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Are Handguns a Matter of Privacy?

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ARTICLE

ARE HANDGUNS A MATTER OF PRIVACY?

BRET N. BOGENSCHNEIDER*

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I. INTRODUCTION

*District of Columbia v. Heller*¹ involved a special policeman in the District of Columbia attempting to register a .22 caliber handgun for self-defense in the home.² The Court's preliminary matter of constitutional interpretation was the Second Amendment's identification as the operative provision rather than the Ninth or Fourteenth Amendment.³ Even if one agrees with the majority opinion that the so-called "Operative Clause" of the Second Amendment, referring to the "right of the people to keep and bear Arms,"⁴ covers the class of personal weapons referred to as "handguns,"⁵ one must also agree that *Heller* attempted to only register a weapon he intended to keep in the home privately for self-defense.⁶ As seemingly conceded in Justice Scalia's majority opinion in *Heller*, the purpose of the Second Amendment relates, at least in part, to the regulated militia based on the so-called "Prefatory Clause," which might be more aptly named the "Purpose Clause."⁷ Accordingly, the *Heller* case involved principally a governmental restriction on privacy for a personal weapon kept for self-defense in the home and might have been evaluated under a right to privacy framework.⁸ The keeping of a handgun in the home could simply be another example of an unenumerated individual privacy right under the

1. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

2. *Id.* at 575; Robert Leider, *Our Non-Originalist Right to Bear Arms*, 89 IND. L.J. 1587, 1642 (2014).

3. *See Heller*, 554 U.S. at 592 (explaining how the Second Amendment's historical background codifies a pre-existing right to possess and carry guns for self-defense).

4. U.S. CONST. amend. II.

5. *See Heller*, 554 U.S. at 584 (concluding the right to bear arms refers to carrying weapons outside an organized militia context).

6. *Id.* at 575.

7. Justice Scalia's majority opinion stated:

The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose. The Amendment could be re-phrased, "Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed."

Id. at 577; *see* N.Y. State Rifle & Pistol Ass'n. v. Bruen, 142 S. Ct. 2111, 2127 (2022) (citing *Heller*, 554 U.S. at 592) (discussing the *Heller* analysis regarding the Second Amendment's Operative Clause). *But see* *United States v. Miller*, 307 U.S. 174, 178 (1939) (concluding a weapon not relating to a well-regulated militia is not protected under the Second Amendment).

8. *See* U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."). The right to privacy as further discussed is either in respect of the Ninth Amendment or Fourteenth Amendment as applied to the states, depending on the context. *See infra* Part III (explaining how the Court has analyzed right to privacy issues using certain constitutional provisions in certain situations).

Ninth and Fourteenth Amendments,⁹ rather than a right to bear arms, because the class of personal weapon, including handguns, particularly the .22 caliber handgun in *Heller*, are not militia arms now and were not militia arms at the time of the American Revolution.

The Second Amendment was traditionally interpreted to involve a collective right to defense through the regulated militia.¹⁰ In historical terms, many federal and state courts have identified an individual right to keep or train with arms but attached it to the military purpose and the collective right to defense; the right applies only if the arms are related in some way to militia service, which in the present-day would resemble the National Guard.¹¹ Professor Leider explained as follows:

The “collective rights view” of the Second Amendment—the idea that the right to keep and bear arms is contingent on service in an organized state militia—was first adopted by the Kansas Supreme Court in 1905. But it became the predominant view in the federal courts from 1935 until *Heller*.¹²

The arms of the militia were expected to be provided by the citizens themselves and in common use at the time.¹³ Courts have disagreed throughout the centuries about the philosophical relation of guns to militia

9. *Cf. Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 286–87 (1990) (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 24–30 (1905)) (affirming the person’s unenumerated right to refuse unwanted medical treatment under the Fourteenth Amendment).

10. Leider, *supra* note 2, at 1594; *Burton v. Sills*, 248 A.2d 521, 526 (1986). Since state militias were formally dissolved some time ago, the military purpose relates today to the hypothetical scenario where militias are re-formed by the states upon some military necessity such as a foreign invasion, insurrection, plague, drought, or similar catastrophic event. *See generally* Alan Gura, *Briefing the Second Amendment Before the Supreme Court*, 47 DUQ. L. REV. 225, 248–63 (2009) (providing the portion of Respondent’s Brief in *Heller* detailing the history surrounding state militias and their purpose).

11. *See* Don B. Kates Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 249–50 (1983) (arguing the *Miller* Court held that the Second Amendment protects an individual right, meaning defendants do not have to prove they are military servicemembers, but at the same time held that the arms protected by the Second Amendment are only those in “common use” and proven to be “part of the ordinary military equipment” (internal quotation marks omitted)); *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942) (explaining how the federal government cannot limit weapons having a “reasonable relationship to the preservation or efficiency of a well regulated militia”); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976) (quoting *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971)) (agreeing the Second Amendment is a collective right, and thus an individual cannot claim the right to possess a firearm).

12. Leider, *supra* note 2, at 1594 (footnote omitted).

13. *United States v. Miller*, 307 U.S. 174, 179 (1939) (“[Citizens] were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.”); Kates Jr., *supra* note 11, at 217, 251 (quoting *Miller*, 307 U.S. at 179).

service.¹⁴ Yet, the late Justice Scalia in *Heller*, and other scholars, noted that no amicus filing or journal article had previously suggested that handguns were not military grade weaponry at the time of the American Revolution—a challenge that will be accepted here.¹⁵

Although primitive handguns existed at the time of the American Revolution, they were simply not “ordinary military equipment”¹⁶ for any infantry unit in 1791.¹⁷ Handguns are generally grouped within the category of “other firearms,” meaning they are not categorized as conventional infantry arms during the American Revolution or, more broadly, the Napoleonic Era.¹⁸ This runs directly contrary to Justice Thomas’s approach in *New York State Rifle & Pistol Association v. Bruen*,¹⁹ which presented handguns as a weapon category unto themselves, as if it had always been

14. See, e.g., *Miller*, 307 U.S. at 178 (holding a sawed-off shotgun had no relation to militia service).

15. See Gura, *supra* note 10, at 266–67 (“No court has questioned that a handgun, generally, is an arm ‘of the kind in common use’ by the public and is either ‘ordinary military equipment’ or otherwise useful in a manner that ‘could contribute to the common defense.’”); *Heller*, 554 U.S. at 587 (“And the phrases used primarily in those military discussions include not only ‘bear arms’ but also ‘carry arms,’ ‘possess arms,’ and ‘have arms’—though no one thinks that those other phrases also had special military meanings.” (emphasis omitted)). The thesis of this Article is to the contrary: “bearing” of arms referred to military training or drilling using muskets, and the term “Arms” referred to weapons suited to the militia that may vary under a dynamic interpretation.

16. The reference is to the *Miller* standard that was in force in the United States for almost a century before *Heller* and roughly a millennium before that in England as a feudal society. *Miller*, 307 U.S. at 178; see Leider, *supra* note 2, at 1647 (2014) (“The tradition in England was that individuals would possess ordinary military weapons. This tradition dated at least from the Assize of Arms in 1181.”). According to Professor Leider:

Miller’s holding is as clear as day. Justice McReynolds was explicitly following *Aymette*, which held that only those weapons that constitute the “ordinary military equipment” are constitutionally protected. The sawed-off shotgun was never ordinary military equipment. The whole essence of the sawed-off shotgun was that it was an ordinary shotgun specially adapted for concealment and criminal purposes, giving the user the destructive power of a shotgun and the portability of a handgun. . . .

Leider, *supra* note 2, at 1632 (footnotes omitted) (quoting *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 158 (1840)).

17. See, e.g., *Revolutionary War Weapons*, HIST. AM. WARS, <http://www.history-of-american-wars.com/revolutionary-war-weapons.html> [<https://perma.cc/HA4F-Z8DU>] (depicting war weapons used by infantrymen during the revolutionary war, none of which are handguns).

18. PHILIP J. HAYTHORNTHWAITTE, *WEAPONS & EQUIPMENT OF THE NAPOLEONIC WARS* 28 (1979).

19. *N.Y. State Rifle & Pistol Ass’n. v. Bruen*, 142 S. Ct. 2111 (2022).

so.²⁰ In historical terms, handguns were adopted, often reluctantly, by heavy cavalry units in the mid-seventeenth century,²¹ but only sparingly used by the latter half of the nineteenth century.²² Neither the British nor Continental forces during the Revolutionary War fielded any heavy cavalry units, which would have used handguns as a primary armament. Haythornthwaite, specifically in respect to the *cavalry use* of handguns in the Napoleonic era, said:

Despite the manufacture of vast quantities of pistols (203,137 pairs by French makers until 1814, for example), so that almost every cavalryman had one or two, they were hardly ever used. ‘An Officer of Dragoons’ recorded the opinion of Marshal Saxe: ‘Pistols . . . are only a superfluous addition of weight and [e]ncumbrance’ . . . and added his own comment: ‘We never saw a pistol made use of except to shoot a glandered horse.’ The pistol’s range was so limited that its discharge was pointless ‘till you feel your antagonist’s ribs with the muzzle,’ at which range it was easier to use the sword.²³

The respective military history books do not specify handguns as in service for infantry units including militia during the Revolutionary war.²⁴ Handguns were indeed rarely used by infantry units in eighteenth to early nineteenth century European conflicts,²⁵ where of course all militia units of

20. See *infra* Part VI (discussing Justice Thomas’s attempt to insert handguns in a broad enough category to be considered a part of the Second Amendment’s core protection).

21. See Gabor Agoston, *Firearms and Military Adaptation: The Ottomans and the European Military Revolution, 1450–1800*, 25 J. WORLD HIST. 85, 98 (2014) (“[A]lthough the Ottomans became acquainted with wheel-lock pistols as early as 1543 in Hungary, they did not adopt them en masse until about the Cretan war (1645–1669) . . .”).

22. For an explanation of the Napoleonic era military unit referred to as “Cuirassiers,” which employed handguns, see generally SIR CHARLES OMAN, *A HISTORY OF THE ART OF WAR IN THE SIXTEENTH CENTURY* 84–88 (1937).

23. HAYTHORNTHWAITE, *supra* note 18, at 51 (footnotes omitted).

24. See WARREN MOORE, *WEAPONS OF THE AMERICAN REVOLUTION . . . AND ACCOUTREMENTS* 7 (1967) (“[T]he only enlisted men who carried [pistols] were the horse soldiers and sailors.”); M. L. BROWN, *FIREARMS IN COLONIAL AMERICA* 321–22 (1980) (describing pistols as “short range firearms used by the mounted and naval forces of the combatants,” and as quasi-martial and nonmartial firearms).

25. Some double-barreled handguns appear to have been manufactured in Europe in the years after the American revolution. HAYTHORNTHWAITE, *supra* note 18, at 28 (“A few double- or multi-barrelled firearms saw service, Henry Nock producing a combination weapon in 1787 with two ‘screwless’ locks, a 39-inch smoothbore barrel and a 20-inch rifled barrel directly above.”).

the era were infantry, and the infantry armament was similar to the American Revolution.²⁶ Binder and Quade explain as follows:

The weaponry used during the Battle of Aspern was typical of armament from the early 19th century, largely consisting of muskets, bayonets and cannons During the Napoleonic Wars, infantrymen were primarily armed with smoothbore heavy flint-lock muskets, usually equipped with a bayonet. Muskets were loaded with lead musket balls of either 17.6 mm (Austrian infantry) or 17.5 mm (French infantry) calibre Officers were additionally supplied with swords, sabres, or rapiers, which often acted as a symbol of rank within the infantry Cuirassiers, the heavy cavalry[,] carried hand guns or short barrelled muskets (carbines), as well as sabres and rapiers In specialized regiments, such as the Austrian Uhlans, lances were also utilized. The artillery, or heavy long-range guns and cannons, were considered the most effective weapons in terms of their ability to kill large numbers of men.²⁷

Handguns were depicted as a primary armament of American revolutionaries in the movie, *The Patriot*, where Mel Gibson portrayed a pistol-wielding revolutionary battling against Redcoat forces in small-scale guerrilla actions in the American South.²⁸ The movie is largely fictional because all militia units in the American Revolution were armed predominantly with muskets. The idea of handguns in military service during the American Revolution, seemingly reflected even in some of the judicial opinions related to guns, may be due, in part, to popular movies featuring handguns in non-realistic historical periods and contexts.²⁹

26. See *infra* Part II (defining “Arms” based on historical considerations, such as what American infantrymen used during the Revolutionary War).

27. Michaela Binder & Leslie Quade, *Death on a Napoleonic Battlefield—Peri-Mortem Trauma in Soldiers from the Battle of Aspern 1809*, 22 INT’L J. PALEOPATHOLOGY 66, 67 (2018).

28. THE PATRIOT (Columbia Pictures 2000). The movie relates to battles in the American South, which were different than elsewhere during the American revolution. See ED GILBERT & CATHERINE GILBERT, PATRIOT MILITIAMAN IN THE AMERICAN REVOLUTION 1775–82, at 54–55 (2015) (detailing how guerrilla warfare played out in battle).

29. See, e.g., Gura, *supra* note 10, at 268 (“Some of those pistols might have been purchased by the Tea Party Indians, ‘each arm’d with a hatchet or axe, and pair pistoles.’ . . . The 634 pistols confiscated by General Gage constituted a full 18.25% of the firearms whose seizure the Continental Congress declared a *causis belli*.”). The British’s confiscation of handguns may have been for stopping their criminal uses, rather than limiting their potential military value. The handguns were presumably outdated and inoperable flintlocks of prior eras, dueling pistols, or other antiques or relics.

