COMMONWEALTH V. RUNYAN: SAFE STORAGE LAWS IN THE CROSSFIRE OF SECOND AMENDMENT LITIGATION

Abstract: The Massachusetts Supreme Judicial Court's 2010 decision in *Commonwealth v. Runyan* upheld a state law requiring firearms to be securely locked when not in the possession of a legally authorized user. The court ruled that the Second Amendment does not apply against the states and that the safe storage law does not infringe upon an individual's right to bear arms for self-defense. The U.S. Supreme Court's recent ruling that the Second Amendment is incorporated against the states via the Fourteenth Amendment has cast the validity of *Runyan* into doubt. This Case Comment argues that the safe storage law implicated in *Runyan* does not infringe upon the rights protected by the Second Amendment as interpreted in recent Supreme Court decisions and concludes that the safe storage laws of other states—which are all less restrictive than the Massachusetts statute—remain constitutional.

Introduction

For most of U.S. history, the Supreme Court rarely considered whether the Second Amendment[1] substantially curtails the ability of state legislatures to restrict the ownership and use of firearms, as the Second Amendment was not deemed applicable to the states.[2] Relying on nineteenth-century Supreme Court precedents, which held that the Second Amendment did not limit the powers of the states, the Massachusetts Supreme Judicial Court (the "SJC") decided in the 2010 case *Commonwealth v. Runyan* that the Second Amendment does not limit the state's power to enforce laws restricting the use and ownership of guns.[3] Only three months after *Runyan* was decided, its primary hold-

[1] "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." U.S. Const. amend. II.

[2] District of Columbia v. Heller, 554 U.S. 570, 625–26 (2008) (explaining, in dictum, why the Court had not previously determined the full scope of the Second Amendment).

[3] *See* Commonwealth v. Runyan, 922 N.E.2d 794, 797–98 (Mass. 2010) (citing Miller v. Texas, 153 U.S. 535, 538 (1894), *abrogated by* McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (plurality opinion); Presser v. Illinois, 116 U.S. 252, 265 (1886), *abrogated by McDonald*, 130 S. Ct. 3020; United States v. Cruikshank, 92 U.S. 542, 553 (1875), *abrogated by McDonald*, 130 S. Ct. 3020) (holding, based on the plain language of cited Supreme Court precedents, that the Second Amendment does not limit the powers of states), *abrogated by McDonald*, 130 S. Ct. 3020.

ing was invalidated by the Supreme Court in *McDonald v. City of Chicago*, which incorporated the Second Amendment into the Fourteenth Amendment.[4] *McDonald* made the Second Amendment's guarantee of an individual right to bear arms for self-defense fully applicable against the states.[5] The Massachusetts safe storage statute at issue in *Runyan* imposes criminal liability on gun owners who fail to store their firearms in locked containers or bound by trigger locks when not in the control of an authorized user. Perhaps anticipating the incorporation of the Second Amendment into the Fourteenth Amendment, the SJC stated in dicta that the statute complies with the Second Amendment because the law allows an individual to bear arms for self-defense in the home.[6]

In his dissent from the *McDonald* decision, Justice Stevens warned that the application of the Second Amendment to the states would "invite[] an avalanche of litigation that could mire the federal courts in fine-grained determinations about which state and local regulations comport with the *Heller* right—the precise contours of which are far from pellucid—under a standard of review we have not even established."[7] The safe storage statute analyzed in *Runyan* is currently the most restrictive in the nation.[8] This Comment asserts that this statute likely remains constitutional after *McDonald*, and it is, therefore, unlikely that other states' safe storage laws will be held invalid if challenged during this Second Amendment "avalanche."[9]

Part I of this Comment describes the facts of *Runyan* and reasoning behind the court's decision that the Second Amendment is inapplicable against the states.[10] Part II analyzes the constitutionality of the

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[4] *Compare Runyan*, 922 N.E.2d at 797–98 (holding on March 10, 2010 that the Second Amendment is not applicable to the states), *with McDonald*, 130 S. Ct. at 3050 (holding on June 28, 2010 that the Second Amendment is fully applicable to the states). Justices Alito, Roberts, Kennedy, and Scalia agreed that the Second Amendment was sufficiently "fundamental from an American perspective" to be incorporated under the Due Process Clause of the Fourteenth Amendment. *McDonald*, 130 S. Ct. at 3050. In contrast, Justice Thomas believed that the Second Amendment would be applicable to the states only under his interpretation of the Fourteenth Amendment's Privileges and Immunities Clause. *Id.* at 3059 (Thomas, J., concurring).

