The Gun-Shy Commonwealth: Self-Defense and Concealed Carry in Post-Heller Massachusetts

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THE GUN-SHY COMMONWEALTH: SELF-DEFENSE AND CONCEALED CARRY IN POST-
HELLER MASSACHUSETTS

I. INTRODUCTION

One in three Americans owns a gun, and in 2011 the percentage of adults with a gun in their home or on their property was the highest since 1993.¹ This increase in gun ownership came at the same time as all-time low support for a ban on handguns.² Preceding the public support against handgun bans, the Supreme Court ruled in District of Columbia v. Heller³ that a ban on handgun ownership by law-abiding residents violated the Second Amendment of the United States Constitution.⁴ This landmark decision established that the Second Amendment guarantees the right of individual citizens to own guns independent of service in the militia.⁵ Despite this seemingly definitive answer on the meaning of the Second Amendment, a looming question remains: does the right to bear arms extend outside of the home, encompassing the right of law-abiding citizens to carry concealed weapons for self-defense?⁶

² See Jeffrey M. Jones, Record-Low 26% in U.S. Favor Handgun Ban, GALLUP (Oct. 26, 2011), http://www.gallup.com/poll/150341/Record-Low-Favor-Handgun-Ban.aspx (“Americans have shifted to a more pro-gun view on gun laws, particularly in recent years, with record-low support for a ban on handguns, an assault rifle ban, and stricter gun laws in general.”). In addition to low support for a handgun ban, for the first time the Gallup poll found greater opposition than support for a ban on semiautomatic weapons or assault rifles. Id. The shift in attitudes towards gun control does not correlate with changed perceptions of crime, fear of crime, or reports of victimization. Id. Instead, the author suggests the trends are a reflection of the public’s acceptance of guns. Id.
⁴ See id. at 635 (holding ban on handgun possession in home violates Second Amendment); see also Jeffrey M. Jones, Public Believes Americans Have Right to Own Guns, GALLUP (Mar. 27, 2008), http://www.gallup.com/poll/105721/Public-Believes-Americans-Right-Own-Guns.aspx (explaining 73% of Americans believe Second Amendment guarantees right to own guns). Most Americans at the time Heller was decided believed the Second Amendment conferred a right to own guns. Id.
⁵ See Heller, 554 U.S. at 595 (“There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.”).
⁶ See Heller, 554 U.S. at 595 (“There seems to us no doubt, on the basis of both text and}
Massachusetts has some of the toughest gun laws in the country, giving local licensing authorities the power to determine who can obtain a concealed carry permit. Despite the Commonwealth’s restrictive conceal and carry regulations, defense attorneys are not without ammunition when defending an otherwise law-abiding client accused of violating the conceal and carry statute in Massachusetts. Using the underlying reasoning in *Heller*, coupled with the original intent of the Framers of the Second and Fourteenth Amendments, defense attorneys can argue the right to bear arms guarantees the right of citizens to protect themselves. This right to self-defense, it can be argued, logically extends outside the confines of a citizen’s home, encompassing the right to carry concealed weapons for self-defense.

Part II(A) of this Note explains the *Heller* ruling as defining an individual right to bear arms under the Second Amendment. Part II(B)

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7. See MASS. GEN. LAWS ch. 140, § 131(a) (2010) (explaining Class A license only permit authorizing holder to carry concealed firearm); see also Howard v. Chief of Police, 794 N.E.2d 604, 606-07 (Mass. App. Ct. 2003) (explaining police chief of Massachusetts town or city has right to grant license to carry).

8. See generally Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1523-24 (2009) (explaining analytical framework for analyzing Second Amendment-related statutes). Despite a history of upholding concealed weapons bans as constitutional, “historical exclusion... was contingent on the social conventions of the time—the social legitimacy of open carry, and the sense that concealed carry was the behavior of criminals—and this exclusion is no longer sustainable now that the conventions are different.” *Id.* at 1524.


10. See O’Shea, *supra* note 6, at 591 (stating Second Amendment logically extends outside of the home).

11. See infra Part II(A).
discusses the Framers’ intent while drafting the Second and Fourteenth Amendments, emphasizing the Framers’ concern about preserving the right to self-defense, as well as early attempts at gun control. Part II(C) explores the reactions and rulings on Second Amendment issues in the lower courts following Heller. Part III(A) describes the use of handguns in self-defense. Part III(B) introduces a national perspective on conceal and carry laws in the United States. Part III(C) examines Massachusetts state court decisions and statutes concerning conceal and carry in the wake of Heller. Part IV(A) examines the need for weapons outside of the home for self-defense. Part IV(B) discusses the improper construction of the language in Heller by Massachusetts courts. Part IV(C) details the methods defense attorneys can use for as applied challenges to the conceal and carry statute in Massachusetts. Finally, Part V states the conclusion. Given the importance of self-defense to the Framers, combined with the reasoning in Heller, Massachusetts conceal and carry permits should be granted to qualified, law-abiding citizens.

II. HISTORY

A. Heller: An Individual Right to Bear Arms

Prior to the Supreme Court decision in Heller, academic debate surrounding the Second Amendment centered around two opposing views. In the collective rights camp, scholars interpreted the Second Amendment to mean a right to bear arms only in connection with military service. In contrast, the individual rights camp provided the opposite

12 See infra Part II(B).
13 See infra Part II(C).
14 See infra Part III(A).
15 See infra Part III(B).
16 See infra Part III(C).
17 See infra Part IV(A).
18 See infra Part IV(B).
19 See infra Part IV(C).
20 See infra Part V.
21 See United States v. Cruikshank, 92 U.S. 542, 553 (1875) (“[The Second Amendment] means no more than that [the right to bear arms] shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government . . . .”), see also Glenn H. Reynolds & Brannon P. Denning, Heller’s Future in the Lower Courts, 102 NW. U. L. REV. 2035, 2036 (2008) (“Pre-Heller discussions of the Second Amendment noted the conflict between an individual rights model in which the Amendment confers a right to arms on individual citizens . . . . and a collective rights model in which it does not confer such a right.”).
22 See Neily, supra note 9, at 130 (describing collective rights theory of Second
interpretation and believed the Second Amendment guaranteed citizens an individual right to possess arms unconnected with military service. The Supreme Court was largely silent on the debate, with the few pre-\textit{Heller} Second Amendment cases addressing the nature of the right merely tangentially.

\textit{Amendment}; Reynolds & Denning, \textit{supra} note 21, at 2035 (stating \textit{Heller} most notable for rejection of collective rights interpretation). For nearly seventy years, the collective rights analysis of the Second Amendment was favored by academic, pundits, and the lower courts. See Reynolds & Denning, \textit{supra} note 21, at 2035; see also Neily, \textit{supra} note 9, at 131 (describing shift from collective rights to individual rights interpretation of Second Amendment in academic community).

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\textit{Pre-Heller} Second Amendment cases addressing the nature of the right merely tangentially. See Frank Espohl, \textit{The Right to Carry Concealed Weapons for Self-Defense}, 22 S. Ill. U. L.J. 151, 152-56 (1997) (describing individual rights interpretation of Second Amendment). One of the sources Espohl and other scholars use to support the individual rights interpretation is Patrick Henry, one of the Founding Fathers, who described the American militia as “our ultimate safety,” stating, “the great object is that every man be armed . . . every man who is able may have a gun.” \textit{Id. at 158 (quoting DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA . . . TAKEN IN SHORTHAND BY DAVID ROBERTSON OF PETERSBURG 202-05 (Richmond 2d ed. 1805)). Additionally, Tench Coxe, a prominent Federalist, wrote that the Second Amendment confirmed the people’s right to keep and bear privately owned arms. Id. at 158-59; \textit{STEPHEN P. HALBROOK, FIREARMS LAW DESKBOOK} § 1:2 (2012), available at Westlaw (describing views of Federalists). The Second Amendment was seen as embodying Samuel Adams’s draft “that the said constitution be never construed to authorize Congress . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms.” \textit{HALBROOK, supra}, at § 1:2 (quoting INDEP. GAZETTEER (Philadelphia), Sept. 9, 1789, at 2, col. 2). Richard Henry Lee, an Antifederalist who strongly advocated the Bill of Rights, provides further support for the interpretation of the Second Amendment as preserving an individual right. See \textit{id. at § 1:2 (quoting RICHARD HENRY LEE, ADDITIONAL LETTERS FROM THE FEDERALIST FARMER 170 (1788)). Lee stated that “to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them.” \textit{Id.}

