V. CAETANO*, 26 N.E.3D 688 (MASS. 2015), *VACATED AND REMANDED SUB NOM. CAETANO V. MASSACHUSETTS*, 136 S. CT. 1027 (2016).

The Second Amendment of the United States Constitution provides citizens with the right to keep and bear arms, and that the right shall not be infringed upon.[1] Massachusetts has incorporated similar language under A17 of the commonwealth's Declaration of Rights, instructing that the people have the right to keep and bear arms for the common defense.[2] In *Commonwealth v. Caetano*,[3] the Supreme Judicial Court of Massachusetts ("SJC") considered whether Massachusetts General Law chapter 140, section 131J, prohibiting public possession and sale of an electrical weapon, is an infringement upon an individual's Second Amendment right to bear arms.[4] The court determined, in light of other options providing for an individual's self-defense, that the statute enacted by the Massachusetts Legislature did not violate the Second Amendment of the Constitution.[5]

On the afternoon of September 29, 2011, the Ashland Police Department was dispatched to a local supermarket to investigate a possible shoplifting incident.[6] Ashland police were informed that the store manager

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[1] *See* U.S. CONST. amend. 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.").

[2] *See* MASS. CONST. pt. 1 art. XVII ("The people have a right to keep and to bear arms for the common defense. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it.").

[3] 26 N.E.3d 688 (Mass. 2015) [hereinafter *Caetano I*].

[4] *See* MASS. GEN. LAWS ch. 140, § 131J (2004) ("No person shall possess a 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, except: (1) a federal, state or municipal law enforcement officer, or member of a special reaction team in a state prison or designated special operations or tactical team in a county correctional facility . . . ."); *Caetano I*, 26 N.E.3d at 689-90 (arguing stun guns are arms for the purposes of the Second Amendment).

[5] *See Caetano I*, 26 N.E.3d at 695 ("Barring any cause for disqualification the defendant could have applied for a license to carry a firearm. In addition, again barring any disqualification, possession of mace or pepper spray for self-defense no longer requires a license.").

[6] *See id.* at 689 (providing background information).

suspected Jaime Caetano and another individual were responsible for the shoplifting.[7] As the officer on the scene questioned both suspects, Caetano consented to the officer's request to search her purse.[8] During the course of searching Caetano's belongings, officers found an operational stun gun.[9] Caetano informed the officers that the stun gun belonged to her, but it was only for defensive purposes.[10] Police arrested Caetano, and the Commonwealth charged her with possession of a stun gun.[11]

At the trial court level, Caetano filed a pre-trial motion with the Framingham District Court requesting dismissal of the pending charge.[12] The district court denied Caetano's pre-trial motion, and a jury-waived trial was subsequently held.[13] Caetano was found guilty in the Framingham District Court for possession of a stun gun.[14] Rather than move directly to sentencing, the district court judge, with Caetano's consent, placed the case on file.[15] The case remained on file for approximately two and a half months prior to Caetano filing a written objection requesting that the court move for the imposition of sentencing.[16] Following the request, Caetano

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[7] *Id.* At this point, Caetano was sitting in a parked car within the store's parking lot with an unknown gentleman. *Id.*

[8] *Id.*

[9] *See* Substitute Brief and Record Appendix for the Defendant on Appeal from the Framingham Division of District Court Department at 4, Commonwealth v. Caetano, 26 N.E.3d 688 (Mass. 2015) (No. SJC-11718) (reporting facts of the case). The officer described the device as a "small black device, with two prongs and a trigger mechanism." *Id.* From his training and experience, the officer testified that he recognized the device to be a stun gun. *Id.* Further, the officer testified that, when he pressed the trigger mechanism, "an electronic current passed between the two prongs on the stun gun itself." *Id.*

[10] *See Caetano I*, 26 N.E.3d at 689 (describing Caetano's prior abusive relationship).

[11] *See id.* (explaining background history). *See generally*, MASS. GEN. LAWS ch. 140, § 131J (2004) (detailing penalties for violating law). The statute punishes an individual found guilty of violating the law by imposing a fine not less than $500, but not to exceed $1000. *Id.* The statute also permits the court to sentence an individual for a term not less than six months, but not more than twenty-four months. *Id.*

[12] *Caetano I*, 26 N.E.3d at 690 (arguing possession of stun gun for self-defense is protected by Second Amendment).

[13] *Id.*

[14] *Id.*

[15] *See id.* (indicating judicial discretion for placing cases on file); *see also* MASS. R. CRIM. P. 28(e) (2015) ("The court may file a case after a guilty verdict or finding without imposing a sentence if the defendant and the Commonwealth both consent."); MASS. GEN. LAWS ch. 140, § 131J (detailing penalties for violating law) ("Whoever violates this section shall be punished by a fine of not less than $500 nor more than $1,000 or by imprisonment in the house of correction for not less than 6 months nor more than 2 1/2 years, or by both such fine and imprisonment.").