[5] *See McDonald*, 130 S. Ct. at 3050.

[6] *See* 922 N.E.2d at 799–800 (in dicta, distinguishing the Massachusetts statute from the statute struck down by the U.S. Supreme Court in 2008 in *District of Columbia v. Heller* and concluding that the Massachusetts statute allows for an individual to engage in lawful self-defense); *see also infra* note 31 and accompanying text.

[7] 130 S. Ct. at 3115 (Stevens, J., dissenting).

[8] *See infra* notes 68–78 and accompanying text.

[9] *See McDonald*, 130 S. Ct. at 3115 (Stevens, J., dissenting); *infra* notes 79–88 and accompanying text.

[10] *See infra* notes 13–30 and accompanying text.

Massachusetts safe storage statute in light of *McDonald*'s incorporation of the Second Amendment against the states via the Fourteenth Amendment.[11] Finally, Part III discusses the validity of safe storage laws of other states.[12]

I. *Runyan* Before Incorporation of the Second Amendment

Runyan was decided by the Massachusetts SJC on March 10, 2010, nearly two years after the U.S. Supreme Court decided *District of Columbia v. Heller*, which had interpreted the Second Amendment as granting an individual right to bear arms, and only three months before the Supreme Court decided *McDonald v. City of Chicago*, which would incorporate the Second Amendment against the states.[13] This was a particularly confusing period in Second Amendment jurisprudence, as on the one hand it was clear that the Supreme Court was prepared to interpret the right to bear arms far more broadly than it had in the past.[14] On the other hand, it was unclear exactly how broad the right would become—even to members of the Supreme Court.[15] Taking advantage of this opportunity, gun rights advocates petitioned the SJC in *Runyan* to treat the Second Amendment as incorporated into the Fourteenth Amendment, so that Massachusetts would be forced to recognize an individual right to bear arms for self-defense.[16] As the Massachusetts Declaration of Rights guarantees only a collective right to bear arms for the common

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[11] *See infra* notes 31–67 and accompanying text.

[12] *See infra* notes 68–88 and accompanying text.

[13] *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3050 (2010) (plurality opinion); District of Columbia v. Heller, 554 U.S. 570, 595 (2008); Commonwealth v. Runyan, 922 N.E.2d 794, 798 (Mass. 2010).

[14] *Compare* Lewis v. United States, 445 U.S. 55, 65–66 (1980) (upholding a statute prohibiting felons from possessing weapons because it is supported by some rational basis), *and* United States v. Miller, 307 U.S. 174, 178 (1939) (suggesting that the Second Amendment must be interpreted in relation to its purpose to maintain militias), *with Heller;* 554 U.S. at 595, 622, 628 n.27 (recognizing an individual right to bear arms unconnected with militia service and rejecting rational basis review in Second Amendment cases).

[15] *See Heller*, 554 U.S. at 635 (dictum in response to dissenting justices) ("[S]ince this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field . . . ."); *cf. id.* at 720–22 (Breyer, J., dissenting) (questioning how judges will apply the majority's analysis of the Second Amendment's scope, and warning that all gun control laws will be jeopardized).

[16] *See* Brief Amicus Curiae of Second Amendment Foundation, Inc. & Gun Owners Action League in Support of Appellee at 15, *Runyan*, 922 N.E.2d 794 (No. SJC-10480) (arguing that incorporation of the Second Amendment into the Fourteenth Amendment was a foregone conclusion after *Heller*, despite the lack of a Supreme Court decision at the time so holding).

defense,[17] the court in *Runyan* was forced to decide if the Second Amendment is applicable to the states and, if so, whether the Massachusetts law governing the safe storage of firearms violates the Amendment's more expansive right to bear arms.[18]

The procedural and factual background of the *Runyan* case is not complex.[19] While investigating a report of "BBs" being shot through a neighbor's window, police officers searched the home of Richard Runyan and found two soft gun-carrying cases under the defendant's bed.[20] One case contained a shotgun secured with a trigger lock, but the other contained an unsecured semiautomatic hunting rifle.[21] Runyan was charged under a Massachusetts statute imposing criminal liability for failing to store a firearm in a locked container or bound by a trigger lock when not in the control of a lawfully authorized user.[22] Assuming that the Second Amendment applied to the states as a matter of sub-

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[17] *See Runyan*, 922 N.E.2d at 798 & n.5 (citing Commonwealth v. Davis, 343 N.E.2d 847 (Mass. 1976)) (recognizing that the Massachusetts Constitution provides only for the common defense and does not limit the legislature's authority to enact the safe storage statute); *Davis*, 343 N.E.2d at 848–49 (stating that the Massachusetts Constitution provides only a collective right to bear arms for the common defense); *cf. Heller*, 554 U.S. at 595 (interpreting the federal constitution to include an individual right to bear arms for self-defense). The Massachusetts Declaration of Rights states:

> The people have a right to keep and to bear arms for the common defence. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it.