Handguns are also not “ordinary military equipment” for militia units in the present day³⁰—a view that appears to be supported by the predominantly long weapons deployed by the militia on both sides of the Ukraine-Russia conflict.³¹ A firearms blog writes: “The AK-74 and AK-74M [are] by far the most ubiquitous weapon[s] . . . [s]een in the hands of both Ukrainian and Russian troops.”³²

One presumption of recent judicial opinions appears to be that professional soldiers occasionally use handguns in military conflicts. By grouping all handguns collectively, as in *Bruen*,³³ it is possible to conclude that a .22 caliber handgun is relevant to military use simply because all handguns are relevant to military use. By this view, handguns are understood through the lens of Western movies and television series. In the movie, no matter its respective caliber or size, this dramatized handgun never blows up in your hand, rarely misses, and its bullets never pass through an exterior wall of a house and strike a bystander. By this depiction, it was plausible for the Court to proceed under an originalist method of legal

30. *But see* Gura, *supra* note 10, at 266 (“Categorically, firearms ‘in common use’ for civilian purposes—rifles, shotguns, and handguns—are plainly ‘part of the ordinary military equipment,’ and their ‘use could contribute to the common defense.’” (quoting *United States v. Miller*, 307 U.S. 174, 178–79 (1939))).

31. *See* Matthew Moss, *Small Arms of the War in Ukraine*, FIREARM BLOG (Mar. 23, 2022), <https://www.thefirearmblog.com/blog/2022/03/23/small-arms-of-the-war-in-ukraine/> [<https://perma.cc/6M6U-2ANS>] (discussing the weapons used in the Ukrainian and Russian war); *see also* *Explainer: Weapons Used in the Russia-Ukraine War*, ASSOCIATED PRESS (Mar. 4, 2022), <https://apnews.com/article/russia-ukraine-kyiv-world-war-ii-europe-military-facilities-5b105b30af83b8c67e6ef854b611faca> [<https://perma.cc/22TZ-9ESJ>] (failing to mention handguns in any respect); Dylan Malyasov, *Ukraine to Receive Panzerfaust 3 Anti-Tank Weapons*, DEF. BLOG (Feb. 28, 2022), <https://defence-blog.com/ukraine-to-receive-panzerfaust-3-anti-tank-weapons/> [<https://perma.cc/BQ64-9XC2>] (explaining some of the weapons used by Ukraine); *Infantry Armament of the Donetsk and Luhansk Militia Forces*, BING, <https://www.bing.com/images/search?q=infantry+armament+of+the+donetsk+and+luhansk+militia+forces&qpv=infantry+armament+of+the+donetsk+and+luhansk+militia+forces&tsc=ImageHoverTitle&form=IGRE&first=1> [<https://perma.cc/87ZS-KMJJ>] (depicting forty-nine images of the Donetsk and Luhansk militia forces and infantry armaments without any picture of a handgun).

32. Moss, *supra* note 31. The blog also states: “In terms of pistols, Makarov PMs are ubiquitous and seen in the hands of both sides.” *Id.* However, there is no image or picture of any such handgun on the blog. *Id.* The Makarov is listed with Soviet production of ten million of these handguns. *Id.* The blogger seems to be implying there are many Makarov handguns owned by the combatants but not actually used in combat. There is a picture only of a handgun from a downed Russian air pilot, which is not a Makarov PM. *Id.* There is also a picture of a Russian officer on the site with an automatic pistol carried on a chest strap. *Id.*

33. *See* *N.Y. State Rifle & Pistol Ass’n. v. Bruen*, 142 S. Ct. 2111, 2119 (2022) (stating handguns are considered a primary self-defense weapon today).

interpretation by grouping handguns into one category and then expecting the lower courts to carve out exceptions for “exceptionally dangerous” versions of handguns at some later time.³⁴ However, it later became obvious that a .22 caliber pistol is different than a stun gun even though both are carried in the hand and contain the word “gun,” and the legal methodology has been difficult to implement in practice.³⁵

But all handguns are not the same. The historical point missed by the Court and scholars is that handguns were rarely used as military weapons throughout history and were predominantly used by specialized and highly trained military units. Handguns, even if considered military-grade at some point in history, were absolutely not proper militia armament in 1791.³⁶ Although beyond the scope of this Article, neither were Bowie knives.³⁷ The West Virginia courts held along these lines as follows:

["Arms"] refer to the weapons of warfare to be used by the militia, such as swords, guns, rifles, and muskets,—arms to be used in defending the state and civil liberty,—and not to pistols, bowie-kni[ve]s, brass knuckles, billies, and such other weapons as are usually employed in brawls, street fights, duels, and

34. *See id.* at 2119–20 (concluding there is no justification for restricting public carry of handguns that are of common use).

35. *See Caetano v. Massachusetts*, 577 U.S. 411, 411 (2016) (per curiam) (reviewing the lower court's decision to uphold the prohibition of stun gun possession).

36. According to Professor Leider:

Neither *Miller* nor *Aymette* took this extraordinarily broad view of “ordinary military equipment.” Almost no nineteenth-century case extended the phrase beyond those weapons *ordinarily issued to individual soldiers* as part of their equipment. Courts routinely provided examples, such as rifles, muskets, and army pistols. They never said that Gatling guns or heavy machine guns—which Hiram Maxim first invented in 1884—were constitutionally protected. If one wanted further guidance on the phrase “ordinary military equipment,” he could look to the constitutional purposes of the militia and ask what weapons soldiers are ordinarily issued when enforcing the laws, suppressing insurrections, and repelling invasions.

Leider, *supra* note 2, at 1638 (footnotes omitted).

37. Infantry in the Napoleonic era did not fight with knives probably because a musket with an attached bayonet rendered the weapon essentially a pike, usually standing taller than a man, which is far superior in hand-to-hand combat than a knife, especially if deployed against mounted opponents. A musket without a bayonet can also be used as a club, which would have a longer effective range than a knife. *See discussion infra* Part I.A (describing the weapons that were not militia arms at the time of the founding). *But see* David B. Kopel et al., *Knives and the Second Amendment*, 47 U. MICH. J.L. REFORM 167, 189 (2013) (“[E]ven if *Heller* had adopted *Aymette*'s rule that there is an individual right to own all militia-suitable arms, the Bowie knife is a militia arm. It may not have been standard equipment for the Tennessee militia in 1840, but there is plenty of evidence of its militia use in the rest of the United States.”).

affrays, and are only habitually carried by bullies, blackguards, and desperadoes, to the terror of the community and the injury of the state.³⁸

A. *Background on the Uses of Handguns*

The statistics on gun deaths suggest that the primary use for handguns today is suicide,³⁹ where use is understood to mean the primary outcome. The primary outcome may not necessarily reflect the stated reason on a firearm registration form, where it is usually hunting or home defense⁴⁰ and only later turns out to be suicide. The jurisprudential analysis might bear on the primary use of the handgun toward suicide.⁴¹ That is, states may have an interest in looking beyond mere justifications, such as hunting or self-defense and so on, given by a person with a vested interest in obtaining a gun permit.⁴² In other areas of constitutional analysis, such as racial discrimination, a non-discriminatory or pretextual reason is often proposed and similar vested explanations are subjected to statistical testing under Title VI, for example.⁴³

38. *State v. Workman*, 14 S.E. 9, 11 (W. Va. 1891). *But see* Jeffrey Monks, *The End of Gun Control or Protection Against Tyranny?: The Impact of the New Wisconsin Constitutional Right to Bear Arms on State Gun Control Laws*, 2001 WIS. L. REV. 249, 271 (describing the “lawful purpose” test, which means “[i]f the weapon is of the type that is commonly used for a lawful purpose (such as self-defense), it is protected” (internal quotation marks omitted)).

39. *See* Andrew J. McClurg, *Sound-Bite Gun Fights: Three Decades of Presidential Debating About Firearms*, 73 UMKC L. REV. 1015, 1045 (2005) (“Despite several years of declining gun violence in the U.S., firearms are still used annually in roughly 10,000 homicides, 16,000 suicides[,] and 800 accidental deaths. To be weighed against these heavy costs are the societal benefits of widespread private gun ownership for personal defense, hunting, target shooting[,] and collecting.” (footnotes omitted)).

40. *Why Own a Gun? Protection is Now Top Reason*, PEW RSCH. CTR. (Mar. 12, 2013), <https://www.pewresearch.org/politics/2013/03/12/why-own-a-gun-protection-is-now-top-reason/> [<https://perma.cc/8SFM-2LGY>].

41. *See* Clayton E. Cramer & Joseph Edward Olson, *Pistols, Crime, and Public Safety in Early America*, 44 WILLAMETTE L. REV. 699, 711 (2008) (explaining pistols appeared to be primarily used in suicides in the Colonial and Revolutionary periods).

42. *Peruta v. County of San Diego*, 824 F.3d 919, 924 (9th Cir. 2016) (reviewing California law requiring citizens to “show ‘good cause’ to carry a concealed firearm); *United States v. Marzzarella*, 614 F.3d 85, 101 (3d Cir. 2010) (holding the state has a “compelling interest of tracing firearms by discouraging the possession and use of firearms that are harder or impossible to trace”).

43. *See* C.R. DIV., U.S. DEP’T OF JUST., TITLE VI LEGAL MANUAL § VI.B. (2021) (“A plaintiff or agency investigation can use statistics in several ways to establish a claim of intentional discrimination. For example, statistics can be used show that an ostensibly race-neutral action actually causes a pattern of discrimination, a racially disproportionate impact, or foreseeably discriminatory results.”).

The body has been understood to carry privacy rights under the curtilage of the Ninth and Fourteenth Amendments.⁴⁴ Suicide by firearm entails a projectile entering one's body. Although not typically mentioned in the context of suicides by gun, assisted suicide occurs when one provides a means of ready death for the other person to commit suicide, whether negligently or recklessly.⁴⁵ Handgun accidents resulting in death are also commonplace. Although gun purchasers may intend to use their handguns for self-defense, they may later decide to use the handgun for suicide or fail to secure it so that someone else commits suicide with it. Thus, a suicide by handgun may not necessarily implicate the gun owner's right to privacy or right to bear arms. Suicides by handgun often involve a minor, generally a male.⁴⁶ Legal analysis under the Second Amendment does not seem to contemplate the potential rights of accident or suicide victims, nor the loss of those victims' future rights.⁴⁷ The suicide victim may also be seen as endowed with individual rights to handguns as it relates to their own body, which could later be constitutionally recognized, just as the Court appears to want to do for unborn children.⁴⁸ In any case, the personal defense outcome, where the handgun is used to prevent a crime, is relatively rare compared to the suicide outcome, which occurs daily in the United States.⁴⁹ Scholars have pointed out the casualty rate of deaths from handguns exceeds the rate of casualties during the Vietnam War.⁵⁰

Motivated research by gun scholars has further evaluated whether persons might select a different means for suicide if handguns were not readily available. The idea is that handguns are very helpful in committing

44. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (holding the right to privacy is protected by the Ninth Amendment and as a "penumbra" in the Bill of Rights).

45. See *Washington v. Glucksberg*, 521 U.S. 702, 706 (1997) (defining assisted suicide).

46. See Susan DeFrancesco, *Children and Guns*, 19 PACE L. REV. 275, 277 (1999) (discussing the risk of gun death in males and youth).

47. See *id.* at 277 (stating over 1,400 minors committed suicide by handgun in 1995); Carl T. Bogus, *Pistols, Politics and Products Liability*, 59 CIN. L. REV. 1103, 1104 (1991) (discussing how more than 22,000 Americans die due to handguns and attempts to reduce this number through legislation has resulted in political struggles).

48. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284 (2022) (holding there is no constitutional right to have an abortion, thereby providing a mechanism for the unborn to have rights and protections under the laws of the states).

49. ARTHUR L. KELLERMAN & DONALD T. REAY, GUN OWNERSHIP IS NOT AN EFFECTIVE MEANS OF SELF-DEFENSE, reprinted in GUN CONTROL 171, 173 (Bruno Leone et al., eds., 1992) ("Even after the exclusion of firearm-related suicides, guns kept at home were involved in the death of a member of the household 18 times more often than in the death of a stranger.").

50. Bogus, *supra* note 47, at 1104.

suicide successfully on the first try, with a success rate of 90% or so;⁵¹ yet other means might exist, such as in Sri Lanka, where ingesting poisonous pesticides is the preferred means of suicide.⁵² Medical and health scholars disagree on various aspects of the role of handguns in suicide,⁵³ yet the analysis concedes the ironclad correlation between handgun purchases and suicide.⁵⁴ Perhaps the point most relevant to legal scholarship is the actual use of handguns rather than the intent.⁵⁵ Scholars have not evaluated the comparatively simple question of whether persons might select a different means for home defense with lesser externalities, such as a long rifle or shotgun, if handguns were not as readily available.

Of course, long weapons are not as concealable or portable and therefore not as helpful in criminal activity⁵⁶ or as inconspicuous to carry around town. Moreover, long weapons are not as profitable for gunmakers to manufacture in large quantities and apparently not as desirable for suicide

51. Lance Lindeen, Comment, *Keep off the Grass!: An Alternative Approach to the Gun Control Debate*, 85 IND. L.J. 1659, 1669 (2010).

52. Don B. Kates et al., *Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda?* 62 TENN. L. REV. 513, 565 n.207 (1995).

53. Compare Garen J. Wintemute et al., *The Choice of Weapons in Firearm Suicides*, 78 AM. J. PUB. HEALTH 824, 825 (1988) (finding handguns were used more frequently in suicides), and S.W. Hargarten et al., *Characteristics of Firearms Involved in Fatalities*, 275 JAMA 42, 42–45 (1996) (finding handguns common in suicides), and Arthur L. Kellerman et al., *Suicide in the Home in Relation to Gun Ownership*, 327 NEW ENG. J. MED. 467, 471 (1992) (finding increased risk of suicide with availability of firearms in the home), and David Lester & Mary E. Murrell, *The Influence of Gun Control Laws on Suicidal Behavior*, 137 AM. J. PSYCHIATRY 121, 122 (1980) (finding stricter gun control laws resulted in lower suicide rates), with Ronald V. Clarke & Peter R. Jones, *Suicide and Increased Availability of Handguns in the United States*, 28 SOC. SCI. MED. 805, 807 (1989) (failing to conclusively link increased handgun availability with higher rates of suicide).

54. David Hemenway & Matthew Miller, *Association of Rates of Household Handgun Ownership, Lifetime Major Depression, and Serious Suicidal Thoughts with Rates of Suicide Across US Census Regions*, 8 INJURY PREVENTION 313, 315 (2002); Garen J. Wintemute et al., *Mortality Among Recent Purchasers of Handguns*, 341 N. ENG. J. MED. 1583, 1586–87 (1999); Peter Cummings et al., *The Association Between the Purchase of a Handgun and Homicide or Suicide*, 87 AM. J. PUB. HEALTH 974, 977–78 (1997).