[16] *See Caetano I*, 26 N.E.3d at 690 (highlighting disagreement amongst counsels). In requesting sentencing, the Commonwealth moved for the imposition of a fine; however, neither side could come to an agreement as to the amount of the fine. *Id.* Due to the disagreement, and to preserve the defendant's right to appeal, the court placed the case back on file. *Id.*

filed for further appellate review, which the SJC granted.[17]

The Second Amendment has been regarded as a fundamental right enshrined in our history since before the Nation's founding.[18] The United States Supreme Court has taken the judicial discretion to shape the scope and applicability of the Second Amendment in an interpretive manner that balances the intent of the framers, while also measuring the temperament of society.[19] In 2008, the Court's decision in *District of Columbia v. Heller* [20] significantly expanded the Second Amendment as an individual right conferred upon the people.[21] In guaranteeing the right of individuals to possess firearms for their defense, or the defense of their homes, the Court cautions that the newly conferred right is not one that is unlimited.[22] The Court does this by providing a narrow stipulation that only those weapons not considered "dangerous and unusual" and those "used by law-abiding citizens for lawful purpose" are inclusive of the Second Amendment protection.[23] In 2010, with *McDonald v. City of Chicago*,[24] the Court

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[17] *See id.* (explaining appellate jurisdiction).

[18] *See* Kyle Hatt, Note, *Gun-Shy Originalism: The Second Amendment's Original Purpose in* District of Columbia v. Heller, 44 SUFFOLK U. L. REV. 505, 506-09 (2011) (discussing history of Second Amendment pre-*Heller*).

[19] *See generally* United States v. Cruikshank, 92 U.S. 542 (1875) (defining meaning and scope of Second Amendment). In *Cruikshank*, the Court reasoned that the Second Amendment was not a right conferred upon the people, but a right that should not be infringed upon by the Congress. *Id.* at 553; *see generally* U.S. v. Miller, 307 U.S. 174, 182-83 (1939) (upholding constitutionality of National Firearms Act). In making its determination, the *Miller* Court essentially permitted Congress to regulate possession of certain types of weapons. *Id.* at 178-79. The Court reasoned that:

> In absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" . . . 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.

Id. at 178.

[20] 554 U.S. 570 (2008).

[21] *See id.* at 635 (holding Second Amendment covers individual's right to possess firearm for self-defense purposes). While the Court annulled the District of Columbia's law prohibiting individuals from possessing handguns within their residences for self-defensive purposes, the Court also mandated that the District of Columbia permit Heller to register his firearm and to have a license to possess his firearm in his residence. *Id.*

[22] *See id.* at 626 ("Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.").

[23] *See id.* at 626-27 (providing constitutional validity for certain limitations). While the Court indicates its list is not exhaustive, the Court stipulates that previous prohibitions on permitting the possession of firearms by those individuals that are mentally ill or are convicted

solidified their *Heller* decision by affirming that the Second Amendment is applicable to the individual states.[25]

Through this expansion, both the lower federal courts and state jurisdictional courts are simultaneously left with the discretion of determining the interpretation of "dangerous and unusual" until the Supreme Court decides to intervene.[26] Many jurisdictions, and their courts, have varied on the interpretation of what weapons or category of weapons constitute as "dangerous and unusual," and whether those instrumentalities either fall within or outside of the scope of the Second Amendment.[27] In addition to the Supreme Court's judicial discretion, the *Heller* court recognized that the Second Amendment was enacted, and ratified, at an early stage in the Nation's history and draws inference that perhaps the Second Amendment, like other Amendments granting individuals certain rights or privileges, may evolve with technology not envisioned by the framers.[28] In particular, this affects whether non-lethal items, like stun

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felons are constitutional. *Id.* Further, the Court recognizes the constitutional validity of laws, whether state or federal, which regulate the possession of firearms in sensitive buildings, such as government buildings or schools. *Id.* Lastly, the Court recognizes the individual states' ability to implement laws that impose conditions or qualifications on the commercial sale of firearms. *Id.*

[24] 561 U.S. 742 (2013).

[25] *See id.* at 767-70 (holding Second Amendment equally applicable to States by virtue of Fourteenth Amendment Due Process Clause).

[26] *See id.* at 790 (conceding limitations on state legislative freedom). The majority opinion agrees with Justice Breyer's dissenting opinion that going forward, the legislative abilities of the states to regulate firearms will either be constrained or limited by the *Heller* decision. *Id.*; *see* Michael C. Dorf & Erwin Chemerinsky, *Three Vital Issues: Incorporation of the Second Amendment, Federal Government Power, and Separation of Powers*, 27 TOURO L. REV. 125, 138 (2011) ("Until the Supreme Court makes this determination, it is left to the lower courts to struggle and decide which gun laws are constitutional and which are unconstitutional."); *see also*, Hatt, *supra* note 18, at 517 ("Heller suffers from an analytical incoherence caused by the meeting of judicial philosophy and political reality.").

