INTRODUCTION

The Supreme Court addressed the scope of the Second Amendment in a pair of opinions, *Heller* and *McDonald*, that moved the nexus of judicial review away from antiquated notions of an arm’s reasonable relation to the militia towards a modernized conception of an arm’s relationship to the individual right of self-defense. The opinions, though steeped deeply in historical context, sought to modernize Second Amendment review, but in doing so raised new questions about the scope of protection they provide. Much attention has focused, appropriately, on the opinions’ impact on firearms. Yet the framework’s impact on nonlethal weapons has gone nearly unexplored, leaving a hodge-podge of contradictory regulations in place around the nation. Owning a stun gun is a crime in at least seven states, and in numerous municipalities, yet owning a firearm is protected within those same jurisdictions. In *Caetano v. Massachusetts* Massachusetts’s highest court took up the question of whether a stun gun is a protected arm under the Second Amendment, yet it engaged in a selective reading of precedent to avoid recognizing a broadened right to bear arms. In late March of this year the Supreme Court issued a per curiam decision, without oral argument or full briefing, remanding the case to be reconsidered. This comment contends that the Court’s opinion in *Caetano* signals that nonlethal weapons are the rare class of weapons that both liberals and conservatives alike can support.
protecting, making the subject a ripe vehicle to revisit and clarify the protections provided under the Second Amendment.

I.

BACKGROUND

At approximately 3 p.m. on September 29, 2011, police officers in Ashland, Massachusetts were dispatched to an area supermarket to investigate a shoplifting incident.¹ Once on the scene the supermarket’s manager pointed them in the direction of a group believed to be the perpetrators.² One of the accused, Jamie Caetano, was seated in a motor vehicle in the store’s parking lot.³ Following a conversation with the officers, Caetano consented to a search of her purse.⁴ After some rummaging the officers found a small, black electronic device—an operational stun gun.⁵ Despite telling the officers that she kept the stun gun on her person as protection, Caetano, a homeless victim of domestic violence, was arrested for possessing it in violation of Mass. Gen. Laws. Ch. 140, § 131J (“Electronic Weapons Ban”).⁶

A stun gun⁷ is a handheld weapon with two metal prongs and a switch.⁸ When the device’s switch is thrown an electrical current is generated that, when placed in direct contact with its target, is capable of producing temporarily incapacitating muscular tenancy.⁹ The stun gun was first developed in the 1970s and has been commercially available, including for purchase over the Internet, since the 1990s.¹⁰ Widely regarded as nonlethal, stun guns are almost never fatal, and are designed not to kill or injure.¹¹ A recent study found that 1201 uses by three police departments resulted in zero deaths, three moderate or severe medical reactions, and no long-term harm.¹²

Massachusetts passed the Electronic Weapons Ban in 1986, well before most stun guns were available for purchase by the public.¹³ The ban prohibits

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². Id.
³. Id.
⁴. Id.
⁵. Id.
⁶. Id. at 3-4.
⁷. Not be confused with a Taser, which delivers an electric shock through two barb-tipped wires that are projected up to fifteen feet.
⁹. Id.
¹⁰. Id. at 781; Craig S. Lerner & Nelson Lund, Heller and Nonlethal Weapons, 60 Hastings L.J. 1387, 1397 (2009).
¹³. MASS. GEN. LAWS ANN. ch. 140, § 131J (2004); See Peterman, supra note 11, at 894.
any person, with the exception of law enforcement and suppliers, from possessing “a portable device or weapon” producing an electrical current designed to “incapacitate temporarily or kill.” The ban authorizes law enforcement officers to “arrest without a warrant any person whom he has probable cause to believe has violated” its provisions.

Following her arrest, Caetano challenged the constitutionality of the Electronic Weapons Ban in a pretrial motion to dismiss. She relied primarily on District of Columbia v. Heller and United States v. Miller in arguing that her stun gun was an “arm” within the meaning of the Second Amendment, and that her right to possess it was protected by both the Second and Fourteenth Amendments. The motion was denied.

During a jury-waived trial Caetano testified that she possessed the gun for self-defense against her abuser. The parties stipulated that the stun gun at issue in the case was the sort of device criminalized by the Electronic Weapons Ban. The judge found Caetano guilty of possession of a stun gun, which she appealed directly to the Massachusetts Supreme Judicial Court. The SJC subsequently heard her case and issued the opinion examined in this Comment.