55. See David C. Biggs, *“The Good Samaritan is Packing”: An Overview of the Broadened Duty to Aid Your Fellowman, with the Modern Desire to Possess Concealed Weapons*, 22 U. DAYTON L. REV. 225, 253 (1997) (“Obviously, it can be argued that one wanting to end his own life could do so without the use of firearms, but it can also be argued as forcefully that without the presence in households of significant numbers of firearms, successful suicide rates would diminish.”).

56. Leider, *supra* note 2, at 1634 (“[S]hortened weapons that have little or no military value—and were specially adapted for concealment and criminal purposes—fell outside the scope of ‘arms’ protected by the Second Amendment.”).

either.⁵⁷ Given the recent decisions in *Heller*, *McDonald v. City of Chicago*,⁵⁸ and *Bruen*, concerned lawmakers in states (such as New York and Illinois) might consider mandatory anti-suicide training for purchasers of handguns, or mandatory training on the benefits of alternative weapons for home defense, such as shotguns or long rifles.⁵⁹ These considerations may be especially important to a state where another type of firearm may cost less dollars yet be equally or more effective than a handgun in virtually all legal scenarios where it can be employed, including a home invasion. Furthermore, firearms other than handguns might be much less likely to result in the death of a family member by suicide or accident.⁶⁰

If the Second Amendment is thought to not contain an elucidated individual right to possess handguns in the home via *Heller* or to carry handguns around town via *Bruen*,⁶¹ then the Ninth Amendment could theoretically reserve those rights to the people, albeit subject to the rights of other people.⁶² The potential Ninth Amendment application to the facts of the recent gun rights cases, particularly in *Heller*, appears legally simpler compared to the Second Amendment's self-defense penumbra—to wit the *Heller* opinion has been aptly described.⁶³ In *Heller*, the Court was concerned

57. See Bogus, *supra* note 47, at 1118 (“About one-half of all suicides are committed with firearms, and, of these, about 83% are committed with handguns.”).

58. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

59. If handguns are now a “core” right, should counseling or other services be funded and available to assist minors thinking about using a handgun to commit suicide? Perhaps the recent decisions in *Heller* and *Bruen* militate in favor of targeted expenditures for the mental health of gun owners themselves or the persons within the household. There is some discussion on proposed design mechanism of handguns, such as locking devices that might also be beneficial. See Bogus, *supra* note 47, at 1125 (suggesting a low-cost interlock mechanism that prevent guns from working without the guard).

60. See *id.* at 1118–21 (discussing the correlation between the deaths of children and adolescents by suicide or accident and the presence of handguns in the household).

61. See David B. Kopel & Joseph G. S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS U. L.J. 193, 259 (2017) (“To speak of ‘bearing’ arms within one’s home would at all times have been an awkward usage. A right to bear arms thus implies a right to carry a loaded gun outside the home.” (quoting *Moore v. Madigan*, 702 F.3d 933, 935–36 (7th Cir. 2012))).

62. See Roland H. Beason, *Printz Puncts on the Palladium of Rights: It is Time to Protect the Right of the Individual to Keep and Bear Arms*, 50 ALA. L. REV. 561, 575 (1999) (explaining how the Ninth Amendment protects the right of self-defense); Akhil Reed Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 186 (2008) (advocating for the “more modest” approach of analyzing self-defense as a Fourteenth Amendment privilege or a Ninth Amendment unenumerated right).

63. See Glenn Harlan Reynolds, *Second Amendment Penumbra: Some Preliminary Observations*, 85 S. CAL. L. REV. 247, 257 (2012) (asserting self-defense was constitutionalized in *Heller*); Matthew Jordan Cochran, *A Fighting Chance for Outlaws: Strict Scrutiny of North Carolina’s Felony Firearms Act*, 32 CAMPBELL

with the right to possess a small .22 caliber handgun in the home for self-defense.⁶⁴ In *Bruen*, the Court was concerned with what might be called the “Tombstone” scenario, where a private citizen fears a confrontation and needs to carry a concealed handgun around town,⁶⁵ notwithstanding that even Doc Holliday chose to carry a shotgun rather than a handgun.⁶⁶ The scoping of the privacy right at issue, then, appears to be just as the late Justice Scalia described the right to self-defense in Second Amendment terms, except as a privacy right to possess a handgun under certain circumstances—which can be taken as reserving that right to the people in addition to the Second Amendment’s guarantee of militia arms.

As explained further in Part II, because handguns were generally not among military weaponry during the American Revolution, these weapons should not be considered within the scope of the term “Arms,” as applied by the majority in *Heller*, to invoke the Second Amendment as the operative constitutional provision. Recruiting posters even in the decades after the American Revolution featured an infantry soldier armed with a musket rather than any handgun.⁶⁷

L. REV. 333, 349 n.51 (2010) (“Applying [the penumbral] concept to the issue at hand, it is not difficult to reason that the Second Amendment, with its specific guarantee of a right to keep and bear arms . . . might be said to ‘emanate’ a ‘penumbra’ containing within its periphery the fundamental right of self-defense.” (citation omitted)).

64. *District of Columbia v. Heller*, 554 U.S. 570, 575 (2008); Leider, *supra* note 2, at 1642.

65. *N.Y. State Rifle & Pistol Ass’n. v. Bruen*, 142 S. Ct. 2111, 2122 (2022); see Ryan S. Andrus, *The Concealed Handgun Debate and the Need for State-to-State Concealed Handgun Permit Reciprocity*, 42 ARIZ. L. REV. 129, 134 (2000) (quoting *Gun Laws and the Need for Self-Defense (Part 2)*, Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary, 104th Cong. 61 (1995) (statement of Bryant Jennings, President of the Memphis Tennessee Police Association)) (“[T]he presence of an armed and trained private citizen beside me presents a greater comfort than waiting for my colleagues to travel, no matter how fast, to be at my side.”); Jack Skaggs, *Have Gun, Will Travel? The Hopelessly Confusing Journey of the Traveling Exception to the Unlawful Carrying Weapons Statute*, 57 BAYLOR L. REV. 507, 508 (2005) (describing the “traveling exception” as a defense to the criminal offense of carrying handguns on one’s person).

66. See *A Brief History of the Famous Gunfight at the O.K. Corral*, O.K. CORRAL, <https://www.ok-corral.com/pages/history.shtml> [<https://perma.cc/PB8Y-67PR>] (detailing how Doc Holliday shot Tom McClauray with a double-barreled shotgun, which Doc hid inside his coat).

67. See Ray Raphael, *Take Notice: The Not-So-1776 Recruiting Poster*, J. AM. REVOLUTION (Feb. 14, 2014), <https://allthingsliberty.com/2014/02/take-notice-the-not-so-1776-recruiting-poster/> [<https://perma.cc/P2YA-E74X>] (depicting a Revolution-era poster showing a soldier armed with a musket). An NFL team’s helmet still featured a militia soldier all the way through the 1990s and is depicted at the start of home games by the firing of muskets by the New England End Zone Militia. Steve Buckley, *For Janie Ritchie and the Patriots End Zone Militia, the Fight Goes On*, THE ATHLETIC (Jan. 7, 2019), <https://theathletic.com/751044/2019/01/07/for-janie-ritchie-and-the-patriots-end-zone-militia-the-fight-goes-on/> [<https://perma.cc/VRK8-P675>].

Muskets were the standard infantry armament of the time; as Haythornthwaite said: “The very basis of Napoleonic warfare was its simplest factor—the private soldier and his musket.”⁶⁸ For these reasons, as further explained below, the constitutional reference to specifically “militia”-type “Arms” should have been taken as a reference to muskets. If the Founding Fathers were each given a piece of a paper and told to draw the weapon corresponding to militia arms, I daresay all of them would have returned a drawing of an infantry soldier armed with a musket, perhaps a bayonet,⁶⁹ but no ghoulish Bowie knives,⁷⁰ no cannon, no Pennsylvania rifle, nor any dueling pistols fished out of an old crate as in *The Patriot*. All the prior scholarship referencing these weapons as being in widespread militia service in 1791, and somehow justifying the decisions in *Heller* and *Bruen*, are erroneous as a matter of military history.

At the time of the American Revolution, militia units were generally infantry. The term militia referred to the citizenry taking up arms upon invasion rather than professional soldiery, which in Europe were traditionally mounted knights.⁷¹ Such infantry were armed with muskets usually with a bayonet to be used in the event of hand-to-hand combat.⁷² Plug bayonets were used for roughly a century in Europe, but eventually side-fixed bayonets were invented, where the musket could still be fired with the bayonet attached.⁷³ This version of the bayonet was widespread by the time of the American Revolution.⁷⁴ Muskets plus a bayonet of some form can be understood as the replacement for pole-axes or spears as wielded in the centuries of European conflict preceding the invention of the musket,

68. HAYTHORNTHWAITE, *supra* note 18, at 13.

69. Kopel et al., *supra* note 37, at 171 (“A bayonet is designed to be mounted on the muzzle of a firearm. Historically, some bayonets were just thrusting weapons with a point and without a sharpened edge.” (footnote omitted)).

70. *See id.* at 190 (explaining the prevalence of Bowie knives during the Civil War).

71. *Militia*, BRITANNICA, <https://www.britannica.com/topic/militia> [<https://perma.cc/JL5R-3NAM>] (defining militia as a “military organization of citizens with limited military training, which is available for emergency service, usually for local defense”).

72. *See Revolutionary War Weapons*, *supra* note 17 (explaining the bayonet’s use primarily with muskets).

73. *See Bayonet*, BRITANNICA (Jan. 9, 2023), <https://www.britannica.com/technology/bayonet> [<https://perma.cc/U43W-GGNW>] (describing the evolution from the early seventeenth century plug bayonet to the late seventeenth century socket bayonet).

74. *See id.* (stating the infantrymen used fixed-bayonets predominantly).

where such traditions are so entrenched that they are still ceremonially maintained by the Swiss guard of the pope in Rome.⁷⁵

The effectiveness of weapons during the Napoleonic era was measured in part by the ability to coordinate fire, which served to disrupt an enemy formation, or more importantly, to repel infantry and cavalry attacks.⁷⁶ This explains the historical preference for muskets with bayonet attachments, as horses would balk if asked to charge into infantry in the square formation at anything less than a gallop.⁷⁷ Military officers and professional soldiers may have used handheld weapons while in service with the artillery, mounted cavalry, or naval units,⁷⁸ but generally, handguns were a secondary armament to be used as a last resort in personal defense.⁷⁹ Cavalry units were potential candidates for handguns as a primary armament during this time period; yet mounted forces were intended to maneuver quickly and attack infantry from the flank or rear, or to attack artillery units, such as in the famous Charge of the Light Brigade.⁸⁰ For this reason, as well as the unreliability of handguns in wet conditions, European cavalry units, such as Lancers, continued to be armed with pole and edged weapons even where handguns were available.⁸¹ In comparison to modern handguns with rifled

75. See *Swiss Guards: A Brief History of the Pope's Army*, WANTED IN ROME (May 6, 2022), <https://www.wantedinrome.com/news/swiss-guards-vatican-popes-army.html> [<https://perma.cc/2CM4-YL2F>] (detailing the uniforms worn by the guards who serve the pope on ceremonial occasions).

76. See HAYTHORNTHWAITE, *supra* note 18, at 3–13 (describing the infantry tactics of the Napoleonic Era and their purposes).

77. *Id.* at 9 (“Their only protection was the square, a bristling hedge of bayonets impenetrable in all but extreme cases as the cavalry (unless armed with lances) could not reach the infantry over their bayonets and their horses would not charge the fearsome sight.”).

78. *Id.* at 28 (“‘Volley guns’ were principally a naval weapon, being muskets with a number of barrels, Nock producing some 655 seven-barrelled guns firing small shot (46 1/2 shots to the lb), never popular due to the danger of starting fires with the excessive ‘flash.’” (footnote omitted)).

79. *Id.* at 51 (“Huge numbers of privately-purchased pistols were used by officers, ranging from de luxe versions of regulation patterns to ornate duellers; some were produced with detachable shoulder-stocks to turn them into short carbines. Even such finely-made weapons, however, had little effect on the battlefield except at the closest range.”).

80. See Tony Bunting, *Battle of Balaklava*, BRITANNICA, <https://www.britannica.com/event/Battle-of-Balaklava> [<https://perma.cc/DV59-3SDT>] (describing how despite the mounted Light Brigade’s intended purpose was to stop the enemy from transporting their weapons by overtaking them from the rear when they were isolated, the command was misheard as “advance rapidly,” and the Light Brigade charged into an onslaught of Russian artillery).

81. Other cavalry units were armed with rifles similar to modern military units. Rifle or musket armed cavalry units, referred to as Dragoons, were tasked to quickly occupy a key terrain feature or battlefield position as infantry, such that cavalry is now sometimes still referred to as mounted infantry.

barrels, guns with unrifled barrels were extremely inaccurate and unreliable, had a limited range, and were largely useless when wet, which was roughly half the time in the field.⁸² Handguns and carbines were also terrifying to horses when discharged by the rider within a few inches of the horse's ear, thus rendering handguns exceptionally dangerous to operate while on horseback.⁸³ For all of these reasons, primitive handguns were not suitable to militia units in any period of military history.⁸⁴ The *Bruen* Court's additional failure to distinguish between the types and relative effectiveness of handguns from the time of Henry VIII to the modern era, by not distinguishing, for example, a Blunderbuss⁸⁵ versus a Colt revolver or Model

See HAYTHORNTHWAITE, *supra* note 18, at 35 (describing the original function of dragoons as "mounted infantry who rode into action and dismounted to fight"). Dragoon units with infantry mounted on horseback were deployed by the British in the American Revolution, but these units were not militia and not armed with handguns. See Travis Shaw, *Cavalry in the American Revolution*, AM. BATTLEFIELD TR., <https://www.battlefields.org/learn/articles/cavalry-american-revolution#:~:text=The%20British%20Army%20sent%20two,siege%20by%20the%20Continental%20Army> [<https://perma.cc/M8R5-8FR2>] ("By the time of the American Revolution, British dragoons had evolved to be closer to conventional cavalry. They still carried firearms in the form of cavalry carbines but were also equipped with sabers to fight on horseback as well.").