Mass. Const. pt. 1, art. 17.

[18] *See* 922 N.E.2d at 796, 797, 798–99 (reciting the defendant's claim that the safe storage statute was unconstitutional, that the trial court's dismissal of the charge against him was based on an erroneous assumption that the Second Amendment applied to the states, and that the statute at issue conflicted with the Second Amendment).

[19] *See infra* notes 20–30 and accompanying text.

[20] *Runyan*, 922 N.E.2d at 796.

[21] *Id.*

[22] *Id.* at 795, 796. The Massachusetts safe storage statute reads:

> It shall be unlawful to store or keep any firearm, rifle or shotgun including, but not limited to, large capacity weapons, or machine gun in any place unless such weapon is secured in a locked container or equipped with a tamper-resistant mechanical lock or other safety device, properly engaged so as to render such weapon inoperable by any person other than the owner or other lawfully authorized user. For purposes of this section, such weapon shall not be deemed stored or kept if carried by or under the control of the owner or other lawfully authorized user.

Mass Gen. Laws ch. 140, § 131L(a) (2008)

stantive due process,[23] the trial judge dismissed the charge, finding that the Massachusetts statute was indistinguishable from the firearm storage statute struck down in *Heller*.[24] On direct appellate review,[25] the SJC, relying on several nineteenth-century Supreme Court decisions,[26] decided that the Second Amendment did not apply to the states and vacated the dismissal.[27] The SJC acknowledged that the cases were weak precedent, as they were decided before the Supreme Court began to incorporate selectively portions of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment, and thus did not address that doctrine.[28] Confronted with a circuit split on incorporation of the Second Amendment,[29] the SJC held that the Amendment does not apply to the states, stating that the nineteenth-century cases remained binding precedent until the Supreme Court decided otherwise.[30]

II. *Runyan* After Incorporation of the Second Amendment

Perhaps anticipating the possibility that the U.S. Supreme Court would decide otherwise and apply the Second Amendment to state firearm regulations,[31] the SJC stated in dicta in *Runyan* that the Massa-

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[23] *See Runyan*, 922 N.E.2d at 797 (noting that the trial judge's decision must have relied on such an assumption).

[24] *Id.* at 795–96.

[25] *Id.* at 796 (noting that the Commonwealth filed a notice of interlocutory appeal, and the SJC granted direct appellate review of the trial court's decision).

[26] *See* cases cited *supra* note 3 (stating that the Second Amendment limits only federal, not state, action).

[27] *Runyan*, 922 N.E.2d at 798, 800.

[28] *See id.* at 797–98 (citing NRA v. City of Chicago, 567 F.3d 856, 857 (7th Cir. 2009), *rev'd sub nom.* McDonald v. City of Chicago, 130 S. Ct. 3020 (2010)) (recognizing that *Cruikshank* was decided before the Supreme Court decided selectively to incorporate the Bill of Rights into the Due Process Clause, and therefore did not discuss whether the right to bear arms was sufficiently fundamental to be incorporated).

[29] *Compare NRA v. City of Chicago*, 567 F.3d at 857 (Second Amendment not incorporated into Fourteenth), *and* Maloney v. Cuomo, 554 F.3d 56, 58 (2d Cir. 2009) (per curiam) (same), *vacated sub nom.* Maloney v. Rice, 130 S. Ct. 3541 (2010), *with* Nordyke v. King, 563 F.3d 439, 457 (9th Cir. 2009) (Second Amendment incorporated into Due Process Clause), *vacated and remanded* 611 F.3d 1015 (9th Cir. 2010).

[30] *Runyan*, 922 N.E.2d at 798.