II. MASSACHUSETTS SUPREME JUDICIAL COURT REASONING IN CAETANO

In an eight-page opinion, the Massachusetts SJC upheld Caetano’s conviction. After briefly addressing the procedural matter of Caetano’s right to appeal, the court set the stage for its analysis by framing Heller as an interpretation of the Second Amendment “in a historical context that focused on the meaning of various words and phrases in the amendment as they probably were understood and used by Congress at the time of [its] enactment.” As such, the question presented to the court, in its view, was whether a stun gun is “the type of weapon contemplated by Congress in 1789” to be within the protection of the Second Amendment.

14. Id.
15. Id.
19. Id.
20. Id.
22. Id.
24. Id.
25. Id. at 775.
26. Id. at 777.
27. Id.
The court then moved to its discussion of the central issue before it: whether Massachusetts’ blanket prohibition of stun guns violated the Second Amendment. The court first noted that, as the Supreme Court restated in *Heller*, the right to keep and bear arms is “not unlimited.”28 It cited examples of limits long accepted by the Court—prohibitions on the possession of firearms by felons and by the mentally ill—before speaking to *Heller*’s recharacterization of the Court’s precedent in *Miller*.29 The SJC stated that in addition to preserving limitations against the possession of arms by certain classes of people, the Court in *Heller* also limited the protections of the Second Amendment to “the sorts of weapons . . . in common use at the time,” a conception supported by “the historical tradition of prohibiting carrying of dangerous and unusual weapons.”30

The court then proceeded to discuss the two-pronged arms analysis espoused in *Heller*: the dangerousness of the weapon and the unusualness of the weapon. In elucidating the dangerousness question, the court relied on a common law distinction, endorsed by the Court in *Heller* and *Miller*, “drawn between weapons that are dangerous per se and those that are dangerous as used.”31 The court found that the stun gun, based on the language of the Electronic Weapons Ban and the stipulation of the parties, fit “easily” within the dangerous per se categorization, as it was an “instrumentality to incapacitate temporarily, injure, or kill.”32

As to the unusualness question, the SJC found that “whether a weapon is ‘unusual’ and whether the weapon was ‘in common use at the time’ of enactment are interrelated” questions.33 Common usage in Second Amendment jurisprudence, the court found, is informed by asking whether the ban prohibits a “weapon of warfare to be used by the militia.”34 To address this question the court followed a literal tact, stating that a stun gun was a “thoroughly modern invention” that “clearly postdates the period relevant to our analysis” and is also “not readily adaptable to use in the military.”35 Relying on these premises as support, the SJC held that stun guns were unusual.36

Ultimately, the SJC held that “[w]ithout further guidance from the Supreme Court on the scope of the Second Amendment,”37 and “[b]ecause the stun gun that the defendant possessed is both dangerous per se at common law and unusual, but was not in common use at the time of the enactment of the Second

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28. *Id.* at 778.
29. *Id.*
30. *Id.* (internal quotation marks omitted).
31. *Id.* at 779.
32. *Id.* at 780 (internal quotation marks omitted).
33. *Id.*
34. *Id.*
35. *Id.* at 781.
36. *Id.*
37. *Id.* at 779.
Amendment,” it would not “extend the Second Amendment right articulated by *Heller* to cover stun guns.”

III. THE SUPREME COURT’S PER CURIAM RESPONSE

On March 21, 2016, the Supreme Court issued a per curiam decision in which it noted three areas in which the SJC erred in interpreting precedent to buttress its conclusion that the Second Amendment does not extend to stun guns, and remanded the case “for further proceedings not inconsistent with [its] opinion.” First, the SJC’s assertion that the Second Amendment does not protect stun guns because they were not in common use at the time of the Amendment’s enactment “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.’” Second, the Court found the SJC’s conclusion that stun guns are modern and therefore unusual was a misguided attempt to impose an additional limitation on Second Amendment rights. “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 emphasized that *Heller* rejected the proposition that to receive Second Amendment protection a weapon must have a military use, making the SJC’s reasoning to that effect improper.

IV. ANALYSIS

The SJC’s holding in *Caetano* was the wrong one. The court considered the passages it relied on from *Heller* in a vacuum, whereas the thrust of the opinion, and the Court’s Second Amendment jurisprudence, call for the opposite conclusion. The SJC seized on vestiges from *Miller* that the Court allowed to survive in *Heller*, creating a framework for analyzing the right to bear arms that is marred by a lack of clarity and guidance. The Supreme Court’s per curiam response, which succinctly undresses the SJC’s pretense, represents a shot across the bow of those jurisdictions hoping to narrow the Second Amendment by divining limitations from precedents’ lack of clarity. In this Comment I will demonstrate that despite engaging in a biased reading of precedent, the Massachusetts SJC demonstrated, and the Court all but confirmed, that *Heller* is

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38. *Id.* at 781.
39. *Id.* at 779.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
in desperate need of revision, which the Court should undertake by expanding the scope of the Second Amendment to protect nonlethal weapons.