[27] *See* People v. Liscotti, 162 Cal. Rptr. 3d 225, 227-28 (Cal. App. Dep't Super. Ct. 2013) (holding possession of "billy" not protected under Second Amendment). *But see* State v. DeCiccio, 105 A.3d 165, 178, 181 (Conn. 2004) (holding civilian possession of police baton and dirk knife within Second Amendment scope); *see also* State v. Geier, 484 N.W.2d 167, 171 (Iowa 1992) (viewing stun gun as dangerous weapons based on intent and purpose). *See generally*, Commonwealth v. Appleby, 402 N.E.2d 1051, 1057 (Mass. 1980) (affirming meaning of "dangerous weapon" dependent on "context in which it is used."); Commonwealth v. Farrell, 78 N.E.2d 697, 702 (Mass. 1948) ("A dangerous weapon, in legal definition, is any instrument or instrumentality so constructed or so used, as to likely produce death or great bodily harm.").

[28] *See Heller*, 554 U.S. at 582 (explaining scope of individual rights in modern times).

> Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communication, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends to all instruments that constitute

guns and tasers which are used for self-defensive purposes, are actually arms and can be considered for protection under the Second Amendment.[29] Additionally, non-lethal weapons are a relatively new innovation in comparison to firearms, but have remarkably changed since their inception as a tool for law enforcement officials.[30] However, even in *Heller*, the Court determined that the scope of the Second Amendment might not be

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> bearable arms, even those that were not in existence at the time of the founding.

Id. (internal citations omitted); *see* Craig S. Lerner & Nelson Lund, *Heller and Nonlethal Weapons*, 60 HASTINGS L.J. 1387, 1394 (2009) ("The emergence of new technologies involving nonlethal weapons suggests that there is a very real possibility that Heller may soon be used to produce results that undermine the purpose of the Second Amendment.").

[29] *See Heller*, 554 U.S. at 584-85 (Ginsburg, J., dissenting) ("'[T]he Constitution's Second Amendment . . . indicate[s]: "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." (quoting Muscarello v. United States, 524 U.S. 125)); *see also* A.J. Peterman, Comment, *Second Amendment Decision Rules, Non-Lethal Weapons, and Self-Defense*, 97 MARQ. L. REV. 853, 863-64 (defining electrical weapons); Eugene Volokh, *Nonlethal Self-Defense,(Almost Entirely) Nonlethal Weapons, and the Right to Keep and Bear Arms and Defend Life*, 62 STAN. L. REV. 199, 207-08, 218 (2009) (questioning classification of non-lethal devices as arms). People may be reluctant to possess or carry lethal weapons for the following reasons: (1) religious or ethical compunctions about killing; (2) emotional availability to pull the trigger on a deadly weapon; (3) concerns of erroneously killing an innocent party; or (4) fear of consequences. *See* Volokh, *supra*, at 207-08 (expounding reasons for owning non-lethal weapons); *see also* Lerner & Lund, *supra* note 28, at 1388 ("*Kyllo v. United States*, however, shows that it is not always silly to wonder whether the Constitution applies to novel devices that were unknown at the time of the framing."). *But see* Friedman v. City of Highland Park, 784 F.3d 406, 411 (7th Cir. 2015), *cert. denied,* 136 S. Ct. 447 (2015) (reasoning certain Second Amendment prohibitions do not diminish defensive options).

[30] *See* ATF Meaning of Terms, 27 C.F.R. § 478.11 (1976) (classifying Taser and stun guns as firearms). At its earliest inception, the Taser expelled a projectile by means of an explosive. *Id.* The federal government, through the ATF, opted to classify the Taser as a firearm since the expelling function of the Taser fit the definition under the National Firearms Act. *Id.*; *see* Bruce Weber, *Jack Cover, 88, Physicist Who Invented the Stun Gun, Dies*, N.Y. TIMES, Feb. 16, 2009, http://www.nytimes.com/2009/02/16/us/16cover.html?_r=1 (highlighting original intent and purpose of stun guns). Stun guns were envisioned as a non-lethal option for law enforcement officials, in response to current events in the 1960s, one being airline hijackings. *Id*; *see* TASER® VS. STUN GUNS, STUN GUN DEFENSE PRODUCTS, http://www.stun-gun-defense-products.com/buy-stun-gun/taser-versus-stun-gun.html (last visited Nov. 4, 2015) (providing descriptions of each weapon). The difference between stun guns and Tasers are the following:

> Stun guns are close proximity self-defense devices that use high-voltage electricity to stop an attacker by momentarily disabling muscle control. [Compared to] Taser devices [which] are electroshock weapons that use electrical current to disrupt muscle control, stopping an attacker dead in their tracks. Taser devices can be used both close and far range. Upon firing, Taser devices shoot two metal probe darts a distance of 15 feet to reach an attacker before he reaches you. The Taser can also be used as a direct contact stun gun, allowing for close proximity self-defense.

