Who Is Armed, and by What Authority?
An Examination of the Likely Impact of Massachusetts Firearm Regulations After McDonald and Heller

“States may have grown accustomed to violating the rights of American citizens, but that does not bootstrap those violations into something that is constitutional.”

I. INTRODUCTION

Article XVII of the Massachusetts Declaration of Rights guarantees a right to keep and bear arms for the common defense. The Supreme Judicial Court (SJC)—Massachusetts’s highest court—has interpreted article XVII as preserving a right to keep and bear arms in connection with service in the militia. Because the SJC’s interpretation of article XVII does not protect an individual right to keep or bear arms, the court has granted the Massachusetts General Court—the state’s legislative body—wide leeway to craft a broad range of regulations governing gun ownership in Massachusetts. In response, the General Court has enacted a comprehensive regulatory scheme for controlling and licensing firearm ownership in the Commonwealth.

Although many citizens have challenged Massachusetts’s gun laws as infringing upon their Second Amendment right to keep and bear arms, the SJC has consistently upheld the laws because, until recently, the Second Amendment did not apply to the states. The United States Supreme Court’s

2. MASS. CONST. pt. I, art. XVII (guaranteeing “a right to keep and to bear arms for the common defence [sic]”).
4. Davis, 343 N.E.2d at 849 (noting regulatory scheme compatible with article XVII because no individual right to bear arms).
5. See, e.g., MASS. GEN. LAWS ANN. ch. 140, § 129C (West 2010) (establishing separate license for possession of rifles and shotguns); id. § 131 (establishing licensing system, subject to licensing authority’s discretion and including restrictions on licenses); id. § 131L(a) (requiring firearm storage in locked containers or firearms affixed with trigger-locks).
6. See infra note 156 and accompanying text (describing history of recent challenges to firearm regulation in Massachusetts since Heller); see also U.S. CONST. amend. II (“[T]he right of the people to keep and bear arms shall not be infringed.”); McDonald v. City of Chicago, 130 S. Ct. 3020, 3050 (2010) (holding
rticence to incorporate the Second Amendment to apply to the states, coupled with the SJC’s interpretation of article XVII, resulted in the routine failure of challenges to the Massachusetts regulatory scheme. After District of Columbia v. Heller and McDonald v. City of Chicago, however, it appears that “the times they are a changin’.” Because of this new definition of the Second Amendment’s scope of protection, several Massachusetts firearm laws may not survive constitutional challenges in the post-McDonald world. This Note will analyze the impact that these opinions will likely have on the Massachusetts gun regulation landscape. The Note examines a small sampling of laws, including safe-storage requirements, discretionary licensing, and discretionary license restrictions, all of which will almost certainly be subject to constitutional challenges in the near future.

Part II.A of this Note will outline the history of firearm regulation in Massachusetts, beginning with the Massachusetts Declaration of Rights. Part II.B will highlight the laws most vulnerable to challenges after McDonald. Although discussed at length in Part II.B, a brief introduction to some of these vulnerable regulations may be useful at this point. Massachusetts has a discretionary licensing system. A licensing authority—usually the chief of police in each municipality—has the authority to exercise his or her discretion and deny an otherwise qualified applicant if the licensing authority believes that the applicant is not “suitable.” A law allowing the discretionary denial of

Fourteenth Amendment’s Due Process Clause incorporates Second Amendment against states).

7. McDonald, 130 S. Ct. at 3030-34 (outlining history and evolution of selective incorporation); see infra Part II (discussing failed attempts to challenge Massachusetts gun laws).
10. Bob Dylan, The Times They Are a-Changin’, on THE TIMES THEY ARE A-CHANGIN’ (Columbia Records 1964); see McDonald, 130 S. Ct. at 3050 (declaring Second Amendment protects fundamental right and applies to states); Heller, 554 U.S. at 592-94 (explaining Second Amendment protects individual right of self-defense unconnected to militia service).
11. See infra Part III (predicting Heller and McDonald’s effect on Massachusetts gun laws); see also MASS. GEN. LAWS ANN. ch. 140, § 131 (West 2010) (establishing license requirements and authorizing license restrictions); id. § 131L (requiring firearms be secured when not in licensee’s control).
12. See infra Part III (predicting effect recent Second Amendment jurisprudence will have on Massachusetts gun laws).
13. See infra Part III (suggesting certain Massachusetts gun laws vulnerable under constitutional analysis).
14. See infra Part II.A (discussing collective-right interpretation of rights preserved under article XVII).
15. See infra Part II.B (evaluating laws unlikely to survive constitutional scrutiny after Second Amendment’s incorporation in McDonald).
16. See infra Part II.B.
17. See MASS. GEN. LAWS ANN. ch. 140, § 131(d) (West 2010) (stating licensing authority “may issue” license if authority deems applicant “suitable person” for license). Because the regulatory scheme greatly infringes upon the right to self-defense as declared by Heller, it will be vulnerable to constitutional challenges after McDonald. See infra Part III.A (discussing vulnerability of discretionary licensing laws).
18. See MASS. GEN. LAWS ANN. ch. 140, § 131(d) (granting discretionary licensing power while leaving “suitable person” undefined); Chief of Police of Shelburne v. Moyer, 453 N.E.2d 461, 464 (Mass. App. Ct. 1983) (stating reversal of denial on suitability grounds requires showing refusal arbitrary and capricious or
a fundamental right based on undefined notions of suitability, while passing constitutional muster under article XVII, will not likely survive constitutional scrutiny under the Second Amendment following the amendment’s incorporation after McDonald.\footnote{19}

The same statute also provides the licensing authority with the power to place restrictions on licenses that limit the right to carry a firearm unless engaged in a particular activity.\footnote{20} For example, the restrictions allow the licensee to carry a firearm only for either employment purposes or when target shooting.\footnote{21} A licensee who attempts to challenge the license restriction faces a heavy burden, as the reviewing court examines the licensing authority’s decision under a deferential abuse of discretion standard.\footnote{22} Given the impact these license restrictions have on an individual’s right to keep and bear a firearm for self-defense, the law authorizing restrictions will almost certainly be challenged going forward.\footnote{23} Furthermore, Massachusetts law currently requires gun owners to secure firearms in a locked container—or with a tamper-proof locking device—whenever the firearm is not under the direct control of a licensed individual.\footnote{24} This law will also likely face a challenge on Second Amendment grounds because of the similarities between the Massachusetts safe-storage requirements and the storage law struck down in Heller.\footnote{25}

As noted above, the Supreme Court has recently clarified the meaning of the right protected by the Second Amendment in Heller, and further incorporated the Second Amendment within the Fourteenth Amendment’s Due Process Clause in McDonald.\footnote{26} Part II.C will discuss Heller and McDonald and provide the foundation for a discussion of the likely impact that these landmark

\begin{footnotes}
\footnotetext[19]{See infra Part III (predicting discretionary component too arbitrary to survive constitutional challenge post-McDonald).}
\footnotetext[20]{Mass. Gen. Laws Ann. ch. 140, § 131(d) (authorizing licensing authority to restrict licenses to certain activities or locations at authority’s discretion).}
\footnotetext[21]{See id. (stating licenses may be issued subject to restriction at license authority’s discretion).}
\footnotetext[22]{See Moyer, 453 N.E.2d at 464 (upholding license restrictions unless authority’s decision arbitrary and capricious or abuse of discretion).}
\footnotetext[23]{See Levine v. Bernstein, No. 99-P-1285, 2002 WL 1492239, at *1 (Mass. App. Ct. July 12, 2002) (holding restriction not infringement because article XVII does not recognize individual right to bear arms); see also infra Part III.B (arguing discretionary licensing will be found to impermissibly restrict Second Amendment right).}
\footnotetext[24]{Mass. Gen. Laws Ann. ch. 140, § 131L(a) (West 2010) (requiring storage in locked container or rendered inoperable with locking device).}
\footnotetext[26]{See supra notes 6, 10 and accompanying text (describing Heller and McDonald’s impact on meaning and scope of Second Amendment).}
\end{footnotes}
rulings will have on Massachusetts gun laws. 27 As a result of these opinions, Massachusetts will likely need to reform its approach to firearm regulation. 28 Part II.D will briefly discuss proposed legislation—particularly a bill labeled House Bill 1568—that could provide a replacement regulatory system capable of surviving heightened constitutional scrutiny. 29

As a result of the Second Amendment’s incorporation under the Fourteenth Amendment, the SJC can no longer restrict analysis of challenges solely to the rights protected by article XVII, and the court will have to determine a new framework for analyzing the Commonwealth’s gun laws. 30 Part III.A predicts that the SJC will adopt a strict-scrutiny standard of review when addressing future challenges to Massachusetts’s gun laws in light of Heller and McDonald. 31 Part III.B anticipates the likely outcome of challenges to safe-storage requirements, discretionary licensing, and unreviewable license restrictions using this new analytical framework. 32 Part III.B also suggests that many laws currently in force impermissibly infringe on the newly defined Second Amendment right to keep and bear arms. 33 This Note will conclude by suggesting that the General Court take action and adopt legislation, either House Bill 1568 or a similar regulatory system, that removes constitutionally impermissible restrictions on gun ownership while preserving the Commonwealth’s ability to reduce crime and preserve the safety of citizens through licensing and other measures. 34

II. HISTORY

The Second Amendment to the United States Constitution guarantees that, because a well-regulated militia is necessary to the security of the state, the right of the people to bear arms shall not be infringed. 35 This deceptively simple clause has stirred debate and controversy as politicians, lawyers, and scholars have argued over its purpose, its scope, and its place in modern society. 36 Theories regarding the meaning of the Second Amendment can be

---

27. See infra Part II.C (examining recent Supreme Court decisions).
28. See infra Part III.B (discussing impact of Supreme Court decisions and likely invalidation of several gun regulations as result).
29. See H.R. 1568, 187th Gen. Court, Reg. Sess. (Mass. 2011) (proposing alternative licensing system to preserve state interests and individual Second Amendment rights); see also infra, Part II.D.
30. See infra Part III.A (exploring need for new analytical approach in Massachusetts after Second Amendment incorporated).
31. See infra Part III.A (predicting SJC approach to analyzing gun laws after Second Amendment incorporation).
32. See infra Part III.B.
33. See infra Part III.B.
34. See H.R. 1568; see also infra Part IV (proposing potential remedy for weakened regulatory scheme).
35. U.S. CONST. amend. II. The Second Amendment states: “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.” Id.
roughly broken into two camps: the individual-right theory and the collective-right theory.\footnote{37} The individual-right theory views the amendment as protecting an individual’s right to own and carry firearms regardless of whether the individual is part of the militia.\footnote{38} The collective-right theory argues that the amendment was a response to concerns about an overly powerful federal government at the time of its passage, and further argues that the amendment is dependent on service in state-controlled militias.\footnote{39} Regardless of the meaning, the Second Amendment, until recently, constrained only the actions of the federal government and left states free to both establish their own protected rights regarding gun ownership and regulate gun ownership and use among their citizens.\footnote{40} Forty-four state constitutions contain provisions preserving, to one degree or another, the right to keep and bear arms.\footnote{41}

\section*{A. Article XVII and Massachusetts Firearm Laws}

Article XVII of the Massachusetts Declaration of Rights secures a right to keep and bear arms for the common defense.\footnote{42} In \textit{Commonwealth v. Davis}, the SJC interpreted article XVII to preserve a collective right to gun ownership for the Commonwealth’s citizens, rather than an individual right, and stated that article XVII extends protection to gun ownership conditioned upon the owner’s connection to the Commonwealth’s militia.\footnote{43} Based on the SJC’s collective-

---

\footnote{37. See Harman, \textit{supra} note 36, at 413-16 (explaining existence of individual and collective-right theories); see also Perkins, \textit{supra} note 36, at 1063-64 (noting distinctions between individual- and collective-right interpretations of Second Amendment).}

\footnote{38. See Perkins, \textit{supra} note 36, at 1063-64 (explaining individual-right interpretation protects right to arms absent militia service); see also Harman, \textit{supra} note 36, at 413-16 (stating majority of legal scholars view Second Amendment as protecting individual right to firearms).}

\footnote{39. See Harman, \textit{supra} note 36, at 413-16 (explaining collective-right theory views Second Amendment as attempt to prevent overreach of federal authority); Perkins, \textit{supra} note 36, at 1063-64 (stating collective-right theorists see Second Amendment as protecting right to state-controlled militias).}


\footnote{42. \textit{M Mass. Const.}, pt. I, art. XVII ("The people have a right to keep and bear arms for the common defence [sic]").

