AMERICAN CONSTITUTIONALISM

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

The Contemporary Era—Individual Rights/Guns

**Caetano v. Massachusetts, \_\_ U.S. \_\_** (2016)

*Massachusetts police officers discovered that Jaime Caetano was carrying a stun gun when searching her for suspected shoplifting. Caetano claimed that she needed to carry the weapon for self-defense against an abusive boyfriend. She was arrested and convicted during a bench trial for violating the state ban on electronic weapons. Caetano appealed, claiming the Massachusetts ban violated her Second Amendment rights as incorporated by the due process clause of the Fourteenth Amendment. The Supreme Judicial Court of Massachusetts ruled that the Massachusetts law was constitutional. Caetano appealed to the Supreme Court of the United States.*

*The Supreme Court by a 6-2 vote remanded the case to the Supreme Judicial Court of Massachusetts. The per curiam opinion insisted that the Supreme Judicial Court erred by focusing primarily on whether stun guns were in common use when the Second Amendment was ratified and ordered the court to apply correct Second Amendment standards. Justice Alito and Thomas insistent that persons clearly had a right to bear stun guns under correct second Amendment standards. What do they believe is the correct Second Amendment standard? Why do you think the judicial majority chose to remand rather than decide the case? Do the justices agree on standards and disagree on applications or do the justices dispute standards? You might note that the Massachusetts opinion began by noting that Caetano was carrying her stun gun in a supermarket. Justices Alito and Thomas emphasize that Caetano used the stun gun to frighten an abusive boyfriend. How do these framings influence your understanding of the case? Should the framings matter?*

PER CURIAM.

The Court has held that “the 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,” *District of Columbia v. Heller* (2008), and that this “Second Amendment right is fully applicable to the States,” *McDonald v. Chicago* (2010). . . .

The [state] court offered three explanations to support its holding that the Second Amendment does not extend to stun guns. First, the court explained that stun guns are not protected because they “were not in common use at the time of the Second Amendment's enactment.” This is inconsistent with Heller 's clear statement that the Second Amendment “extends ... to ... arms ... that were not in existence at the time of the founding.”

The court next asked whether stun guns are “dangerous per se at common law and unusual,” in an attempt to apply one “important limitation on the right to keep and carry arms.”  In so doing, the court concluded that stun guns are “unusual” because they are “a thoroughly modern invention.”  By equating “unusual” with “in common use at the time of the Second Amendment's enactment,” the court's second explanation is the same as the first; it is inconsistent with *Heller* for the same reason.

Finally, the court used “a contemporary lens” and found “nothing in the record to suggest that [stun guns] are readily adaptable to use in the military.”  But Heller rejected the proposition “that only those weapons useful in warfare are protected.”

For these three reasons, the explanation the Massachusetts court offered for upholding the law contradicts this Court's precedent. . . . The judgment of the Supreme Judicial Court of Massachusetts is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I2fc9e487ef6a11e5a795ac035416da91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), with whom Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I2fc9e487ef6a11e5a795ac035416da91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) joins, concurring in the judgment.

It is settled that the Second Amendment protects an individual right to keep and bear arms that applies against both the Federal Government and the States.  That right vindicates the “basic right” of “individual self-defense.”  Caetano's encounter with her violent ex-boyfriend illustrates the connection between those fundamental rights: By arming herself, Caetano was able to protect against a physical threat that restraining orders had proved useless to prevent. And, commendably, she did so by using a weapon that posed little, if any, danger of permanently harming either herself or the father of her children.

. . . .

The state court repeatedly framed the question before it as whether a particular weapon was “ ‘in common use at the time’ of enactment of the Second Amendment. In *Heller*, we emphatically rejected such a formulation. We found the argument “that only those arms in existence in the 18th century are protected by the Second Amendment” not merely wrong, but “bordering on the frivolous.”  Instead, we held that “the 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.”  It is hard to imagine language speaking more directly to the point. Yet the Supreme Judicial Court did not so much as mention it.