Taser® vs. Stun Guns, *supra*.

conferred to certain weapons, specifically in light of their growing use or implementation by either law enforcement or the military.[31]

Although forty-three states permit non-lethal electrical weapons, like Tasers and stun guns, a few remaining states, including Massachusetts, prohibit their use.[32] Even as a majority of states have accepted the idea of their citizens using electrical weapons, those citizens are not turning to electrical weapons in comparison to firearms.[33] Additionally, even as those states are permitting the use of this class of weapons, many states have taken the opportunity to list them as dangerous weapons, or require

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[31] *See Heller*, 554 U.S. at 627-28 ("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."); *see also Friedman*, 784 F.3d at 410-11 ("Some of the weapons prohibited by the ordinance are commonly used for military and police functions; they therefore bear a relation to preservation and effectiveness of state militias. But states, which are in charge of militias, should be allowed to decide when civilians can possess military-grade firearms."); Lerner & Nelson, *supra* note 28, at 1411-12 ("The presumption that civilians have a right to use weapons commonly used by the police should be rebuttable by sufficiently strong evidence that a particular device is suitable for police work but not for civilian use.").

[32] *See, e.g.*, HAW. REV. STAT. § 134-16 (2014); N.J. STAT. § 2C:39-3 (2015); MASS. GEN. LAWS ch. 140, § 131J (2014); N.Y. PENAL LAW § 265.01 (McKinney 2013); R.I. GEN. LAWS § 11-47-42 (2012); Volokh, *supra* note 29, at 211-12 (explaining stun gun ban history). *See generally* MICH. COMP. LAWS § 750.224a (2012).

[33] *See* WILLIAM J. KROUSE, CONG. RESEARCH SERV., RL32842, GUN CONTROL LEGISLATION (2012), *available at* https://fas.org/sgp/crs/misc/RL32842.pdf (detailing gun possession in United States). By 2007, 106 million handguns were available for sale or in the possession of individuals in the United States. *Id.* at 8. Additionally, between 1988-93, handguns were reportedly used 2.5 million times for defensive purposes. *Id.* at 13. According to Eugene Volokh:

> There is no well-organized National Stun Gun Association . . . who fight[s] proposed stun gun bans. Stun guns are too new and too rare for that. There is no stun gun culture . . . There is no stun gun hunting, target shooting, or collecting that makes people want to protect stun gun possession . . . .

Volokh, *supra* note 29, at 210-11; *see* Taser Int'l Inc., Form 10-K (Annual Report) (Mar. 21, 2015), http://files.shareholder.com/downloads/TASR/982338744x0x815519/5B316A98-DD91-4C8F-B6FD-B65535485F53/2014_Form_10-K.pdf [hereinafter *Taser Int'l Form 10-K*] (highlighting limited consumer acceptance). In its annual outlook, Taser highlighted that conducted electrical weapons (i.e., stun guns) have gained limited acceptance amongst consumers as the result of competition with handguns and other non-lethal weapon options. *Taser Int'l Form 10-K*, *supra*, at 13. However, according to Arming Women Against Rape & Endangerment ("AWARE"), an educational organization in Massachusetts, because a majority of states have taken the initiative to legalize stun guns, and because numerous law enforcement agencies utilize the weapon for non-lethal confrontations, there is no way to classify the device as rare or unusual. *See* Brief Amici Curiae of Arming Women Against Rape & Endangerment at 16-17, Commonwealth v. Caetano, 26 N.E.3d 688 (Mass. 2015) (objecting to unusualness factor of stun guns).

individuals to have a license in order to either carry or purchase them.[34] Most recently, as a result of the Supreme Court decisions and law enforcement's use of non-lethal weapons, the Wisconsin legislature chose to reverse its position and permit the sale and possession of stun guns.[35] Whereas recently in Michigan, the state's intermediate appellate court struck down the state's law prohibiting the possession of electrical weapons as being unconstitutional.[36] Massachusetts, however, has only amended the law once in an effort to benefit law enforcement officials.[37] Given the decisions of *Heller* and *McDonald*, the Massachusetts legislature has yet to consider expanding the opportunity to permit civilian use.[38] However, it should be noted that even as states are permitting civilian and law enforcement use of non-lethal weapons, questions remain as to the safety and futility of the weapon.[39]

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[34] *See* Peterman, *supra* note 29, at 877-87 (providing state-by-state non-lethal weapon laws); *see also State Statutes Regarding or Relating to Taser Brand Conducted Electrical Weapons*, TASER INT'L, INC., https://taser.cdn.prismic.io/taser%2F96e5e4e8-692f-4ff1-bffc-c5cb2a61edfa_cew-state-statute-chart.pdf (updated Aug.18, 2015) (detailing individual state laws classifying electrical weapons).

[35] *See* 2011 Wis. Sess. Laws 35, https://docs.legis.wisconsin.gov/2011/related/acts/35.pdf; Bruce Vielmetti, *Stun Guns Now Legal – New Law Allows Electronic Weapons, with a Permit*, MILWAUKEE J. SENTINEL, Nov. 26, 2011, http://www.jsonline.com/news/wisconsin/stun-guns-now-legal-ol36b3o-134545158.html ("Under [Wisconsin's] new law, a permit is required before buying or carrying a Taser, concealed or not, while a deadly handgun can be openly carried without a permit.").