[31] *See* Commonwealth v. Runyan, 922 N.E.2d 794, 798 (Mass. 2010) (citing NRA v. City of Chicago, 567 F.3d 856, 857 (7th Cir. 2009), *rev'd sub nom.* McDonald v. City of Chicago, 130 S. Ct. 3020 (2010)), and thus recognizing the Supreme Court would be reviewing the decision). The Supreme Court oral argument for *McDonald*, held only eight days before the SJC released the *Runyan* decision, focused on the possible incorporation of the Second Amendment into the Fourteenth Amendment. S*ee id.* at 794 (stating that *Runyan* was decided on March 10, 2010); Transcript of Oral Argument *passim*, *McDonald*, 130 S. Ct. 3020 (No. 08-1521) (discussing on March 2, 2010 the possibility of incorporating the Second Amendment).

chusetts safe storage law complies with the Second Amendment right to bear arms as interpreted by the Supreme Court in the 2008 case *District of Columbia v. Heller*.[32] Because the Supreme Court recently held in the 2010 case *McDonald v. City of Chicago* that the Second Amendment is fully applicable against the states, the continued validity of the SJC's decision in *Runyan* depends entirely upon this dicta.[33]

Unfortunately, the Supreme Court, in both *Heller* and *McDonald*, gave the lower courts relatively little guidance to determine when a statute violates the Second Amendment, and what standard of judicial scrutiny should be used in this inquiry.[34] Although the majority in *Heller* expressly rejected the use of rational basis scrutiny or an interest-balancing test,[35] the Court did not appear to adopt a standard of strict scrutiny.[36] This has led some federal circuit courts to apply intermediate scrutiny to alleged violations of the Second Amendment.[37]

Other courts and commentators believe that the Supreme Court will eventually adopt a framework similar to that used in First Amendment jurisprudence, which allows categorical limitations to the constitutional right.[38] Justice Scalia seemed to suggest this possibility in his

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[32] *Runyan*, 922 N.E.2d at 799–800. In *Heller*, the Supreme Court held that the Second Amendment protects an individual's right to bear arms for self-defense in the home. 554 U.S. 570, 595, 628–29 (2008).

[33] *See McDonald*, 130 S. Ct. at 3050 (holding that the Second Amendment is fully applicable against the states).

[34] *See* Ryan L. Card, Note, *An Opinion Without Standards: The Supreme Court's Refusal to Adopt a Standard of Constitutional Review in* District of Columbia v. Heller *Will Likely Cause Headaches for Future Judicial Review of Gun-Control Regulations*, 23 BYU J. Pub. L. 259, 260 (2009) (suggesting that the Court did not adopt any particular standard and may have rejected all possible ones); Andrew R. Gould, Comment, *The Hidden Second Amendment Framework Within* District of Columbia v. Heller, 62 Vand. L. Rev. 1535, 1537 (2009) (stating that lower courts adjudicating Second Amendment cases received little explicit guidance from *Heller*); *see also* John W. Whittlesey, Note, *Second-Amendment Scrutiny: Firearm Enthusiasts May Win the Battle but Ultimately Lose the War in* District of Columbia v. Heller, 58 Case W. Res. L. Rev. 1423, 1430–48 (2008) (reviewing possible scrutiny standards in detail).

[35] 554 U.S. at 628 n.27, 634–35; *see also McDonald*, 130 S. Ct. at 3047 (reaffirming rejection of an interest-balancing approach).

[36] *See Heller*, 554 U.S. at 688–89 (Breyer, J., dissenting) (stating that the majority's broad categorical exclusions of certain weapons and citizens from the Second Amendment right may not survive constitutional review under true strict scrutiny).

[37] *See, e.g.*, United States v. Williams, 616 F.3d 685, 692 (7th Cir. 2010) (applying intermediate scrutiny but not creating a uniform rule); United States v. Marzzarella, 614 F.3d 85, 96–97 (3d Cir. 2010) (applying intermediate scrutiny but recognizing that other firearm laws may require different standards of review).

[38] *See, e.g.*, United States v. Skoien, 614 F.3d 638, 641 (7th Cir. 2010) (reasoning that categorical disqualifications from Second Amendment rights are permissible, as for First Amendment rights, when supported by a strong showing that the statute is related to an important objective); Jason T. Anderson, Note, *Second Amendment Standards of Review: What*

opinions in *Heller* and *McDonald*.[39] Under such a framework, courts would apply strict scrutiny to any law violating the core rights protected by the Second Amendment,[40] which *Heller* seemed to define as the right of law-abiding citizens to possess and use weapons in the home for lawful purposes—such as self-defense—provided that the weapons are in common use for that purpose at the time.[41]