\footnote{43. See \textit{Commonwealth v. Davis}, 343 N.E.2d 847, 848-49 (Mass. 1976) (adopting collective-right interpretation and holding article XVII permits laws regulating firearm ownership); see also \textit{Commonwealth v. Murphy}, 44 N.E. 138, 138 (Mass. 1896) (stating legislature may regulate carrying of firearms). Although the right to bear arms was only a fringe issue in \textit{Murphy}—the primary issue was the violation of a statute barring drilling and parading of an unauthorized militia group—the SJC stated that the legislature can regulate and
right interpretation, article XVII does not protect gun ownership outside the militia, and as a result, the General Court can freely regulate possession of firearms so long as the regulations do not impede militia service.\footnote{44} Furthermore, the \textit{Davis} court suggested that some form of regulatory authority would remain, even if the Second Amendment was applied to the states.\footnote{45} Shortly after \textit{Davis}, the SJC concluded violent-crime statistics provided the General Court with a reasonable basis for concluding that gun control laws were a necessary and legitimate tool to combat the rising violent-crime rate in Massachusetts.\footnote{46}

In the interests of reducing violent crime and increasing public safety, the General Court established a comprehensive scheme for regulating firearm ownership in the Commonwealth.\footnote{47} Under the scheme, Massachusetts gun owners must be licensed to own firearms; if the owner moves, he or she must provide written notification to the municipality’s chief of police within thirty days of arrival.\footnote{48} In addition to licensing requirements for purchasing and carrying firearms,\footnote{49} Massachusetts law further restricts a licensee’s ability to

\begin{itemize}
\item limit the right to bear arms. \textit{See Murphy}, 44 N.E. at 138.
\item \textit{See Davis}, 343 N.E.2d at 849 (holding article XVII allows regulation of gun ownership short of complete prohibition).
\item \textit{See id.} at 850-51 (reasoning Second Amendment incorporation would not preclude state’s power to regulate firearms). The SJC noted that even if the Second Amendment was held to constrain the states, the state’s regulatory power would presumably remain, as restrictions on the possession and carrying of firearms have long been considered valid public-safety regulations. \textit{See id.} at 849-51 (supposing state’s regulatory authority would survive Second Amendment incorporation). The \textit{Davis} court did not elaborate on what that post-incorporation regulatory power might entail. \textit{See id.} at 851 (remaining silent on nature of state regulatory authority if Second Amendment applied to states by Supreme Court in future).
\item \textit{See id.} at 171 (justifying gun control based upon violent-crime statistics); Ruggiero v. Police Comm’r of Bos., 464 N.E.2d 104, 106 (Mass. App. Ct. 1984) (stating purpose of Massachusetts gun laws to limit irresponsible persons’ access to firearms); \textit{see also Davis}, 343 N.E.2d at 849 (noting statute part of large regulatory scheme intended to promote public safety); 1964 MASS. ATT’Y GEN. REP., PUB. DOC. NO. 12, at 233, 233-34 [hereinafter MASS. ATT’Y GEN. REP.] (interpreting legislative intent to keep firearms from hands of evildoers); Lisle Baker, \textit{New Federal and State Firearm Regulation in Massachusetts}, BOS. B.J., Dec. 1968, at 7, 9 (1968) (explaining new regulations intended to regulate owners of dangerous firearms); \textit{infra} note 54 and accompanying text (exploring complexities of Massachusetts gun laws).
\item \textit{See MASS. GEN. LAWS ANN.} ch. 140, § 131(d) (West 2010) (creating statutory requirements for license application process and discretionary authority for licensing body in municipality); \textit{see also id.} § 131(f) (effective Apr. 14, 2011) (requiring written notice of change of address to licensing authority within thirty days). Massachusetts law requires only gun owners and sex offenders to provide notice to law enforcement when moving to a new address. \textit{Compare id.} § 131(l) (obliging licensee to provide written notice to licensing authority when moving to new town), with MASS. GEN. LAWS ANN. ch. 6, § 178E(a) (West 2010) (mandating sex offenders notify Commonwealth in writing upon change of address).
\item \textit{Mass. Gen. Laws Ann.} ch. 140, § 131(d) (establishing “may issue” licensing system for owning and carrying firearms). Aside from a number of statutory disqualifications that result in an application’s immediate denial, the municipality’s licensing authority has extensive discretion to determine whether the applicant is a “suitable person” or has a proper purpose for requesting a license. \textit{See id.; see also Dupont v. Chief of Police of Pepperell}, 786 N.E.2d 396, 398 (Mass. App. Ct. 2003) (explaining criminal convictions result in automatic disqualification from firearm ownership); MacNutt v. Police Comm’r of Bos., 572 N.E.2d 577, 579-80 (Mass.
carry firearms, and also establishes safe-storage requirements to prevent unauthorized access to legally owned firearms. Strict penalties exist to ensure that individuals comply with the regulations. There are statutory disqualifications that permanently prevent a person from acquiring a firearms license, including past criminal history, prior firearm or drug offenses, mental health issues, and evidence of drug or alcohol addiction.

The General Court was very thorough in crafting its gun laws; the regulations mentioned above are just a small fraction of the laws regulating gun ownership and use. A person must have received their license before purchasing or possessing firearms, ammunition, ammunition components—such as bullets, casings, primers, and gunpowder—and certain ammunition...
feeding devices (commonly called magazines or clips). Massachusetts law creates three types of firearm licenses—a Firearms Identification Card (FID), a Class B License to Carry, and a Class A License to Carry—and each license carries its own unique privileges and limitations.

An FID card allows the purchase of non-large-capacity rifles and shotguns, but does not permit the licensee to purchase or possess handguns or rifles capable of accepting large-capacity feeding devices. An FID card is a “shall issue” license that allows an eighteen-year-old to possess rifles, shotguns, and ammunition so long as he or she satisfies the statutory requirements. A Class B License to Carry does not actually permit a person to carry firearms, but rather only allows a person to purchase and possess non-large-capacity handguns and large-capacity rifles and shotguns. The only true license to

---

55. Mass. Gen. Laws Ann. ch. 140, § 131(a) (requiring license to purchase or possess firearms, ammunition, and feeding devices); see also id. § 121 (defining “ammunition” to include various components and other devices or instruments). Massachusetts also regulates “large capacity weapons” and “large capacity feeding devices,” which the law defines as weapons or feeding devices capable of holding or adaptable to hold more than ten rounds of ammunition. Id. § 121 (defining large-capacity weapon and large-capacity feeding device). Large-capacity weapons and feeding devices may only be purchased or possessed by a Class A license holder. Id. § 131(b). The law prohibits owning a high-capacity feeding device made after September 13, 1994, but a Class A license holder may own a large-capacity feeding device made on or before that date. Id. § 131M (establishing felony punishment for possession of large-capacity magazines made after September 13, 1994).

56. See Mass. Gen. Laws Ann. ch. 140, § 129B (establishing FID), id. § 131(a)–(b) (creating Class A and Class B Licenses to Carry). For example, only Class A and Class B licenses allow the licensee to possess handguns. Compare id. § 131(a) (allowing licensee to possess large-capacity handgun), and id. § 131(b) (allowing licensee to possess non-large-capacity handgun), with id. § 129B(6) (stating FID does not entitle holder to possess large- or non-large-capacity handguns). Further, those licenses are “may issue” licenses, which are issued only if the licensing authority determines that the applicant is a suitable person and has a proper purpose for owning firearms. See Mass. Gen. Laws Ann. ch. 140, § 131(d) (stating licensing authority “may issue” license to qualified applicants thereby giving licensing authority discretion to grant application). The statute establishing Class A and B licenses also requires that the applicant demonstrate either a good reason to fear injury to his or her person or property, or a different reason—including target shooting—before the licensing authority may issue a license. See id.; see also Stavis v. Carney, No. CIV.A. 99-349-A, 2000 WL 1170090, at *4-5 (Mass. Super. Ct. July 31, 2000) (explaining licensing authority’s two-step analysis to determine suitability and proper purpose).


58. Id. (using “shall issue” language and requiring applicant be eighteen or older).

59. See id. § 131(b) (establishing scope of Class B license); see id. § 121 (excluding feeding device holding ten rounds or less from definition of “large capacity” feeding device). A Class B license is essentially a permit to possess non-large-capacity handguns, because Class B licenses do not allow concealed carry. See id. § 131(b) (omitting language permitting concealed carry). Furthermore, while carrying firearms openly is not illegal in Massachusetts, it is viewed unfavorably. See id. Compare id. § 131(b) (forbidding Class B licensee to carry a firearm in concealed manner), with id. § 131(a) (allowing licensee to carry firearms without distinguishing between openly carried and concealed firearms). Massachusetts does not forbid Class A or B licensees from carrying a firearm openly. See id. § 131(a) (listing carry and concealed carry as actions sanctioned by license); id. § 131(b) (stating Class B license permits licensee to carry, but not conceal, firearm). A prudent gun owner will not likely carry a firearm openly because the sight of an armed individual could cause alarm, starting a chain of events that might ultimately result in the licensing authority revoking the individual’s license on suitability grounds. See id. § 131(a) (allowing at-will revocation of firearm license should licensing authority deem licensee unsuitable).
carry under Massachusetts law is the Class A license.60 Class A licenses allow a licensee to own large-capacity handguns, rifles, and shotguns in addition to permitting the licensee to carry a concealed handgun.61 Both the Class A and B licenses are “may issue” licenses that leave the decision of whether to issue a license to the licensing authority in the applicant’s municipality.62 If the licensing authority denies a license application, the applicant can appeal the denial.63 In order to prevail on appeal, the applicant must show that the licensing authority abused his or her discretion by denying the license, and that the applicant is “a suitable person” having a proper purpose for owning a firearm.64

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.65 Aside from establishing certain basic procedural requirements for licensing—including fingerprinting, a background check, and a $100 fee—the General Court delegated the decision regarding the suitability of potential firearms owners to the licensing authorities in the Commonwealth’s towns and cities.66 In order to determine whether the applicant is a suitable person with a proper purpose, the licensing authority can require the applicant to provide supplemental information in addition to the standard application materials.67 For example, one town’s licensing authority might supplement the

61. See id. (authorizing carry and possession of large-capacity firearms “for all lawful purposes”); see also id. § 131M (outlining prohibition of ownership of large-capacity feeding devices possessed after September 13, 1994).
62. See id. § 122 (providing licensing authority “may” issue license after determining applicant’s suitability and purpose). Section 122 further delegates license determinations to the chief of police in the applicant’s city or town of residence. Id.
63. See id. § 131(f) (providing for judicial review of denial of application for license to carry).
65. See Mass. Gen. Laws Ann. ch. 140, § 131(a) (allowing licensing authority to determine application requirements and criteria for suitability). Because a license is required to possess a firearm and the local licensing authority controls access to such licenses, the statutes create a system where an individual’s access to firearms for self-protection depends largely on the individual’s place of residence. Id. § 131(a); id. § 122 (providing local police chief with power to approve or deny license applications).
statutory requirements by requiring letters of recommendation, a doctor’s note, or a shooting test, while the authority in a neighboring town might only require the applicant’s paperwork and a brief telephone interview. Moreover, the policy of the local licensing authority dictates whether the licensing authority will issue a restricted license.