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23 See Wendy Kaminer, \textit{Second Thoughts on the Second Amendment}, \textit{The Atlantic}, Mar. 1996, available at http://www.theatlantic.com/magazine/archive/1996/03/second-thoughts-on-the-second-amendment/6747/ (explaining \textit{pre-Heller} cases largely explored issues of federal power, not nature of Second Amendment right). \textit{Pre-Heller} Supreme Court cases that considered the Second Amendment include \textit{United States v. Cruikshank}, 92 U.S. 542 (1875), \textit{Presser v. Illinois}, 116 U.S. 252 (1886), and \textit{United States v. Miller}, 307 U.S. 174 (1939). In \textit{Cruikshank}, the first time the Supreme Court considered a Second Amendment claim, the Court was primarily concerned with the limits of federal power. 92 U.S. at 553. In \textit{Presser}, the Court reinforced the \textit{Cruikshank} view of the Second Amendment, affirming that the Second Amendment applied only to the federal government and not to a state law prohibiting private citizens from organizing their own military units. 116 U.S. at 267; see also Adam Winkler, \textit{The Secret History of Guns}, \textit{The Atlantic}, Sept. 2011, available at www.theatlantic.com/magazine/archive/2011/09/the-secret-history-of-guns/8608/ (stating \textit{Presser} reflected view that Bill of Rights applied to federal government and not states). Prior to \textit{Heller}, \textit{Miller} was called the “most significant Supreme Court decision on the Second Amendment.” Kaminer, \textit{supra}. \textit{Miller} was an appeal of defendants convicted under federal law for transporting an unregistered shotgun of less than regulation length across state lines. \textit{Miller}, 307 U.S. at 175. In striking down the defendant’s Second Amendment claim, the Court noted there was no evidence presented that a shotgun was in fact a militia weapon. \textit{Id. at 179}. Rather than providing easy-to-follow precedent, the \textit{Miller} decision was a “less-than-definitive holding now cited approvingly by both sides in the gun-control debate.”
The Supreme Court changed course when deciding *District of Columbia v. Heller*, coming out on the individual rights side of the Second Amendment debate. The appellant in *Heller*, a Washington, D.C. special policeman, challenged the District of Columbia’s prohibition on registering handguns and carrying unregistered firearms, restrictions that amounted to a general prohibition on the possession of handguns. The majority opinion, penned by Justice Scalia, struck down the District of Columbia law as an unconstitutional infringement on Second Amendment rights. Although definitively stating the Second Amendment right to bear arms was an individual right independent of service in the militia, the majority *Heller* opinion left many unanswered questions for lower courts, one of the largest being the scope of the right to carry arms for self-defense. Rather than a landslide victory for guns-rights advocates, *Heller* emphasized that the right to keep and bear arms, while an individual right, was not a “right to keep and carry any weapon whatsoever in any manner whatsoever and


25 554 U.S. 570, 592 (2008) (“[W]e find that [the Second Amendment] guarantee[s] the individual right to possess and carry weapons in case of confrontation.”); see also Patrick J. Charles, “Arms for Their Defence”?: An Historical, Legal, and Textual Analysis of the English Right to Have Arms and Whether the Second Amendment Should Be Incorporated In McDonald v. City of Chicago, 57 CLEV. ST. L. REV. 351, 353 (2009) (explaining *Heller* Court interpreted Second Amendment as individual right to arms); Michael C. Dorf, *Does Heller Protect a Right to Carry Guns Outside the Home?*, 59 SYRACUSE L. REV. 225, 227-28 (2008) (explaining individual rights interpretation of *Heller* Court). The language in the Second Amendment is based on the English “have arms” provision of the English Bill of Rights in 1689. See Kranz, *supra* note 9, at 641-42 (explaining *Heller* reasoning). The Court interpreted the English “have arms” provision as a right to personal armed self-defense, reasoning the Founders understood this to be the Second Amendment’s “central component.” See Charles, *supra*, at 353 (explaining Supreme Court view of English right). However, some scholars dispute the Court’s interpretation of the “have arms” provision in the English Bill of Rights and Blackstone’s Commentaries. *Id.* at 353, 355-83.

26 See *Heller*, 554 U.S. at 574-75 (“The District of Columbia generally prohibits the possession of handguns. It is a crime to carry an unregistered firearm, and the registration of handguns is prohibited.”).

27 *Id.* at 635 (“[W]e hold that the District’s ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense. Assuming that *Heller* is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home.”)

28 See *id.* at 589 (stating “to bear arms” is not limited to military use); see also Denning & Reynolds, *supra* note 24, at 273 (describing remaining questions of applicability of *Heller* to state and local action). The three main questions largely left unanswered by *Heller* were: (1) whether the ruling applied only to the federal government; (2) the standard of review to apply to gun law challenges; and (3) the fate of other gun laws and the scope of the *Heller* ruling. Alan B. Morrison, SCOTUSBLOG, *Heller Discussion Board: “Clarity is in the Eye of the Beholder”* (June 26, 2008 at 12:48pm), http://www.scotusblog.com/2008/06/heller-discussion-board-clarity-is-in-the-eye-of-the-beholder.
for whatever purpose.”29 Instead of clearly defining what was constitutionally permissible in gun control legislation, *Heller* deliberately set a controlled pace of defining Second Amendment rights.30

Justice Scalia’s majority opinion in *Heller* created further problems by stating in dicta:

[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.31

Lower courts picked up on what many characterize as “limiting language” in the *Heller* opinion, with most courts treating Justice Scalia’s enumerated firearms restrictions as constitutional limitations of Second Amendment rights.32 Despite this trend in the lower courts, some scholars have argued that singling out “sensitive places” means Justice Scalia likely did not intend the *Heller* decision to effectively ban all firearms possession in every place but the home.33

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29 *Heller,* 554 U.S. at 626.
32 See *Lockhart,* supra note 30, at § 2 (analyzing post-*Heller* lower court decisions).
33 See *Dorf,* supra note 25, at 228 (“More likely, Justice Scalia meant to leave open the possibility that additional public places—such as airports—could be deemed sensitive.”). Courts interpreted *Heller* to mean the Justices intended future litigation to define the limits of the right, while stating limitations and prohibitions on firearms currently in effect will assist in defining the Second Amendment parameters. *See Dawson,* 934 N.E.2d at 607 (holding current limitations on firearms constitutionally valid). However, no reported cases have held that *Heller* (or the later decision in *McDonald v. City of Chicago,* 130 S. Ct. 3020 (2010)) precludes states from prohibiting the possession of handguns outside of the home. *See People v. Aguilar,* 944 N.E.2d 816, 828 (Ill. App. Ct. 2011) (holding *Heller* did not prevent states from restricting handgun carrying outside home).
Gun rights activists seemingly scored another victory when the Court extended the Second Amendment to the states in *McDonald v. City of Chicago*[^1]. The appellants in *McDonald* challenged Chicago-area gun laws that prohibited the registration of most handguns, "effectively banning handgun possession by almost all private citizens" who resided in Chicago and the Chicago suburb of Oak Park.[^2] Justice Alito’s plurality opinion in *McDonald* stated that the Second Amendment extended to the states through the Due Process Clause of the Fourteenth Amendment, emphasizing that *Heller* guaranteed a right to self-defense under the Second Amendment.[^3] However, like in *Heller*, the Court failed to define the scope of the Second Amendment right.[^4] Instead, they reinforced the *Heller* dicta that the individual right to bear arms is not without limits.[^5]


[^2]: *McDonald*, 130 S. Ct. at 3026. A Chicago city ordinance stated that "‘[n]o person shall . . . possess . . . any firearm unless such person is the holder of a valid registration certificate for such firearm.” *Id.* (quoting CHICAGO, ILL., MUN. CODE § 8-20-040(a) (2009)). The same Chicago city code then prohibited the registration of most handguns. *Id.* The Village of Oak Park, located adjacent to Chicago, made it “‘unlawful for any person to possess . . . any firearm,” which included pistols, revolvers, and handguns. *Id.* (quoting OAK PARK, ILL., MUN. CODE §§ 27-2-1 (2007), 27-1-1 (2009)).

[^3]: *McDonald*, 130 S. Ct. at 3036-37, 3047 (stating *Heller* declared self-defense a basic right essential to American ordered scheme of liberty); see also Denning & Reynolds, *supra* note 24, at 279-83 (describing process of selective incorporation of Bill of Rights); Liptak & Fitzsimmons, *supra* note 34 (explaining process to incorporate Second Amendment through Due Process Clause of Fifth Amendment). Using the language of defining a fundamental right as formulated in Washington v. Glucksberg, 521 U.S. 702, 721 (1997), the Court found that the right to self-defense was "deeply rooted in this Nation’s history and tradition." *McDonald*, 130 S. Ct. at 3036. After an extensive discussion of the Fourteenth Amendment and the importance of self-defense, the Court held that Second Amendment rights were fundamental to the American scheme of ordered liberty and therefore were protected from state infringement under the Fourteenth Amendment. *Id.* at 3036-32.

[^4]: See Denning & Reynolds, *supra* note 24, at 295-300 (stating that post-*Heller* lower courts noted lack of clarity on standard of review and scope); Liptak & Fitzsimmons, *supra* note 34 ("As in the *Heller* decision, the justices left for another day just what kinds of gun control laws can be reconciled with Second Amendment protection. The majority said little more than that there is a right to keep handguns in the home for self-defense.").

