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Second Thoughts About Stun Guns

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SECOND THOUGHTS ABOUT STUN GUNS

René Reyes*

Abstract

The Massachusetts Supreme Judicial Court (“SJC”) recently declared that the Commonwealth’s statutory ban on stun guns violates the Second Amendment to the U.S. Constitution. The SJC had previously upheld the statute against constitutional challenge in Commonwealth v. Caetano, but the reasoning behind this holding was rejected in a brief per curiam opinion by the U.S. Supreme Court in 2016. However, the guidance given by the Supreme Court in the Caetano litigation was far from unambiguous: it faulted the SJC’s reasoning without opining on the ultimate question of the ban’s constitutionality, thus leaving open the possibility that the statute could pass constitutional muster under an alternative analytic approach. This essay discusses what such an alternative approach might have looked like. Specifically, I suggest that the SJC could have upheld the statutory ban by emphasizing the relative rarity of stun guns as a preferred means of self-defense not only as a matter of founding era history, but also as a matter of contemporary reality. This sort of analysis would have allowed the SJC to distinguish stun guns from other weapons that have received constitutional protection in other cases, and would have been fully consistent with both the scope and limitations of the right to bear arms under the Supreme Court’s Second Amendment jurisprudence.

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I. Introduction

In *Ramirez v. Commonwealth*,¹ the Massachusetts Supreme Judicial Court (“SJC”) declared that the Commonwealth’s statutory ban on stun guns violates the Second Amendment to the U.S. Constitution.² The SJC had previously upheld the statute against constitutional challenge in *Commonwealth v. Caetano*,³ but the reasoning behind this holding was rejected by the U.S. Supreme Court in a brief per curiam opinion in 2016.⁴ Notably, while the Supreme Court found that the SJC’s analysis in *Caetano I* was inconsistent with constitutional principles, it did not go so far as to hold the Massachusetts stun gun ban unconstitutional; it merely vacated the *Caetano I* judgment and remanded the case for further proceedings.⁵ Nevertheless, the SJC has interpreted the Supreme Court’s guidance to mean that “the absolute prohibition in section 131J that bars *all* civilians from possessing or carrying stun guns, even in their home, is inconsistent with the Second Amendment and is therefore unconstitutional.”⁶

Yet the SJC may have been too hasty in reaching this conclusion. For the Supreme Court’s “guidance” in *Caetano II* was

1. 94 N.E.3d 809 (Mass. 2018) (striking down MASS. GEN. LAWS ch. 140, § 131J (2004) as facially invalid).

2. *Id.*

3. 26 N.E.3d 668 (Mass. 2015) (hereinafter “*Caetano I*”), *vacated*, *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016).

4. *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016) (hereinafter “*Caetano II*”).

5. *Id.*

6. *Ramirez*, 94 N.E.3d at 815.

far from unambiguous: it faulted the SJC's reasoning without opining on the ultimate question of constitutionality, thus leaving open the possibility that section 131J could pass constitutional muster under an alternative analytic approach. This essay discusses what such an alternative approach might have looked like and assesses how it might have fared. Specifically, I suggest that the SJC could have upheld section 131J by emphasizing the relative rarity of stun guns as a preferred means of self-defense not only as a matter of founding era history but also as a matter of contemporary reality. I argue that this sort of analysis would have allowed the SJC to distinguish stun guns from other weapons that have received constitutional protection in other cases,⁷ and would have been fully consistent with both the scope and limitations of the right to bear arms under the Supreme Court's recent Second Amendment jurisprudence.

II. Second Amendment Doctrine: Tensions and Ambiguities

Beginning with *United States v. Miller*⁸ in 1939, federal courts long took the view that the Second Amendment “protects the right to keep and bear arms for certain military purposes, but . . . does not curtail the Legislature’s power to regulate the nonmilitary use and ownership of weapons.”⁹ Indeed, until 2001, “every Court of Appeals to consider the question had understood *Miller* to hold that the Second Amendment does not protect the right to possess and use guns for purely private, civilian purposes.”¹⁰ But since *District of Columbia v. Heller*¹¹ in 2008, the

7. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570 (2008) (concluding that the Second Amendment creates an individual right to bear arms not connected to service in militia, and striking down D.C.’s ban on possession of handguns and requirement that other firearms be disassembled or bound by trigger lock); *McDonald v. Chicago*, 561 U.S. 742 (2010) (determining that the Second Amendment applies to the states through the Fourteenth Amendment and striking down municipal ban on private ownership of handguns).

8. 307 U.S. 174 (1939) (rejecting a Second Amendment challenge to conviction under the National Firearms Act for transporting short-barreled shotgun in interstate commerce).

9. *Heller*, 554 U.S. at 637 (Stevens, J., dissenting).

10. *Id.* at 638 n.2 (Stevens, J., dissenting).

11. 554 U.S. 570 (2008).