82. See Harry Schenawolf, *Muskets & Rifles of the American Revolution: Difference and Tactics*, REVOLUTIONARY WAR J. (June 19, 2019), <https://www.revolutionarywarjournal.com/muskets-rifles-of-the-american-revolution-difference-and-tactics/> [<https://perma.cc/M835-WYS9>] (explaining the drawbacks of unrifled barrels).

83. See *Shooting from Horseback*, SOVIET GUN ARCHIVES (Mar. 16, 2014), <http://sovietguns.blogspot.com/2014/03/shooting-from-horseback.html> [<https://perma.cc/TG76-KVDR>] (emphasizing the importance of a rider to train his horse because the horse's behavior can impede the rider's ability to shoot).

84. Russian Cossack militia units are a possible exception but are most often depicted with a long weapon, although such are reported to have used handguns as irregulars during both World Wars. *Arms*, INTERNET ENCYCLOPEDIA OF UKRAINE, <http://www.encyclopediaofukraine.com/display.asp?linkpath=pages%5CA%5CR%5CArms.htm#:~:text=The%20arms%20of%20the%20Cossacks,as%20the%20helmet%20or%20armor> [<https://perma.cc/MB4A-PSUD>]. Another possible exception may include handgun usage by irregular forces at the battle of Culloden. See WILLIAM REID, *ARMS THROUGH THE AGES 165* (Harper & Row 1976) ("At the time of Culloden fully-equipped Scottish soldiers carried a dirk and a pair of pistols, a round targe on their backs, a blew bonnet on their heads, in one hand a broadsword and a musket in the other." (internal quotation marks omitted)).

85. The blunderbuss was the precursor to the modern shotgun and was used mostly in close range to shoot scatter shots and projectiles. *Blunderbuss, the "Thunder Box" of the Battlefield*, AM. REVOLUTION INST., <https://www.americanrevolutioninstitute.org/recent-acquisitions/english-blunderbuss/> [<https://perma.cc/8FQ7-ESTU>]; see HAYTHORNTHWAITE, *supra* note 18, at 28 ("The bell-mouthed 'blunderbuss' . . . popularly thought to fire a mixture of nails and scrap-iron, was little-used as an 'issue' weapon.").

1911,⁸⁶ may itself comprise legal error within the originalist or textual interpretational methods as applied by the Court.⁸⁷ The lower courts' difficulty in applying *Heller* and *Bruen* arises partly from the Court's equivalency of handguns idea; often this could be more readily resolved with an analysis focused on the relative privacy right at stake associated with the particular weapon.

Handguns were also not as significant to military armament as a Hollywood-based movie understanding of U.S. military history might lead one to believe. Napoleonic warfare during the American Revolution was less focused on killing the enemy in comparison to modern warfare.⁸⁸ The modern era of military methods premised on achieving victory by eliminating the enemy soldiers is often taken to have begun with General Ulysses S. Grant's grinding-down-of-the-confederacy-phase of the American Civil War, especially the trench warfare at Petersburg.⁸⁹ As a matter of military history, primitive handguns were instead used much earlier in the sixteenth century by cuirassier mounted units most famously against densely packed pole-armed infantry formations.⁹⁰ The cuirassier

86. Perhaps the foremost example of a revolver, the Colt Dragoon, was manufactured for the U.S. Army's mounted rifle regiment. *Colt Model 1848 (Dragoon)*, MIL. FACTORY (Feb. 17, 2018), https://www.militaryfactory.com/smallarms/detail.php?smallarms_id=251 [<https://perma.cc/8GC-P-9FCF>]. The U.S. military used the Colt Model 1911 from 1911 to 1986. *Colt U.S. Model 1911 Pistol*, SMITHSONIAN: NAT'L MUSEUM OF AM. HIST., https://americanhistory.si.edu/collections/search/object/nmah_1291794 [<https://perma.cc/R793-47W4>].

87. In *Heller*, Justice Scalia provided a disclaimer on this point. See *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008) (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)) (distinguishing arms that were "in common use at the time," from "dangerous and unusual weapons," of which the Blunderbuss may be one).

88. See *Revolutionary War Strategy*, AM. BATTLEFIELD TR., <https://www.battlefields.org/learn/articles/revolutionary-war-strategy> [<https://perma.cc/RD9E-6UFE>] ("The Americans would avoid a direct assault on the British unless conditions were overwhelmingly favorable. Short of that, they would prod and harass the British forces without coming into a major engagement.").

89. NOAH ANDRE TRUDEAU, *THE SIEGE OF PETERSBURG: CIVIL WAR SERIES* (1995), http://npshistory.com/publications/civil_war_series/20/sec1.htm [<https://perma.cc/PJU9-XHGB>].

90. See G.A. SHEPPERD, *A HISTORY OF WAR AND WEAPONS, 1660 TO 1918: ARMS AND ARMOUR FROM THE AGE OF LOUIS XIV TO WORLD WAR I* 14–15 (1971) ("A few armies maintained bodies of cuirassiers, armed with pistol and sword, but these were only used against troops already thrown into disorder by gun or musket fire. Gustavus appreciated too well the value of the speed and weight of the horse to imitate these tactics, and his cavalry was trained to charge at speed and rely on the keen edge of their swords."); see also OMAN, *supra* note 22, at 85, 88 (detailing how the pistol overtook the cross-bow and arquebus as the weapon of choice for cavalry since it only required one hand and how the cuirassiers "moved into the position of heavy cavalry by the end of the sixteenth century").

usually carried one or more firearms and would approach the dense enemy formation and fire into it indiscriminately because the weapons were widely inaccurate; then he would quickly gallop away to hopefully reload before being dismounted from the horse or inadvertently coming within the enemy's reach.⁹¹ Such tactics were used in battles where handguns were the primary armament of nonmilitia soldiery and became impossible once infantry units were armed with muskets of their own.⁹² Cuirassier tactics were not a common military practice at the time of the American Revolution. Neither Britain nor the colonies had heavy cavalry or cuirassier units at the time of the American Revolution that would have used handguns as a primary armament.⁹³ In any case, handguns borne by professional line officers placed in command of militia units, as depicted in popular culture like *The Last of the Mohicans*,⁹⁴ were not common militia armament in 1791.⁹⁵ Eventually, improved handgun designs, such as Colt revolvers, became traditional U.S. cavalry armaments,⁹⁶ and this indeed occurred in the decades surrounding the Fourteenth Amendment's ratification in 1868.⁹⁷

91. Treva J. Tucker, *Eminence Over Efficacy: Social Status and Cavalry Service in Sixteenth-Century France*, 32 SIXTEENTH CENTURY J. 1057, 1071 (2001). The relative primitiveness of handguns for long centuries of European history, including at the time of the American Revolution, was further reflected through their usage in duels where the discharge of handguns by both parties would often resolve the matter without the need for bloodshed because the projectiles were so inaccurate in practice. *The History of Dueling in America*, PBS: AM. EXPERIENCE, <https://www.pbs.org/wgbh/americanexperience/features/duel-history-dueling-america/> [https://perma.cc/6MGK-PVTD].

92. See Tucker, *supra* note 91, at 1073 (describing the criticisms levied at the *caracole* tactic, including the inaccuracy of pistols and the cuirassiers vulnerability to musket attack).

93. DIGBY SMITH, CHARGE! GREAT CAVALRY CHARGES OF THE NAPOLEONIC WARS 13 (2003) ("Britain had no armoured cavalry throughout the period, and neither had Denmark, Portugal, Spain, Sweden, or the Italian states.").

94. THE LAST OF THE MOHICANS (20th Century Fox 1992).

95. See *supra* notes 16–29 with accompanying text (discussing the evidence behind there being no handguns used as common militia armament around 1791).

96. See Benjamin Brimelow, *Here are the Sidearms the U.S. Military has Carried into Battle Since First Taking on the British*, INSIDER (Nov. 24, 2022, 2:09 PM), <https://www.businessinsider.com/history-of-pistols-sidearms-used-by-the-us-military-2020-11> [https://perma.cc/PZ5M-L48Z] (reviewing the history of handguns used by the U.S. military, including the importance of the Colt revolver in the nineteenth century and its use by U.S. Army cavalry and mounted-infantry units).

97. *Landmark Legislation: The Fourteenth Amendment*, U.S. SENATE, <https://www.senate.gov/about/origins-foundations/senate-and-constitution/14th-amendment.htm#:~:text=Passed%20by%20the%20Senate%20on,laws%2C%E2%80%9D%20extending%20the%20provisions%20of> [https://perma.cc/LQ9T-9R7D]. The passage of the Fourteenth Amendment and the application of the Bill of Rights, including the Second Amendment to the states, may be jurisprudentially significant.

Contrary to the changing history of handguns, in *Bruen*, the majority stated the handgun equivalency between historical periods in laying out the general ruling of the case:

Drawing from this historical tradition, we explained there that the Second Amendment protects only the carrying of weapons that are those “in common use at the time,” as opposed to those that “are highly unusual in society at large.” . . . Whatever the likelihood that handguns were considered “dangerous and unusual” during the colonial period, they are indisputably in “common use” for self-defense today. They are, in fact, “the quintessential self-defense weapon.” . . . Thus, even if these colonial laws prohibited the carrying of handguns because they were considered “dangerous and unusual weapons” in the 1690s, they provide no justification for laws restricting the public carry of weapons that are unquestionably in common use today.⁹⁸

In this context, it seems fair to question whether the preeminence of a much later historical period, where handguns were foremost in Hollywood Westerns and *The Patriot*, may have influenced the majority by providing a mistaken understanding of the role of handguns in military conflict between the nineteenth and nineteenth centuries.

II. THE TERM “ARMS”

The majority opinion in *Heller* expanded the right to bear “Arms” to weapons not related to militia service.⁹⁹ Justice Scalia wrote: “The term [“Arms”] was applied, then as now, to weapons that were not specifically designed for military use and were not employed in a military capacity.”¹⁰⁰ Scholars and historians have called this claim into question based on the lay

However, the cases of the late nineteenth century centered on the restriction of handguns in various respects exactly because the weapons became more effective in comparison to prior models and were resulting in injury and death. *See, e.g.*, *English v. State*, 35 Tex. 473, 474 (1871) (assessing the constitutionality of a statute prohibiting carrying firearms), *abrogated by* N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111 (2022). The trend at the time of the Fourteenth Amendment was toward more regulation. *See, e.g.*, Mark Anthony Frassetto, *The Law and Politics of Firearms Regulation in Reconstruction Texas*, 4 TEX. A&M L. REV. 95, 96 (2016) (arguing the ratifiers of the Fourteenth Amendment supported broad gun regulation). As explained later, Colt handguns again became outdated with the invention of the Gatling gun and other modern weapons. *Gatling Gun*, BRITANNICA (Feb. 16, 2023), <https://www.britannica.com/technology/Gatling-gun> [https://perma.cc/6HC7-XJWD].

98. *Bruen*, 142 S. Ct. at 2143.

99. *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008).

100. *Id.*

usage of terms, irrespective of the military usages at the time.¹⁰¹ The other question is whether the drafters would have considered handguns military-grade weapons; that is, did the Founders contemplate handguns as a primary armament to equip militia units? The thesis developed here is that handguns were not used by infantry militia in the 1770s, nor any militia cavalry or heavy cavalry fielded by either side during the Revolution. It is therefore reasonable to think that the original intent of the signers of a document referencing both “militia” and “Arms” was to refer predominantly to muskets, or much less likely possibly to Pennsylvania (jaeger) rifles.¹⁰² Accordingly, “Arms” can be read to refer almost exclusively to infantry muskets probably with a side-bayonet attachment. If the soldiers did not have muskets, then the term could be interpreted to refer to secondary armaments, such as pikes or pole-axe weapons, more so than handguns.¹⁰³

In terms of the Prefatory Clause and the military purpose it seems to suggest, *Heller's* desire to possess a weapon needed for the potential militia service was similar to the colonists' expectation to drill or practice loading and discharging muskets at their home prior to joining a militia regiment. In *Bruen*, the Court explained it interprets the phrase “bear Arms” to essentially permit individuals to carry handguns around town,¹⁰⁴ and possibly to brandish them,¹⁰⁵ a practice which was historically often made illegal in England and Western towns, as cited in *Bruen*.¹⁰⁶ These citations and the Court's interpretation of “to bear” as “to carry” seem to reflect a romantic ideology of carrying handguns from the Western period, even though it was not at all the contextual meaning of those words in 1791.

101. See Kyra Babcock Woods, *Corpus Linguistics and Gun Control: Why Heller is Wrong*, 2019 BYU L. REV. 1401, 1424 (2019) (“[T]he original public meaning of the Second Amendment did not support the private right to use a firearm. In other words, Justice Scalia and the majority incorrectly interpreted the Second Amendment based on the original public meaning theory of originalism.”).

102. The Founders would likely have argued over whether jaeger rifles were a legal armament for militia and whether an untrained militia might be expected to follow the rules of war.

103. See HAYTHORNTHWAITE, *supra* note 18, at 32 (“The pike was the infantry version of the lance, never extensively used in the Napoleonic Wars, but an easily-produced emergency weapon; thousands of 8- to 10-foot pikes were produced by France in 1792–3, and similarly by Prussia in 1813 for the Landwehr, being replaced as soon as possible by firearms.”).

104. The ruling was based partly on the public understanding in 1791 and 1868. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2138 (2022).

105. See *id.* at 2158–59 (2022) (Alito, J., concurring) (examining instances where a person's brandishing of a gun prevented bodily harm or death without making a judgment of whether this behavior should be protected under the Constitution).

106. *Id.* at 2153–54 (“Finally, respondents point to the slight uptick in gun regulation during the late-19th century—principally in the Western Territories.”).

Rather, at the time of the drafting of the Second Amendment, it was necessary for a regulated militia to drill and become proficient with muskets as a key part of Napoleonic warfare.¹⁰⁷ The purpose of the Second Amendment was to allow colonial regiments to bear arms or to drill in the formation and maneuver tactics necessary to warfare at the time.