[36] *See* People v. Yanna, 824 N.W.2d 241, 245 (Mich. Ct. App. 2012) (holding Michigan law prohibiting electrical weapons as unconstitutional). The court reasoned that since *Heller* upheld handguns for self-defensive purposes nonlethal options, such as stun guns, are less dangerous and could not be prohibited when handguns are permitted. *Id.* Additionally, 43 states also permit the use of electrical weapons, and law enforcement "routinely" uses them; the court reasoned that stun guns are neither "unusual" nor "rare" weapons. *Id.* at 245-46.

[37] *See* 2004 Mass. Acts 738 (approving emergency legislation granting certain law enforcement officials use of electronic weapons); *see generally* Donovan Slack, *Stun Gun Bill Gaining Ground – Police Shootings Focus of Attention*, BOSTON.COM, July 5, 2004, http://www.boston.com/news/local/articles/2004/07/05/stun_gun_bill_gaining_ground?pg=full. (discussing electrical weapons bill in context with police shootings). The legislation, passed under an emergency clause to give the law immediate effect, permitted law enforcement officials to use electrical weapons as a non-lethal recourse. *Id.* At the time, the city of Boston was grappling with two police involved shootings and preparing to host the Democratic National Convention. *Id.*

[38] *See* H. 2184, 189th Gen. Ct., Reg. Sess. (Mass. 2015) (amending existing statute to include county law enforcement). The bill amends current law to include an exemption for county law enforcement officials thereby permitting them to use electrical weapons in the field. *Id.*

[39] *See* Erica Goode, *Tasers Pose Risks to Heart, a Study Warns,* N.Y. TIMES, Apr. 30, 2012, http://www.nytimes.com/2012/05/01/health/research/taser-shot-to-the-chest-can-kill-a-study-warns.html?_r=0 (highlighting recent study on Taser effects); Mark Puente and Doug Donovan, *Shocking force: Police in Maryland didn't follow Taser safety recommendations in hundreds of incidents*, THE BALTIMORE SUN, Mar. 19, 2016, http://www.baltimoresun.com/news/maryland/investigations/bal-tasers-in-maryland-story.html

In *Commonwealth v. Caetano*, the SJC determined, in light of the recent Supreme Court decisions, that the Second Amendment did not confer the protection to electrical weapons, and in particular, stun guns.[40] First, the court reasoned that because the core of the *Heller* decision focused on the protection and defense of the home, the crux of the holding could not be applicable to the present situation since it concerned personal possession.[41] Second, in taking into consideration precedent on the issue of dangerous and dangerous *per se* weapons, the court opined that because stun guns are solely for the purpose of causing bodily assault or defense, then it fits as a dangerous weapon.[42] The court also reasoned that because stun guns were not in common usage during the time of enactment as compared to firearms, and in essence are considered a modern invention, then stun guns were obviously not readily adaptable for military use as compared to conventional firearms, as envisioned by the founders when drafting the Amendment, and thus are unusual.[43] Providing additional support for their decision, the SJC concluded that the legislature was rationally within its right to enact the law because it dealt with the interest of public health, safety, and welfare.[44] Notably, the SJC recognized that their decision would prohibit access to a certain class of weapon, but cautioned that without further guidance its discretion is limited.[45] On

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(providing detailed analysis regarding use of Tasers by law enforcement). In what the newspaper detailed as the first-data analysis of Taser use by Maryland law enforcement officials, the Sun raised concerns surrounding the growing implementation of the weapon by local police departments alongside the lack of coherent policies regarding their use. *Id.*

[40] *See Caetano I*, 26 N.E.3d at 692 ("Without further guidance from the Supreme Court on the scope of the Second Amendment, we do not extend the Second Amendment right articulated by *Heller* to cover stun guns.").

[41] *See id.* (differentiating conduct of *Heller* versus *Caetano I*). The court highlights the fact that Caetano was not using the stun gun to defend her home, and therefore, such conduct "falls outside" of the scope of the Second Amendment. *Id.*

[42] *See Caetano I*, 26 N.E.3d 688, 692-93 (Mass. 2015) (explaining precedent case law). In labeling stun guns as dangerous weapons or dangerous per se, stun guns are essentially placed at the discretion of the legislature or court to determine their applicability under the Second Amendment. *See, e.g.*, Commonwealth v. Farrell, 78 N.E.2d 697, 702 (Mass. 1948) ("A dangerous weapon, in legal definition, is any instrument or instrumentality so constructed or so used as to be likely to produce death or great bodily harm.") (internal citations omitted); Commonwealth v. Appleby, 402 N.E.2d 1051, 1057 (Mass. 1980) ("the meaning of 'dangerous weapon' depends . . . on the context in which it is used.").

[43] *See Caetano I*, 26 N.E.3d at 693-94 (providing justification under unusualness factor test).

[44] *Id.* at 694.