A. Contemporary Review of the Second Amendment Right to Bear Arms

A proper understanding of the flaws in the SJC’s reading of Heller requires consideration of the context in which it was written and the doctrinal changes it sought to work on arms analysis under the Second Amendment. To that end, a contemporary review of relevant precedent must examine a line of thought beginning in 1939 with Miller, refocused in 2008 by the Court in Heller, and extended to the states in 2010 by McDonald v. City of Chicago.45

Under Miller a weapon must be reasonably related to the purposes of the Second Amendment to be considered an arm.46 That case involved a defendant who transported a sawed-off shotgun across state lines in violation of the National Firearms Act of 1934.47 The Court held that because the Second Amendment must be interpreted with an eye towards its origin as a mechanism to allow states to adequately arm their militias, the protection of the Second Amendment can only extend to those arms that have “some reasonable relationship to the preservation or efficiency of a well-regulated militia.”48 The Court concluded that because the sawed-off shotgun is not a weapon that is “part of the ordinary military equipment or that its use could contribute to the common defense,” it was not a protected arm.49

Nearly seventy years later, the Court in Heller sought to broaden the scope of arms captured in the ambit of the Second Amendment’s protection while simultaneously resisting pressure to overrule its narrower precedent. In Heller, a police officer brought suit to enjoin a handgun related ban in the District of Columbia.50 After a lengthy historical exposition the Court moved to cabin Miller by stating that it stands only for the proposition that the “Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes.”51 The Court invalidated the ban on the grounds that it violated the right to keep and bear arms for self-defense of “hearth and home” under the Second Amendment.52 After couching the right to bear arms within the individual’s right of self-defense53, as opposed to the militia-centric analysis espoused in Miller, Justice Scalia, writing for the majority, went to work putting the new Miller limitation in more favorable context.

45. 561 U.S. 742 (2010).
46. Miller, 307 U.S. at 178.
47. Id. at 175.
48. Id. at 178.
49. Id.
51. Id. at 625.
52. Id. at 635.
53. Id.
The Court first addressed the question raised by *Miller*, of whether the Second Amendment protects only those arms in existence when it was ratified in 1791. It concluded that the term arms “was applied, [at the time of enactment] as now, to weapons that were not specifically designed for military use and were not employed in a military capacity.”\(^{54}\) As if speaking directly to the *Miller* Court, Scalia responded: “We do not interpret constitutional rights that way.”\(^{55}\)

Just as the First Amendment has been extended to modern forms of communication and the Fourth Amendment to modern forms of search, “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.”\(^{56}\) Having emphatically established its intent to usher in a capacious era of Second Amendment jurisprudence, the Court lastly addressed what remains of the all-but-annihilated *Miller* test. It endorsed the vestigial “in common use at the time” language, but repurposed it to accord with a prohibition on the carrying of “dangerous and unusual weapons.”\(^{57}\)

The Court again took up the question of the right to bear arms in *McDonald*, where it held that the individual right to self-defense acknowledged in *Heller* is applicable to the states via the Fourteenth Amendment. *McDonald*, factually similar to *Heller*, involved a municipality’s handgun ban.\(^{58}\) The Court adopted the *Heller* language outlined above, but failed to answer the questions it raised about the scope of Second Amendment protection.\(^{59}\)

### B. *Heller*’s Unusual Trap and Caetano’s Predictable Sidestep

Under the current Second Amendment framework, courts are instructed to analyze a weapon’s proximity to the nexus of an individual’s right of self-defense—not its historic bona fides.\(^{60}\) Despite that shift in interpretation, and Justice Scalia’s proclamations regarding its frivolousness, the Court’s assertion that the Second Amendment protects only arms employed by “law-abiding citizens for lawful purposes” has absorbed the historical underpinnings embraced by *Miller* that *Heller* sought to reject.\(^{61}\) Analysis of whether a weapon fits into this lawfulness limitation has taken the form of asking whether it is dangerous and unusual—meaning that those weapons that are both or either fall outside the protection of the Second Amendment.\(^{62}\) Although neither category of analysis is particularly helpful, courts, including the SJC, have read unusualness to preserve the *Miller*-like examination of a weapon’s relationship

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54. *Id.* at 581.
55. *Id.* at 582.
56. *Id.* (emphasis added).
57. *Id.* at 624-25.
58. *McDonald*, 561 U.S. at 750.
59. *Id.* at 791.
60. See *id.* at 635.
61. See *id.*
to militia activities, or its common usage at the time of the Second Amendment’s enactment.63