Conversely, under this categorical scheme, the Second Amendment would provide little or no protection for certain classes of people, weapons, and uses of firearms that have traditionally been excluded from the right to bear arms.[42] The Supreme Court stated in *Heller*, "[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places . . . ."[43] The Court also explained that the prohibition on carrying dangerous and unusual weapons "is fairly supported by historical tradition," and forms a limitation on the right to bear arms.[44] Although it is possible that the Court will decide to curtail these exceptions in future cases,[45] the plurality in

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the Supreme Court Left Unanswered in District of Columbia v. Heller, 82 S. Cal. L. Rev. 547, 578–79 (2009) (arguing that courts should adopt from First Amendment jurisprudence a framework of categorical exceptions and apply reduced judicial scrutiny to statutes that do not violate the core purpose of the right).

[39] *See McDonald*, 130 S. Ct. at 3056 (Scalia, J., concurring) (suggesting that deeply rooted restrictions on the fundamental right to bear arms may indicate the Second Amendment's scope, as similar traditional restrictions on the freedom of speech indicate the scope of the First Amendment); *Heller*, 554 U.S. at 595 ("Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*.").

[40] *See* Anderson, *supra* note 38, at 579; *cf., e.g.*, United States v. Playboy Entm't Grp., 529 U.S. 803, 814 (2000) (using strict scrutiny when reviewing a statute restricting the content of speech under the First Amendment).

[41] *See Heller*, 554 U.S. at 626–27 (discussing limitations on the Second Amendment right).

[42] *See id.* at 595 (recognizing that the Second Amendment does not protect bearing arms for any purpose, just as the First Amendment does not protect certain types of speech). In First Amendment jurisprudence, the Court has determined that some categories of speech, such as child pornography, are entirely outside the historical protections of the First Amendment. *See* United States v. Stevens, 130 S. Ct. 1577, 1586 (2010); United States v. Williams, 553 U.S. 285, 288 (2008).

[43] 554 U.S. at 626–27; *cf.* Robert L. Tsai, *John Brown's Constitution*, 51 B.C. L. Rev. 151, 161 (2010) (comparing the Second Amendment with the provisional constitution written by John Brown—an ardent protector of gun rights—which limited the right to bear arms to those of sound mind, good character, and suitable age).

[44] *Heller*, 554 U.S. at 627 (approving more narrowly tailored prohibitions than the handgun ban at issue).

[45] *See id.* at 635 (stating, in response to the dissent, that the Court will more fully determine the Second Amendment's scope in future cases).

McDonald repeated its assurances that these traditional reservations would not be undone by its recent opinions, and that "incorporation does not imperil every law regulating firearms."[46] If the Supreme Court indeed decides to borrow from First Amendment jurisprudence, its 2010 decision in *United States v. Stevens* suggests that the Court would not be willing to recognize new categories of firearms restrictions that exist outside of the Second Amendment's historical tradition.[47]

On the one hand, it seems that the Massachusetts safe storage statute, which requires that guns be stored in a locked container or bound by a trigger lock when not under the control of an authorized user,[48] may be one of the laws imperiled by *Heller* and *McDonald*, as it restricts the ability of gun owners to quickly access their weapons for self-defense.[49] Furthermore, this mandate extends to guns stored in rooms of the home,[50] which the Court described in *Heller* as the place "where the need for defense of self, family, and property is most acute."[51] Thus, the Massachusetts law, which may impair the ability of gun owners to defend themselves in their homes and does not implicate any of the traditional exceptions to the right to bear arms listed in *Heller*, seems to stand on a weak constitutional foundation.[52]

On the other hand, the statute analyzed in *Runyan* could be found constitutional because it resembles the eighteenth-century laws that regulated the storage and discharge of firearms in Boston and other cities.[53] A majority of the Court in *Heller* believed that these statutes,

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[46] 130 S. Ct. at 3047 (responding to respondents' concerns).

[47] *See* 130 S. Ct. at 1586 (declining to create a new categorical exception to First Amendment rights that has not been historically recognized).

[48] Mass Gen. Laws ch. 140, § 131L(a) (2008).

[49] *See Heller*, 554 U.S. at 628–29 (ruling that a statute requiring guns to be locked at all times is unconstitutional because it does not allow for self-defense in the home); 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, 1534 (2009) (arguing that the few seconds lost when unlocking a gun may significantly impair the ability to defend oneself in an emergency).