Infantry tactics were governed by weapon performance and the tactical developments of the eighteenth century. Only by manoeuvring in tightly-packed masses could discipline be maintained, volley-fire be effective, and infantry reasonably safe against cavalry. The tenets of infantry tactics utilized two basic formations: line and column.¹⁰⁸

Around the time of the Revolutionary War, the Prussian army was considered by many to be the best in the world.¹⁰⁹ Because of this, the Founders sought and obtained Prussian military drill instructors during the war believing discipline in training and drill would determine the outcome of battles.¹¹⁰ To the Founders, the lack of bearing arms by drill would have meant that the colonial military units would have no chance in battle against the heavily drilled British forces, even if they were far superior in numbers and properly armed by the States.¹¹¹ The modern day reading of the Second Amendment that perceives the backwoods “militia” as individual persons organizing and arming themselves with guns to resist a despotic government was not what the Founders had in mind. Instead, the words “well-regulated militia” meant, in part, a professionally trained militia unit not necessarily regulated by the state, such that it had the ability to maneuver in the face of the enemy while under fire.

107. See HAYTHORNTHWAITE, *supra* note 18, at 5 (explaining Napoleonic “[i]nfantry tactics were governed by weapon-performance and . . . tactical developments,” such as drilling and disciplined maneuvering).

108. *Id.*

109. John Danielski, *Fredrich von Steuben—Meet the Prussian Aristocrat Who Built America’s First Professional Army*, MIL. HIST. NOW (Sept. 5, 2019), <https://militaryhistorynow.com/2019/09/05/from-prussia-with-love-how-frederich-von-steuben-shaped-americas-first-professional-army/> [https://perma.cc/JQ4J-UHAT] (“At the time, Prussia’s army was the fourth largest in Europe and widely considered to be the best . . .”).

110. See *id.* (recounting how George Washington enlisted a Prussian military captain as he believed this man could provide “something that the rag-tag Continental Army desperately needed: a uniform system of drill that would enable American soldiers to meet Britain’s redcoats on equal terms”).

111. See *id.* (analyzing George Washington’s decision to let former Prussian military leader Baron Von Steuben implement drilling techniques on American soldiers).

The foregoing reference to jaeger (German for “hunting”) rifles or shotguns as “arms” should give some pause to military scholars, as these hunting weapons may have been employed by the combatants during the Revolution.¹¹² Jaeger rifles were designed with a rifled barrel, which caused the projectile to spin as it was fired and carry through the air accurately to a greater distance.¹¹³ Such weapons were copied in the United States once German immigrants arrived with these newfangled “rifles” (referring to the rifled barrel, thus distinguishing the rifle from the musket which had a smoothbore barrel).¹¹⁴ In the United States, these German-made weapons were used on the frontier and accordingly referred to as Pennsylvania rifles.¹¹⁵

Rifles were different because these weapons made it possible to aim in combat. Muskets were generally not aimed but pointed. An officer would point his sword in the direction of the enemy and indicate the level at which the musket was to be held—the higher the elevation the farther the shot—and the soldiers would discharge their weapon held at the indicated elevation. Volley fire from the muskets was intended to strike the enemy unit indiscriminately. As explained by Haythornthwaite:

The real shortcomings of the smoothbore musket were in range and accuracy, for in aiming at an individual at all but the closest ranges it was wildly inaccurate. Before considering the mass of contemporary statistics which indicate both the theoretical and actual performance of the musket, it must be remembered that in the context of Napoleonic warfare it was not *necessary* for a musket to hit an individual target, tactics demanding that it should simply

112. See Schenawolf, *supra* note 82 (referencing how German immigrants altered the design of German rifles, or *Jaeger*, to make a more accurate shot and how this weapon was perfect for the American Revolution).

113. HAYTHORNTHWAITE, *supra* note 18, at 24 (“A ‘rifled’ barrel has spiral grooving on the interior, which imparts a spin upon the projectile, stabilizing its flight and providing greater accuracy. A muzzle-loading rifle was loaded in the same way as a musket, except that the tighter fit of the ball needed greater pressure to force it down the barrel (occasionally requiring a mallet to drive it home), slowing down the rate of fire to perhaps two shots a minute, even slower when burnt powder clogged the barrel.”).

114. See Schenawolf, *supra* note 82 (describing the changes German immigrants made to the rifles in America).

115. See HENRY J. KAUFFMAN, THE PENNSYLVANIA-KENTUCKY RIFLE 4–6 (1960) (detailing the evolution of the German rifle and its impact on what became known as the Pennsylvania rifle).

score a hit anywhere on a mass of men many times larger than the proverbial barn door.¹¹⁶

Gevaert echoed the view of Haythornthwaite in relation to the inaccuracy of the musket:

Smoothbore flintlock muskets indeed caused most of the wounds, but the accuracy of the weapon was strongly limited at ranges greater than 100 m. An individual infantryman would be very lucky if he could hit something at more than 80 m and at 200 m only a concentrated mass of soldiers could be effective, so firing muskets en masse had to be used as a military tactic. Some calculations estimate that only 5% of the casualties in war were caused by bullets fired at a range of about 100 m and that this number was reduced to 2% when the bullets were fired from up to 200 m. . . . At Waterloo, where many shots were fired at close range, only one bullet out of 162 hit its target.¹¹⁷

Hence, the term “Arms” referred to muskets, cannons, and cavalry armaments that may have at times included primitive handguns used by the professional officers and soldiers only. Even the armament of cavalry with handguns depended significantly on the horse’s training, however.¹¹⁸ This is because when a soldier fired a handgun while seated on the horse, the horse could startle and buck off the rider in battle, causing serious injury to the rider. Military horses at that time were carefully trained not to buck in the discharge of firearms or cannons.¹¹⁹ Hence, cavalry could only deploy handguns with trained military-grade horses that were accustomed to having a firearm go off next to their ear. Unfortunately, there was a severe shortage of horses in the Continental Army and mounts were seldom available to militia soldier because horses were prioritized for moving cannons from

116. HAYTHORNTHWAITE, *supra* note 18, at 19.

117. Bert Gevaert, *The Use of the Saber in the Army of Napoleon*, 2016 ACTA PERIODICA DUELLATORUM 103, 103–04 (footnotes omitted).

118. See *Shooting from Horseback*, *supra* note 83 (“Precision of firing from horseback is affected by many factors that firing from the ground is not. It is dependent on, for example, the behaviour of the horse. The horse often impedes its rider’s ability to shoot precisely, which is why every cavalryman must dedicate much attention to the training of his horse.”).

119. *Equestrian at War*, MOUNT VERNON, <https://www.mountvernon.org/george-washington/farming/the-animals-on-george-washingtons-farm/horses/equestrian-at-war/> [<https://perma.cc/33HL-S4NC>] (“[G]ood training was considered the only antidote to panic. In the 18th century, some horses were acclimated to live fire by standing before a line of cannons.”).

place to place.¹²⁰ Horse-mounted infantry or cavalry were not common to the militia, as ridiculously depicted in *The Patriot*. Throughout American history, militia cavalry units were formed from time to time, such as Missouri State Militia cavalry units that were deployed during the Civil War roughly a century later.¹²¹ Since militia cavalry (as opposed to militia infantry) have almost no historical basis and would not have been contemplated by the Founders, the potential for cavalry armament with handguns is largely irrelevant to the interpretation of the historical meaning of the Second Amendment.

Militia units also did not have artillery or cannons, as these weapons were highly prized and exclusively assigned to the regular army throughout the Napoleonic period.¹²² The Founders would not have associated the term “militia” with cannon, mortars, naval, or other heavy weapons. Accordingly, the reference to militia arms in 1791 should be interpreted under the general meaning as referring to muskets, musket balls or ammunition, and gunpowder.

A. *Dictionary Positivism*

In the process of constitutional analysis, even before identification of the operative Amendment at issue, one must select a method of legal interpretation. The Court in *Heller* and *Bruen* applied a combined textual and originalist approach that is novel in its methodology. Justice Thomas described the methodology in *Bruen* as follows: “Step one of the predominant framework is broadly consistent with *Heller*, which demands a test rooted in the Second Amendment’s text, as informed by history.”¹²³ The late Justice Scalia in *Heller* split the Second Amendment between the prefatory language and the core meaning, stating: “No dictionary has ever adopted [the militia definition of “bear arms”], and we have been apprised of no source that indicates that it carried that meaning at the time of the

120. Dean Snow, *Continental and Militia Cavalry Compared: A Case Study from Saratoga, 1777*, J. OF THE AM. REVOLUTION (Aug. 31, 2021), <https://allthingsliberty.com/2021/08/continental-and-militia-cavalry-compared-a-case-study-from-saratoga-1777/> [<https://perma.cc/8V35-AG9Z>] (concluding cavalry units generally “were expensive to form and maintain” and “there were persistent shortages,” while also finding cavalry militia units “were logistically less dependable” largely because they were “too dependent upon *ad hoc* arrangements”).

121. See MISSOURI TROOPS IN SERVICE DURING THE CIVIL WAR 130, 136 (Gov’t Printing Off. 1902) (describing the positions and orders of Missouri state militia cavalry units in July of 1864).

122. *Revolutionary Cannons*, AMREVNC, <https://amrevnc.com/revolutionary-cannons/> [<https://perma.cc/99AV-5WQJ>] (“Specially trained artillery crews fired cannons . . .”).

123. N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2127 (2022).

founding.”¹²⁴ Such a dictionary-based approach is hard to reconcile with textualism for several reasons. First, normally all the words might be expected to count for something, including the Prefatory Clause. Second, the absence of the word “handgun” might normally be interpreted to mean it is excluded, but according to the Court, it is not. Third, by changing the scope of a word to adopt the meaning of a different word, originalism departs from textualism, as exemplified by the text actually saying, “Arms,” rather than “weapons.” The Founders obviously could have used the word “weapons” but apparently chose not to. They might also have been expected to mention self-defense as a core right, if that was intended, rather than the given military purposes of the Second Amendment. Justice Stevens made a similar critique of the methodology of *Heller* as follows:

When each word in the text is given full effect, the Amendment is most naturally read to secure to the people a right to use and possess arms in conjunction with service in a well-regulated militia. So far as appears, no more than that was contemplated by its drafters or is encompassed within its terms. Even if the meaning of the text were genuinely susceptible to more than one interpretation, the burden would remain on those advocating a departure from the purpose identified in the preamble and from settled law to come forward with persuasive new arguments or evidence.¹²⁵

The prior interpretation of the word “Arms” as related to military or militia armament had been adopted by many state supreme courts and federal courts.¹²⁶ If a dictionary held legal significance, surely then it was written by a knowledgeable scholar—Blackstone or Dworkin perhaps? Alas no, the first dictionaries were drafted by prison inmates and then updated over time, and there are many competing dictionaries now, the origins of which are unknown, such that a judge could pick the one with the desired

124. *District of Columbia v. Heller*, 554 U.S. 570, 586 (2008).

125. *Id.* at 651 (Stevens, J., dissenting).

126. *See Arnold v. Cleveland*, 616 N.E.2d 163, 167–68 (Ohio 1993) (finding the Second Amendment was drafted merely “to allow Americans to possess arms to ensure the preservation of a militia”); *United States v. Haney*, 264 F.3d 1161, 1165 (10th Cir. 2001) (stating a law which does not impair a state’s ability to maintain a militia would not run afoul of the Second Amendment); *United States v. Milheron*, 231 F. Supp. 2d 376, 378 (D. Me. 2002) (analyzing the right to bear arms as a collective right instead of an individual right); *United States v. Kozerski*, 518 F. Supp. 1082, 1090 (D.N.H. 1981) (“[T]he Second Amendment is a collective right to bear arms rather than an individual right . . .”).

definition.¹²⁷ In *Heller*, the Court felt the need to consider a term's history, albeit erroneously,¹²⁸ in addition to its dictionary definition.¹²⁹ This is plain evidence of dictionary positivism's failure as a legal method, which some may see as inferior to even a straightforward internet search.

Generally, if we are concerned merely with dictionary definitions used in a statute as methodology, then this would be a dictionary-based method of legal interpretation. Although the Court at times examined the dictionary definition of terms in *Heller*, the use of dictionary definitions is certainly odd as a legal methodology in any written opinion, particularly where the constitutional provision at issue has a history going back two centuries. The dictionary is used most often when examining obscure terminology and terms not commonly known to the lawyers involved. Nearly all lawyers are highly trained, often in the humanities, and are likely to know a word's given definition or common meaning. Lawyers practicing before the Supreme Court work in teams and carefully review their briefs, making a misnomer error exceedingly unlikely.

Positivism has been doubted, particularly as a matter of American jurisprudence, in the fields where it is commonly applied, such as taxation.¹³⁰ Although beyond the scope of this piece, constitutional interpretation is much less suited to positivism compared to other fields, where it has also broadly failed and is not used very much.¹³¹ Even worse, if the Court intends to switch between positivism and realism in the same opinion, such as what occurred in both *Heller* and *Bruen*, nearly any legal result is possible and the opinion is largely without prospective guidance. Given the lack of consistency in legal method within recent gun rights opinions, there is a strong case the Court should write nothing at all and simply issue its decision without an opinion commentary. Likewise, the Stevens dissent stated in a footnote:

127. See Woods, *supra* note 101, at 1409 (explaining how the differences between dictionaries can produce results where judges "cherry-pick" dictionaries to fit the interpretation they prefer).

128. See Saul Cornell, Heller, *New Originalism, and Law Office History: "Meet the New Boss, Same as the Old Boss,"* 56 UCLA L. REV. 1095, 1098 (2009) (describing *Heller's* historical analysis of the Second Amendment's Operative Clause as "law office history," which is a "results oriented methodology in which evidence is selectively gathered and interpreted to produce a preordained conclusion").

129. *Heller*, 554 U.S. at 595 (drawing conclusions "on the basis of both text and history").

130. See generally Bret N. Bogenschneider, *5 ½ Problems with Legal Positivism and Tax Law*, 44 PEPP. L. REV. 1 (2017) (discussing the problems when applying legal positivism to the law of taxation).