Having satisfied the statutory and suitability requirements, the applicant may receive a license to carry. The licensing authority may, however, restrict the license, because the statute creating Class A and B licenses provides the licensing authority the ability to restrict those licenses to a particular purpose or activity. A person who desires a firearm for employment purposes—such as a security guard, locksmith, or tow-truck driver—might receive an “Employment” restriction, while another licensee might be restricted to “Target and Hunting” activities. Restricted licenses allow the licensee to only carry a

68. See MASS. GEN. LAWS ANN. ch. 140, § 131(d) (entrusting investigation of applicant’s suitability to licensing authority); see also MacNutt, 572 N.E.2d at 579-80 (upholding licensing authority requiring applicant pass shooting test prior to issuing firearm license); Ruggiero v. Police Comm’r of Bos., 464 N.E.2d 104, 106 (Mass. App. Ct. 1984) (noting legislature intended licensing authority to have every conceivable means of controlling access to firearms). The court in MacNutt noted that a licensing authority has the ability and discretion to determine suitability through any measure not arbitrary or capricious. 572 N.E.2d at 580; see also Stavis, 2000 WL 1170090, at *5 (interpreting statute as permitting additional requirements reasonably related to determining suitability). The shooting test requirement, for example, is an obstacle that makes the application process more difficult and may result in fewer people obtaining a firearms license; however, the Appeals Court reasoned that the test was not an unreasonable requirement and was within the licensing authority’s discretion. MacNutt, 572 N.E.2d at 579.


70. MASS. GEN. LAWS ANN. ch. 140, § 131(a) (using permissive rather than mandatory language to ensure licensing authority retains discretion to approve license application).

71. See id. § 131(a) (permitting reasonable restrictions on licenses to carry); see also Ruggiero, 464 N.E.2d at 107-08 (upholding validity of restricted license). Restrictions are primarily a concern for holders of Class A licenses, because Class A licenses allow the licensee to carry concealed firearms. See MASS. GEN. LAWS ANN. ch. 140, § 131(a) (implicitly authorizing concealed carry of firearms with Class A license); see also supra note 59 and accompanying text (explaining differences between license types and limitations of Class A licenses). Class A and B licenses do allow a licensee to carry a concealed firearm on the licensee’s own property notwithstanding any license restrictions; however, the licensee must securely store the firearm before leaving home. See id. § 131L (requiring licensee to secure firearm when not under licensee’s direct control); see also Commonwealth v. Seay, 383 N.E.2d 828, 832 (Mass. 1978) (permitting firearm carry within licensee’s residence with valid license to carry or FID); accord Commonwealth v. Dunphy, 386 N.E.2d 1036, 1038-39 (Mass. 1979) (defining apartment building common areas and foyers as outside of licensee’s home). These limitations place a series of stumbling blocks that a licensee must avoid in order to comply with the regulatory system, and they likely have a chilling effect on the licensee’s right to bear arms, given the strict penalties awaiting violators. See infra notes 75, 77 and accompanying text (discussing likely effect of license restrictions on licensee’s conduct).

firearm when engaged in the activity named in the restriction.\textsuperscript{73} For example, a Class A license restricted to “Target and Hunting” permits the licensee to carry a concealed firearm only when engaged in target shooting or hunting activities.\textsuperscript{74} As license restrictions are left to the discretion of the licensing authority, licensees have no way to know precisely what the restriction issued permits him or her to do.\textsuperscript{75} A licensee with a restricted license cannot know whether a “Target and Hunting” restriction permits concealed carry when traveling to and from the range or hunting location, or whether the licensee can stop or make a detour along the way, without violating the restriction.\textsuperscript{76} These restrictions effectively prohibit the licensee from carrying a concealed firearm because prudent gun owners will most likely choose to not carry a firearm rather than risk the strict penalty for an inadvertent violation of his or her license restriction by carrying a firearm.\textsuperscript{77}

In addition to laws governing the possession, transport, carry, and use of firearms, the General Court also established requirements for the storage of firearms when not in use.\textsuperscript{78} The General Court established the Commonwealth’s gun laws with the intention of preventing irresponsible people from accessing firearms.\textsuperscript{79} To that end, Massachusetts law requires

\textsuperscript{73} See Mass. Gen. Laws Ann. ch. 140, § 131(a) (West 2010) (allowing licensing authority to place restrictions on licenses); see also Ruggiero, 464 N.E.2d at 107 (stating license restrictions valid and binding under statute and reviewed for abuse of discretion).


\textsuperscript{75} See Mass. Gen. Laws Ann. ch. 140, § 131(a) (leaving license restrictions undefined and subject to licensing authority’s discretion without requiring definition). The licensing authority has the power to establish any restriction it deems proper; however, most license restrictions fall into the categories suggested by the Criminal History Systems Board (now called the Department of Criminal Justice Information Services). See id. § 131(a); see also Non-Resident Application Instructions, supra note 72 (providing suggested definitions for restrictions).

\textsuperscript{76} Mass. Gen. Laws Ann. ch. 140, § 131(d) (failing to include requirement for definition of scope of restrictions). Conversely, a self-employed individual who possesses a Class A license restricted to “employment” purposes has the functional equivalent of an unrestricted license because she can presumably claim to be involved in employment activities at any point. See id. (allowing undefined restrictions at licensing authority’s discretion).

\textsuperscript{77} See id. § 131(a) (allowing license restrictions and punishing violations with license revocation and $1000 to $10,000 fine); id. § 131 (establishing authority to apply restrictions and penalties for violating restrictions); see also John R. Lott Jr., More Guns, Less Crime: Understanding Crime and Gun-Control Laws, in Gun Control and Gun Rights 39-40 (Andrew J. McClurg et al. eds., 2002) (suggesting fears regarding concealed carry unfounded because small number of licenses in surveyed statistics revoked for firearm offenses); supra note 68 and accompanying text (examining licensing authority’s broad power in determining suitability and establishing license requirements).

\textsuperscript{78} Mass. Gen. Laws Ann. ch. 140, § 131L(a) (outlining firearm storage requirements).

firearms be rendered inoperative either by storage in a locked container or through a locking device, such as a trigger lock, whenever the firearm is not under the licensee’s control.\textsuperscript{80} Violations are punished by a fine of between $1000 and $10,000.\textsuperscript{81} Furthermore, if a minor accesses an improperly stored firearm and injury results, the improper storage is evidence of wanton or reckless conduct in any civil or criminal suit.\textsuperscript{82}

Although the statute requires a locked container or a tamper-resistant locking device, the statute does not provide clarity regarding what type of container will satisfy the requirement.\textsuperscript{83} The statute considers a firearm adequately secured so long as the owner stores it in a manner that will deter unauthorized access, even if the container is not specifically designed for storing firearms.\textsuperscript{84} The container itself need not be in a secure location if the firearm within it is properly secured.\textsuperscript{85} Proper securement of a firearm for legal purposes is a fact-specific determination made by the factfinder.\textsuperscript{86}

\textbf{B. Challenges to Massachusetts Gun Regulations Under Article XVII and Davis}

Many cases have challenged various aspects of Massachusetts’s firearm regulatory scheme.\textsuperscript{87} Each challenge failed under the holding in \textit{Davis} for two


\textsuperscript{80} MASS. GEN. LAWS ANN. ch. 140, § 131L(a) (West 2010) (requiring owner store firearm in secured container or affix with trigger-lock); Commonwealth v. Lojko, 928 N.E.2d 679, 681 (Mass. App. Ct. 2010) (interpreting storage requirements as providing firearms may be stored any place so long as secure in locked container).

\textsuperscript{81} MASS. GEN. LAWS ANN. ch. 140, § 131L(c)-(d) (enumerating penalties for violation of storage laws).

\textsuperscript{82} See id. (stating violation serves as evidence of reckless or wanton conduct in subsequent criminal or civil proceeding).

\textsuperscript{83} Id. § 131L(a) (failing to define requirements for container or locking device). \textit{But see} Lojko, 928 N.E.2d at 681 (requiring container capable of deterring all but most persistent from gaining access) (quoting Parzick, 835 N.E.2d at 1175); Parzick 835 N.E.2d at 1176 (determining lock or container must prevent ready access by anyone not lawful owner).

\textsuperscript{84} See Parzick, 835 N.E.2d at 1175 (concluding statute requires locked container capable of preventing access to firearms). The Appeals Court stated that storage must be within a secure container, and that locking a firearm within a container is not sufficient if the container can be easily accessed. \textit{Id.} (reasoning firearm not stored securely if key to locked container accessible nearby); \textit{see also} Commonwealth v. Lee, 409 N.E.2d 1311, 1315 (Mass. App. Ct. 1980) (holding statute’s language does not require storage in container specifically made for firearms).

\textsuperscript{85} See Lojko, 928 N.E.2d at 681 (holding secure container satisfies requirements even when container itself not stored in secure location). Presumably the same requirements for secure containers also hold true for firearms affixed with trigger-locks, in that so long as the lock is affixed to the firearm, the firearm need not be in a secure location. \textit{See id.} (reasoning purpose of statute satisfied by preventing unauthorized use of firearms); \textit{see also} Lee, 409 N.E.2d at 1315 (applying statute to container not designed for firearms).

\textsuperscript{86} See Lee, 409 N.E.2d at 1316 (stating compliance with storage requirements depends on facts of situation in question).

\textsuperscript{87} See, e.g., Commonwealth v. Depina, 922 N.E.2d 778, 789-90 (Mass. 2010) (holding Massachusetts Constitution permits license requirement for owning firearms because article XVII embodies collective right to bear arms); Commonwealth v. Runyan, 922 N.E.2d. 794, 798-99 (Mass. 2010) (upholding storage laws and
reasons: first, the SJC interpreted article XVII to not recognize an individual right to arms, and second, because the Second Amendment had not yet been incorporated against the states under the Fourteenth Amendment. In Davis, the superior court convicted the appellant for possession of firearms and ammunition without a license. In his appeal, the defendant claimed that the Commonwealth’s license requirement violated his Second Amendment right to keep and bear arms. The SJC deemed the Second Amendment inapplicable to citizens’ gun rights in the Commonwealth because it restricted only federal government action. Reading article XVII as preserving a collective right to bear arms for the common defense, the SJC stated that the right to bear arms belonged to the people in the aggregate, and only laws that impede the effectiveness of the militia violate article XVII. Because the statute did not interfere with the common defense provided by the militia—currently, the National Guard—the statute did not violate article XVII. The SJC also held, in Davis, that because the statute in question fell within a larger regulatory scheme intended to promote the public safety, the statute was consistent with previously established firearm regulations.