[^5]: See People v. Dawson, 934 N.E.2d 598, 607 (Ill. App. Ct. 2010) ("All of the Justices who wrote in *McDonald* make clear that there is a bevy of empirical evidence that must be considered in future litigation concerning this right and that many of the present day limitations and prohibitions on firearms will not only stand, but assist in defining the parameters of the second amendment right."). abrogated by People v. Williams, 964 N.E.2d 557 (Ill. App. Ct. 2011);
B. Self-Defense: Intent of the Framers and Early Gun Control

Justice Scalia based the majority opinion in *Heller* on the original intent of the Framers of the Second Amendment, focusing largely on a “normal meaning” version of originalism.\(^3\) Using this framework, Justice Scalia examined the meaning of the Second Amendment according to what would have been known to ordinary citizens in the founding generation.\(^4\) The Antifederalists crafted the Second Amendment in response to fears of an overly powerful federal government, specifically addressing the fears of a standing army.\(^5\) The Framers of the Second Amendment were aware of the problems of prior monarchs who restricted possession of firearms to Protestants who owned large tracts of land, preventing many from defending themselves and their property.\(^6\) To combat these fears, the Framers sought to allow individual citizens the right to bear arms if the federal government used the army to usurp the rights of citizens or states, which culminated in the drafting of the Second Amendment.\(^7\)

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Denning & Reynolds, *supra* note 24, at 297 (“The Court’s continued reticence offers lower courts a way to ‘narrow [the right to keep and bear arms] or even avoid it altogether,’ thus ‘impair[ing] the robust implementation . . . of the right.’” (quoting Brannon P. Denning, The New Doctrinalism in Constitutional Scholarship and District of Columbia v. Heller, 75 TENN. L. REV. 789, 799 (2008))); see also District of Columbia v. Heller, 554 U.S. 570, 626 (“[T]he right secured by the Second Amendment is not unlimited.”).\(^8\)

\(^3\) See *Heller*, 554 U.S. at 581-87 (explaining meaning of “keep and bear arms” as understood at time of Second Amendment drafting); id. at 592-98 (understanding right to bear arms as pre-existing right); Dorf, *supra* note 25, at 227 (“[I]t would be odd to attribute to the founding generation the hidden intent to protect a right to carry weapons from place to place but only within the confines of their houses . . . .”).

\(^4\) See *Heller*, 554 U.S. at 581-88 (describing common meaning of “keep arms” and “bear arms” at time of founding); see also Dorf, *supra* note 25, at 227 (explaining Justice Scalia’s analysis of original meaning in founding era). Under this analysis, “keep arms” meant to have weapons and “bear arms” meant to carry. See Dorf, *supra* note 25, at 227.

\(^5\) See Kaminer, *supra* note 24 (“[F]ear and loathing of standing armies did underlie the Second Amendment, which was at least partly intended to ensure that states would be able to call up citizens in defense against a tyrannical central government.”).

\(^6\) See Kranz, *supra* note 9, at 641-42 (reiterating purposes underlying Second Amendment).

Some scholars dispute this interpretation of self-defense as used by the British, stating it referred more to a collective defense against oppressive regimes than an individual right. See Patrick J. Charles, The Right of Self-Preservation and Resistance: A True Legal and Historical Understanding of the Anglo-American Right to Arms, 2010 CARDOZO L. REV. DE NOVO 18, 27 (2010) (“[T]he doctrine of ‘self-preservation’ referred to the philosophical principle that Parliament may forcibly resist with arms to restore the Constitution should the king violate the laws, liberties, religion, and estates of the realm.”); Neily, *supra* note 9, at 145 (describing true nature of “self-defense” provision in English Bill of Rights). These scholars argue the Founders understood the concept of self-defense as akin to “resistance.” See Charles, *supra*, at 33-34.

\(^7\) See id. at 32-36 (describing motivations behind Second Amendment). The Second Amendment, like the majority of the Bill of Rights, was a response to concerns about federal abuses of power. Id. at 36. The Founding Fathers also noted that the potential force of a citizen
Exemplifying this wariness of a strong central government, the language of the Second Amendment largely conforms to that of the English Bill of Rights, which included a condemnation of previous kings for disarming the people.\textsuperscript{44}

Even in the Founding Era, gun rights were accompanied by gun control laws.\textsuperscript{45} The founding generation denied gun ownership to slaves, free blacks, and law-abiding white men who refused to swear loyalty to the Revolution.\textsuperscript{46} Additionally, firearms legislation often involved high taxes and bans on inexpensive guns in southern states to prevent poor black and white citizens from purchasing them.\textsuperscript{47}

The Fourteenth Amendment functioned as its own kind of gun control, expanding the class of people who could own firearms in the wake of the Black Codes common in the defeated post-Civil War South.\textsuperscript{48} The militia was a guarantee against a federal military coup. \textit{Id.} at 37-38. Writers and politicians of the Founding Era described the militia as the ultimate safety against a tyrannical government. See Espohl, supra note 23, at 158-59 (explaining views of Patrick Henry and Tench Coxe, Federalist thinkers); HALBROOK, supra note 23, at § 1:2 (citing James Madison, Noah Webster, Richard Henry Lee to explain Founding Era views).

\textsuperscript{44} See Heller, 554 U.S. at 593 (analyzing English Bill of Rights and language in Second Amendment). The English Bill of Rights states: “[T]he subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law.” \textit{Id.}; see also Charles, supra note 42, at 25-26 (describing English origins of language in Second Amendment). In 1670, King Charles II restricted ownership of guns and longbows to owners of large tracts of land, which “effectively disarmed the middle class and poor.” Kranz, supra note 9, at 641-42. William and Mary restored the right to keep and bear arms for all Protestants when they ascended to power in 1688. \textit{Id.} Given that the Founding Fathers viewed the American Revolution as a reaffirmation of the Glorious Revolution, the English Bill of Rights’ “have arms” provision was likely the inspiration for the Second Amendment. See Charles, supra note 42 at 53. But see \textit{id.} at 53-59 (arguing Court incorrectly interpreted English “have arms” provision).

\textsuperscript{45} See Kranz, supra note 9, at 642 (stating American colonists passed firearms legislation in 1600s-1700s). But see Denning & Reynolds, supra note 24, at 274 (describing gun control laws as product of twentieth century, with exception of Jim Crow enactments).

\textsuperscript{46} See Kranz, supra note 9, at 642 (describing gun control laws passed by colonists). Colonial gun control laws “followed the English tradition of having those who made public policy by deciding who was ‘dangerous’ and then forbidding gun ownership by that class of people.” \textit{Id.}


\textsuperscript{48} See U.S. CONST. amend. XIV, § 1. The full text of the Fourteenth Amendment states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of
Black Codes sought to reestablish white supremacy by disallowing gun ownership by freed slaves. Throughout the South, parties forcibly took firearms from newly freed slaves in a systematic effort to disarm this population. In proposing the Fourteenth Amendment, Senator Jacob Howard of Michigan, a principal sponsor of the Amendment in the Senate, reminded his colleagues that the Amendment guaranteed, among other things, "the right to keep and bear arms." At the time the Fourteenth Amendment was proposed, the use of firearms for self-defense was the only way black citizens in the South could protect themselves from lynchings and mob violence. The legislators behind the Fourteenth Amendment clearly believed the right of individuals to use guns for self-defense was an essential element of citizenship. While Americans did not develop widespread personal use of guns until after the Civil War, when advances in manufacturing made them more available, the founding generation established the right to own and use weapons as a "hallmark of citizenship."

citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.; see also Winkler, supra note 24 (explaining gun rights origins of Fourteenth Amendment).

49 See Winkler, supra note 24 (describing history of Fourteenth Amendment). A common provision of the Black Codes was to bar blacks from possessing firearms. Id. In Mississippi in January 1866 groups seized every gun and pistol found in the hands of freedmen in parts of the state. Id.; see also Denning & Reynolds, supra note 24, at 280-81 (describing right to bear arms when Fourteenth Amendment ratified). By the time legislators ratified the Fourteenth Amendment, state constitutions largely protected the right to keep and bear arms, with many explicitly protecting it as an individual right to self-defense. See Denning & Reynolds, supra note 24, at 281.

50 See Denning & Reynolds, supra note 24, at 285-86 (describing post-Civil War disarming in southern states).

51 See Winkler, supra note 24 (describing history of Fourteenth Amendment). Professor Akhil Reed Amar of Yale Law School affirmed this interpretation, stating, "Between 1775 and 1866 the poster boy of arms morphed from the Concord minuteman to the Carolina freedman." Id.

52 See Denning & Reynolds, supra note 24, at 285-86 (describing self-defense rationale of Fourteenth Amendment). Eli Cooper, a target of mob violence in the South following the end of the Civil War, explained: "[T]he Negro has been run over for fifty years, but it must stop now, and pistols and shotguns are the only weapons to stop a mob." McDonald v. City of Chicago, 130 S. Ct. 3020, 3088 (2010) (Thomas, J., concurring in part and concurring in judgment).