[50] *See* Commonwealth v. Parzick, 835 N.E.2d 1171, 1175–76 (Mass. App. Ct. 2005) (determining that an unsecured gun stored in a locked bedroom violates the safe storage statute when the door's lock could be easily picked).

[51] 554 U.S. at 628.

[52] *See id.* at 628–29 (holding that it is unconstitutional to prevent citizens from using firearms for self-defense, especially in their homes).

[53] *See id.* at 631–34 (indicating that colonial statutes restricting the storage and discharge of firearms in various cities—cited in a dissenting opinion to prove a narrower scope of the right to bear arms—would comply with the Second Amendment's individual right to bear arms for self-defense if the laws allowed the guns to be loaded and fired to confront intruders). Although these laws predate the Bill of Rights, the Court interpreted

though prohibiting the storage of loaded firearms in the home, or the indiscreet firing of guns within the city, would allow citizens to temporarily load and discharge firearms to confront intruders in their homes.[54] The majority implied that if these colonial statutes contained exceptions for self-defense, they would comply with the pre-existing, individual right to bear arms for self-defense codified in the Second Amendment.[55] Similarly, the modern safe storage statute in Massachusetts, which provides an exception for self-defense, would likely be found constitutional.[56] In addition, the SJC noted in *Runyan* that the modern Massachusetts safe storage statute is more permissive than those of the eighteenth century,[57] as the modern law allows gun owners to keep their weapons loaded, unlocked, and unsecured on their persons for instantaneous self-defense.[58] The colonial safe storage laws, in contrast, mandated that firearms be stored unloaded, requiring gun owners to load their weapons before firing at an intruder, a process that would have taken approximately fifteen seconds for an experienced soldier or one minute for someone with less training.[59] Modern gun owners, however, could release a trigger lock and fire their weapons, which may be stored loaded, in less time.[60]

Drawing on the modern Massachusetts safe storage statute's allowance for self-defense, the SJC distinguished the statute at issue in *Runyan* from the District of Columbia statute invalidated by the Supreme Court in *Heller*, which required firearms to be disassembled or bound by a trigger lock at all times when not used for lawful recreational purposes.[61] Unlike the District of Columbia law, which did not allow gun

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the Second Amendment as codifying a pre-existing right to bear arms, the scope of which was determined by founding era laws. *Id.* at 592.

[54] *Id.* at 631–34.

[55] *See id.* at 633–34 (noting that the colonial laws do not undermine the majority's analysis and do not burden the right to bear arms for self-defense).

[56] *See id.* at 632–34 (ruling that exceptions for self-defense would make these laws constitutional); *see also Runyan*, 922 N.E.2d at 799 (finding such an exception).

[57] *See* 922 N.E.2d at 799 n.8 (noting that under the modern safe storage statute, guns are more readily accessible for self-defense than under eighteenth-century laws).

[58] *Id.* at 799.

[59] *Id.* at 799 n.8 (citing James E. Hicks, *United States Military Shoulder Arms, 1795–1935*, 1 Am. Mil. Hist. Found. 23, 30–31 (1937)); *accord Heller*, 554 U.S. at 685 (Breyer, J., dissenting) (citing Hicks, *supra*, at 26–30).

[60] *Runyan*, 922 N.E.2d at 799 n.8 (dicta); Brief Amicus Curiae of Second Amendment Foundation, *supra* note 16, at 30–31 (stating that the Massachusetts safe storage statute allows gun owners to store loaded and operational weapons in quick-release safes, making them "readily available to authorized users who know the safe's keypad code").

[61] D.C. Code § 7-2507.02 (LexisNexis 2008), *invalidated by Heller*, 554 U.S. 570; *Runyan*, 922 N.E.2d at 799.

owners to keep loaded firearms in their homes, even for self-defense, the Massachusetts statute allows authorized gun users to keep their firearms loaded and unlocked for immediate self-defense in the home, provided that the weapon remains within the owner's control.[62] Justice Breyer, in his dissent in *Heller*, remarked that the only issue regarding the District of Columbia safe storage statute was "whether the Constitution requires an exception that would allow someone to render a firearm operational when necessary for self-defense."[63] The majority in *Heller* determined the District of Columbia statute to be unconstitutional because its unequivocal text precluded citizens from rendering their firearms operational and using them for the "core lawful purpose of self-defense."[64] Conversely, the Massachusetts statute allows citizens to keep operable, unlocked, and loaded guns on their persons or to unlock their weapons when needed for self-defense.[65] Because the Massachusetts law does not infringe on the core rights protected by the Second Amendment,[66] it would be found constitutional under any standard of scrutiny that courts may apply.[67]