Shortly thereafter, the SJC upheld the Commonwealth’s restrictive licensing scheme, in Commonwealth v. Jackson, as a method of reducing violent crime within the state. Although the SJC in Jackson focused on disproportionate punishment for repeat offenders, the SJC also noted in its opinion the role firearms had played in the rise of violent crime in Massachusetts. Citing violent-crime statistics, the SJC concluded that the General Court had reasonable grounds for establishing restrictive licensing requirements in order
to increase public safety by limiting access to firearms.\textsuperscript{97} When read together, \textit{Davis} and \textit{Jackson} provide a strong foundation for the current firearms regulatory scheme and preclude arguments that challenge restrictions based on article XVII.\textsuperscript{98}

1. Discretionary “May Issue” Licensing

Highlighting its concern for public safety, the General Court enacted a regulatory scheme that provided licensing authorities with wide-reaching powers to determine who owns firearms in the Commonwealth.\textsuperscript{99} Although the statute did not determine the nature of a licensing authority’s discretion, the SJC clarified the scope of that authority in \textit{Rzeznik v. Chief of Police of Southampton}.\textsuperscript{100} The SJC reasoned that public safety justified granting a licensing authority access to the applicant’s information, including full criminal history, when determining whether the applicant was a suitable gun owner.\textsuperscript{101} The appellant in \textit{Rzeznik} had been convicted of a felony but had the record of his conviction sealed.\textsuperscript{102} After issuing the appellant a restricted license to carry for business purposes only, and not for self-protection, the licensing authority determined that it had the power to take sealed records into account when reviewing gun license applications.\textsuperscript{103} The licensing authority then revoked the


\textsuperscript{98} See Jackson, 344 N.E.2d at 171-72 (reasoning concerns for public safety sufficiently justify restrictive licensing); Davis, 343 N.E.2d at 848-49 (finding no individual right to bear arms and statute challenged fell within larger regulatory scheme designed to protect public safety). Underlying both opinions in \textit{Jackson} and \textit{Davis} is the SJC’s recognition that the legislature enacted the restrictive regulatory scheme with a concern towards public safety. See Jackson, 344 N.E.2d at 171; Davis, 343 N.E.2d at 848-49.

\textsuperscript{99} See MASS. GEN. LAWS ANN. ch. 140, § 131(a) (West 2010) (delegating licensing authority power to exercise discretion when issuing firearm licenses); see also Commonwealth v. Landry, 376 N.E.2d 1243, 1245 (Mass. App. Ct. 1978) (arguing statute’s language suggests General Court intended “more thorough investigation” of applicant); \textit{supra} note 98 and accompanying text (discussing concerns for public safety as foundation of restrictive licensing system).

\textsuperscript{100} See \textit{Rzeznik} v. Chief of Police of Southampton, 373 N.E.2d 1128, 1132 (Mass. 1978) (authorizing use of sealed records to determine applicant’s suitability for license).

\textsuperscript{101} Id. (noting information in sealed records relevant to question of suitability).

\textsuperscript{102} Id. at 1131.

\textsuperscript{103} Id. (describing how licensing authority relied on memorandum from state agency to support utilizing
appellant’s gun license based on the contents of the appellant’s sealed record.\textsuperscript{104} In upholding the use of sealed records, the SJC reasoned that the statute delegated broad authority to the licensing authority to determine whether an applicant is qualified to receive a gun license.\textsuperscript{105}

As a result, licensing authorities have a broad reach when assessing an applicant’s suitability.\textsuperscript{106} Even a full pardon does not prevent the licensing authority from denying an application.\textsuperscript{107} In \textit{DeLuca v. Chief of Police of Newton}, the police chief denied an application by the appellant based upon an earlier manslaughter conviction, despite the fact that the governor had fully pardoned the appellant.\textsuperscript{108} The SJC held that a pardon did not prevent the licensing authority from considering the underlying (yet pardoned) offense when determining the appellant’s suitability.\textsuperscript{109} The licensing authority also retains the power to revoke a license at will, and the licensee has no right to have the determination adjudicated by a jury.\textsuperscript{110} In \textit{Godfrey v. Chief of Police of Wellesley}, the appellant refused to answer questions on Fifth Amendment grounds during a police investigation involving shots fired in the appellant’s sealed criminal conviction).

\textsuperscript{104} Rzeznik, 373 N.E.2d at 1131. The licensing authority revoked the appellant’s license the evening after the appellant testified before a grand jury regarding the licensing authority’s involvement in an unspecified conflict of interest. \textit{Id.} The trial judge noted that revoking the appellant’s license immediately after his testimony created the “irresistible impression” that the revocation was vindictive and fueled by personal animosity. \textit{Id.} at 1134. The SJC ignored this finding of vindictiveness and upheld the revocation despite its inappropriate motivation because an applicant’s criminal history was a statutory disqualification. \textit{Id.} The SJC also stated that if the revocation was retaliatory, it could be an actionable violation of appellant’s First Amendment rights. \textit{Id.} Unfortunately for the appellant, that violation did not change the fact that his conviction disqualified him statutorily from owning a firearm under Massachusetts law. \textit{Id.} \\
\textsuperscript{105} \textit{Id.} at 1132 (upholding use of sealed records when determining suitability). \\
\textsuperscript{107} \textit{Id.} at 630 (noting “suitability” determinations involve character, therefore allowing licensing authority to consider pardoned offenses as bearing on applicant’s character). \\
\textsuperscript{108} \textit{Id.} at 629. \\
\textsuperscript{109} \textit{Id.} at 630 (holding police chief entitled to consider acts underlying pardoned offenses to determine applicant’s suitability). \\
\textsuperscript{110} See Godfrey \textit{v. Chief of Police of Wellesley}, 616 N.E.2d 485, 487-88 (Mass. App. Ct. 1993) (holding extremely limited judicial review of license revocation precluded jury trial as justified by statute’s language); \textit{see also} \textit{Mass. Gen. Laws Ann.} ch. 140, § 131 (West 2010). In fact, some licensing authorities have determined that even being the victim of a crime can result in a license revocation. \textit{See} Erin Smith & Robert Mills, \textit{40 Guns Stolen From House, LOWELL SUN}, Jan. 5, 2011, www.lowellsun.com/food/ci_17014950 (stating victim’s Class A license immediately revoked after licensee reported theft of handguns and rifles from his home). Recently, a burglar robbed a licensee’s gun collection, stealing approximately forty guns from a home-built vault in the licensee’s basement. \textit{See id.} The police immediately revoked the victim’s license despite a police captain stating that the licensee had stored his firearms in a “very, very secure” vault. \textit{See id.; see also Police: 40 Guns Stolen From Lowell, ASSOCIATED PRESS,} Jan. 5, 2011, http://www1.whdh.com/news/articles/local/12003193348697/police-40-guns-stolen-from-lowell-home (explaining police revoked victim’s license before investigating whether licensee broke any laws). At the time of revocation, the licensee had not been charged with violating any firearm laws or regulations. \textit{See Smith & Mills, supra (explaining victim not accused of wrongdoing prior to license revocation).}
neighborhood.111 The police chief subsequently revoked the appellant’s firearm license, claiming that the appellant was no longer suitable to hold a firearm license.112 The Massachusetts Appeals Court (Appeals Court) upheld the revocation, stating that the licensing statute allowed license revocation for cause at the will of the licensing authority, and that the reasons proffered by the chief—that the appellant was no longer suitable—satisfied the statute’s “for cause” requirement.113 The Appeals Court resolved that the license revocation was neither arbitrary nor capricious, regardless of whether the appellant was merely exercising his Fifth Amendment rights.114

2. Restrictions on Use

The General Court has delegated broad discretion to a municipality’s licensing authority to limit access to firearms in order to help prevent violent crime—the goal of the state’s gun regulation scheme.115 This discretion includes the ability to limit a license to a particular, specified purpose.116 As discussed above, a restricted Class A license allows the licensee to carry a concealed firearm only when engaged in the activity listed in the restriction.117 In Ruggiero v. Police Commissioner of Boston, the Appeals Court interpreted the licensing statute to allow the licensing authority to place enforceable restrictions on an issued license.118 The SJC declined to review the Appeals Court decision, allowing the Ruggiero holding to maintain its precedential value of upholding the validity of the Commonwealth’s license restrictions.119

The Ruggiero court anticipated the confusion that would arise from attempting to enforce undefined restrictions and recommended that the executive branch provide a statement or set of guidelines to aid future licensees in understanding the Commonwealth’s gun regulations.120 The Massachusetts

111. Godfrey, 616 N.E.2d at 486.
112. See id. (declaring licensing authority stated licensee needed to “recognize the serious danger which continues to exist”).
113. Id. at 488.
114. Id. (upholding revocation on suitability grounds because statute delegates broad discretion despite retaliatory nature of revocation).
116. See Ruggiero, 464 N.E.2d at 107 (inferring authorization for license restrictions from “considerable latitude” given to licensing authority).
117. Id. (explaining purpose of license restrictions); see also supra note 71 and accompanying text (discussing effect of license restrictions).
118. See MASS. GEN. LAWS ANN. ch. 140, § 131(a) (West 2010) (requiring applicant have “proper purpose” for owning firearm); Ruggiero, 464 N.E.2d. at 107 (focusing on “proper purpose” language in licensing statute).
119. See Ruggiero, 464 N.E.2d at 107; see also NON-RESIDENT APPLICATION INSTRUCTIONS, supra note 72 (providing nonbinding suggested definitions for license restrictions); supra note 75 and accompanying text (discussing undefined license restrictions).
120. Ruggiero, 464 N.E.2d at 107 (pointing to proper purpose requirement and limitations imposed on
Executive Office of Public Safety issued a set of nonbinding guidelines in response, in which the office suggested definitions for license restrictions. Unfortunately, these suggested definitions are not terribly helpful to licensees because the licensing authority ultimately defines the scope of a restriction, not the statute or these guidelines.

### 3. Storage Requirements

Unlike the constitutional challenges to license requirements, most cases involving the storage laws have focused on the laws’ application to particular facts. In *Commonwealth v. Lee*, police seized a box from the back of the appellant’s van, in which the appellant had placed a rifle. The appellant challenged his conviction for unlawful storage of a firearm, and the Appeals Court set aside the verdict declaring that the jury instructions given at trial failed to properly instruct the jury on deciding whether the gun was properly stored under the statutory terms. The Appeals Court affirmed that the determination of whether a container satisfied the storage requirements was a question for the finder of fact and not a question of law. The Appeals Court undertook a plain-meaning interpretation of the statute and rejected the Commonwealth’s argument that the statute required firearms to be stored in a container specifically designed for firearms.

Twenty-five years later, the Appeals Court relied on its holding in *Lee* when deciding *Commonwealth v. Parzick*. In *Parzick*, the appellant was convicted of improper storage of a firearm after several of his rifles had been stolen from his house. The appellant had stored several rifles in an unlocked closet in his

---

121. See *NON-RESIDENT APPLICATION INSTRUCTIONS*, supra note 72 (providing guidance regarding possible definitions for license restrictions).

122. MASS. GEN. LAWS ANN. ch. 140, § 131(a) (granting discretion to licensing authority to impose license restrictions on applicants).