131. See, e.g., John Finnis, *On the Incoherence of Legal Positivism*, 75 NOTRE DAME L. REV. 1597, 1597 (2000) ("Legal positivism is an incoherent intellectual enterprise.").

The Court's atomistic, word-by-word approach to construing the Amendment calls to mind the parable of the six blind men and the elephant, famously set in verse by John Godfrey Saxe. In the parable, each blind man approaches a single elephant; touching a different part of the elephant's body in isolation, each concludes that he has learned its true nature. One touches the animal's leg, and concludes that the elephant is like a tree; another touches the trunk and decides that the elephant is like a snake; and so on. Each of them, of course, has fundamentally failed to grasp the nature of the creature.¹³²

Justice Scalia noted that the submissions of the parties, including amici briefs, revealed an alternate idiomatic meaning to the term "Arms," citing an amicus "Linguists' Brief."¹³³ This brief appears not to have influenced his opinion, however, as the idiomatic meaning was rejected despite its consistency with *Miller*.¹³⁴ This part of the *Heller* decision is difficult to understand. Other parts of the opinion seem to serve as a disclaimer; any legal error in historical analysis is assignable to the lawyers for the District of Columbia and not the Court, so that the specific ruling would not be subject to doubt. One concern then is the precedential value of *Heller*. Insofar as the opinion repeatedly says it is reliant on the historical briefing of the parties, including the amici briefs from linguists, which the Court later found to be wrong, does the opinion still hold as precedent for other cases? A lower court might follow *stare decisis* by declining to follow *Heller* as precedent by referencing Scalia's disclaimer language suggesting the scope of the legal ruling was based on the amica briefs submitted, and the applicable error should be assigned only to the ruling in that case and not future cases. In the novel combination of textualism and originalism with the recent decisions, it is simply hard for a lower court to know what the law is exactly if the consensus view on history changes.¹³⁵

132. *Heller*, 554 U.S. at 652 n.14 (Stevens, J., dissenting) (citation omitted).

133. *Id.* at 586 (majority opinion).

134. *See id.* (rejecting the difference in meaning in regards to the text of the Amendment); *United States v. Miller*, 307 U.S. 174, 178 (1939) (interpreting the Second Amendment to be limited to ensuring the effectiveness of a well-regulated militia).

135. *See* *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2162 (2022) (Barrett, J., concurring) ("[T]he Court does not conclusively determine the manner and circumstances in which postratification practice may bear on the original meaning of the Constitution.").

III. ALTERNATE RIGHT-TO-PRIVACY FRAMEWORK

The proposed registration or licensure of the handgun in both *Heller* and *Bruen* is directly contrary to privacy, so privacy rights are surely at issue in respect of registration of the firearm.¹³⁶ The defense of the body or person also seems comparable to other cases surrounding a right to privacy related to the physical body.¹³⁷ The handgun could be used as a defense to prevent or secure the body from violation or harm in the event of a criminal event. The majority opinions in both *Heller* and *Bruen* appear to regard resistance to criminal activity inside and outside the home as the new purpose of the Second Amendment.¹³⁸ Of course, courts have often assigned concerns over bodily security to the Ninth or Fourteenth Amendment.¹³⁹ The preliminary question here is simply whether the registration of a .22 handgun for self-defense in the home raises an individual right related to privacy that could be legally cognized under a right-to-privacy framework. If it were first agreed that the Second Amendment does not protect an elucidated right to carry handguns, then it seems the current originalist majority has to answer that question in the affirmative, based on Justice Scalia's references to the extensive need for self-defense given in *Heller*.¹⁴⁰

A possible compromise might be amenable to some states as proposed here: the recognition of a Ninth or Fourteenth Amendment right to keep and bear handguns in the home as a matter of privacy, along with a Second Amendment right to keep and bear those arms related to the common defense outside the home. This was the compromise of prior generations as explained by Professor Leider:

136. See *id.* at 2122 (“It is a crime in New York to possess ‘any firearm’ without a license.”); *Heller*, 554 U.S. at 574–75 (“The District of Columbia generally prohibits the possession of handguns. It is a crime to carry and unregistered firearm, and the registration of a handgun is prohibited.”).

137. See generally *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (reviewing the constitutionality of a law forbidding the use of contraceptives and its implications to the right to privacy).

138. See *Bruen*, 142 S. Ct. at 2122 (first citing *Heller*, 554 U.S. 570; and then citing *McDonald v. City of Chicago*, 561 U.S. 742 (2010)) (reaffirming the individual right to self-defense inside the home, then holding that right extends to outside the home).

139. See *Ingraham v. Wright*, 430 U.S. 651, 661 (1977) (quoting 1 BLACKSTONE, COMMENTARIES *134) (internal quotation marks omitted) (acknowledging the unenumerated right to personal security “from the corporal insults of menaces, assaults, beating, and wounding” is historically “among the ‘absolute rights of individuals’”); see, e.g., *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980) (explaining how the Fourteenth Amendment may be involved in “violations of personal rights of privacy and bodily security”).

140. See generally *Heller*, 554 U.S. 570 (referring to the need for firearms in a self-defense context throughout the majority opinion).

But state courts also redefined the right to keep and bear arms in order to uphold near-total prohibitions against the carrying of pistols. Instead of emphasizing the right to bear arms for private purposes, state courts viewed the right primarily in a “civic republican” lens. They held that the right to bear arms primarily existed for defense of the community, not for private self-defense. Accordingly, the weapons that were protected were individual *military* weapons (i.e., “ordinary military equipment”), not weapons primarily carried for personal self-defense. Under this view, military rifles and carbines received the most constitutional protection, whereas handguns received almost none.¹⁴¹

In practical terms, this would also mean that handguns could be possessed in the home but not carried around town, as permitted by *Bruen*. A balancing along these lines gives credence to the rights of gun owners and to the rights of victims who have or will be harmed by handguns.¹⁴² All concerned citizens may wish to possibly reduce the number of handguns available to criminals outside the home, making it less likely that gun owners would see the need to conceal carry outside the home. This would create a chain reaction where less need for handguns leads to less need for handguns, and so on.

Justice Breyer’s dissent in *Bruen* extensively cites statistics to describe the harm caused by firearms.¹⁴³ Justice Alito, in his concurrence, asked rhetorically why Justice Breyer presented these statistics.¹⁴⁴ The back-and-forth between the Justices in the dissent and concurrence seems to reflect a desire within the dissent to balance interests under the Second Amendment in the event of a European-style ban on guns.¹⁴⁵ The dissent does itself a disservice each time it equates all guns to handguns along these lines, however. The societal problems developed so extensively in the Breyer

141. Leider, *supra* note 2, at 1593–94 (footnote omitted).

142. *See id.* (suggesting the protection of rifles under the Second Amendment, rather than pistols).

143. *Bruen*, 142 S. Ct. at 2163 (Breyer, J., dissenting).

144. *Id.* at 2157 (Alito, J., concurring) (“What is the relevance of statistics about the use of guns to commit suicide?”).

145. “In the European Union, private possession of handguns (pistols and revolvers) is permitted only with special authorisation.” Philip Alpers et al., *European Union – Gun Facts, Figures and the Law*, GUN POLICY, <https://www.gunpolicy.org/firearms/region/european-union> [https://perma.cc/QP4Y-5WY7].

dissent relate predominantly to handguns.¹⁴⁶ Long guns are neither portable nor concealable, so they are less useful for unlawful purposes and are widely used in rural areas to the benefit of society.

IV. PRIOR STATE SUPREME COURT AND FEDERAL COURTS' INTERPRETATIONS ON COLLECTIVE RIGHTS TO BEAR ARMS

Some constitutional scholars have been quick to dismiss centuries of caselaw that did not interpret the Second Amendment as describing a broadly defined individual right to bear weapons. One eminent scholar in this area, Professor Kopel, claimed the collective right interpretation of the Second Amendment arose in 1986 in *Burton v. Sills*,¹⁴⁷ which cited a law review article yet failed to reference the *Miller* decision from 1939 or any previous state supreme court decisions which imposed the collective right interpretation.¹⁴⁸ Kopel is mistaken on this point, as the *Miller* decision was premised on the military purpose rationale, as explained by Professor Leider:

The government's brief in *Miller* . . . argued that the right to bear arms "is not one which may be utilized for private purposes but only one which exists where the arms are borne in the militia or some other military organization provided for by law and intended for the protection of the state."¹⁴⁹

Kopel further described the collective right view as a Communist interpretation,¹⁵⁰ rather than a constitutional, military purpose interpretation

146. See John Gramlich, *What the Data Says About Gun Deaths in the U.S.*, PEW RSCH. CTR. (Feb. 3, 2022) (stating handguns accounted for 59% of all firearm killings in 2020, while rifles only accounted for 3%).

147. *Burton v. Sills*, 248 A.2d 521 (N.J. 1968).

148. Professor Kopel wrote:

Perhaps even more importantly, when the New Jersey law was challenged in a Second Amendment lawsuit, the New Jersey Supreme Court became the first in American history to declare the Second Amendment was a "collective right." Quoting a 1966 article from the *Northwestern Law Review*, the New Jersey court stated that the Second Amendment "was not framed with individual rights in mind. Thus it refers to the collective right 'of the people' to keep and bear arms in connection with 'a well-regulated militia.'"

David B. Kopel, *The Great Gun Control War of the Twentieth Century—and its Lessons for Gun Laws Today*, 39 FORDHAM URB. L.J. 1527, 1547 (2012) (footnotes omitted) (quoting *Burton*, 248 A.2d at 526).

149. Leider, *supra* note 2, at 1631.

150. Kopel, *supra* note 148, at 1548 ("[T]he New Jersey court's version of the 'collective right' in the Second Amendment was akin to 'collective property' in a Communist dictatorship. The 'collective right' to arms supposedly belonged to everybody at once, but could never be asserted by an individual.").

of the Second Amendment's text, previously followed by generations of federal and state judges.¹⁵¹ Kopel also claims the collective right view arising in 1986 supposedly did not yield any individual right to keep or bear arms.¹⁵² This was not what *Miller* held; rather it viewed the Second Amendment right as assignable to individuals where applicable.¹⁵³ Kopel also indicated that various courts and scholars, which had not anticipated the individual rights aspects of the *Heller* decision, were “wrong” notwithstanding the breathtaking departure from prior cases that *Heller* and *Bruen* represent, or the fact that these cases were decided later in time.¹⁵⁴ Justice Scalia reflected this approach when he referred to his opinion as dispensing the “true” meaning of the Second Amendment from the dictionary-based review.¹⁵⁵

As a jurisprudential matter, scholars have not tried very hard to draw out a theme from the many prior cases relating to military purposes of the Second Amendment¹⁵⁶ so as to present *Heller* as comparatively coherent and representing the “deeply rooted” but evolving views of Americans towards guns.¹⁵⁷ Prior decisions, such as *Miller*, were presented, on the other

151. Leider, *supra* note 2, at 1635 (stating prior to *Miller* there was nearly 100 years' worth of case law holding weapons with minimal military value were not within the scope of the Second Amendment). *But see* Kopel, *supra* note 148, at 1550 (“But whatever the scope of the Second Amendment right, it was, unanimously, an individual one. The ‘collective right’ and ‘state’s right’ lower court decisions of the late twentieth century were brusque and consisted of virtually no analysis . . .”).

152. Kopel, *supra* note 148, at 1548 (quoting *Burton*, 248 A.2d at 526).

153. *See* *United States v. Miller*, 307 U.S. 174, 178 (1939) (suggesting an individual has the right to possess a firearm under the Second Amendment so long as the possessions bears “some reasonable relationship to the preservation or efficiency of a well regulated militia”).

154. Kopel, *supra* note 148, at 1550 (suggesting lower courts, which claimed to follow *Miller*, were incorrect in their interpretation that the case precluded an individual right to bear arms as evidenced by all nine *Heller* Justices recognition of, but disagreement over the scope of, the individual right to bear arms).

155. *See* *District of Columbia v. Heller*, 554 U.S. 570, 624 n.24 (2008) (“And [the judges] erroneous reliance upon an uncontested and virtually unreasoned case cannot nullify the reliance of millions of Americans (as our historical analysis has shown) upon the true meaning of the right to keep and bear arms.”); *see also* Gura, *supra* note 10, at 238 (“[The District of Columbia’s] militia theory was specifically addressed—and rejected—by the Framers, and that rejection is confirmed by centuries of precedent. Precedent likewise confirms the individual nature of Second Amendment rights.”).

156. *See* Sanford Levinson, *The Embarrassing Second Amendment*, 99 *YALE L. J.* 637, 639–40 (1989) (suggesting the lack of scholar interest in the Second Amendment); *see also* Glenn Harlan Reynolds, *Foreword: The Second Amendment as Ordinary Constitutional Law*, 81 *TENN. L. REV.* 409, 409 (2014) (highlighting the lack of scholarship dedicated to the Second Amendment and widely held view that it related only to militias).

157. Leider, *supra* note 2, at 1592 (“Although *Heller* radically reshaped the Second Amendment right to fit the twenty-first-century popular understanding of the right, its popular constitutional project is deeply rooted in our nation’s historical Second Amendment jurisprudence.”).

hand, as incoherent and plainly out of touch with popular opinions on guns.¹⁵⁸

Heller and *Bruen* were presented as originalist¹⁵⁹ or historically based¹⁶⁰ and not premised on popular opinions of the present day. If we do not presume such accidental alignment between policy outcome and popular opinion in *Heller*, we potentially reach a disturbing causal relationship rather than a coincidence—that is, the popular opinion held by many Americans that handguns are a “core” right expressly set forth in the text of the Second Amendment may have influenced the legal interpretation.¹⁶¹ Of course, this reflects potentially a dynamic view of constitutional interpretation. But the *Heller* and *Bruen* opinions expressly claim not to be dynamic at their core, but originalist or perhaps textual.¹⁶² Thus, this rendering of the legal interpretations set forth in *Heller*, at least appear to be a pretext for formulating a decision based on popular opinion, or whatever the majority perceived popular opinion to be from the courthouse. The majority also adopted a new “penumbra” of self-defense in the Second Amendment with a “core” right of a private citizen to carry a concealed handgun around town.¹⁶³

A. *Military Purposes Entail an Individual Right*

Although the Second Amendment “was not adopted with individual rights in mind, but as a protection for the States in the maintenance of their militia organizations against possible encroachments by the federal

158. See *Kates*, *supra* note 11, at 212 (“This state’s right analysis renders the amendment little more than a holdover from an era of constitutional philosophy that received its death knell in the decision rendered at Appomattox Courthouse.”).