53 See Winkler, supra note 24 (stating crafters of Fourteenth Amendment considered gun ownership essential to citizenship). Not only was the ability to own a gun essential to citizenship, but the ability to possess guns for the purpose of self-defense was essential during a time when Southern freedmen were routinely disarmed and deprived of the right to possess arms. Id.; see also Volokh, supra note 8, at 1522-23 (carrying arms one of most essential privileges of freedmen).

54 See MICHAEL A. BELLESILES, ARMING AMERICA: THE ORIGINS OF A NATIONAL GUN
C. Post-Heller in the Lower Courts: A Need for Clarity

Justice Scalia stressed in the Heller majority opinion that the individual right to bear arms under the Second Amendment was not the right to carry any weapon in any manner.\(^\text{55}\) Confusion regarding the scope of the Second Amendment and whether this right extends outside of the home is reflected in lower court decisions.\(^\text{56}\) In the hundreds of legal challenges that followed Heller, lower courts have been reluctant to expand the Supreme Court’s holding.\(^\text{57}\) Lower courts point to the dicta in Justice Scalia’s Heller opinion, emphasizing that nothing in the opinion should “be taken to cast doubt on longstanding prohibitions on the possession of firearms” by certain classes of citizens, including felons and the mentally ill, or laws forbidding carrying firearms in places like schools or government buildings.\(^\text{58}\)

Judge Wilkinson, writing for the Fourth Circuit Court of Appeals in United States v. Maciondaro,\(^\text{59}\) stated:

[If the right to bear arms is to apply] outside the home

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\(^\text{56}\) See Morrison, supra note 28 (explaining confusion surrounding Heller decision).


\(^\text{58}\) Heller, 554 U.S. at 626-27; see also Winkler, supra note 24 (describing lower courts’ reliance on Justice Scalia’s paragraph). Contrary to the lower courts’ blind acceptance of Justice Scalia’s dicta, the Founders “had no laws resembling [Justice] Scalia’s list of Second Amendment exceptions.” Winkler, supra note 24. During the Founding Era, there were no laws banning guns in sensitive places, prohibiting the mentally ill from possessing guns, or requiring gun dealers to be licensed. Id. Instead, these limitations are first appeared in the twentieth century. Id.

\(^\text{59}\) 638 F.3d 458 (4th Cir. 2011).
environment, we think it prudent to await direction from the [Supreme] Court itself:

... We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights.60

Absent clear guidance from the Supreme Court, lower courts are unwilling to extend the right to bear arms for personal defense outside of the home for fear of extending or restricting national gun policy.61

III. FACTS: CONCEAL AND CARRY

A. Handguns and Self-Defense

Handguns are quintessential self-defense weapons.62 Research indicates that victims who resist with a gun or other weapon are less likely...
than other victims to lose property in burglaries or robberies. In robberies and assaults, victims who resist by using guns or other weapons are less likely to be injured than those who do not resist or those who resist without weapons.

Proponents of gun control quote statistics noting the widespread use of handguns to perpetrate violent crimes. However, studies also show that reducing gun availability among the noncriminal majority could reduce defensive gun use that would otherwise save lives, prevent injury, and help victims retain their property. It should also be noted that self-defense using a firearm rarely results in the death of the criminal assailant, and feared scenes of wild gunfights in the streets by allowing firearms for self-defense have not materialized. Additionally, while more Americans today own personal firearms than in past decades, violent crime rates in 2010 were at their lowest levels in years, and from 2001-2010, the overall violent victimization rate decreased forty percent.

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63 Kleck & Gertz, supra note 62, at 151.
64 See id. at 151-52. Potential victims are less likely to be injured if they defend themselves using a gun or other weapon; this is true whether the research relied on victim surveys or on police records. Id. at 152. Those who use guns in self-defense are not “vigilantes intent on punishing criminals,” and are no more likely to support the death penalty nor endorse a view that courts do not deal harshly enough with criminals than those who did not use guns in self-defense. Id. at 178.
65 See Gun Violence Statistics, L. CENTER TO PREVENT GUN VIOLENCE, http://smartgunlaws.org/category/gun-studies-statistics/gun-violence-statistics/ (last visited Jan. 27, 2013) (finding firearms third-leading cause of injury-related deaths nationwide in 2009). The Law Center to Prevent Gun Violence (formerly known as the Legal Community Against Violence), a gun control organization, states that for the years 1993-2001, handguns were seven times more likely to be used to commit violent crimes than other firearms. Id.
66 See Kleck & Gertz, supra note 62, at 180 (stating weapons for self-defense effective in thwarting criminal attempts).
67 See id. at 181 (“Saving a life through DGU [Defensive Gun Use] would be a benefit, but this almost never involves killing the criminal . . . .”)
68 See Press Release, Bureau of Justice Statistics, Rate of Violent Victimization Declined 13 Percent in 2010 (Sept. 15, 2011) (on file with author), available at http://bjs.ojp.usdoj.gov/content/pub/press/cv10pr.cfm (stating violent crime trends from 1993 to 2011). Violent Crime is defined by the Department of Justice as rape, sexual assault, robbery, aggravated assault, or simple assault. Id. This highlights the larger trend of decreasing criminal victimization in the United States, with violent and property victimization rates at their lowest in 2010 since the early 1990s. Id. Second Amendment Foundation Vice President, Alan Gottlieb, stated that “[m]ore Americans today own firearms than they did a generation ago, yet violent crime rates are at their lowest levels in many years.” Press Release, Second Amendment Foundation, SAF Says New Gallup Data Shows Americans Value Their Gun Rights (Oct. 26, 2011) (on file with author), available at http://www.saf.org/viewpr-new.asp?id=379.
Historically statutes banning concealed weapons have been held constitutional; however, this exclusion was contingent on the social conventions of the time, which legitimized open carry and condemned concealed carry of firearms as "the behavior of criminals." Today, only Illinois and Washington, D.C. do not allow concealed carry permits for firearms. There are four categories of concealed carry permits for firearms: a complete prohibition on concealed carry permits, "may issue" permits, "shall issue" permits, and no permit requirements. States with "may issue" laws allow concealed carry of firearms with a permit, and the issuing agency has discretion to grant or deny a permit. In 2011, ten states were "may issue" concealed carry jurisdictions. States with "shall issue" laws allow concealed carry with a permit, and the issuing agency, with no discretion, must grant a permit to anyone who meets the minimum qualifications. In 2011, thirty-five states had "shall issue" concealed carry laws. Also in 2011, four states did not require permits to carry firearms.

69 See Volokh, supra note 8, at 1524 (stating belief that concealed carry was illegitimate social behavior); see also Espohl, supra note 23, at 174 ("The right to carry weapons for self-defense implies the right to carry them in the manner most consistent with defensive utility—concealed."). Given the plain language of the Second Amendment, "it would be odd to attribute to the founding generation the hidden intent to protect a right to carry weapons from place to place but only within the confines of their houses . . . " Dorf, supra note 25, at 227.

70 See Guns in Public Places: The Increasing Threat of Hidden Guns in America, LEGAL COMMUNITY AGAINST VIOLENCE 2-3 (July 5, 2011), http://smartgunlaws.org/wp-content/uploads/2011/07/Guns_In_Public_Places.pdf [hereinafter Guns in Public Places] (stating statistics for concealed carry by state). Illinois gun laws may be changing after a recent decision from the Seventh Circuit Court of Appeals ruled the state’s restrictive firearms regulations were unconstitutional infringements on the Second Amendment. Moore v. Madigan, Nos. 12-1788, 12-1269, 2012 WL 6156062, at 49 (7th Cir. Dec. 11, 2012). The Seventh Circuit stayed the mandate for 180 days "to allow the Illinois legislature to craft a new gun law that will impose reasonable limitations, consistent with the public safety and the Second Amendment . . . on the carrying of guns in public." Id.

71 See Guns in Public Places, supra note 70, at 2-3 (describing characteristics of concealed carry laws); see also Kranz, supra note 9, at 649-50 (describing requirements for each type of concealed carry jurisdiction).

72 See Guns in Public Places, supra note 70, at 2-3 (describing "may issue" characteristics).

73 See id. at 2 (listing "may issue" jurisdictions). In 2011, the states that were "may issue" concealed carry jurisdictions included Alabama, California, Connecticut, Delaware, Hawaii, Maryland, Massachusetts, New Jersey, New York, and Rhode Island. Id.

74 See id. (articulating "shall issue" jurisdiction requirements); Kranz, supra note 9, at 649-50 (describing "shall issue" jurisdictions as minimizing discretion given to local officials to issue permits).