125. See id. at 1316.

126. See id.

127. See id.

128. *Parzick*, 835 N.E.2d at 1175 (basing decision regarding definition of secured container on reasoning in *Lee*). The court held that section 131’s requirement of a “secured” container meant not merely a locked container but a securely locked one. Id (citing *Lee*, 409 N.E.2d at 1316).

bedroom, and he appealed the conviction while arguing that he satisfied the requirement of storing firearms in a locked container by locking the bedroom door.130 The court assumed—without deciding—that a room could be a container itself, and focused instead on the requirement that the container be both secure and locked.131 The court determined that the appellant did not store his firearm securely because the locked bedroom door could be opened with minimal effort and did not prevent “ready access” to the firearms by others.132

Although firearms must be stored in a secure container, the law does not require the container itself to be secured.133 In Commonwealth v. Lojko, the appellant stored a handgun by placing it in a plastic box and securing the box with a cable lock—a lock mechanism connected to a tamper-proof cable.134 On appeal, the appellant raised the issue of whether he had properly stored the firearm by placing the locked container in the backyard of his house.135 After determining the cable-lock mechanism satisfied the secure container requirement, the Appeals Court held that the storage law does not require the gun owner to place the secure container in a secure location.136 The Appeals Court instead determined that the statute only required a firearm to be stored in a secure container.137 The secured box left in the backyard complied with the safe-storage requirements because it prevented access to the firearm, not because it prevented theft of the container securely storing the firearm.138

Courts have resolved most challenges to the Massachusetts regulatory scheme quickly and decisively by relying on the SJC’s reasoning that originated in Davis.139 In 2003, the Appeals Court explained that a license to

---

130. See id. at 1174.
131. Id. at 1175 (reading statute to require securely locked container capable of preventing determined attempts to access firearm).
132. See id. at 1176 (reasoning appellant’s bedroom not secure because door lock vulnerable to thief with bobby pin).
134. Id. at 680 (describing method of securing firearm).
135. See id. at 680-88 (explaining locked box containing firearm stored in cooler in appellant’s backyard).
136. See id. at 681 (holding statute requires no more than firearm locked in secure container).
137. See Lojko, 928 N.E.2d at 681 (reading statute’s plain language as only requiring secure container).
138. See id. (determining statute requires secure container without requiring container kept in secure location); see also Commonwealth v. Lee, 409 N.E.2d 1311, 1316 (Mass. App. Ct. 1980) (reasoning statute intended to prevent access to—not necessarily theft of—firearms). Although the court did not discuss firearms secured with trigger-locks, the same reasoning supports an inference that a firearm locked with a trigger-lock, but not locked in a container, would comply with section 131L, even if it were left in the back yard. See MASS. GEN. LAWS ANN. ch. 140, § 131L (West 2010) (requiring firearm affixed with trigger-lock or locked in secure container); see also Lojko, 928 N.E.2d at 681 (declining to read into statute requirement not expressed in language).
carry firearms was a privilege granted by statute and not a right protected by the Massachusetts Declaration of Rights.\(^\text{140}\) Two recent Supreme Court cases, \textit{Heller} and \textit{McDonald}, however, appear to directly contradict this line of reasoning and, as such, will likely force the SJC to alter the way it approaches challenges to the Commonwealth’s firearm regulatory scheme.\(^\text{141}\)

\subsection*{C. Recent Federal Cases and Massachusetts Gun Regulation}

Since the Supreme Court decided \textit{United States v. Miller} in 1939, all debate over the interpretation of the Second Amendment has been either academic or political, because the Supreme Court refused to address the meaning of the amendment in any subsequent case until 2008.\(^\text{142}\) In \textit{Miller}, the Court upheld a constitutional challenge to the National Firearms Act of 1934—the first federal firearms law—by holding that a weapon needed to have a “reasonable relationship” to the preservation of a militia in order to qualify for Second Amendment protection.\(^\text{143}\) The holding in \textit{Miller} sustained until 2008, when the Court decided the landmark case \textit{District of Columbia v. Heller}.\(^\text{144}\) In \textit{Heller}, the Court defined the right protected by the Second Amendment as an individual right to self-defense rather than a collective or militia-based right.\(^\text{145}\) The facts of \textit{Heller}, however, did not provide the Court with the opportunity to resolve whether the right could be incorporated against the states under the Fourteenth Amendment, and the decision, therefore, bound only the federal government.\(^\text{146}\)

\begin{itemize}
\item \textit{Heller}'s holding defined the meaning of the Second Amendment but left many details, including the scope of the Amendment’s application, unclear. \textit{See id.} (stating first case resolving Second Amendment’s meaning not intended to
\end{itemize}
I. District of Columbia v. Heller

In *Heller*, the Supreme Court addressed the constitutionality of the District of Columbia’s (D.C.) firearm-storage laws and, in turn, the meaning of the Second Amendment.\(^{147}\) Justice Scalia’s majority opinion methodically deconstructed the Second Amendment’s text to determine its original meaning.\(^{148}\) The Court determined that the Second Amendment merely recognized and protected a preexisting individual right at common law to bear arms.\(^{149}\) *Heller* acknowledged the need for public safety regulations; however, the Court argued that those regulations cannot impair the individual’s right under the Second Amendment.\(^{150}\) The opinion did note that the Second Amendment does not guarantee an unlimited right to bear arms, and it also explicitly stated that *Heller* should not be read to invalidate all firearm regulation.\(^{151}\)

\(^{147}\) *District of Columbia v. Heller*, 554 U.S. 570, 576-619 (2008) (determining meaning and purpose of Second Amendment). The District of Columbia required gun owners to store firearms either disassembled or unloaded and affixed with trigger-locks when the firearms were not in use. *Id.* at 575. Respondent challenged the District of Columbia’s general prohibition on handguns and the storage law as a violation of the right to keep and bear arms. *Id.* at 574-75. Related laws barred individuals from carrying unregistered handguns while simultaneously prohibiting the registration of handguns. *See id.* (citing code sections creating de facto ban on handgun possession).

\(^{148}\) *Id.* at 577-606 (conducting textual analysis of Second Amendment to discern historical meaning and purpose).

\(^{149}\) *Id.; see also id.* at 579-81 (establishing strong presumption Second Amendment protects individual right instead of collective right). The Court then determined that the framers intended the Second Amendment to protect the individual’s right to self-defense. *See id.* at 592 (determining Second Amendment protects right to keep and bear arms for purpose of confrontation). Interpreting *Miller*, the Court stated that the Second Amendment was intended to allow individuals to keep and bear weapons “‘in common use at the time’ for lawful purposes like self-defense.” *Id.* at 621-25 (interpreting language to exclude weapons not commonly possessed for lawful purposes from Second Amendment protection). Because Americans had historically chosen handguns as the primary tool for self-defense, the Court explicitly included handgun ownership as enjoying Second Amendment protection. *Id.* at 628-30. Although the Court did not discuss the constitutionality of concealed-carry laws, it defined the Second Amendment as preserving a right to keep and bear arms in case of confrontation, which likely includes a right to carry—either openly or concealed—outside the home. *See id.* at 584-88 (explaining “bear arms” means to carry arms in case of confrontation, without military connotation).

\(^{150}\) *Id.* at 626-30.

\(^{151}\) *Heller*, 554 U.S. at 626 (stating Second Amendment right not unlimited and providing examples of presumptively valid regulations). The Court highlighted a small number of long-standing regulations to illustrate those regulations it assumed would remain effective in spite of its ruling. *Id.* at 626-27. The nonexhaustive list included age restrictions and prohibitions on gun possession by felons or the mentally ill, as well as laws forbidding firearms in places like schools or government buildings. *Id.* at 626. The Court also assumed that laws imposing conditions and qualifications on arms sales would remain permissible. *See id.* at 627. *See generally Darrell A.H. Miller, Guns as Smut: Defending the Home-Bound Second Amendment, 109 COLUM. L. REV. 1278 (2009) (comparing Second Amendment to First Amendment and analogizing gun laws to laws governing pornography). *Heller* does not provide protection to all weapons because the “common use” carve-out leaves room for legislatures to control access to weapons like short-barreled shotguns and automatic weapons. *See 554 U.S. at 623-29 (explaining Second Amendment protection does not encompass all types of weapons).
Although *Heller* took enormous strides in defining the Second Amendment, the Court chose not to establish a level of judicial scrutiny by which courts could evaluate Second Amendment restrictions.\(^{152}\) While not establishing a standard of review, the Court did state that a complete ban on handguns would most likely fail any level of scrutiny.\(^{153}\) Furthermore, the Court specifically rejected approaches under either rational-basis review or an interest-balancing test, noting that constitutionally guaranteed rights require a stronger form of protection.\(^{154}\)

Despite the apparent significance of the *Heller* decision, the opinion had relatively minimal impact in Massachusetts.\(^{155}\) The SJC emphasized the limits of the *Heller* decision and its lack of impact on the Commonwealth’s gun laws in two cases decided on the same day, *Commonwealth v. Runyan* and *Commonwealth v. Depina*.\(^{156}\) *Runyan* concerned a challenge to the Massachusetts storage law, which is similar to the law struck down in *Heller*.\(^{157}\) Relying on *Heller*, the trial court found that the safe-storage requirement violated the defendant’s Second Amendment rights.\(^{158}\) The SJC reversed the trial court, holding that the Second Amendment did not yet apply to the states and therefore article XVII still governed firearm ownership in Massachusetts.\(^{159}\) In *Depina*, the defendant challenged the licensing

---

152. See *Heller*, 554 U.S. at 634-35 (stating first in-depth examination into Second Amendment not intended to clarify entire field).
154. *Id.* at 629 n.27, 634-35 (declaring rational-basis standard of review insufficient protection for fundamental right and declining interest-balancing analysis for enumerated right).
156. See *Depina*, 922 N.E.2d at 789-90 (declaring Massachusetts firearm regulation unchanged by Supreme Court’s Second Amendment definition); *Runyan*, 922 N.E.2d at 797 (recognizing no change in Massachusetts law after *Heller*).
158. See *Runyan*, 922 N.E.2d at 789-90 (discussing lower court’s disposition of charges).
159. See *id.* at 797-98 (holding Second Amendment not applicable in Massachusetts until incorporated). The SJC also noted that Massachusetts law did not require guns to be locked if under an individual’s direct control, and therefore storage requirements did not prevent an individual from accessing the firearm while at home. *Id.* at 799. Furthermore, the SJC noted that modern storage laws are less restrictive than early American laws requiring separate storage of muskets and gunpowder, because a gun stored with a trigger-lock could be accessed more quickly than a musket could be loaded. *Id.* at 799 n.8; see also Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second*
requirement for carrying a loaded weapon by contending that the statute impaired his right to bear arms under the Second Amendment. Again, the SJC declared the Second Amendment inapplicable, and rejected the defendant’s argument relying on the Davis court’s collective-rights interpretation of the right protected by article XVII.

2. McDonald v. City of Chicago

Two years after Heller, the Supreme Court incorporated the Second Amendment against state actions through the Due Process Clause of the Fourteenth Amendment. The appeal in McDonald concerned municipal regulations that functioned as a de facto ban on handgun ownership, much like those struck down by the Court in Heller. The Court held that the right to keep and bear arms for purposes of self-defense was a fundamental right essential to the American system of ordered liberty, and was therefore protected by the Fourteenth Amendment’s Due Process Clause. By incorporating the Second Amendment under the Fourteenth Amendment’s Due Process Clause, the Court ensured that states could not take legislative or regulatory action that impaired the fundamental right protected by the Second Amendment. Recognizing, however, that the right to bear arms had been subject to regulation throughout history, the Court in McDonald echoed its opinion in Heller by stating that the Second Amendment does not prohibit every law regulating firearms.