159. See *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2132 (2022) (“Fortunately, the Founders created a Constitution—and a Second Amendment . . . Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated.”).

160. *Id.* at 2136 (“We categorize these historical sources because, when it comes to interpreting the Constitution, not all history is created equal.”).

161. See *Leider*, *supra* note 2, at 1590–91 (asserting courts define the Second Amendment in accordance with the “then-commonly accepted scope of the right” and suggesting we should ask “how the contemporaneous population views the right to bear arms” when predicting how future courts will apply *Heller*).

162. See *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (addressing “how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century”); *Bruen*, 142 S. Ct. at 2156 (ending its “long journey through the Anglo-American history of public carry”).

163. *Heller*, 554 U.S. at 630.

power,”¹⁶⁴ the existence of a collective or state right under the Second Amendment does not preclude an individual right. As explained by Professor Kates: “[T]he individual right advocate may accept the state’s right theory and simply assert that, even though one of the amendment’s purposes may have been to protect the states’ militias, another was to protect the individual right to [bear] arms.”¹⁶⁵ Even if it did not explicitly say so, the Court in *Heller* might also have considered Heller’s individual right to train or practice with his personal .22 handgun (or to drill in military terms) in the District of Columbia, which he could not legally do because he was unable to register the handgun. The various references by scholars to the military in Article I of the Constitution, and the federal command structure of the modern National Guard, are largely irrelevant to the militia purposes of the Second Amendment.¹⁶⁶ That is to say, a citizen’s ownership of firearms in relation to a regulated militia is not insurrection or treasonous *ab initio*, even if it is not expressly authorized by federal law.¹⁶⁷ The respective command structure of the citizen militia in the event of war has been a problem throughout history, but it does not invalidate the military purpose of the Second Amendment.

V. PURPOSES OF HANDGUNS

A bizarre aspect of the textual-originalist-historical legal methodology applied in *Heller* and *Bruen* is the de-emphasis of an individual’s possession of a handgun for purposes other than self-defense.¹⁶⁸ By splitting off the Prefatory Clause, which specifies the purpose of the keeping and bearing of arms as related to the regulated militia, the majority seems to wish to avoid

164. *United States v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942).

165. Kates, *supra* note 11, at 213.

166. *See* Kopel, *supra* note 148, at 1549–50 n.151 (highlighting the absurd implications of the state’s rights interpretation of the Second Amendment by illustrating how it would then permit state governments to “negate federal gun control laws” by broadly defining its state militia).

167. *See* *Presser v. Illinois*, 116 U.S. 252, 267–68 (1886) (“[State governments] have also the power to control and regulate the organization, drilling, and parading of military bodies and associations, except when such bodies or associations are authorized by the militia laws of the United States.”).

168. *See* *Heller*, 554 U.S. at 636 (making self-defense the central point of the Court’s holding while declining to address other handgun uses, such as for unlawful activity); *see also* *N.Y. State Rifle & Pistol Ass’n. v. Bruen*, 142 S. Ct. 2111, 2156 (2022) (basing the Court’s holding on the “constitutional right to bear arms in public for self-defense,” while failing to decide whether there is also a constitutional right to bear arms in public for other reasons).

analysis of the respective military purposes.¹⁶⁹ The Prefatory Clause tells us the military purpose relates to the regulated militia—indeed, it is not so much a Prefatory Clause as it is a Purpose Clause.¹⁷⁰ Combining originalism and textualism in this manner seems incoherent, and it is appropriate for legal scholars to inquire as to the purpose of the handgun under the assumption that *Heller* will be abandoned at some point in the future.¹⁷¹

Another significant problem with originalist interpretation is that historical evolution of firearms is relevant to legal interpretation. If we are not concerned directly with the purposes of arms, the usage of the term could still change over time as purposes evolve. In that case, purpose is still relevant to legal interpretation of the Second Amendment even if *Heller* says that it is not. As a prime example, in the Napoleonic era of conflict, infantry firearms usually did not have rifled barrels and the term “militia Arms” referred essentially to muskets.¹⁷² In the Ukraine conflict, militia units are armed in nearly all cases with assault rifles, with outdated semi-automatic rifles on both sides, but not handguns.¹⁷³ In *Bruen*, the Court further disavowed nineteenth century Western state regulations on handguns without considering advancements in handgun design occurring in the mid- to late-nineteenth century.¹⁷⁴ Such differences in handgun design are significant and include a rifled barrel, increased reliability, and repeating fire. Modern handguns seem to be particularly well-suited for self-defense, law enforcement, suicide, and criminal activity, yet the lack of handgun-armed militia units on both sides of the Ukraine conflict indicates such weapons are not well-suited to the military purpose of the Second Amendment.

The era of the handgun as a primary armament of a militia unit may have begun during the Civil War in the Western theatre on an extremely limited basis, continued through the Western period, as so often romanticized by

169. *Heller*, 554 U.S. at 577 (dividing the Second Amendment into the Prefatory Clause and Operative Clause).

170. *Id.* (stating the Prefatory Clause “does not limit the [Operative Clause] grammatically, but rather announces a purpose”).

171. See Jason T. Anderson, Note, *Second Amendment Standards of Review: What the Supreme Court Left Unanswered in District of Columbia v. Heller*, 82 S. CAL. L. REV. 547, 591 (2009) (examining the purposes behind handgun ownership through statistical analysis).

172. *Infantry Tactics and Combat During the Napoleonic Wars*, NAPOLUN, https://www.napolun.com/mirror/napoleonistyka.atspace.com/infantry_tactics_2.htm [<https://perma.cc/47A7-WTF9>].

173. See generally Moss, *supra* note 31 (documenting the types of small arms being used in the Russia-Ukraine war).

174. See N.Y. State Rifle & Pistol Ass'n. v. Bruen, 142 S. Ct. 2111, 2137 (2022) (citing *Gamble v. United States*, 139 S. Ct. 1960, 1975–76 (2019)) (treating mid- to late-nineteenth century evidence as “secondary” and “mere confirmation of what the Court thought had already been established”).

Hollywood, and likely ended with the Gentleman's Agreement of 1884 splitting the manufacture of handguns and rifles between the Colt and Winchester companies, respectively.¹⁷⁵ Handguns as a primary armament of cavalry¹⁷⁶ surely ended with the Battle of San Juan Hill where rifle-armed cavalry units and Gatling guns were successfully deployed,¹⁷⁷ notwithstanding Roosevelt brandishing a handgun salvaged from the USS Maine.¹⁷⁸ Accordingly, the Gentlemen's Agreement, which occurred when the gun market was informally divided between rifles and handguns, appears to be the historical point where handguns were no longer viewed as essential armament for a mounted cavalry unit, making the handgun market worth abandoning by the Winchester company.¹⁷⁹

A. *Militia Armament in the Ukraine Conflict*

The Kalashnikov rifle was developed in the post-war Soviet Union and was quickly accepted as the predominant infantry armament of the former Soviet and allied nations.¹⁸⁰ Up to 150 million units have been produced under license or exported, making the gun readily available throughout the world in 5.45mm or 7.62mm.¹⁸¹ The Automatic Kalashnikov ("AK") with a curved magazine has become iconic with revolution and appears on the

175. See Brimelow, *supra* note 96 (explaining the revolver's use during the Civil War and on the Western Frontier); Nancy McClure, *A Gentlemen's Agreement Between Colt and Winchester?*, BUFFALO BILL CTR. OF THE W. (Nov. 16, 2014), <https://centerofthewest.org/2014/11/16/points-west-gentlemens-agreement-colt-and-winchester/> [<https://perma.cc/PAK5-CHN5>] (describing the agreement between Colt and Winchester to sell only pistols and rifles, respectively).

176. See generally Matthew Moss, *The 240-Year Evolution of the Army Sidearm: The Weapons that Won a Revolution and Defended a Republic*, POPULAR MECHANICS (May 25, 2017), <https://www.popularmechanics.com/military/weapons/a26625/us-military-handguns/> [<https://perma.cc/ZBZ3-UXGW>] (observing the various handguns used by cavalrymen during the 1800s).

177. See Raymond K. Bluhm, *Battle of San Juan Hill*, BRITANNICA, <https://www.britannica.com/event/Battle-of-San-Juan-Hill> [<https://perma.cc/K4H6-YCBF>] (describing how the Gatling gun served as a turning point in the Battle).

178. Shanti Escalante-de Mattei, *Theodore Roosevelt's 1898 Revolver Sold For Nearly \$1 Million at Auction Last Month*, YAHOO! FINANCE (Jan. 5, 2023), <https://finance.yahoo.com/news/theodore-roosevelt-1898-revolver-sold-210000013.html> [<https://perma.cc/48WY-AMHT>].

179. See McClure, *supra* note 175 (providing the background surrounding the Gentlemen's Agreement).

180. *AK-47*, BRITANNICA (May 18, 2020), <https://www.britannica.com/technology/AK-47> [<https://perma.cc/FDA5-D9D7>].

181. Howard Altman, *Iconic Russian AK-47 Might Some Day Be 'Made in U.S.A.' For Military (W/Video)*, TAMPA BAY TIMES (Jun. 12, 2016), <https://www.tampabay.com/news/military/macdill/iconic-russian-ak-47-rifle-might-some-day-be-made-in-usa/2280972/> [<https://perma.cc/QRU6-MS2H>].

flag of the nation of Mozambique.¹⁸² In modern day Russia, the Kalashnikov has a legendary status despite its drawbacks as a combat rifle.¹⁸³ Police forces in Russia bear these weapons rather than handguns, which may be significant as explained in the next section. Other Russian military weapons, including machine guns, are bored to the 7.62mm ammunition of the Kalashnikov so that the armament is interchangeable.¹⁸⁴ Internationally speaking, the AK rifle is the foremost militia armament worldwide.¹⁸⁵

The United States has its own firearms tradition that has been exported to other nations, primarily due to the AR-15 semi-automatic rifle and its smaller 5.56mm ammunition, which were introduced during the Vietnam War partly by the efforts of Secretary of Defense McNamara.¹⁸⁶ A fully automatic version of the AR-15, the M16, was rushed into frontline service in response to the AK being provided by the Soviets to the North Vietnamese.¹⁸⁷ It was initially rejected by U.S. forces as unreliable based on controversial reports that U.S. servicemen died in combat as a direct result of the rifle's unreliability.¹⁸⁸ However, today, the AR-15's design and ammunition, as modified into the M16 military version, are standard U.S. armament.¹⁸⁹ Under a military purposes interpretation of the Second Amendment, it seems certain that the AR-15 and its variants are viable militia arms in the modern day.

182. Smita Pranav Kothari, *Arms and the Flag*, READER'S DIGEST (Sept. 27, 2018, 6:09 PM), <https://www.readersdigest.in/features/story-arms-and-the-flag-124415> [<https://perma.cc/JD3A-HAGW>].

183. *AK-47*, MILITARY-TODAY, http://www.military-today.com/firearms/ak_47.htm [<https://perma.cc/X9MA-VWGR>].

184. See, e.g., Daniel Brown, *The Russian Maker of the AK-47 Just Unveiled a New AK-308 rifle With a Large 7.62 mm NATO Round*, BUS. INSIDER (Aug. 20, 2018), <https://www.businessinsider.com/russian-maker-of-ak-47-unveils-ak-308-rifle-with-76251mm-nato-round-2018-8> [<https://perma.cc/AKL5-79SS>] (portraying the AK103 as a weapon which uses the 7.62 ammunition).

185. See *AK-47*, *supra* note 183 (discussing the widespread use of the AK variant around the world); LARRY KAHANER, *AK-47: THE WEAPON THAT CHANGED THE FACE OF WAR 3* (2007) ("Why has the AK earned such a legendary reputation? The gun has few moving parts so it hardly ever jams. It is resistant to heat, cold, rain, and sand. It doesn't always shoot straight, but in close combat its awesome firepower (600 rounds a minute) and reliability give it a nod over more sophisticated weapon designs, such as the M-16?").

186. James Fallows, *M-16: A Bureaucratic Horror Story*, ATLANTIC (June 1981), <https://www.theatlantic.com/magazine/archive/1981/06/m-16-a-bureaucratic-horror-story/545153/> [<https://perma.cc/CQG7-GEQC>].

187. *Id.*

188. *Id.*

189. *M16 Rifle*, DARPA, <https://www.darpa.mil/about-us/timeline/agile-and-m16> [<https://perma.cc/W553-HWBY>].

Militia units on both sides of the Ukraine conflict are armed with AK weapons for combat.¹⁹⁰ Images of the Ukraine militia forces bearing AK-type variants are widely available on the internet.¹⁹¹ Footage can also be found of the Donetsk and Luhansk Russian-backed militia forces bearing AK-type variants.¹⁹² After an extensive search, the author has been unable to find any footage from the Ukraine war of a militia unit employing handguns in combat. In one Russian video, for example, an attack helicopter crew was forced to land by Ukrainian ground fire, and while exiting the downed aircraft, the pilot grabbed what appeared to be an AK rifle, not a handgun, that was stored in the cockpit.¹⁹³ There appears to be no footage of a militia unit employing handguns in combat during the Ukrainian War. Of course, neither AK nor AR weapons have the same aura as the musket during the American Revolution.¹⁹⁴

B. *Suitability of Long Guns for Home Defense*

Modern handguns can be understood in simple terms as a rifle without the extended barrel. Thus, the above question regarding the purpose of the handgun can be rephrased as follows: Why would anyone want a rifle without a barrel? Or alternatively, does the handgun achieve any lawful purpose that long guns do not? This question then relates to the barrel's function on a firearm. The barrel increases projectile accuracy and efficiency of the expanding gases, causing the rifle to have a longer range.¹⁹⁵ The

190. Jon Guttman, *AK-74: The Mainstay Assault Rifle of Both Sides in the Russia-Ukraine War*, HISTORYNET (Sept. 19, 2022), <https://www.historynet.com/ak-74-russia-ukraine-war/> [https://perma.cc/77M3-L693].