75 See Guns in Public Places, supra note 70, at 2 (listing "shall issue" jurisdictions). In 2011, states that were "shall issue" jurisdictions for concealed carry permits included: Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Montana, Nebraska, North Dakota, Oklahoma, Oregon, Nevada, New
concealed weapons. In addition, forty-three of the fifty state constitutions clearly protect an individual’s right to own guns independent of military service.

Today, state expansion of gun rights is the norm, and the shift towards liberalization of conceal and carry laws began when Florida passed “shall issue” legislation in 1987. Prior to this time, only eight states had “shall-issue” laws that required courts or local officials to issue conceal and carry permits. Rather than ushering in an era of widespread gun violence, data indicated concealed carry permit holders in Florida were far less likely to commit gun crimes than the general population. As one editorial describes, “[t]here is no safety benefit from prohibiting public carrying of guns that could possibly outweigh the Second Amendment interest at stake.” However, the existing empirical research is often complex and inconclusive, and debates about gun control are driven more by ideology

Hampshire, New Mexico, North Carolina, Maine, Mississippi, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin. See id. (detailing jurisdictions that do not require gun permits to own or carry firearms). Alaska, Arizona, Vermont, and Wyoming do not require any type of gun permit to carry a firearm. See id. Massachusetts is among seven states that do not recognize an individual right to bear arms under its state constitution. See Commonwealth v. Depina, 922 N.E.2d 778, 790 (Mass. 2010) (explaining Massachusetts Constitution does not recognize individual right to bear arms).

See Patrick Jonsson, Tucson Shooting Spotlights US Shift on Gun Control, CHRISTIAN SCI. MONITOR (Jan. 24, 2011), http://www.csmonitor.com/USA/Politics/2011/0124/Tucson-shooting-spotlights-us-shift-on-gun-control (articulating trend of more liberal conceal and carry permits). The number of states that automatically issue conceal and carry weapons permits after a background check increased from nine in 1980 to thirty-seven in 2011. See id. Additionally, twenty-four states allow people to openly carry guns, eleven of which require no permit to openly carry a firearm. See id.; see also Kranz, supra note 9, at 646 (stating Florida law started trend toward liberal conceal and carry laws).

See Jacob Sullum, Editorial, Gun Ban Dominoes Poised for Big Fall, CHI. SUN TIMES, Mar. 3, 2010, at 25, available at Westlaw, 2010 WLNR 4435053 (alleging data from Florida indicates permit holders less likely to commit gun violence).
than data.82

C. Massachusetts Conceal and Carry

The Massachusetts Constitution contains a provision similar to the
Second Amendment.83 Article XVII of the Massachusetts Declaration of
Rights states, “The people have a right to keep and to bear arms for the
common defence.”84 Despite the similar wording between the Second
Amendment and article XVII, Massachusetts courts have not interpreted
this provision as guaranteeing an individual right to keep and bear arms.85
In Commonwealth v. Depina,86 the Massachusetts Supreme Judicial Court
(“SJC”) found that article XVII guaranteed merely a collective right to bear
arms connected with service in the militia and maintaining the common
defense.87 In finding so, the SJC stated, “‘[t]here is nothing to suggest that,
even in early times, due regulation of possession or carrying of firearms,
short of some sweeping prohibition, would have been thought to be an
improper curtailment of individual liberty or to undercut the militia
system.’88

Perhaps growing out of the SJC’s collective rights interpretation of
the Massachusetts “bear arms” provision, Massachusetts has some of the
toughest gun control laws in the country.89 The Commonwealth is a “may

82 Kaminer, supra note 24 (“Debates about gun ownership and gun control are driven more
by values and ideology than by pragmatism—and hardly at all by the existing empirical research,
which is complex and inconclusive.”).
83 See MASS. CONST. pt. 1, art. XVII.
84 Id. The full text of article XVII states:

The people have a right to keep and to bear arms for the common defence. 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.

constitution does not recognize individual right to keep and bear arms); Brian Driscoll, Note, Who
Is Armed, and by What Authority? An Examination of the Likely Impact of Massachusetts
Firearm Regulations After McDonald and Heller, 45 SUFFOLK U. L. REV. 91, 95-96 (2011)
(“Based on the SJC’s collective-right interpretation, article XVII does not protect gun ownership
outside the militia . . .

86 922 N.E.2d 778 (Mass. 2010).
87 See id. at 790 (stating nature of article XVII right associated with participation in militia).
88 Id. (quoting Commonwealth v. Davis, 343 N.E.2d 847, 849 (Mass. 1976)).
89 See Welcome to Massachusetts!, SECRETARY COMMONWEALTH MASS.,
http://www.sec.state.ma.us/cis/ciwsel/welomas.htm (last visited Jan. 27, 2013) (describing strict
carry” jurisdiction, giving local police departments the authority to issue gun permits, including permits for carrying concealed weapons.\textsuperscript{90} Gun permits cost $100 and come in three types that specify the type of firearms and restrictions on carrying: (1) Firearms Identification (“FID card”), which allows the use of standard rifles and shotguns; (2) Class B License, which allows the use of standard rifles, shotguns, regular handguns, and rifles and shotguns able to take larger capacity magazines; and (3) Class A License, which allows the use of any legal gun listed in the FID or Class B category and permits the carrying of concealed weapons.\textsuperscript{91} Permits are restricted to Commonwealth residents without restraining orders filed against them and without a criminal record of felonies or serious misdemeanors involving violence, drugs, or guns.\textsuperscript{92} If an applicant for a Class A or B license underwent treatment for an addiction or was institutionalized for a mental health problem, he or she must wait five years and then apply with a doctor’s note.\textsuperscript{93} Applicants for each of the permits are weeded out with fingerprinting and background checks and are required to fill out onerous forms.\textsuperscript{94} If a person is a first-time applicant for a permit, he or she must take an approved four-hour course covering state law, proper transportation of firearms, and safe storage of firearms.\textsuperscript{95}

The “may carry” nature of the Commonwealth’s conceal and carry statute means applicants often must meet with an officer before their local chief of police will issue a permit.\textsuperscript{96} The local police chief can deny a person’s permit request based on “suitability,” where they examine information such as arrest records, mental health documentation, previous

\begin{itemize}
  \item \textsuperscript{90} See MASS. GEN. LAWS ch. 140, § 131(d) (2010) (describing Class A requirements for license to carry concealed firearms). The conceal and carry statute states: “Any person . . . may submit to such licensing authority or the colonel of state police, an application for a Class A or Class B license to carry firearms . . . which such licensing authority or said colonel may issue if it appears that he applicant is a suitable person to be issued such license, and that the applicant has good reason to fear injury to his person or property, or for any other reason, including the carrying of firearms for use in sport or target practice only . . . .” Id.
  
  \item \textsuperscript{91} See ch. 140, § 131(a)-(d) (enumerating requirements for different Massachusetts gun licenses); see also Michael Morton, Are You a Suitable Gun Owner? Police Chiefs Decide, METROWEST DAILY NEWS, Jan. 16, 2011, 9:11 PM, http://www.metrowestdailynews.com/features/x198684937/ Are-you-a-suitable-gun-owner-Police-chiefs-decide (describing types of permits and cost).
  
  \item \textsuperscript{92} See ch. 140, § 131(d)(i)-(vii) (elucidating minimum requirements to receive concealed carry permit); Morton, supra note 91 (stating restrictions on gun permitting).
  
  \item \textsuperscript{93} See ch. 140, § 131(d) (articulating minimum requirements to receive concealed carry permit); see also Morton, supra note 91 (explaining background checks for concealed carry permits).
  
  \item \textsuperscript{94} See Morton, supra note 91.
  
  \item \textsuperscript{95} See id. (stating restrictions on gun permitting).
  
  \item \textsuperscript{96} See id. (explaining requirement of meeting with officer before permit issuance).
\end{itemize}
restraining orders, or "community behavior." The requirements for this "supplemental information" vary from town-to-town, with little uniformity across the Commonwealth. While police chiefs are cautioned not to be arbitrary or capricious in their denial of applications, this broad authority still provides chiefs with wide discretion and a "power tool" for controlling who can carry firearms.

This discretion in issuing permits to otherwise qualified applicants was aptly described by Police Chief Richard Braga of Hudson, Massachusetts: "What we have to do is use our own common sense. We're entrusted with that."

Massachusetts state courts, following the trend in lower courts around the country, interpreted the Heller and McDonald decisions as guaranteeing an individual right to possess arms for self-defense in the home. However, it is only recently that courts articulated this precise definition of the right, shifting from a general right of possession for self-defense to a narrow right of self-defense restricted to the home. In general, Massachusetts courts have interpreted Heller and McDonald to mean the Second Amendment right to keep and bear arms is only infringed when legislation effectuates a total ban of handgun possession or prevents the use of an operable firearm in the home.