Unfortunately, the Court in McDonald remained silent on the standard of

---


160. Depina, 922 N.E.2d at 789.


162. See McDonald v. City of Chicago, 130 S. Ct. 3020, 3050 (2010) (incorporating Second Amendment as defined by Heller to states via Due Process Clause). The Supreme Court noted that the incorporation of the Second Amendment will likely limit the legislative freedom enjoyed by the states in the area of gun control legislation. See id. at 3050 (observing result of incorporation of constitutional rights that policy decisions taken away from states); see also Herbert P. Wilkins, Former Chief Justice of the Mass. Supreme Judicial Court, Address at Suffolk University Law Review’s Donahue Lecture Series (Nov. 18, 2010) (stating Supreme Court effectively rewrote Massachusetts Declaration of Rights by incorporating Second Amendment).

163. See McDonald, 130 S. Ct. at 3026 (discussing similarity between laws in Chicago and D.C.).

164. Id. at 3042 (noting wide protection of fundamental right to bear arms enshrined in many state constitutions at time of Fourteenth Amendment’s ratification).

165. Id.

166. See id. at 3047 (noting incorporation not death knell for all gun laws); see also Perkins, supra note 36, at 1061 (suggesting Court adopt balancing test for answering Second Amendment questions); 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, 1456 (2009) (reasoning legitimacy of regulations depends on how heavy burden law imposes on exercise of fundamental right).
review courts should utilize when considering the constitutionality of gun laws, although the Court again rejected using either rational-basis review or an interest-balancing analysis. The *McDonald* decision will likely force the SJC to reinterpret article XVII of the Declaration of Rights in a manner consistent with the Second Amendment right to keep and bear arms.

**D. Possible Alternative to the Current Regulatory Scheme**

Some legislators in the Massachusetts House of Representatives have proposed an alternative regulatory system, House Bill 1568, which would establish a licensing system that preserves the Commonwealth’s ability to regulate gun ownership while removing aspects of the current scheme likely to fail constitutional scrutiny after *Heller* and *McDonald*. Recognizing the Commonwealth’s desire to preserve public safety, House Bill 1568 maintains requirements relating to criminal records and mental health, and preserves gun-free zones, such as schools and government buildings. House Bill 1568 also provides that a license can be revoked and the licensee’s firearms confiscated should a licensee become statutorily disqualified. The bill reforms the licensing system by removing the discretionary element granted to the licensing authority under the current scheme, and replaces the three current licenses—the FID and the Class A and B “may issue” licenses to carry—with a single, “shall issue” license. The proposed bill relies instead on the licensee’s age to determine the type of firearm the licensee may own, purchase, or carry concealed. The bill also eliminates license restrictions entirely. House

167. See *McDonald*, 130 S. Ct. at 3047 (rejecting interest-balancing analysis while stating validity of reasonable regulations).

168. See infra Part III.A (discussing *McDonald* decision’s impact in Massachusetts and predicting SJC’s approach to potential constitutional challenges).


170. See H.R. 1568 §§ 6, 21 (allowing license denial for criminal convictions and mental illness); Zimmer, supra note 169, at 201 (predicting laws preventing gun ownership by felons and mentally ill will survive strict scrutiny).

171. See H.R. 1568 §§ 1, 6 (allowing license revocation and firearm confiscation upon licensee becoming “prohibited person”).


173. H.R. 1568 § 6 (replacing three licenses with single shall-issue license). The proposed system dispenses with the current distinctions between licenses and provides for a single FID. Id. Instead, the licensee’s age determines what rights the license permits. Id. An applicant can acquire an FID at age fifteen that allows the licensee to own and use rifles and shotguns. Id. Upon turning eighteen, the FID automatically allows the licensee to purchase rifles and shotguns. Id. Finally, at twenty-one, the licensee may purchase and own handguns while gaining the unrestricted right to carry a concealed firearm. Id.
Bill 1568 presents a compromise between the Commonwealth’s interest in public safety and crime reduction and the fundamental right to self-defense protected by the Second Amendment and would likely satisfy post-\textit{McDonald} scrutiny.\textsuperscript{175}

\section*{III. ANALYSIS}

The future of gun regulation in Massachusetts is now unclear.\textsuperscript{176} The Supreme Court’s definition of the Second Amendment in \textit{Heller} directly contravenes the SJC’s interpretation of article XVII.\textsuperscript{177} Moreover, after \textit{McDonald}, the SJC will no longer be able to rely on the previously defined collective-right interpretation of article XVII when faced with challenges to Massachusetts gun laws under the Second Amendment.\textsuperscript{178} While the decisions in both \textit{Heller} and \textit{McDonald} left room for argument regarding the constitutionality of state gun regulation, the Court also chose to provide little guidance to aid state courts in resolving future litigation that challenges state gun regulations.\textsuperscript{179}

The SJC has routinely upheld Massachusetts gun laws because the Second Amendment was not incorporated against the states under the Fourteenth Amendment, and the SJC had interpreted article XVII to not guarantee an

\textsuperscript{174} See H.R. 1568 §§ 6(8)(c), 17 (repealing current licensing scheme and replacing with new system omitting language authorizing license restrictions).


\textsuperscript{176} Compare \textit{McDonald}, 130 S. Ct. at 3050 (incorporating Second Amendment through Due Process Clause), and \textit{Heller}, 554 U.S. at 595 (holding Second Amendment protects individual right to bear arms), with Commonwealth v. Davis, 343 N.E.2d 847, 890-91 (Mass. 1976) (reasoning Second Amendment only constrains federal action). The SJC will not be able to rely on the \textit{Davis} reasoning to resolve future challenges and must find a new analytical approach to determine whether Massachusetts gun laws comply with the Second Amendment. Compare \textit{McDonald}, 130 S. Ct. at 3050 (holding individual right to gun ownership incorporated to apply to state action), with \textit{Davis}, 343 N.E.2d at 849 (interpreting article XVII as preserving collective right to own firearms). See generally, Zimmer, supra note 169 (suggesting gun laws be rewritten to comply with strict scrutiny).

\textsuperscript{177} See supra note 176 (comparing Supreme Court’s rulings with seemingly contradictory SJC precedent).

\textsuperscript{178} See supra note 168 and accompanying text (discussing uncertainty surrounding Massachusetts gun laws post-incorporation); see also infra Part III.B (suggesting analytical method for resolving conflict between Second Amendment and Massachusetts gun laws).

\textsuperscript{179} See Volokh, supra note 166, at 1456-57 (reasoning severity of burden determines law’s validity); supra notes 152, 166 and accompanying text (discussing uncertainty surrounding gun laws after \textit{Heller} and \textit{McDonald}); infra Part III.A-B (analyzing likely result of Second Amendment incorporation and pushing for rewritten firearm laws).
individual right to gun ownership. The decisions in *Heller* and *McDonald* have changed the framework for analyzing gun rights Massachusetts’s citizens possess because these decisions have established that the Second Amendment protects an individual’s right to keep and bear arms for self-defense, and also that this fundamental right applies to the states. As a result, the SJC will likely face a number of challenges regarding the constitutionality of the Commonwealth’s gun laws, including safe-storage requirements, the discretionary licensing system, and discretionary license restrictions. Because the Supreme Court defined the right to keep and bear arms as a fundamental and individual right applied to the states under the Due Process Clause, the SJC must adopt a method of analyzing constitutional challenges to these regulations under the individual-right interpretation of Second Amendment and not the collective-right interpretation of article XVII.

**A. The SJC Will Likely Adopt a Strict-Scrutiny Standard When Faced with Constitutional Challenges to Massachusetts Gun Laws**

The Supreme Court defined the Second Amendment as protecting a fundamental, individual right without establishing an explicit standard of review for determining whether a regulation has violated that right. The Court dismissed rational-basis review and an interest-balancing test in both the *Heller* and *McDonald* decisions, because neither provided sufficient protection for a fundamental right. Nevertheless, the Court stated that although the Second Amendment protects a fundamental right, that right was not unlimited and certain longstanding regulations would not be threatened.

**B. Massachusetts Laws After Heller and McDonald**

Impairments of fundamental rights are typically reviewed using a “strict scrutiny” standard of review. This standard requires that the government...
have a compelling interest in regulating a protected activity and that the regulation be narrowly tailored to satisfy that interest. Governments will almost always seek to justify gun laws under the government’s interest in reducing crime and promoting public safety. The SJC will likely consider both of these interests compelling, resulting in an analysis that focuses on whether the regulations are narrowly tailored enough to satisfy the Commonwealth’s interest. Applying strict-scrutiny review will likely result in some significant changes to the scope of Massachusetts’s regulations, but the SJC will probably not invalidate the entirety of Massachusetts gun laws.

I. Discretionary Licensing and License Restrictions Will Likely Fail Post-McDonald Scrutiny

a. Discretionary Licensing

Some citizens of the Commonwealth will almost certainly challenge the current discretionary licensing scheme on constitutional grounds under the Second Amendment. A licensing system that determines a person’s ability to exercise a fundamental right based on a licensing authority’s unilateral discretion will almost certainly fail strict scrutiny. The Commonwealth will likely declare that it has a compelling interest in promoting public safety and reducing crime, but it is unclear precisely how effective gun licensing laws are at preventing the irresponsible use of firearms. Furthermore, although the legislatures assume strict-scrutiny standard and construe legislation to ensure compliance after incorporation).

188. See Craven, supra note 69, at 844 (explaining strict scrutiny requirements).
189. See id. at 846 (exploring justifications for firearm regulation). Laws that regulate gun owners contribute to public safety by decreasing the number of firearms in public, thereby reducing the likelihood of irresponsible persons gaining access to firearms. Id.
190. See id. (predicting states will succeed in meeting first prong of strict scrutiny under compelling public safety interest justifying gun regulations).
191. See McDonald v. City of Chicago, 130 S. Ct. 3020, 3047 (2010) (noting longstanding restrictions on gun rights not threatened by incorporation); District of Columbia v. Heller, 554 U.S. 570, 626 (2008) (outlining gun laws likely to survive heightened scrutiny); see also Cahall, supra note 155, at 387-88 (recommending “may issue” states adopt “shall issue” system providing objective licensing criteria); Craven, supra note 69, at 846-49 (analyzing incorporation’s likely impact on New York’s discretionary licensing system).
192. See Craven, supra note 69, at 846-47 (predicting vulnerability of licensing systems based on discretionary criteria).
193. See Heller, 554 U.S. at 631 (declining to address discretionary licensing upon stipulation law not enforced in arbitrary manner); Craven, supra note 69, at 845-47 (discussing inherently arbitrary nature of discretionary licensing system and its vulnerability to strict scrutiny).
194. See Heller, 554 U.S. at 701-05 (Breyer, J., dissenting) (noting conflicted results of several studies on impact of gun laws leave doubt regarding effectiveness); see also ATF FIREARMS TRACING REPORT, supra note 97 (suggesting Massachusetts licensing laws do not prevent criminals from acquiring guns in state); Craven, supra note 69, at 846 (discussing potential justifications for government enacting licensing system). In his dissenting opinion in Heller, Justice Breyer stated that the D.C. City Council did not act irrationally when it determined that gun laws could prevent crime, despite the conflicting statistical data. 554 U.S. at 703 (Breyer, J., dissenting) (stating lack of clarity does not suggest irrational legislation).
SJC will likely hold that the government interest is compelling, the SJC will not likely view the means used by the Commonwealth as being narrowly tailored or the least-restrictive alternative because of the uncertainty regarding the law’s effectiveness.195