Supreme Court has articulated a much more expansive understanding of the right to bear arms. The Second Amendment is no longer limited to militia service or to those weapons that are useful in warfare; it is now interpreted to confer an individual right that encompasses “all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.”¹²

The Court’s per curiam opinion in *Caetano II* chided the SJC for failing to adequately account for the breadth of current Second Amendment doctrine. The SJC had reasoned that section 131J was constitutional because stun guns “were not in common use at the time of the Second Amendment’s enactment,”¹³ were unusual in the sense of being “a thoroughly modern invention,”¹⁴ and were not “readily adaptable to use in the military.”¹⁵ But the Supreme Court found that these reasons were inconsistent with *Heller*’s conclusion that the right to bear arms was not limited to military arms or to weapons in existence in the 18th century.¹⁶ Justice Alito’s concurring opinion sharpened this criticism, noting that the SJC “did not so much as mention” *Heller*’s language interpreting the Second Amendment to include arms “not in existence at the time of the founding.”¹⁷ The Court accordingly vacated the SJC’s decision, insofar as “the explanation the Massachusetts court offered for upholding the law contradicts this Court’s precedent.”¹⁸

But if the SJC’s opinion in *Caetano I* did not adequately engage with the Second Amendment’s breadth, the Supreme Court’s opinion surely did not adequately engage with the Amendment’s limitations. *Heller* itself explicitly stated that “the right secured by the Second Amendment is not unlimited,” and that “the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”¹⁹ The *Heller* majority went on to “recognize another

12. *Caetano II*, 136 S. Ct. at 1027 (quoting *Heller*, 554 U.S. at 582).

13. *Caetano I*, 26 N.E.3d at 693.

14. *Id.* at 693–94.

15. *Id.* at 694.

16. *Caetano II*, 136 S. Ct. at 1028.

17. *Id.* at 1030 (Alito, J., concurring) (quoting *Heller*, 554 U.S. at 582).

18. *Id.* at 1028.

19. *Heller*, 554 U.S. at 626.

important limitation on the right to keep and carry arms”—namely, that “the sorts of weapons protected were those ‘in common use at the time’ of the founding.”²⁰ The Court observed that this limitation was “fairly supported by the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’”²¹ This language is clearly relevant to any constitutional assessments of bans on newer weapons such as stun guns.²² This language is also clearly in tension with any suggestion that stun guns are obviously and categorically protected by the Second Amendment. Yet the Supreme Court’s decision in *Caetano II* barely mentioned these important limitations on the right to bear arms and offered no discussion of how to resolve the tensions inherent in its own Second Amendment jurisprudence. As noted above, the Court did not even clearly state that section 131J was necessarily unconstitutional—it simply rejected the SJC’s reasoning and left the doctrinal landscape in a state of ambiguity.

III. Resolving the Ambiguity: An Alternative Approach

So how was the SJC to resolve this ambiguity? One option was the approach actually taken by the court in *Ramirez*—i.e., to read the Supreme Court’s opinion in *Caetano II* to mean that an absolute ban on civilian possession of stun guns is unconstitutional.²³ But that approach is unsatisfactory for several reasons. First, it fails to adequately account for the fact that the Supreme Court did not itself strike down the stun gun ban when it was presented with the opportunity to do so.²⁴ Second, the SJC’s approach would seem to assume that many of the limits on the right to bear arms expressly recognized in *Heller*

20. *Id.* at 627.

21. *Id.* (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *148–49).

22. One might even say that “[i]t is hard to imagine language speaking more directly to the point.” *Cf. Caetano II*, 136 S. Ct. at 1030 (Alito, J., concurring).

23. *See Ramirez*, 94 N.E.3d at 815 (“But the absolute prohibition in § 131J that bars all civilians from possessing or carrying stun guns, even in their home, is inconsistent with the Second Amendment and is therefore unconstitutional.”).

24. *See Caetano II*, 136 S. Ct. at 1028 (vacating the SJC’s judgment but not striking down Massachusetts’ stun gun law).

are without practical import. No tribunal should make such an assumption in the absence of direct and unambiguous ruling to that effect from the Supreme Court—and no such ruling was reached in *Caetano II*.

A better option would have been for the SJC to avail itself of the Supreme Court's implicit invitation to offer an alternative explanation for upholding section 131J against constitutional challenge. Rather than emphasizing the fact that stun guns were not in common use at the time of the founding, an alternative explanation could have emphasized that stun guns are not in common use even today—at least not compared to the kinds of weapons that have heretofore been the subject of the Supreme Court's Second Amendment solicitousness.²⁵ For example, the majority opinion in *Heller* repeatedly emphasized the prevalence of handguns in American society.²⁶ Handguns were said to be the “class of ‘arms’ that is overwhelmingly chosen by American society” for self-defense, and are “the most preferred firearm in the nation to keep and use for protection of one’s home and family.”²⁷ The majority in *McDonald v. Chicago*²⁸ reiterated these points, noting that “the American people have considered the handgun to be the quintessential self-defense weapon.”²⁹ Statistics seem to bear out these observations: recent reports estimate that there are in excess of 110 million handguns in America.³⁰ By comparison, there may be no more than

25. See *id.* (rejecting the SJC's explanation that stun guns were not constitutionally protected “because they were not in common use at the time of the Second Amendment's enactment.”).

26. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008) (“[H]andguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.”).

27. See *id.* at 628 (internal quotation marks omitted).

28. 561 U.S. 742 (2010).

29. *Id.* at 767 (quoting *Heller*, 554 U.S. at 629).

30. See Tom McCarthy, Lois Beckett & Jessica Glenza, *America's Passion for Guns: Ownership and Violence by the Numbers*, THE GUARDIAN (Oct. 3, 2017, 2:00 PM), <https://www.theguardian.com/us-news/2017/oct/02/us-gun-control-ownership-violence-statistics> (last visited June 20, 2018) (estimating that there were some 111 million handguns in U.S. as of 2015) (on file with the Washington and Lee Law Review); see also Harry Enten, *There's a Gun for Every American. But Less Than a Third Own Guns*, CNN POLITICS (Feb. 15, 2018, 6:02 p.m.), <https://www.cnn.com/2018/02/15/politics/guns-dont-know-how-many-america/index.html> (last visited June 20, 2018) (discussing surveys about gun

approximately 200,000 stun guns owned by private citizens nationwide.³¹

If the SJC had based its reconsideration of section 131J in *Ramirez* on this contemporary disparity, it would have been grounding its discussion firmly in *Heller*'s core areas of concern while simultaneously avoiding the analytic pitfalls identified by the Supreme Court in *Caetano II*. To wit, this sort of analysis would have acknowledged that *Heller* and *McDonald* create rights to bear arms that extend beyond weapons that were in existence at the time of the founding, and which include overwhelmingly common firearms such as modern handguns. At the same time, the analysis would have been true to *Heller*'s clear statement that prohibitions on dangerous and unusual weapons are well-established in the constitutional tradition. Given that handguns outnumber stun guns in America today by a ratio of at least 550 to 1, it would be far from unreasonable to find stun guns "unusual" in a constitutionally relevant sense.

But would this alternative analysis have withstood further scrutiny by the Supreme Court? After all, the SJC did already mention the numerical disparity between stun guns and firearms in its initial opinion in *Caetano I*.³² However, the SJC's discussion on this point was extremely brief,³³ and it was offered in connection with the argument that stun guns were unusual at the time the Second Amendment was enacted. Contemporary rarity was not framed or presented as an independent basis for upholding section 131J, nor was it rejected or even addressed by the per curiam opinion of the Supreme Court. And while Justice Alito wrote separately to express the view that stun guns were sufficiently popular by today's standards to merit constitutional protection, he was joined on this point by Justice Thomas alone.³⁴ The fact that a majority of the Court declined to adopt Justice

ownership in the United States) (on file with the Washington and Lee Law Review).

31. *Caetano II*, 136 S. Ct. at 1033.

32. *See Caetano I*, 26 N.E.3d at 693 ("In her motion to dismiss the complaint against her, the defendant acknowledged that the 'number of Tasers and stun guns is dwarfed by the number of firearms.'").

33. *See Caetano II*, 136 S. Ct. at 1032 (characterizing the SJC's discussion on this point as "cursory").

34. *Id.* at 1032–33.

Alito's reasoning strongly suggests that an argument rooted in the modern scarcity of such weapons remains constitutionally viable even after *Caetano II*. The SJC should have taken the opportunity to develop such an argument in greater detail and to offer it as a basis for upholding section 131J in *Ramirez*.

IV. Conclusion

Justice Alito declared in his concurring opinion in *Caetano II* that “[a] State’s most basic responsibility is to keep its people safe.”³⁵ The state legislature of the Commonwealth of Massachusetts has sought to keep its people safe by limiting access to dangerous weapons, including stun guns. Indeed, as highlighted by the SJC in *Ramirez*, “[t]he legislature was so concerned with the risk of [stun gun] misuse that, in 1986 it initially barred *all* individuals, including law enforcement officers, from possessing electrical weapons.”³⁶ The Supreme Court’s recent Second Amendment jurisprudence has imposed significant constraints on the ability of states to pursue such safety measures. However, other courts should not interpret these constraints more broadly than controlling precedent requires, nor should courts fail to recognize that these constraints themselves are limited in scope.

To suggest that the SJC should have upheld section 131J in *Ramirez* is not to suggest that it should have been obtuse or recalcitrant in the face of clear direction from the Supreme Court. Quite to the contrary, this essay has argued that the Supreme Court’s jurisprudence has been replete with tensions and ambiguities of the Supreme Court’s own creation. It is not incumbent on the SJC or other courts to resolve these tensions by reading some of the most important limitations on the right to bear arms out of the Second Amendment altogether. In the absence of significantly clearer direction from the Supreme Court to the contrary, the SJC ought to have upheld the constitutionality of section 131J—for such a decision would have

35. *Id.* at 1033.

36. *Ramirez*, 94 N.E.3d at 817.

been fully consistent not only with Supreme Court precedent, but also with principles of democratic governance and public safety.