IV. ANALYSIS

Since the Supreme Court's decisions in Heller and McDonald, the

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97 See id. (setting forth "weeding out" process).
98 See Driscoll, supra note 85, at 99-100 ("This discretionary structure has created an uneven licensing system, where an applicant's ability to obtain a Class A or B license depends on the town in which the applicant lives."). In addition, "licensing authorities have a broad reach when assessing an applicant's suitability." Id. at 105.
99 See id. at 105-06 (stating various police chiefs view this discretion as an asset).
100 Morton, supra note 91.
101 See Commonwealth v. Powell, 946 N.E.2d 114, 125 (Mass. 2011) ("[T]he Court announced for the first time that the Second Amendment protects an individual right to keep and bear firearms in one's home for the purpose of self-defense, not simply a collective right to possess and carry arms for the purpose of maintaining a State militia."); Commonwealth v. McCollum, 945 N.E.2d 937, 954 (Mass. App. Ct. 2011) ("McDonald made applicable to the States an individual's right to possess firearms in the home as previously announced in District of Columbia v. Heller."); Commonwealth v. Perez, 952 N.E.2d 441, 451 (Mass. App. Ct. 2011) ("The Second Amendment does not protect the defendant in this case because he was in possession of the firearm outside his home.").
102 See Commonwealth v. Runyan, 922 N.E.2d 794, 797 (Mass. 2010) ("[T]he Court announced for the first time that the Second Amendment protects a limited, individual right to keep and bear arms for the purpose of self-defense, not simply a collective right to possess and carry arms for the purpose of maintaining a State militia.").
103 See Powell, 946 N.E.2d at 129 (stating Supreme Court only ruled Second infringed with total handgun ban or prevented home use).
Massachusetts Supreme Judicial Court has decided only a handful of cases where defendants challenged various gun-related convictions on Second Amendment grounds. Lower appellate courts in Massachusetts also have not entertained many Second Amendment challenges to gun charges since \textit{Heller}. These decisions followed the trend of the vast majority of lower courts around the country, applying the \textit{Heller} and \textit{McDonald} opinions narrowly and refusing to declare any of the Commonwealth’s gun regulations unconstitutional.

The defendants that brought the Second Amendment-based appeals to Massachusetts courts had a few things in common: none of the opinions that mentioned licensing noted that the appellants had a felony-free criminal history, and no defendant had applied for and was denied a license.

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106 See Doyle, \textit{supra} note 57, at 6 (describing lower court challenges post-\textit{Heller}); Morrison, \textit{supra} note 28 (reflecting lower court confusion regarding \textit{Heller}'s scope); Winkler, \textit{supra} note 24 (detailing lower court reliance on Justice Scalia’s limiting language in \textit{Heller}); see also cases cited \textit{supra} note 104 (listing SJC cases that found no Second Amendment right outside home); cases cited \textit{supra} note 105 (listing Massachusetts Appeals Court cases that found no Second Amendment right outside home). \textit{But see} Fletcher v. Haas, 851 F. Supp. 2d 287, 305 (D. Mass. 2012) (declaring Massachusetts prohibition against lawful permanent aliens owning or carrying firearms unconstitutional).
to carry a firearm. If a defendant with no criminal history was convicted of illegal possession of a firearm, and this same defendant was previously denied a license to carry, how would a Massachusetts court rationalize upholding the potentially arbitrary “may carry” licensing statute?  

This potential predicament can be illustrated using modified facts from the Massachusetts Superior Court case, Catucci v. Benedetti. In this case, the appellant, Catucci, sought judicial review of a Firearms Licensing Review Board (“FLRB”) decision that denied his petition to renew a license to carry a firearm. In 1971, Catucci pled nolo contendere to assault and battery for getting in a fist-fight, resulting in the other person’s hospitalization. Under the licensing statute for carrying concealed weapons, an applicant is disqualified if he or she has been convicted of a felony or a misdemeanor punishable by imprisonment for more than two years. Catucci’s assault and battery conviction was

107 See, e.g., Wallace, 949 N.E.2d at 913 (“Because the defendant has not asserted or made any showing that he applied for a license under G.L. c. 140, § 131, to carry a firearm (and was denied), we conclude that he may not challenge his conviction of carrying a firearm without a license ... under the Second or Fourteenth Amendments.”); Johnson, 958 N.E.2d at 36-37 (explaining defendant could not raise as-applied challenge because he never attempted to obtain license); Loadholt II, 954 N.E.2d at 1129-30 (stating defendant did not contend he ever attempted to obtain FID card); Powell, 946 N.E.2d at 129 (noting defendant did not attempt to obtain FID card). A few SJC cases, decided before McDonald extended Second Amendment rights to the states, declined to analyze statutes or the licensing status of the defendants. See, e.g., Depina, 922 N.E.2d at 782 (neglecting to note if defendant applied for license to carry); Loadholt I, 923 N.E.2d at 1052 (holding Second Amendment does not apply to states); Runyan, 922 N.E.2d at 799 (reasoning statute does not make it impossible for licensed persons to possess firearms for self-defense). For those cases that explicitly mentioned it, the defendants challenging their convictions had criminal backgrounds. See, e.g., Johnson, 958 N.E.2d at 37 (stating defendant ineligible even if applied for license to carry because of prior felony conviction); Wallace, 949 N.E.2d at 913 n.5 (stating appellate counsel acknowledge defendant’s prior felony conviction); Loadholt I, 923 N.E.2d at 1041 (noting defendant previously convicted of two violent crimes).

108 See Commonwealth v. Lee, Nos. 10550, 2010-10549, 2011 Mass. Super. LEXIS 18, at *1, *5 (Mass. Super. Ct. Feb. 25, 2011) (describing licensing authority’s discretion in issuing licenses to carry). The court in Lee described the process to obtain a license to carry. Id. at *3. To obtain a license, a person must apply to the licensing authority, which is generally the chief of police. Id. at *2-*3. According to the court, the chief may issue the license if it appears the applicant is a “suitable person” and is not disqualified on specific grounds. Id. at *3. According to the court in Lee, “A licensing scheme, unless void on its face, imposes legal harm only on one who applies for a license and is unlawfully denied.” Id. at *7. Here, unlike the hypothetical situation described in the analysis, the defendants, if they applied for a license, would have been properly denied due to their criminal histories. Id. at *7.


110 Id. at *1.

111 Id.

112 Id. (setting forth statutory scheme for license to carry); see also MASS. GEN. LAWS ch. 140, § 131(d)(i) (2010) (detailing requirements to obtain license to carry firearm).
punishable by up to two and a half years in prison.\textsuperscript{113} Despite this criminal transgression, the licensing authority, in this case the Malden Chief of Police, had no objection to Catucci receiving his license to carry because it had been over thirty-eight years since the original criminal act.\textsuperscript{114} In making their decision, the FLRB was free to consider other evidence regarding the applicant’s suitability to carry a firearm.\textsuperscript{115} When considering Catucci’s application, the FLRB took into account the untruthful denials on Catucci’s 2009 application that he was never convicted of assault and battery in 1971, in addition to denying his guilty plea to disorderly conduct in 1979.\textsuperscript{116} The FLRB also considered Catucci’s prior unexplained loss of a handgun.\textsuperscript{117} The court in \textit{Catucci} noted that \textit{Heller} did not address the permissibility of a statute that disqualifies those convicted of a serious misdemeanor, like in this case, as opposed to a felony.\textsuperscript{118} The \textit{Catucci} court acknowledged that an across the board firearms ban was unconstitutional, but emphasized that it “remains permissible to seek to keep firearms out of the hands of irresponsible persons.”\textsuperscript{119}

The court also emphasized the statute did not per se disqualify Catucci due to his assault and battery conviction.\textsuperscript{120} Instead, the NLRB gave Catucci an opportunity to appear before the Board and overcome his disqualification by presenting clear and convincing evidence of his suitability under the statute, which he was unable to do.\textsuperscript{121} If we changed the facts of \textit{Catucci v. Benedetti} so the appellant still had an assault and battery charge from thirty-eight years prior, but did not deny his criminal history nor had an unexplained loss of a handgun, would the outcome of \textit{Catucci} be different?\textsuperscript{122} Given the recent trend in Massachusetts courts, it

\begin{itemize}
  \item \textsuperscript{113} \textit{Catucci}, 2010 Mass. Super. LEXIS 252, at *1 (explaining punishment for assault and battery).
  \item \textsuperscript{114} Id. at *2 (stressing Malden Chief of Police denied application based on appellant’s disqualification).
  \item \textsuperscript{115} Id. at *1-*2 (characterizing FLRB’s discretion in determining appellant’s renewal of license). The court further elaborated that administrative deference was given to the agency because they can observe a witness’s demeanor and are under no obligation to believe the applicant’s testimony. Id. at *3. Furthermore, the court stated administrative decisions are overturned only if the court finds the decision was arbitrary or capricious, unsupported by substantial evidence, in excess of statutory authority, or based on an error of law. Id. at *2.
  \item \textsuperscript{116} Id. at *2 (enumerating criteria looked at by FLRB).
  \item \textsuperscript{117} Id. at *2 (highlighting criteria when evaluating application for permit).
  \item \textsuperscript{118} \textit{Catucci}, 2010 Mass. Super. LEXIS 252, at *4-*5 (explaining limited holding of \textit{Heller}).
  \item \textsuperscript{119} Id. at *4-*5.
  \item \textsuperscript{120} Id. at *5 (stating appellant’s criminal history did not prompt per se denial of license).
  \item \textsuperscript{121} Id. (explaining appearance process).
  \item \textsuperscript{122} See id. at *1 (describing facts of \textit{Catucci}).
\end{itemize}
is likely the court in the Catucci hypothetical would apply a narrow reading of *Heller* and *McDonald* and still deny Catucci his renewal for a license to carry. However, using the rationale of self-defense and highlighting the improperly narrow application by Massachusetts courts of the *Heller* and *McDonald* opinions, defense attorneys can argue that citizens convicted of unlawfully carrying a firearm were simply exercising their Second Amendment right to self-defense.