[45] *See id.* at 692 ("Without further guidance from the Supreme Court on the scope of the Second Amendment, we do not extend the Second Amendment right articulated by *Heller* to cover stun guns."). Essentially, the SJC conceded that additional challenges to the law may arise, yet it limited its approach to consider such challenges and implied that it may change its approach if the Supreme Court heard additional challenges to the Second Amendment or provided additional guidance. *Id.*; *see* Dorf, *supra* note 26, at 137 (highlighting Supreme Court decisions

March 21, 2016, the Supreme Court vacated the *Commonwealth v. Caetano* decision and remanded it back to the SJC for further consideration.[46] In reviewing the *Caetano* opinion, the Supreme Court reasoned that the SJC's interpretation of the term "in common use at the time" as being inconsistent with the how the Supreme Court interpreted the term in the *Heller* decision.[47] On two fronts, the SJC used the term to justify their rationale that because stun guns were neither in common use during the enactment of the Second Amendment nor of longstanding tradition similar to that of firearms, that stun guns were unusual weapons, and could not have constitutional protection. [48]

With the Supreme Court vacating the decision of *Caetano*, the SJC currently has the opportunity to correctly address the complex question of whether non-lethal weapons, in particular electrical weapons, should receive Second Amendment protections.[49] In undertaking a second consideration of the legal challenge, the SJC should continue to uphold the constitutional validity of the law prohibiting civilian possession of electric weapons, thereby denying the weapon Second Amendment protection.[50] As the Supreme Court highlighted, the primary concern of *Heller* was the ability of one to have defensive measures for the protection of hearth and home; the issue within *Caetano* is dissimilar because this was for her personal protection while out in public.[51] In considering Caetano's

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presents opportunity for additional challenges to Second Amendment).

[46] Commonwealth v. Caetano, 26 N.E.3d 688 (Mass. 2015), *vacated and remanded sub nom.* Caetano v. Massachusetts, 136 S. Ct. 1027 (2016) [hereinafter *Caetano II*].

[47] *See id.* at 1027 ("[T]he explanation the Massachusetts court offered for upholding the law contradicts this Court's precedent.").

[48] *See id.* (highlighting Massachusetts SJC inconsistency with applying *Heller*). *Compare Caetano I*, 26 N.E.3d at 693 ("For reasons that follow, there can be no doubt that a stun gun was not in common use at the time of enactment, and it is not the type of weapon that is eligible for Second Amendment protection."), *with* District of Columbia v. Heller, 554 U.S. 570, 624-25 (2008) ("We think that Miller's 'ordinary military equipment' language must be read in tandem with what comes after: '[O]rdinarily when called for [militia] service [able-bodied] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.'"), *and Heller*, 554 U.S. at 582 ("[T]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.").

[49] *See Caetano II*, 136 S. Ct. at 1027 (reasoning "in common use" argument provided by SJC is inconsistent with *Heller*). The Supreme Court viewed the SJC's reasoning that because stun guns are of modern invention, such weapons fall outside the scope of the Second Amendment protection, as being inconsistent with precedent case law. *Id.* The Supreme Court properly suggested that the SJC reconsider such reasoning as it contradicts *Heller*. *See id.* (remanding case for further proceedings).

[50] *See Caetano I*, 26 N.E.3d at 695 (holding Massachusetts General Law chapter 140, section 131J as constitutional).

[51] *See id.* at 692 ("The conduct at issue in this case falls outside the 'core' of the Second Amendment, insofar as the defendant was not using the stun gun to defend herself in her home,

conduct, the SJC should continue to be mindful of the circumstances that led to Caetano's initial contact with law enforcement authorities and how this affects *Heller*.[52] Although the court took into consideration Caetano's personal circumstances, her decision to rely on a weapon banned by the Commonwealth, should be no different than when an individual utilizes any other type of prohibited weapon (i.e., brass knuckles).[53] In light of the Supreme Court's per curiam decision requiring the SJC to correctly apply *Heller*, there should be added concern as to how far states may go with regulating access to certain types of weapons, while balancing the interests of an individual's right to choose.[54] While the SJC was correct in its initial decision to uphold the law, the court was incorrect when it recognized that it would deny the use of and access to a certain class of weapon for defensive purposes.[55]

In reconsidering *Caetano*, the SJC should first focus its reasoning on the *type* of weapon rather than a particular *class* of weaponry that they are choosing to prevent access to, as the Commonwealth currently permits the use of other non-lethal defensive weapons.[56] Previous case law has shown that when a governmental entity simply prohibits the use of, or

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and involves a 'dangerous and unusual weapon.'") (internal citations omitted).

[52] *See* Substitute Brief and Record Appendix for the Defendant, *supra* note 9, at 2 (highlighting law enforcement investigating shoplifting complaint); *see also Heller*, 554 U.S. at 625 ("We therefore read Miller to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes . . . .").

[53] *See Caetano I*, 26 N.E.3d at 689-90 (providing factual context regarding Caetano's personal circumstances).

[54] *See* McDonald v. City of Chicago, 561 U.S. 742, 790 (2013) (conceding limitations on state legislative freedom). The majority opinion agrees with Justice Breyer's dissenting opinion that going forward the legislative abilities of the states to regulate firearms will either be constrained or limited by the *Heller* decision. *Id.*; *see* Hatt, *supra* note 18, at 517 ("Heller suffers from an analytical incoherence caused by the meeting of judicial philosophy and political reality.").