. . . . While stun guns were not in existence at the end of the 18th century, the same is true for the weapons most commonly used today for self-defense, namely, revolvers and semiautomatic pistols. Revolvers were virtually unknown until well into the 19th century, and semiautomatic pistols were not invented until near the end of that century. Electronic stun guns are no more exempt from the Second Amendment's protections, simply because they were unknown to the First Congress, than electronic communications are exempt from the First Amendment, or electronic imaging devices are exempt from the Fourth Amendment.

The Supreme Judicial Court's holding that stun guns may be banned as “dangerous and unusual weapons” fares no better. As the per curiam opinion recognizes, this is a conjunctive test: A weapon may not be banned unless it is both dangerous and unusual. Because the Court rejects the lower court's conclusion that stun guns are “unusual,” it does not need to consider the lower court's conclusion that they are also “dangerous.” But make no mistake—the decision below gravely erred on both grounds.

As to “dangerous,” the court below held that a weapon is “dangerous per se” if it is “‘designed and constructed to produce death or great bodily harm’ and ‘for the purpose of bodily assault or defense.’”  That test may be appropriate for applying statutes criminalizing assault with a dangerous weapon. But it cannot be used to identify arms that fall outside the Second Amendment. First, the relative dangerousness of a weapon is irrelevant when the weapon belongs to a class of arms commonly used for lawful purposes.  Second, even in cases where dangerousness might be relevant, the Supreme Judicial Court's test sweeps far too broadly. *Heller* defined the “Arms” covered by the Second Amendment to include “‘any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another.’” Under the decision below, however, virtually every covered arm would qualify as “dangerous.”

. . . .

The court also opined that a weapon's unusualness depends on whether “it is a weapon of warfare to be used by the militia.”  . . . Heller recognized that militia members traditionally reported for duty carrying “the sorts of lawful weapons that they possessed at home,” and that the Second Amendment therefore protects such weapons as a class, regardless of any particular weapon's suitability for military use.  Indeed, *Heller* acknowledged that advancements in military technology might render many commonly owned weapons ineffective in warfare.  But such “modern developments ... cannot change our interpretation of the right.” Ibid.

In any event, the Supreme Judicial Court's assumption that stun guns are unsuited for militia or military use is untenable. [Section 131J](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST140S131J&originatingDoc=I2fc9e487ef6a11e5a795ac035416da91&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) allows law enforcement and correctional officers to carry stun guns and Tasers, presumably for such purposes as nonlethal crowd control. Subduing members of a mob is little different from “suppress[ing] Insurrections,” a traditional role of the militia. Additionally, several branches of the U.S. armed services equip troops with electrical stun weapons to “incapacitate a target without permanent injury or known side effects.”

As the foregoing makes clear, the pertinent Second Amendment inquiry is whether stun guns are commonly possessed by law-abiding citizens for lawful purposes today. The Supreme Judicial Court offered only a cursory discussion of that question, noting that the “‘number of Tasers and stun guns is dwarfed by the number of firearms.’”  This observation may be true, but it is beside the point. Otherwise, a State would be free to ban all weapons except handguns, because “handguns are the most popular weapon chosen by Americans for self-defense in the home.”

The more relevant statistic is that “[h]undreds of thousands of Tasers and stun guns have been sold to private citizens,” who it appears may lawfully possess them in 45 States. While less popular than handguns, stun guns are widely owned and accepted as a legitimate means of self-defense across the country. Massachusetts' categorical ban of such weapons therefore violates the Second Amendment.

The lower court's ill treatment of Heller cannot stand. The reasoning of the Massachusetts court poses a grave threat to the fundamental right of self-defense. The Supreme Judicial Court suggested that Caetano could have simply gotten a firearm to defend herself.  But the right to bear other weapons is “no answer” to a ban on the possession of protected arms.  Moreover, a weapon is an effective means of self-defense only if one is prepared to use it, and it is presumptuous to tell Caetano she should have been ready to shoot the father of her two young children if she wanted to protect herself. Courts should not be in the business of demanding that citizens use more force for self-defense than they are comfortable wielding.

Countless people may have reservations about using deadly force, whether for moral, religious, or emotional reasons—or simply out of fear of killing the wrong person. “Self-defense,” however, “is a basic right.”  I am not prepared to say that a State may force an individual to choose between exercising that right and following her conscience, at least where both can be accommodated by a weapon already in widespread use across the Nation.