The General Court relied upon the SJC’s collective-right interpretation of gun ownership when it enacted the discretionary licensing restriction.196 That same system continues to apply even though the right to own firearms has been recognized as part of the fundamental right of self-defense.197 A regulatory scheme that determines whether a person can exercise a fundamental right based entirely on the discretion of a licensing authority is unlikely to be considered narrowly tailored or the least-restrictive means used so as to satisfy strict scrutiny.198 The General Court has provided no guidelines in the statute to aid the licensing authority’s exercise of discretion.199 Instead, an applicant’s ability to own firearms has been left entirely to the discretion of an essentially unreviewable licensing authority.200 Furthermore, each licensing authority has complete autonomy to establish the municipality’s application process to determine suitability, thereby creating the likelihood that these processes differ for each municipality.201

House Bill 1568 instead offers an alternative to the current system that represents a less-restrictive and more narrowly tailored approach to gun regulation for the Commonwealth.202 The availability of a less-restrictive system through which the General Court can continue to restrict firearms access while maintaining public safety demonstrates a less restrictive and more narrowly tailored alternative to the current scheme.203 Once subjected to strict-scrutiny analysis under the Second Amendment, the current scheme will likely fail to pass constitutional muster because of its highlyrestrictive nature, constraints on the right to self-defense, and the existence of a more narrowly

195. See Craven, supra note 69, at 846-47 (highlighting reasons discretionary licensing system fails narrowly tailored prong of strict scrutiny).
198. See supra notes 65-69 and accompanying text (discussing discretionary licensing system and its effect on individual’s right to own guns for self-defense).
199. See MASS. GEN. LAWS ANN. ch. 140, § 131 (West 2010) (providing no criteria or guidance for determining applicant’s suitability).
200. See supra notes 62-66 and accompanying text (discussing impact of discretionary licensing on gun ownership).
201. See supra note 67 (highlighting legislative intent providing licensing authority broad power and discretion).
203. See infra notes 237, 242 and accompanying text (discussing House Bill 1568 as means of balancing Second Amendment right against compelling government interests).
tailored and less-restrictive alternative.204

b. License Restrictions

Opponents of gun control regulations will also likely challenge, under the Second Amendment, the statute authorizing license restrictions, which limit a licensee’s ability to carry concealed firearms in certain activities.205 Much like other statutes, the Commonwealth will most likely seek to justify these license restrictions by citing compelling interests of public safety and crime prevention.206 However, after the decisions in Heller and McDonald, the SJC will not likely hold that those discretionary restrictions are either narrowly tailored or the least-restrictive means of furthering the compelling state interest.207

Licensing restrictions place a significant burden on a licensee’s right to self-defense by drastically impeding the licensee’s ability to have the firearm available if it is needed.208 Furthermore, once the licensee has received his or her license, the licensee has already satisfied the statutory criteria established by the General Court.209 The SJC will probably not view the imposition of an

204. See District of Columbia v. Heller, 554 U.S. 570, 629 (2008) (quoting State v. Reid, 1 Ala. 612, 616-17 (1840)) (stating statute constructively prohibiting exercise of right under pretense of regulation clearly unconstitutional); see also Craven, supra note 69, at 846-47 (outlining restrictive nature of discretionary licensing system). A statute that limits a person’s fundamental right of self-defense based essentially on the person’s town of residence will not likely survive constitutional muster. See supra notes 66-68, 76 (describing effect of discretionary licensing on individual’s ability to obtain license to carry).

205. See supra notes 75, 77 and accompanying text (exploring how restrictions function as de facto ban on right to keep and bear arms).

206. See supra note 189 and accompanying text (predicting government will justify regulatory schemes citing public safety and crime reduction interests).

207. See supra notes 76-77 (discussing broad impact of license restrictions on lawful gun owners).

208. See supra notes 75-77 and accompanying text (highlighting impact of license restriction on right to keep and bear arms).

209. See supra note 71 (explaining impact of restrictions on Class A licenses). A self-employed individual who possesses a Class A license restricted to “employment purposes” has the functional equivalent of an unrestricted license because she can presumably claim to be involved in employment activities at any point. See MASS. GEN. LAWS ANN. ch. 140, § 131(d) (West 2010) (allowing undefined restrictions at licensing authority’s discretion); see also supra note 75 (discussing impact of license restrictions). It is not clear why restrictions exist, because when issuing a Class A license, the licensing authority has already determined that the applicant is a suitable person with a proper purpose for carrying firearms. See MASS. GEN. LAWS ANN. ch. 140, § 131(d) (requiring applicant demonstrate suitability and proper purpose before issuing license). If a person is suitable and can be trusted to own and carry firearms, then there is no reason to restrict the license; conversely, if the individual is not suitable and cannot be trusted, then there is no reason to issue the license in the first place. See id. Given the licensing authority’s broad discretion, there is no reason to issue a license unless the licensing authority is fully satisfied that the applicant is a trustworthy and suitable person. See id.; see also MacNutt v. Police Comm’r of Bos., 572 N.E.2d 577, 579-80 (Mass. App. Ct. 1991) (highlighting broad latitude given to licensing authority to establish requirements as deemed necessary); supra note 64 and accompanying text (discussing review of licensing authority actions under arbitrary and capricious standard). Restricting the license of an otherwise suitable applicant has no purpose other than to prevent the licensee from carrying a firearm. See supra notes 75, 77 and accompanying text (exploring impact of license restrictions on individual’s ability to carry firearm for self-defense). Furthermore, it is not clear why a person who cannot be trusted with an unrestricted license can be trusted to abide by a license restriction. See supra note 68 and
additional restriction atop the already existing licensing as narrowly tailored enough, but instead will likely view it as a gratuitous infringement on a licensee’s protected right to bear arms under the Second Amendment.\textsuperscript{210}

The Commonwealth will likely argue that license restrictions promote the compelling interests of public safety and crime reduction by limiting the number of firearms in public areas.\textsuperscript{211} While this is certainly a compelling interest, the Commonwealth is unlikely to convince the SJC that license restrictions are narrowly tailored or the least-restrictive means of promoting those interests as required by strict-scrutiny analysis.\textsuperscript{212} License restrictions do not prevent a licensee from purchasing or possessing firearms, and thus do little to prevent the presence of firearms in society.\textsuperscript{213} Licensees who intend to use firearms for illegal purposes are unlikely to be dissuaded simply because they possess a restricted license.\textsuperscript{214} Moreover, as criminals continue to acquire firearms despite the stringent regulatory scheme, it appears that license restrictions do little more than limit law-abiding citizens’ exercise of their fundamental right of self-defense under the Second Amendment.\textsuperscript{215}

\begin{itemize}
  \item \textsuperscript{210} See Cahall, supra note 155, at 373 (suggesting some restrictions on gun ownership will not survive after \textit{Heller}). Cahall argues that \textit{Heller} does not stand for a complete invalidation of mainstream firearm laws, such as age restrictions and laws barring criminal possession, but only threatens laws on the margins. \textit{Id.}
  \item \textsuperscript{211} See supra note 194 and accompanying text (predicting government will argue public safety interest justifies imposition of gun laws).
  \item \textsuperscript{212} See \textit{Heller}, 554 U.S. at 629-30 (implying statute amounting to deconstruction of right under guise of public safety regulation unconstitutional). Furthermore, it is unclear how law-abiding gun owners deemed suitable by a licensing authority contribute to crime or compromise public safety. See supra note 209 (evaluating effectiveness of license restrictions in reducing crime or promoting safety).
  \item \textsuperscript{213} MASS. GEN. LAWS ANN. ch. 140, § 131(a) (allowing purchase and possession of firearms with restricted license); see also supra notes 70-71 and accompanying text (discussing license restrictions and gun ownership permitted with restricted license).
  \item \textsuperscript{214} See supra notes 71-77 and accompanying text (discussing license restrictions’ chilling effect on individual’s ability to carry firearms).
  \item \textsuperscript{215} See supra note 95 and accompanying text (showing large number of recovered guns used in crimes originated in Massachusetts notwithstanding strict gun laws). Many of the regulations appear to have the purpose of placing obstacles in the path of aspiring gun owners, making the process onerous enough to deter people from pursuing a license to carry. See supra note 68 (discussing effect of discretionary licensing requirements on applicants); see also supra note 48 (comparing change-of-address-notification requirements for lawful gun owners and criminal sex offenders).
\end{itemize}
Commonwealth’s compelling interest.\textsuperscript{216} Regardless of the restricted license statute’s flaws, the Commonwealth’s entire licensing scheme will not be overturned by the SJC; in fact, only the discretionary components cause sufficient vulnerability for the current regulatory system.\textsuperscript{217} Removing the suitability determination from the discretion of the local licensing authority and instead creating a nondiscretionary licensing system would likely satisfy strict scrutiny.\textsuperscript{218} A licensing system that forbids access to firearms by certain people, such as criminals, the mentally ill, and people with drug or alcohol addictions, would likely be well within the longstanding restrictions considered presumptively valid by the Court in \textit{Heller}.\textsuperscript{219} Furthermore, restrictions establishing age requirements or required gun safety courses serve the government’s compelling interest in public safety and crime reduction and are also sufficiently narrowly tailored to survive strict scrutiny.\textsuperscript{220} By amending certain sections of the current regulatory scheme, and adopting laws similar to those in House Bill 1568, the General Court may avoid the SJC declaring the gun regulations unconstitutional while maintaining the ability to regulate gun ownership in the interests of crime prevention and public safety.\textsuperscript{221}

2. \textit{Safe-Storage Laws Will Likely Survive Post-McDonald Scrutiny}

Opponents of the Commonwealth’s current gun regulations will likely challenge the scheme’s safe-storage laws because of the similarity of the Massachusetts laws to the D.C. law struck down by the Court in \textit{Heller}.\textsuperscript{222}

\textsuperscript{216} See supra notes 75-77 and accompanying text (explaining significant impact of license restrictions on licensee’s right to self-defense); supra note 118 (noting lack of clarity resulting from lack of established definitions). In fact, it is difficult to conceive of any sort of discretionary limitation on the exercise of a fundamental right that would survive strict scrutiny. See District of Columbia v. Heller, 554 U.S. 570, 625-29 (2008) (stating legislature’s ability to regulate must not deconstruct right to keep and bear arms); Craven, supra note 69, at 846-47 (explaining discretionary component major flaw in most licensing systems); see also supra notes 75-77 (describing arbitrary nature of license restrictions).

\textsuperscript{217} See McDonald v. City of Chicago, 130 S. Ct. 3020, 3047 (2010) (reiterating \textit{Heller}’s assurances not all regulations imperiled by incorporation); District of Columbia v. Heller, 554 U.S. 570, 625-29 (2008) (assuring decision does not invalidate all firearm regulations); see also Craven, supra note 69, at 846-47 (pointing to discretionary component as vulnerable portion of licensing).

\textsuperscript{218} See McDonald, 130 S. Ct. at 3047 (explaining not all firearm laws vulnerable to constitutional challenge); Heller, 554 U.S. at 626-27 (recognizing rights protected by Second Amendment not unlimited); see also Craven, supra note 69, at 846-49 (explaining reasons “may issue” laws likely to fail strict scrutiny).