Therefore, despite its intentions, Heller left the door ajar for a Second Amendment limiting interpretation in its treatment of unusualness. The Court’s ill-advised retention of Miller’s common usage test as an element of defining what arms may be employed by “law-abiding citizens for lawful purposes” is where courts like the SJC anchor the militia-based arguments that they employ to uphold Second Amendment restrictions. The SJC found that stun guns were unusual because the number of stun guns in America is dwarfed by the number of handguns, and the stun gun is not “readily adaptable to use in the military.”64 Both assertions are premised on flawed reasoning as a matter of fact and as a matter of policy.

Relying on ownership statistics or military applicability as a measure of a weapon’s unusualness under the law is flawed because it doesn’t consider the factors that bring about the state of an arm’s usage. The number of handguns in the United States does, predictably, dwarf the number of stun guns.65 Yet this doesn’t say anything about individuals who may desire to own a weapon and would prefer it be a nonlethal alternative for any number of reasons—practical, ethical, religious, or otherwise66 —yet are prohibited from doing so in their jurisdiction. Nor does it acknowledge the role legislatures and advocacy groups play in promoting, or suppressing, demand in a particular class of weapon. And although stun guns are employed by police forces and in some military capacities,67 the same constitutionally myopic rationale is employed. Ultimately, “Heller invites the government itself to diminish the scope of a constitutional right by preventing certain arms from being in common use by civilians.”68

Despite there being little question that the Supreme Court’s recent jurisprudence expanded the sphere of arms protected by the Second Amendment, the SJC’s opinion in Caetano employed a method of reasoning that Heller inadvertently let stand. In partially premising its decision regarding the “unusualness” of stun guns on the conclusion that it must “determine whether a stun gun is the type of weapon contemplated by Congress in 1789 as being protected by the Second Amendment,”69 the SJC brazenly subscribed to that line of reasoning that Justice Scalia explicitly referred to as “bordering on the frivolous.”70 With its per curiam order the Court has signaled its vigilance

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63. See Peterman, supra note 11, at 872-75.
64. See Commonwealth v. Caetano, 470 Mass. at 781.
65. See Peterman, supra note 11, at 855-58.
68. Lerner & Lund, supra note 10, at 1394.
70. Heller, 554 U.S. at 582. Academics have also pointed to the absurdity inherent in the idea that the Second Amendment is as rigidly constrained by history as the SJC purports, following the logic
regarding States’ efforts to use outdated reasoning to limit the scope of the Second Amendment, yet the order’s limited applicability exhibits the need for a more broad-reaching pronouncement.

V.
NONLETHAL WEAPONS AS THE PROPER VEHICLE TO SECOND AMENDMENT CLARITY

Nonlethal weapons deserve Second Amendment protection. As outlined above, and acknowledged by the Court’s recent overture, stun guns qualify for protection as an arm under *Heller*. Common-sense also calls for extending protection to weapons less-lethal than firearms. The absurdity of the state of the law in some states—that it is lawful to carry a lethal weapon, but unlawful to carry a nonlethal, and therefore less dangerous one—demands revision. 71 Caetano herself stands as a case study in why these weapons should be legal—after obtaining multiple futile restraining orders against her abuser, the father of her children, she was able to deter an additional attack by wielding her stun gun, without risk of the confrontation escalating to the point of lethal force. 72 The Court’s per curiam order in *Caetano* suggests that liberals and conservatives alike can agree that the right of self-defense central to *Heller* need not exclusively amount to the right to use lethal force.

CONCLUSION

*Caetano* represents one of what I predict will be an increasing number of Second Amendment challenges to state bans of nonlethal weapons, especially in light of the Court’s per curiam order. With the recent surge of mass shootings in the United States questions implicating the Second Amendment are now firmly fixed in the national spotlight. The debate regarding the need to limit or expand gun rights is raging louder than ever. As this case demonstrates, nonlethal weapons are a sound mechanism, both jurisprudentially and on policy, for the Court to wade back into the morass that is the Second Amendment and provide courts and practitioners some much needed clarity.

to the preposterous conclusion that the “‘Armies’ that Congress is authorized to raise [. . . ] consist only of infantry marching on foot with antique black powder muskets and of cavalry mounted on horses. And the ‘Navy’ that Congress is authorized to maintain would be a fleet of wooden sailing ships.” *See* Lerner & Lund, supra note 10, at 1387.

71. *See, e.g.*, Volokh, *supra* note 66, at 207.