[55] *See Caetano I*, 26 N.E.3d at 692 ("Here, we are concerned not with ensuring that designated classes of people do not gain access to firearms or weapons generally, but rather with prohibiting a class of weapons entirely.").

[56] *See id.* at 695 ("Barring any cause for disqualification the defendant could have applied for a license to carry a firearm. . . . [B]arring any disqualification, possession of mace or pepper spray for self-defense no longer requires a license."); *see also Heller*, 554 U.S. at 621 (defining *Miller*'s holding). Rather, it was that the type of weapon at issue was not eligible for Second Amendment protection:

> In the absence of any evidence tending to show that the possession or use of [a weapon] 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*.

Id. at 622.

limits access to, a type of weapon, it cannot be the exclusive reasoning for striking down a particular law when other remedies suffice under the constitution.[57] Second, in determining the applicability of the scope of the Second Amendment protection, the Supreme Court turns to whether a weapon is both "dangerous" and "unusual" and the SJC too should look to properly address this issue.[58] Case law within Massachusetts, and case law from other jurisdictions, has provided an applicable roadmap to understanding how courts may classify a weapon as dangerous or dangerous per se within the Commonwealth.[59] Therefore, when reconsidering *Caetano*, the SJC does not have to look any further than to its own guidance to correctly categorize the weapon as being dangerous.[60] Furthermore, even in light of the SJC's misapplication of the "in common use" doctrine, which was the impetus as to why the Supreme Court overturned the *Caetano* decision, the SJC was not far off in its approach to addressing the issue. [61] By parsing through the limited guidance provided in *Heller*, the SJC needs to understand that the measure of whether a weapon is unusual is to ascertain whether such weapon is currently in common use at that particular point in time in which the matter is being adjudicated.[62] If comparing electrical weapons, like stun guns or Tasers, to

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[57] *See* Friedman v. City of Highland Park, 784 F.3d 406, 411 (7th Cir. 2015) ("Unlike the District of Columbia's ban on handguns, Highland Park's ordinance leaves residents with many self-defense options.").

[58] *See Heller*, 554 U.S. at 627("[A]s we have explained, that the sorts of weapons protected were those 'in common use at the time.' We think that limitation is fairly supported by historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'");Lerner & Nelson, *supra* note 28, at 1409 ("[T]he Heller language specifically exempting 'dangerous and unusual weapons' from constitutional protection would be helpful in defending a Taser ban. Tasers are less rooted in our historical traditions than firearms, less commonly own and used today, and perhaps in some ways more horrifying than traditional, albeit more lethal firearms.").

[59] *See* Commonwealth v. Farrell, 78 N.E.2d 697, 702 (Mass. 1948) ("A dangerous weapon, in legal definition, is any instrument or instrumentality so constructed or so used as to be likely to produce death or great bodily harm.") (internal quotations omitted).

[60] *See* Commonwealth v. Appleby, 402 N.E.2d 1051, 1057 (Mass. 1980) (affirming *Farrell* by providing ". . . meaning of 'dangerous weapon' depends on the context . . . used.").

[61] *See Caetano II*, 136 S. Ct. at 1027 ("By equating 'unusual' with 'in common use at the time of the Second Amendment's enactment,' . . . the court's second explanation is . . . inconsistent with Heller . . . ."). *But see Heller*, 554 U.S. at 624-28 (". . . men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."). Although the *Heller* Court spends considerable time interpreting the *Miller* court's use of the term "in common use," the Supreme Court opted not to provide a simple answer as to what constitutes "common use." *See Heller*, 554 U.S. at 627 (failing to define "common use" other than that it "is supported by the historical tradition"). Therefore, courts are left to their own judicial interpretation until the Supreme Court provides further guidance on the terminology. *Id.*

[62] *See Heller*, 554 U.S. at 627 ("Miller said, as we have explained, that the sorts of weapons protected were those "in common use at the time." (quoting U.S. v. Miller, 307 U.S. 174, 179 (1939))).

firearms, and in particular handguns, the Supreme Court has already provided they are the most popular weapon of choice, and therefore one easily could put forward the argument that those weapons are in common usage.[63] Unlike firearms, there is limited data providing information regarding civilian ownership, but also limited data from those states that allow their law enforcement officials to use the weapon in the field.[64] In comparison to knowing the dangers of firearms, there remains an unknown factor as to the level of dangerousness and risks associated with the use of electrical weapons, which should give any court pause before deciding to upend a law that has the potential to place more of these types of weapons on the streets.[65] Even presenting an argument justifying civilian possession on the basis of law enforcement, and to a certain degree, military reliance of non-lethal electrical weapons would be flawed because every weapon employed by those entities does not automatically equate to access to civilians, and thereby would not be enough to disqualify the weapon from being categorized as dangerous and unusual.[66]

Despite the prevailing trend of other states decriminalizing civilian possession of electrical weapons, the Massachusetts Legislature too has had opportunities to provide civilians with access, but at their discretion has chosen not to.[67] Those states that have chosen to permit civilian access

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[63] *See id.* at 629 ("Whatever reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition on their use is invalid."); *see also* KROUSE, *supra* note 33 (detailing gun possession in United States).