\textsuperscript{219} See Heller, 554 U.S. at 626-27 (listing likely examples of valid prohibitions on firearm-possession laws); see also Cahall, supra note 155, at 371-72 (noting \textit{Heller} will not affect “vast majority” of gun regulations).

\textsuperscript{220} See Heller, 554 U.S. at 625-29, 629 n.26 (listing examples of conditions and qualifications likely to survive strict scrutiny). The Court’s list of presumptively lawful regulations was intended to be an illustration only, is not exhaustive, and is likely to include requirements focused on public safety. \textit{Id.}

\textsuperscript{221} See supra notes 169-175 and accompanying text (discussing alternative legislation balancing government interest with Second Amendment right).

\textsuperscript{222} See supra note 157 and accompanying text (comparing similarities between D.C. and Massachusetts storage requirements).
Although the SJC resolved the constitutionality of the safe-storage requirements in its decision in Runyan, the decision relied on a pre-incorporation understanding of the Second Amendment and focused its analysis on article XVII.\(^{223}\) Any subsequent challenges, however, must be resolved using the Second Amendment as defined in Heller.\(^{224}\)

Given that unauthorized access to firearms can often lead to accidents involving death or serious injury, the Commonwealth should have little difficulty establishing a compelling interest in promoting public safety.\(^{225}\) The storage requirement significantly impacts a licensee’s ability to use the firearm needed for self-defense by forcing the licensee to retrieve the secured container and unlock it before accessing the firearm.\(^{226}\) While this requirement is certainly restrictive, it is less restrictive than the law struck down by the Court in Heller and may survive constitutional scrutiny.\(^{227}\) Unlike the D.C. statute, the Massachusetts statute does not require a gun to be disassembled or stored unloaded.\(^{228}\) Also, where the D.C. statute required the owner to render the firearm inoperable whenever the firearm was not in use, Massachusetts’s storage law only requires that the firearm be locked when the licensee is not otherwise in control of the firearm.\(^{229}\) Finally, while the Court’s decision in Heller explicitly stated that the D.C. statute was unconstitutional, the Court’s decision in no way suggested that other storage laws violate the Constitution.\(^{230}\) Even though the Massachusetts storage law may significantly affect a licensee’s ability to access the firearm when needed for self-defense, the law

\(^{223}\) See Commonwealth v. Runyan, 922 N.E.2d 794, 789-90 (Mass. 2010); supra note 159 and accompanying text (summarizing SJC’s approach to challenges to storage requirements before Second Amendment incorporated).

\(^{224}\) See McDonald v. City of Chicago, 130 S. Ct. 3020, 3050 (2010) (incorporating Second Amendment to constrain state action); Runyan, 922 N.E.2d at 797 (deciding case based on state of law before Second Amendment incorporated).

\(^{225}\) See supra note 138 and accompanying text (noting storage laws primarily intended to prevent negligent, rather than malicious, access to firearms). A law requiring a firearm be locked within a case, without a requirement that the case be secured, does not appear to be a rule intended to prevent theft, as a container can be easily stolen with the firearm still locked inside. See supra note 133 and accompanying text (discussing lack of requirement container holding firearm be secured).


\(^{227}\) See supra note 159 (exploring differences between D.C. and Massachusetts storage laws). Compare Runyan, 922 N.E.2d at 798-99 (holding storage requirements permissible because firearm only locked when not directly controlled by licensee), with Heller, 554 U.S. at 629-33 (noting D.C. storage law essentially forbid use of firearms for self-defense).

\(^{228}\) Mass. Gen. Laws Ann. ch. 140, § 131L(a) (West 2010) (requiring storage of firearms when not under licensee’s control); see also supra note 80 and accompanying text (explaining safe-storage requirements in Massachusetts).

\(^{229}\) See Mass. Gen. Laws Ann. ch. 140, § 131L(a); D.C. Code § 7-2507.02 (2008) (amended 2009) (requiring firearms be locked, disassembled, or otherwise inoperable unless in use); see also supra note 159 (comparing D.C. and Massachusetts storage laws).

\(^{230}\) Heller, 554 U.S. at 632-34 (highlighting overturning of D.C. statute does not mean all storage laws generally impermissible).
will likely survive strict scrutiny because the owner only needs to comply with the storage requirements when the firearm is not within his or her control.\textsuperscript{231}

In Runyan, the SJC upheld the constitutionality of Massachusetts’s storage requirements because they represented a very minor restriction on a licensee’s ability to access a firearm for self-defense.\textsuperscript{232} By reading the Runyan decision to gain insight into the SJC’s most likely approach to analyzing the constitutionality of these laws, the SJC will most likely hold that the storage requirements do not impermissibly infringe on the gun owner’s protected rights under the Second Amendment.\textsuperscript{233} The SJC has viewed locking devices as a minor obstacle to accessing a firearm, because as long as the licensee maintains control over the firearm, the licensee does not need to attach a locking device.\textsuperscript{234} The SJC will likely reason that the law places only a minor burden on the right to self-defense in limited circumstances and will likely uphold the law as a narrowly tailored means to promote public safety.\textsuperscript{235}

IV. ADOPTING A LEGISLATIVE ALTERNATIVE TO LITIGATING CHALLENGES TO THE REGULATORY SYSTEM

The General Court should be proactive and remove the aspects of the regulatory scheme that are most vulnerable to constitutional challenges, rather than reacting to challenges brought piecemeal by litigants.\textsuperscript{236} Adopting House Bill 1568 would allow the General Court to maintain a functional regulatory system, while minimizing the impact of the Heller and McDonald decisions.\textsuperscript{237} When enacting a replacement regulatory system, the General Court could retain the storage requirements currently in effect because they are likely to survive elevated scrutiny.\textsuperscript{238} Furthermore, replacing the current “may issue” scheme with a “shall issue” system would resolve much of the constitutional

\textsuperscript{231} See supra note 159 (discussing impact of storage laws on right of self-defense); supra notes 227-230 (comparing requirements of Massachusetts and D.C. storage laws and discussing their impact on self-defense).

\textsuperscript{232} See Commonwealth v. Runyan, 922 N.E.2d 794, 799 (Mass. 2010) (upholding storage laws because lock required only when gun not under licensee’s direct control).

\textsuperscript{233} See id. (explaining locks required only when gun outside licensee’s control, thereby placing no burden on right of self-defense); see also supra note 159 (outlining SJC’s reasoning on constitutionality of safe-storage law).

\textsuperscript{234} See Runyan, 922 N.E.2d at 799 & n.8 (noting access to guns secured with trigger-locks no slower than loading musket); see also supra note 159 and accompanying text (explaining storage laws not applicable if licensee has control of firearm).

\textsuperscript{235} See supra note 159 (discussing minimal impact of storage laws on right of self-defense); supra notes 232-234 (explaining SJC’s past reasoning regarding storage laws and predicting outcome of future challenges).

\textsuperscript{236} See McDonald v. City of Chicago, 130 S. Ct. 3020, 3115 (Stevens, J., dissenting) (suggesting incorporation will lead to “avalanche of litigation” to determine permissible scope of regulations); id. at 3126-27 (Breyer, J., dissenting) (outlining sampling of potential litigation after incorporation); see also supra note 169 and accompanying text (outlining provisions similar to House Bill 1568).

\textsuperscript{237} See supra notes 170-171 and accompanying text (recognizing balance between government interest and right to bear arms).

\textsuperscript{238} See supra notes 227-231 and accompanying text (discussing likelihood storage requirements will satisfy heightened scrutiny).
vulnerability without sacrificing much of the General Court’s ability to regulate gun ownership, because the existing statutory disqualifiers provide significant limitations on unsuitable persons’ access to firearms. With the current statutory disqualifiers in place to promote public safety and violence prevention, switching to a “shall issue” system will not likely diminish the effectiveness of the regulatory system. If the General Court adopts House Bill 1568, it will retain the ability to revoke an issued license should the licensee become statutorily disqualified after receiving a license. In addition, removing restrictions on a licensee’s ability to carry a concealed firearm would bring the regulatory system in line with the fundamental right to self-defense recognized in Heller without unduly affecting the government’s ability to use licensing to prevent irresponsible persons from gaining access to firearms.

V. CONCLUSION

The Court’s decisions in Heller and McDonald do not signal an end to effective firearm regulation in Massachusetts, but rather will ensure that any regulations imposed be carefully evaluated and narrowly executed. Compliance with the newly incorporated Second Amendment will not require Massachusetts to nullify all of its existing gun laws. House Bill 1568 is a potentially effective option for responding to the Second Amendment’s incorporation. Adopting House Bill 1568 would create a modified regulatory system likely capable of surviving elevated constitutional scrutiny. By taking legislative action, the General Court may avoid litigating each individual provision of the current regulatory scheme.

By adopting House Bill 1568, or a similar regulatory system, the General Court will be able to enact a comprehensive system to maintain public safety while simultaneously ensuring that law-abiding citizens may exercise their protected fundamental right to keep and bear arms. Replacing discretionary licensing with uniform “shall issue” requirements and removing licensing

---

239. Mass. Gen. Laws Ann. ch. 140, § 131(d)(i)-(iv) (West 2010) (enumerating statutory disqualifications for Class A and B licenses). Under the current statutory scheme, permanent disqualifications apply if the applicant has ever been convicted of a felony or a misdemeanor punishable by more than two years imprisonment, any violent crime, a violation of any law involving weapons or ammunition punishable by imprisonment, or a violation of laws concerning controlled substances. Id. The same is true if a person has been confined for treatment of a mental illness or has received treatment for drug or alcohol addiction, as well as a person who is subject to an outstanding arrest warrant or a restraining order. Id.; see also supra note 217 and accompanying text (arguing discretionary components of regulatory scheme result in vulnerability to constitutional challenge).

240. See supra note 67 (highlighting potential for disparate results arising from discretionary system). Such disparate results are less likely to occur in a “shall issue” regulatory scheme because the discretionary component would no longer be a factor. See H.R. 1568, 187th Gen. Court, Reg. Sess. (Mass. 2011) (establishing system allowing all nonprohibited applicants to exercise Second Amendment rights).

241. See H.R. 1568 §§ 6, 8 (allowing license revocation if licensee becomes “prohibited person”).

242. See id. §§ 1, 6 (retaining statutory disqualification for “prohibited persons”); see also supra notes 71, 209 (questioning license restrictions’ effectiveness in reducing crime or promoting public safety).
restrictions would allow the Commonwealth to appropriately limit access to firearms without infringing on citizens’ Second Amendment rights. By eliminating these two provisions, the General Court would resolve the two most constitutionally vulnerable portions of the current scheme. Furthermore, because the storage laws will likely survive elevated scrutiny, the General Court can leave the locking requirements intact to promote public safety by preventing unauthorized access to firearms.

Should the General Court decide not to amend the current scheme, individual challenges will likely force replacement of the regulatory scheme in piecemeal fashion. Each provision struck down as violating the Second Amendment will force the legislature to either respond with a new law—and risk another constitutional challenge—or leave that particular area unregulated. Such a strategy is inefficient and costly, and can be avoided simply by enacting a new system capable of surviving elevated scrutiny. Given the potential impact of widespread constitutional challenges to the current scheme, the General Court should consider an alternative answer to the question of who is armed in the Commonwealth of Massachusetts.

Brian Driscoll