A. Self-Defense: The Need Outside of the Home

The need for self-defense naturally extends outside of the home. A person armed with a weapon outside of the home is more likely to fend off robberies, rapes, and assaults. Furthermore, there is only a small likelihood of causing the potential offender deadly harm. The appellant in *Heller* only challenged his right to use a handgun in his home for self-defense, and did not challenge the ability to carry a handgun in self-defense outside of the home. The Supreme Court did not examine the constitutionality of statutes restricting the right of law-abiding citizens to carry concealed weapons for use in self-defense, but their lack of examination does not mean laws restricting conceal and carry are presumptively valid.

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123 See cases cited supra notes 101, 104, 105 (highlighting narrow reading of *Heller* holding by Massachusetts courts).
124 See Neily, supra note 9, at 144-46 (detailing self-defense purpose of Second Amendment); Volokh, supra note 8, at 1523-24 (explaining rationale of self-defense in creation of Fourteenth Amendment).
125 See Barnes, supra note 61, at A3 (quoting Antigone Peyton on lower court confusion post-*Heller*); Doyle, supra note 57, at 6 (detailing struggles in lower court); Savage, supra note 61, at 16 (explaining lower court confusion with *Heller* decision).
126 See Kleck & Gertz, supra note 62, at 180-81 and accompanying text (analyzing effectiveness of guns and weapons in self-defense outside the home).
127 See id. at 181 (finding defensive gun use “almost never involves killing the criminal”).
128 See District of Columbia v. *Heller*, 554 U.S. 570, 575-76 (2008) (“[The appellant] ... filed a lawsuit in the Federal District Court for the District of Columbia seeking, on Second Amendment grounds, to enjoin the city from enforcing the ban on the registration of handguns, the licensing requirements insofar as it prohibits the carrying of a firearm in the home without a license, and the trigger-lock requirement insofar as it prohibits the use of ‘functional firearms within the home.’”).
129 See Denning & Reynolds, supra note 24, at 273 (stating scope of Second Amendment left undefined by *Heller*); Morrison, supra note 28 (acknowledging lingering questions for lower courts after *Heller*). But see *Heller*, 554 U.S. at 626 (“[T]he majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.”). Although states traditionally upheld concealed weapons laws, Justice Scalia’s majority opinion also stated that the Court “[d]id not undertake an exhaustive historical analysis today of the full scope of the Second Amendment ...” *Heller*,
Allowing a person to use a weapon in self-defense outside of the home comports with the history of the Second and Fourteenth Amendments. The Second Amendment was passed in part to guarantee individuals the right to arm themselves to defend against tyrannical governments. The Framers of the Second Amendment surely did not imagine citizens defending against a tyrannical government strictly from the confines of their home—unless the battlefield was confined solely to a citizen’s front yard, that citizen would necessarily need to carry their weapon outside of the home. Similarly, nothing in the history described by Justice Scalia in the Heller opinion or in most academic research finds that the right to bear arms is limited only to the home. Justice Scalia stated in Heller that nothing in the opinion should “be taken to cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings . . .” By noting that prohibitions against carrying weapons in “sensitive places” was presumptively valid, Justice Scalia left open the possibility that carrying weapons in non-sensitive places may be permissible under the Second Amendment. Additionally, nothing in the actual text of the Second Amendment restricts the right to bear arms for self-defense strictly to the home.

Similarly, the right to self-defense described in McDonald necessarily extends outside of the home. The Fourteenth Amendment, which led to the incorporation of the Second Amendment to the states, was drafted in part to allow freed slaves to protect themselves from armed lynchings.

554 U.S. at 626.

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130 See Heller, 554 U.S. at 593 (describing English Bill of Rights’ connection to Second Amendment); Charles, supra note 44, at 25-26, 52-53 (same); Kranz, supra note 9, at 641-42 (same); Denning & Reynolds, supra note 24, at 281 (describing self-defense motivations in creation of Fourteenth Amendment); Winkler, supra note 24 (elaborating on self-defense as underlying motivation in Fourteenth Amendment).

131 See Espohl, supra note 23, at 158 (describing views of militia as safety against tyrannical governments); Kaminer, supra note 24 (stating defense against tyrannical government was purpose of Second Amendment).

132 See Denning & Reynolds, supra note 24, at 286 (commenting on mob violence in post-Civil War South).

133 See Dorf, supra note 25, at 227-28 (recognizing odd characterization if founding generation meant only to protect right to carry arms in home).

134 Heller, 554 U.S. at 626-27.

135 See Dorf, supra note 25, at 228 (stating Justice Scalia likely meant to leave open possibility that not all public places “sensitive”).

136 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.”).

137 See Bell, supra note 47 (describing bans on concealed weapons in nineteenth century); Denning & Reynolds, supra note 24, at 285-86 (explaining systematic disarming of black citizens); Winkler, supra note 24 (detailing motivations and history behind Second Amendment).
A freed slave ran the risk of violence and lynch mobs in public spaces and in his or her home. It is also nonsensical to think the drafters of the Fourteenth Amendment envisioned the freedman’s right to bear arms restricted to protecting himself or herself only while in the confines of his or her home. By seeking to guarantee equality among freedmen and white men, the drafters of the Fourteenth Amendment wanted to guarantee that every person could bear arms for self-defense, whether inside or outside the home.

Changing social norms also promotes the idea that conceal and carry permits should be granted to qualifying law-abiding individuals. While those who carried concealed weapons used to be looked at as scoundrels and those who openly carried their weapons were viewed as law-abiding citizens, now citizens likely cower at the sight of a gun publicly displayed in a holster. The need for self-defense in public has not diminished since the time open carry was commonplace, and this changing perception of openly displayed firearms means concealed carry should be allowed for law-abiding citizens seeking to protect themselves.

B. Heller “Presumptively Valid” Language Improperly Construed

The Massachusetts Supreme Judicial Court narrowly applies the Heller decision as guaranteeing an individual right to keep and bear firearms for self-defense only in one’s home. Massachusetts lower

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138 See Denning & Reynolds, supra note 24, at 286 (explaining threat of lynching mobs motivated Fourteenth Amendment).
139 See id. at 285-86 (illustrating dangers of public lynching mobs).
140 See id. at 286 (describing mob violence in post-Civil War South).
141 See BELLESILES, supra note 54, at 13-15 (describing rise in gun culture in post-Civil War United States); Slotkin, supra note 54 (stating hallmark of citizenship was gun ownership).
142 See Saad, supra note 1 (stating increase in gun ownership approval). According to a Gallup Poll, 2011 saw the highest reported gun ownership in two decades coupled with a record-low percentage of Americans favoring a legal ban on handgun possession. Id.; Jones, supra note 2 and accompanying text (describing record-low support for handgun ban).
143 See Volokh, supra note 8, at 1524 (asserting traditional view of concealed guns as illegitimate social behavior).
144 See Press Release, supra note 68 (describing crime rates in 2010). Although total crime rates are down, the need for self-defense remains. See id.; Kleck & Gertz, supra note 62, at 180 and accompanying text (illustrating effectiveness of guns and arms for self-defense).
courts steadfastly quote Heller’s holding as “the right of law-abiding responsible citizens to use arms in defense of hearth and home.”\textsuperscript{146} Massachusetts courts have described this as a qualified right, with limitations on who can own weapons and where they can be carried.\textsuperscript{147}

One of the first cases after the Heller decision that brought a Second Amendment challenge to the SJC was Commonwealth v. Depina,\textsuperscript{148} where the defendant was convicted of illegally carrying a firearm and unlawful carrying of a loaded firearm.\textsuperscript{149} This case preceded McDonald’s extension of the Second Amendment to the states under the Fourteenth Amendment.\textsuperscript{150} Disposing of the defendant’s Second Amendment claim, the court explained, “The defendant’s argument rests on the assumption that the protection of the Second Amendment applies to the States as a matter of substantive due process under the Fourteenth Amendment to the United States Constitution.”\textsuperscript{151} The court stated that the Second Amendment does not apply to the states through the Fourteenth Amendment or otherwise, and therefore the defendant’s claim that “the licensing scheme the statute enforces[] infringe[s] his Second Amendment right to keep and bear arms must fail.”\textsuperscript{152} The court did not explore the permissible limits of the Second Amendment nor apply the Heller reasoning to the license-to-carry statute.\textsuperscript{153} While dismissing the appeal, the Depina court’s description of the Second Amendment right as protecting a limited, individual right to keep and bear arms for the purpose of self-defense hints at the true meaning of Heller: the Second Amendment is meant to protect the individual right to keep and bear arms, regardless of the location of this need.\textsuperscript{154}

\textsuperscript{146} District of Columbia v. Heller, 554 U.S. 570, 635 (2008); see also cases cited supra note 101, 104, 105 (describing Massachusetts cases interpreting Heller narrowly).