[64] *See* Volokh, *supra* note 29, at 212 (highlighting limited statistical information on usage); *see also Taser Int'l Form 10-K*, *supra* note 33, at 13 (highlighting limited consumer acceptance). In its annual outlook, Taser highlighted that conducted electrical weapons have gained limited acceptance amongst consumers primarily due to competition with handguns and other non-lethal weapon options. *Taser Int'l Form 10-K*, *supra* note 33, at 13.

[65] *See* sources cited *supra* note 39 and accompanying text.

[66] *See* Lerner, *supra* note 28, at 1401-02 (discussing developments in non-lethal weapons); *see also Heller*, 554 U.S. at 627-28 ("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. . . . 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."); *Freidman*, 784 F.3d at 410 ("Some of the weapons prohibited by the ordinance are commonly used for military and police functions; they therefore bear a relation to preservation and effectiveness of state militias. But states, which are in charge of militias, should be allowed to decide when civilians can possess military-grade firearms."). *But see* Brief Amicus Curiae of Arming Women Against Rape & Endangerment, *supra* note 33, at 16-17 (objecting to unusualness factor of stun guns). The advocacy group highlights that because a majority of states have taken the initiative to legalize stun guns, and because numerous law enforcement agencies utilize the weapon for non-lethal confrontations, there is no way to classify the device as rare or unusual. *Id.*

[67] *See* H. 2184, 189th Gen. Court, Reg. Sess. (Mass. 2015) (enabling counting law enforcement officers to possess electrical weapons); *see also*, 2004 Mass. Acts ch. 170 (approving emergency legislation granting certain law enforcement officials use of non-lethal

have done so by enumerating various limitations on one's ability to access the weapon.[68] If the SJC were to provide judicial remedy by granting civilians the use of electric weapons for defense purposes, the court essentially would undermine the legislature's attempt to regulate the use of dangerous weapons and would welcome challenges to weapons not previously considered for constitutional protection.[69] In light of the limited guidance provided by the Supreme Court, a reasonable person may argue that because an instrument is in common ownership and meets the definition of a bearable arm, it too would constitute as a weapon deserving of Second Amendment protection.[70] At the end of the day, the SJC has to be cognizant that any hasty judgment by the Court to strike down the law because of the Supreme Court's per curiam decision resurrects the slippery slope argument as to how far and wide the Court can stretch the scope of the Second Amendment in the name of self-defense.[71] In addition to the aforementioned reasons, in reconsidering Caetano's challenge, the SJC should remain aware of the Supreme Court's specific instruction that the Second Amendment is not an unlimited privilege.[72]

Presented with the opportunity to adjudicate whether certain classes of weapons, such as stun guns, are granted Second Amendment protection, the Supreme Judicial Court in *Commonwealth v. Caetano*, made the correct decision of not extending the scope of the privilege. The Supreme Court in its precedent case law articulated how far the scope of the Second Amendment protection should extend to certain classes of

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weapons).

[68] *See* Peterman, *supra* note 29, at 877-87 (providing state-by-state non-lethal weapon laws); *see also State Statutes Regarding or Relating to Taser Brand Conducted Electrical Weapons*, *supra* note 34 (detailing individual state laws classifying electrical weapons); Vielmetti, *supra* note 35 ("Under [Wisconsin's] new law, a permit is required before buying or carrying a Taser, concealed or not, while a deadly handgun can be openly carried without a permit.").

[69] *See McDonald*, 561 U.S. at 790 (conceding limitations on state legislative freedom). The Court agreed with Justice Breyer's dissenting opinion that going forward that the legislative abilities of the states to regulate firearms either will be constrained or limited by the *Heller* decision. *Id.*; *see* Dorf, *supra* note 26, at 136 (highlighting potential legal challenges facing courts). As a result of making *Heller* applicable to the states under *McDonald*, both federal and state courts likely will see additional challenges to existing weapons laws. *See McDonald*, 561 U.S. at 790 (conceding limitations on state legislative freedom); Dorf, *supra* note 26, at 136 (highlighting potential legal challenges facing courts).

[70] *See Heller*, 554 U.S. at 584-86 (providing meaning of "bear arms").

[71] *See McDonald*, 561 U.S. at 889-90 (2010) (Stevens, J., dissenting) ("The notion that a right to 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.").

[72] *See Heller*, 554 U.S. at 626-27 (". . . was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.").

weapons, and viewed that the privilege does not guarantee citizens an unlimited right to possess any weapon for any particular reason. Despite the SJC overlooking the *Heller* Court's interpretation of *Miller*, the court correctly articulated the reasons as to why electrical weapons should not be afforded constitutional protection. By upholding Massachusetts General Law chapter 140, section 131J, the SJC, in continuing the prohibition of electrical weapons, does not foreclose on opportunities for individuals to possess other weapons, whether lethal or non-lethal, for self-defensive purposes.

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