III. Implications for Other States' Safe storage Laws

If, indeed, the Massachusetts safe storage statute at issue in *Runyan* remains constitutional[68] in the wake of the subsequent 2010 Supreme Court case *McDonald v. City of Chicago*,[69] it is likely that the safe storage statutes adopted by other states will also be held constitutional under the Second Amendment.[70] Although fourteen states and the District of

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[62] *Runyan*, 922 N.E.2d at 799; *see also* D.C. Code § 7-2507.02 ("[E]ach registrant shall keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is kept at his place of business, or while being used for lawful recreational purposes . . . .").

[63] *Heller*, 554 U.S. at 692 (Breyer, J., dissenting).

[64] *Id.* at 630 (majority opinion).

[65] *Runyan*, 922 N.E.2d at 799.

[66] *See supra* notes 38–47 and accompanying text.

[67] *See Marzzarella*, 614 F.3d at 89 (stating that Second Amendment challenges will fail at the outset if the law does not burden rights guaranteed by the Amendment).

[68] *See supra* notes 56–67 and accompanying text.

[69] 130 S. Ct. 3020, 3050 (2010) (plurality opinion) (incorporating the Second Amendment into the Fourteenth Amendment so that the Second Amendment is fully applicable against the states).

[70] *See infra* notes 79–88 and accompanying text; *see also* Rachel Shaffer, Note, *Child Access Prevention Laws: Keeping Guns Out of Our Children's Hands*, 27 Fordham Urb. L.J. 1985, 1997–98 (2000) (comparing state laws that reduce children's access to guns); Legal Community Against Violence, Regulating Guns in America: An Evaluation and Comparative Analysis of Federal, State and Selected Local Gun Laws 234–38 (2008), http://www.lcav.org/publications-briefs/reports_analyses/RegGuns.entire.report.pdf (last

Columbia have adopted statutes that impose criminal liability on persons who negligently store firearms,[71] only the Massachusetts, Minnesota, and District of Columbia laws impose liability even if a child does not access the weapon.[72] Of these statutes, the Massachusetts law is currently the most restrictive, as it is the only one that requires guns to be stored in locked containers or bound by trigger locks even when no irresponsible person is likely to access them.[73] By contrast, most of these statutes impose criminal liability only if a minor gains access to a firearm or uses it in a dangerous manner.[74] Furthermore, like the Massachusetts statute,[75] many of these safe storage statutes allow for self-defense in the home, as they do not require guns to be locked when carried on the owner's person.[76] If the extraordinarily strict firearm storage law from Massachusetts may be found constitutional,[77] it is unlikely that the Second Amendment would render more permissive safe storage laws unconstitutional.[78]

Additionally, the safe storage laws of other states will likely remain valid under the Second Amendment, as many states already assiduously

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visited Dec. 28, 2010) (reviewing child access prevention laws in twenty-seven states and the District of Columbia).

[71] D.C. Code § 7-2507.02 (LexisNexis Supp. 2010); Legal Community Against Violence, *supra* note 70, at 236.

[72] Legal Community Against Violence, *supra* note 70, at 236 (listing states); *see* D.C. Code § 7-2507.02(b) (imposing liability for failure to lock guns when the owner knows or should know that a child is likely to gain access to the weapon without parental permission); Mass Gen. Laws ch. 140, § 131L(a) (2008) (imposing liability for failure to lock guns whenever not in possession of authorized user); Minn. Stat. § 609.666(2) (2009) (imposing liability for negligent storage of a loaded firearm when the user knows or should know that a child is likely to gain access).

[73] *Compare* Mass Gen. Laws ch. 140, § 131L(a) (imposing liability for failure to store guns in a locked container or bound by a trigger lock whenever not in possession of an authorized user), *with* D.C. Code § 7-2507.02(b) (requiring guns to be stored locked, but imposing liability only if the owner knows or should know that a child is likely to gain access to the weapon without parental permission), *and* Minn. Stat. § 609.666(2) (imposing liability for negligent storage of a loaded firearm when the person knows or should know that a child is likely to gain access and not explicitly requiring the gun be locked).

[74] Legal Community Against Violence, *supra* note 70, at 236–37.

[75] *See Runyan*, 922 N.E.2d at 799 (recognizing that the Massachusetts safe storage statute allows for an individual to engage self-defense in the home).