\textsuperscript{147} See Heller, 554 U.S. at 626-27 (“Like most rights, the Second Amendment right is not unlimited. . . . [It is] not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. . . . Nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”); see also cases cited supra notes 101, 104, 105 (listing Massachusetts cases that narrowly define right to bear arms).

\textsuperscript{148} 922 N.E.2d 778 (Mass. 2010).

\textsuperscript{149} Id. at 781-82 (listing charges against defendant).

\textsuperscript{150} See id. at 789-90 (stating defendant’s challenge rests on erroneous assumption that Second Amendment extends to states).

\textsuperscript{151} Id. at 789.

\textsuperscript{152} Id. at 789-790.

\textsuperscript{153} Id. (stating court must follow applicable Supreme Court precedent at time of case).

\textsuperscript{154} See Depina, 922 N.E.2d at 789 (“[T]he Second Amendment protects a limited, individual
The Massachusetts cases that followed Depina returned to a narrow reading of the Heller and McDonald holdings by adopting the "presumptively valid" language of Justice Scalia’s majority Heller opinion, without delving into the constitutionality of each challenged Massachusetts gun regulation.155 However, the "presumptively valid" language used by Justice Scalia is flawed.156 At the time of the Founding Era, when the Second Amendment was drafted, there were no such laws described by Justice Scalia.157

A recent SJC case ruling on the Second Amendment is one of the most stringent readings of Heller and McDonald, and it lacks cohesive reasoning regarding the restrictions of the Second Amendment.158 In Commonwealth v. Loadholt (Loadholt II),159 the appellant challenged the requirement of prior approval by government officers before a person may possess ammunition or a firearm as a violation of the Second Amendment.160 The SJC interpreted the appellant’s challenge glibly: “Said another way, the defendant asserts that the Second Amendment bars any licensing system.”161 Rather than the court’s version of the argument, the appellant simply challenged the right of a government official to (potentially) arbitrarily decide who was granted a license to carry a firearm.162 The SJC applied Heller and McDonald narrowly, holding a citizen’s Second Amendment right does not prohibit laws regulating who may possess weapons, purchase weapons, or whether and where such weapons may be carried.163 Loadholt II reinforces the idea that Massachusetts courts interpret Heller and McDonald as narrowly as possible to keep and bear firearms for the purpose of self-defense . . .”.

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156 See Winkler, supra note 24 (finding Justice Scalia’s language in Heller incorrect).

157 See id. (stating there were no such prohibitions against owning firearms described by Justice Scalia).

158 See Loadholt II, 954 N.E.2d at 1129-31 (applying strict reading of Heller and McDonald for gun-related criminal case).

159 954 N.E.2d 1128 (Mass. 2011).

160 Id. at 1128-29.

161 Id. at 1130.

162 Id. at 1129. The defendant contended that the statute requiring a license to possess a firearm was facially invalid because it required prior approval by a government officer before a person could possess ammunition or a firearm. Id. at 1130.

163 Id. at 1130 (characterizing limited right to carry and bear arms as stated in Heller and McDonald).
possible by grasping onto select passages of text to preserve existing gun regulations. By reinforcing the nature of the Second Amendment and the emphasis on self-defense, attorneys can persuade Massachusetts courts to look at the Heller and McDonald holdings using a wider frame.

C. “As Applied” Challenges by Defendants

Every Second Amendment-related case reviewed by Massachusetts courts contained “on its face” challenges to the applicable firearms carrying statute, with appellants arguing the statutory scheme was an unconstitutional infringement on their Second Amendment rights. These types of challenges have been unsuccessful at every level of the Massachusetts court system. However, an “as applied” challenge to the firearms statutory scheme may prove more successful, given the right client.

The main roadblock to defendants in cases involving an as-applied Second Amendment challenge was an inability to show that the statutory scheme created a real impediment to self-defense. None of the defendants in any Massachusetts “as applied” challenge attempted to apply for a permit to carry a firearm, so none of the defendants could show that the “may carry” nature of the Massachusetts conceal and carry statute unconstitutionally infringed on their Second Amendment right to bear arms for self-defense. A common factor complicating these appeals was that

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164 See Loadholt II, 954 N.E.2d at 1130 (quoting language in McDonald that “incorporation does not imperil every law regulating firearms”).

165 See infra note 173 and accompanying text (describing methods for challenging statutes).

166 See, e.g., Commonwealth v. Johnson, 958 N.E.2d 25, 36-37 (Mass. 2011) (stating defendant did not raise as-applied challenge to statutory scheme); Loadholt II, 954 N.E.2d at 1130 (explaining that defendant contended statute was facially unconstitutional); Commonwealth v. Powell, 946 N.E.2d 114, 128 (Mass. 2011) (describing facial challenge to statute); see also cases cited supra note 105 (listing Massachusetts Appeals Court cases dealing with Second Amendment).


168 See cases cited supra note 107 (noting lack of applicability did not allow court to assess detriment to defendant).

169 See id. (listing cases where defendants did not apply for a firearm or ammunition license).

170 See id. (noting cases where defendants’ lack of permit application did not allow court to assess detriment).
all of the defendants had criminal histories prior to their arrests.\textsuperscript{171} Because most of these prior criminal acts were felonies, if they \textit{had} applied they would not have been issued a permit to carry a concealed weapon under Massachusetts restrictions.\textsuperscript{172}

A logical way to challenge the Massachusetts statutory scheme granting local authorities the discretion to issue conceal and carry permits would be to find a defendant who applied for but was denied a conceal and carry permit based on the licensing authority’s discretionary powers.\textsuperscript{173} This defendant must not have a criminal background, which would be a reasonable roadblock to obtaining a permit to carry a concealed weapon.\textsuperscript{174}

With this type of defendant, an attorney could successfully argue that the deprivation to his or her client was real, and the defendant was denied lawful means of self-defense in violation of the Second Amendment.\textsuperscript{175}

\section*{V. CONCLUSION}

The Supreme Court in \textit{Heller} and \textit{McDonald} recognized the right to bear arms under the Second Amendment as an individual right. But the Second Amendment, contrary to the interpretation of Massachusetts courts, guarantees more than an individual right to possess arms inside the home. Instead, the history of the Second and Fourteenth Amendments, coupled with the guaranteed right of self-defense underlying the decisions in \textit{Heller} and \textit{McDonald}, means citizens also have the right to bear arms to defend themselves. By looking to the underlying reasoning of \textit{Heller} and \textit{McDonald}—the right to bear arms for self-defense—Massachusetts courts can begin restoring the Second Amendment rights of law-abiding citizens who apply for a permit to carry a concealed firearm. As Justice Scalia noted in his \textit{Heller} opinion, the handgun is the quintessential weapon for self-defense. Protecting a citizen’s right to carry these quintessential weapons guarantees that their Second Amendment right to self-defense will

\begin{itemize}
\item \textsuperscript{171} \textit{See id.} (describing criminal histories of defendants).
\item \textsuperscript{172} \textit{See id.} (describing criminal histories of defendants); \textit{see also MASS. GEN. LAWS} ch. 140, § 131(d) (2010) (stating requirements and disqualifications to obtain conceal and carry permit).
\item \textsuperscript{173} \textit{See Guns in Public Places, supra} note 70 (describing discretion in “may issue” jurisdictions); Kranz, \textit{supra} note 9, at 649-50 (explaining “shall issue” jurisdictions minimize discretion in licensing authorities); Morton, \textit{supra} note 91 (articulating discretion placed in licensing authorities); cases cited \textit{supra} note 108 (explaining licensing authority’s discretion in prior Massachusetts gun cases); \textit{see also} cases cited \textit{supra} note 107 (listing Massachusetts cases that had defendants with previous felonies).
\item \textsuperscript{174} \textit{See MASS. GEN. LAWS} ch. 140, § 131(d) (2010) (listing conceal and carry permit requirements); cases cited \textit{supra} note 107 (describing cases involving defendants with felony records).
\item \textsuperscript{175} \textit{See Kleck & Gertz, supra} note 62, at 175-81 (describing benefits of gun for self-defense).
\end{itemize}
remain intact.

Megan Ruebsamen