[76] *See, e.g.*, D.C. Code § 7-2507.02(b)(2) (exempting a gun user from liability when carrying a firearm on his or her person or in close proximity); N.H. Rev. Stat. Ann. § 650–C:1(V)(c) (2007) (stating that liability for negligent storage will not attach if the firearm was carried on the person or in close proximity).

[77] *See supra* notes 56–67 and accompanying text.

[78] *See* District of Columbia v. Heller, 554 U.S. 570, 632 (2008) (stating that the Court's analysis does not "suggest the invalidity of laws regulating the storage of firearms to prevent accidents").

protect the right to bear arms.[79] Massachusetts is one of only two states that have decided that their state constitutions provide only a collective right to bear arms for the common defense.[80] By contrast, the constitutions of twenty-two states expressly provide an individual right to bear arms for self-defense, and eighteen other state constitutions provide, either explicitly or through their interpretation, an individual right to bear arms that includes self-defense.[81] Only six states have no state constitutional provision regarding the right to bear arms,[82] and two states have not yet determined if their state constitutions provide an individual or collective right.[83] Prior to the application of the Second Amendment against the states in *McDonald*, Massachusetts was able to proscribe the use of guns for individual self-defense.[84] In *Runyan*, however, the SJC decided that the Massachusetts safe storage statute allows for individuals to use guns for self-defense.[85] Furthermore, Massachusetts allows all competent, law-abiding, adult citizens to receive licenses to keep non-high capacity firearms in their homes.[86] This suggests that the state possessed greater legislative authority to regulate firearms than it chose to exercise.[87] Legislatures would likely be even more respectful of an individual's right to bear arms for self-defense when this right is protected by the state's constitution.[88]

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[79] *See McDonald*, 130 S. Ct. at 3116 (Stevens, J., dissenting) (citing KRISTIN A. GOSS, DISARMED: THE MISSING MOVEMENT FOR GUN CONTROL IN AMERICA 6 (2006)) (suggesting that legislators tend to under-regulate guns).

[80] Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 205 (2006); *see also* Junction City v. Lee, 532 P.2d 1292, 1295 (Kan. 1975) (quoting City of Salina v. Blaksley, 83 P. 619, 620 (Kan. 1905)); *Runyan*, 922 N.E.2d at 798 n.5 (citing Commonwealth v. Davis, 343 N.E.2d 847 (Mass. 1976)).

[81] Volokh, *supra* note 80, at 205.

[82] *Id.*

[83] *Id.* at 205, 207 (citing 1993 Va. Op. Atty. Gen. 13 (1993) (construing the right as collective); *Opinion No. 05-078*, 2006 WL 304006 (2006) (construing the right as individual)); *see also* State v. Mendoza, 920 P.2d 357, 363 & n.9 (Haw. 1996) (expressly declining to decide whether the Hawaiian constitutional provision—identical to the Second Amendment—guarantees an individual or collective right to bear arms).

[84] *See Runyan*, 922 N.E.2d at 798 & n.5 (holding that the Second Amendment does not apply to the states and noting that the Massachusetts Constitution guarantees only a collective right to bear arms for the common defense).

[85] *Id.* at 799.

[86] *See* MASS GEN. LAWS ch. 140, § 129B (2008) (stating that a firearm identification card shall be issued to any non-alien resident over the age of eighteen who has not been convicted of specifically listed crimes and does not suffer from a disqualifying mental illness or addiction).

[87] *See id.*; *supra* note 79.

[88] *See Heller*, 554 U.S. at 632–33 (stating that because Pennsylvania's constitution provided an individual right to bear arms for self-defense, the state would be unlikely to enforce a ban on the firing of guns in Philadelphia when done in self-defense).

Conclusion

In the 2010 case *Commonwealth v. Runyan*, the Massachusetts SJC held that the Second Amendment to the U.S. Constitution does not apply against the states. Only three months later, the Supreme Court case *McDonald v. City of Chicago* invalidated that holding. Nevertheless, the statute at issue in *Runyan*, which imposes criminal liability for failing to store firearms in locked containers when not in the possession of a lawfully authorized user, is likely still constitutional. In *Runyan*, the SJC stated in dicta that the Massachusetts safe storage statute does not conflict with the core rights protected by the Second Amendment, as it allows individuals to bear arms for self-defense in the home. If, indeed, the Massachusetts statute is constitutional after *McDonald*, the safe storage statutes of other states, many of which impose fewer burdens on the individual right to bear arms for self-defense, will also be held to comply with the Second Amendment.

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