191. See generally Moss, *supra* note 31 (compiling photos from articles and social media posts to document the firearms being used in the Russia-Ukraine war and noting AK variants as the “most ubiquitous weapon”).

192. BING, <https://www.bing.com/videos/search?q=donetsk+and+luhansk+militia+arms+ak47&FORM=HDRSC4> [https://perma.cc/HKU8-K5UD].

193. The Sun, *Russia Releases Dramatic Cockpit Video of Helicopter Attack on Ukrainian Air Defence Positions*, YOUTUBE (Mar. 18, 2022), <https://www.youtube.com/watch?v=ojA1dsC4TMM> [https://perma.cc/9PAJ-TP24].

194. The iconic British Redcoats conquered or colonized much of the known world using the musket. Peter Suci, *The British Conquered the World with the Enfield Rifle*, NAT'L INT. (Dec. 16, 2020), <https://nationalinterest.org/blog/reboot/british-conquered-world-enfield-rifle-174512> [https://perma.cc/4D9N-LJ4P]. The musket was in service for centuries, as opposed to decades for the modern AR and AK weapons; this likely understates the martial significance of the musket to the Founders.

195. *Beginner's Guide to Barrel Attachments: Tactical Experts*, TACTICALGEAR, <https://tacticalgear.com/experts/beginners-guide-to-barrel-attachments> [https://perma.cc/8U38-NXDX].

operational aiming of the gun is much easier with a barrel fixed with iron sights at the end of the barrel.¹⁹⁶ Recoil is also reduced so that subsequent shots are more likely to be accurate.¹⁹⁷ Nearly all militaries employ long rifles for these reasons.¹⁹⁸ A carbine or shorter rifle with smaller bullets is employed in urban or other close-quarters combat situations.¹⁹⁹ The handgun normally serves as a backup weapon when a soldier does not have access to a rifle or carbine, and only extremely rarely as a substitute for a rifle, where the barrel itself may be a disadvantage.²⁰⁰ For example, inside the confined quarters of a tank or armored vehicle, the barrel of a rifle means it could not be brought to bear, so a handgun (i.e., a gun without a long barrel) is needed. Infantry soldiers might also carry a handgun as a secondary weapon to be used where the long rifle becomes lost or damaged in combat or possibly to avoid collateral damage; heavier rifle rounds could go past or through the target and strike an unintended target beyond. The police officer in *Heller* likely selected a .22 caliber handgun for home defense partly for this reason, knowing that the .22 bullets would not pass through the walls of the home and strike a bystander outside or in a nearby home.

The benefits of a handgun then are not related to its mechanism. In all mechanical aspects relating to the operation of a firearm, a long rifle is superior to a handgun. The lack of a long barrel on the handgun lends itself instead to portability and concealment. Portability and concealment are extremely important to criminals for obvious reasons, especially in urban areas. Portability is important to police officers in the United States, although in other countries long rifles are often borne by police for the

196. See Matt Rice, *How To Use Iron Sights*, OZARK ARMAMENT (June 6, 2022), <https://ozarkarmament.com/resources/how-to-use-iron-sights/> [https://perma.cc/F9S6-3W8U] (explaining the ease of using a gun with iron sights).

197. Brandon Maddox, *What is Felt Recoil?*, SILENCER CENT. (Jan. 4, 2023) <https://www.silencercentral.com/blog/what-is-felt-recoil/#:~:text=If%20you%20think%20a%20handgun,heavier%20guns%20dampen%20more%20recoil> [https://perma.cc/B4GS-U7QS] (explaining a rifle shooting the same ammunition as a handgun will have less recoil).

198. See *A Class Apart—Assault Rifles Used by the World's Biggest Armies*, ARMY TECH. (May 28, 2014), <https://www.army-technology.com/features/featurea-class-apart-assault-rifles-used-by-the-worlds-biggest-armies-4280828/> [https://perma.cc/C9LN-29F6] (listing different primary assault rifles of various countries).

199. *Close Quarters Combat*, SCHOLARLY CMTY. ENCYCLOPEDIA, <https://encyclopedia.pub/entry/35629> [https://perma.cc/XJ9S-HNZZ].

200. Rob V., *Here's What Pistol Each Military Branch Uses in 2022*, OPERATION MIL. KIDS (Oct. 12, 2022), <https://www.operationmilitarykids.org/military-pistols/> [https://perma.cc/L623-YU5B] (explaining pistols are used often as a soldier's "last resort").

reasons explained in the above paragraphs.²⁰¹ For persons that fear crime outside the home, portability of the handgun may be an advantage, although rifles and shotguns can be easily carried with a shoulder strap. Further, a primary reason for lawful handgun carry is for concealment because carrying a long rifle in public is disfavored; the smaller handgun simply goes unnoticed, except when the intent is surprise. One response to gun advocates who say that handguns have a deterrent effect is simply that the deterrent effect of carrying a long rifle on a shoulder strap would be magnitudes greater than the mere potential that someone might be carrying a small caliber handgun on their ankle. The value of surprise to a person carrying a concealed weapon is to get the leg up on an attacker but at the expense of any deterrent effect on the criminal.

Yet, in the context of home defense, such as in *Heller*, are the handgun benefits of portability and concealment valid objectives? There is a strong case that they are not. The gun does not need to be carried anywhere for purposes of home defense and obviously does not need to be concealed from the intruder. Many gun enthusiasts who select a handgun for home defense rather than a long rifle or shotgun readily admit that the handgun confers no mechanical or operational advantage and probably is disadvantageous in comparison to a shotgun or semi-automatic rifle when measured on these rational grounds.²⁰² Gun enthusiasts simply prefer a handgun because they previously trained with that weapon class on the range or in prior military service as a back-up or secondary weapon.²⁰³ Thus, the choice of handgun, with all its societal drawbacks, is really due to gun owners' personal preferences, despite the fact that a long rifle or shotgun would actually do the job better.²⁰⁴ In terms of military purposes, the long rifle or carbine would also appear to be equal or superior to the handgun in

201. See *Beginner's Guide to Barrel Attachments: Tactical Experts*, *supra* note 195 (explaining increased accuracy is a benefit of a longer rifle).

202. Kevin Creighton, *Home Defense: Pistols vs. Shotguns vs. Rifles*, NRA FAM. (Dec. 28, 2021), <https://www.nrafamily.org/content/home-defense-pistols-vs-shotguns-vs-rifles-2/> [<https://perma.cc/RD9V-3BAR>].

203. See Kevin Lankes, *We Surveyed 1,001 Veterans About Gun Control, Here's What They Said*, VETERANLIFE (2022), <https://veteranlife.com/military-news/gun-control/> [<https://perma.cc/789W-QHPE>] (correlating the fact that 59.2% of surveyed veterans own a firearm for self-defense with the fact that 58.8% own pistols).

204. See Kopel & Greenlee, *supra* note 61, at 240 (quoting *Hollis v. Lynch*, 827 F.3d 436, 448–49 (5th Cir. 2016)) (“*Heller* concluded that handguns are ‘the most popular weapon chosen by Americans for self-defense in the home’ and are therefore not unusual.”).

nearly all aspects of modern militia service.²⁰⁵ In *Heller*, Justice Scalia wrote for the majority in defense of handguns, specifically:

[T]he American people have considered the handgun to be the quintessential self-defense weapon. There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home²⁰⁶

To the contrary, in the rural parts of the United States, home defense by farmers and ranchers is often achieved with rifles or shotguns because rural persons are more familiar with those weapons than handguns.²⁰⁷ Long rifles are also often thought by gun experts to be more suitable to novice users because they must be operated with both hands leading to more successful targeting in an emergency situation.²⁰⁸ Kates took the opposite position in a seminal piece on the original meaning of the Second Amendment, where he advocated for handguns in favor of rifles for urban home defense:

Although it appears that most people who keep firearms for self-defense today depend upon handguns, it is unfortunately the case that some urbanites continue to rely on long guns. While a rifle or shotgun is clearly more effective than a handgun if the sole consideration is instantly killing a burglar, the various potential side effects of firing such a weapon in an urban environment make it unacceptable. . . . While a shotgun's discharge does not have

205. See *A Class Apart—Assault Rifles Used by the World's Biggest Armies*, *supra* note 198 (demonstrating the use of rifles rather than handguns in the military). The author concedes a vehicle-mounted militia is conceivable in the modern day and that for combat inside or from the vehicle a handgun could confer an advantage in combat. There may be other situations impossible to predict where a handgun might be helpful in addition to a long rifle as a secondary armament.

206. *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008).

207. *Id.* at 699 (Breyer, J., dissenting) (quoting LT Dresang, *Gun Deaths in Rural and Urban Settings: Recommendations for Prevention*, 14 AM. BD. FAM. PRAC. 107, 108 (2001)) (“Finally, the linkage of handguns to firearms deaths and injuries appears to be much stronger in urban than in rural areas. [S]tudies to date generally support the hypothesis that the greater number of rural gun deaths are from rifles or shotguns, whereas the greater number of urban gun deaths are from handguns.” (alteration in original)).

208. Bob Campbell, *First Gun: Rifle or Handgun?*, U.S. CONCEALED CARRY ASS'N (May 17, 2021), <https://www.usconcealedcarry.com/blog/first-gun-rifle-or-handgun/> [https://perma.cc/Z17A-GE4F].

equivalent penetration because its velocity is far less, that velocity still substantially exceeds all but the most powerful handguns.²⁰⁹

On these technical points, Kates is mistaken. A shotgun discharge is more powerful than a handgun, but multiple projectiles exit the barrel simultaneously and the force of each is dispersed.²¹⁰ Accordingly, a shotgun would have little collateral damage outside the home even in an urban environment because the force of the propellant is divided amongst all of the projectiles.²¹¹ The range of a shotgun in most gauges is extremely limited, making it ideal for home defense in a city and superior in nearly every respect to a handgun.²¹²

To this point, long rifles, such as a .308 or .3030, are subject to Kates's penetration concern where the bullets are likely to proceed through the home and onward into an urban environment, placing bystanders at risk. However, the number of rounds fired by a rifle is likely to be far less in the context of home defense. Fewer rounds means less potential for collateral damage, not more. The reasons for this are several fold: First, larger caliber rifles are typically bolt operated and not semi-automatic or revolver operated, so that each shot requires the user to chamber another round with the bolt action, rather than to simply depress the trigger as with the handgun where many rounds are often fired in quick succession.²¹³ Second, a large caliber rifle fired toward a person in a confined space will stun, or possibly blow out the eardrums of, any intruder, even if the bullet misses the target. In any case, this will be an exceedingly loud and concussive force. The shock of being fired at with a large caliber rifle, where the intruder does not necessarily know what has happened, could be more effective than actually striking an attacker with a pistol round, where that first injury may in some cases instigate an even more aggressive attack (or a shoot-out if the intruder is armed). Third, as was discovered in the trenches of the First World War, smaller caliber bullets did not necessarily stop a determined attacker, so the larger .45 caliber handgun was deployed by the U.S. military in France as a

209. Kates, *supra* note 11, at 261–62 (footnotes omitted).

210. *Why You Should Use a Shotgun for Home Defense*, TACTICALGEAR, <https://tacticalgear.com/experts/why-you-should-use-a-shotgun-for-home-defense> [<https://perma.cc/QX85-8HUP>].

211. *Id.*

212. *Id.*

213. *Bolt Action*, BRITANNICA, <https://www.britannica.com/technology/bolt-action> [<https://perma.cc/R4LU-HHDM>].

solution.²¹⁴ In the modern day, police and others armed with 9mm handguns often fire many rounds in self-defense and some criminals have been struck dozens of times in such encounters. On the other hand, if the initial rifle round is on target, the intruder will not be able to continue. Notably, if the intruder is also armed, the potential for that person to return fire in a shoot-out and strike bystanders is also reduced.

VI. SPECIFIC PROBLEMS IN ORIGINALISM WITHIN *HELLER* AND *BRUEN*

By striking the Prefatory Clause from the respective legal analysis in *Heller*, the majority eliminated the military purpose aspects of Second Amendment jurisprudence.²¹⁵ However, the majority also was careful to explain its intent was to eliminate all purpose-based analysis because it might lead to scrutiny or balancing tests in the context of a handgun ban.²¹⁶ The purpose of *Heller* therefore was to guarantee a “core” right to keep a handgun in the home, which was expanded in *Bruen* to carry a handgun around town.²¹⁷ On the other hand, if the state wishes to limit the right to keep or bear handguns for any reason other than self-defense, then a scrutiny-based analysis is employed where the state must explain its purpose in regulation.²¹⁸ The individual’s purpose for having the handgun is nonetheless relevant to the state’s purpose in regulating the handgun, so the non-purpose framework of *Heller* becomes circular, no matter how theoretically appealing this framework is. The extraordinary number and breadth of Second Amendment cases after *Heller* are further evidence the framework of stated and hidden purposes is either not workable or extremely difficult for courts to enforce.

If the presumed preference of handguns for self-defense is called into question, conceptual holes and contradictions readily arise in the reasoning of both *Heller* and *Bruen*. For example, reported claims that handguns are to

214. Tom Laemlein, *The Doughboy's M1911 Pistol in World War I*, AM. RIFLEMAN (Dec. 27, 2017), <https://www.americanrifleman.org/content/the-doughboy-s-m1911-pistol-in-world-war-i/> [<https://perma.cc/P9H5-YD45>].

215. *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008) (positing the Prefatory Clause merely “announces the purpose for which the right was codified” but cannot be “the only reason Americans valued the ancient right”).

216. *Id.* at 629 (presuming the individual’s purpose for keeping a handgun at home is self-defense).

217. *Id.* at 630; *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2161 (2022) (Alito, J., concurring).

218. See Kopel, *supra* note 148, at 1608–09 (predicting long rifle prohibitions would fail strict scrutiny under *Heller*).

be used for self-defense, hunting, or so on may be pretextual because some people may not state their true purpose on the registration form. Additionally, if we reasonably think that a significant number of people acquire a handgun to commit suicide, does that suicidal purpose fall within the textual or originalist interpretations given by Justice Thomas in *Bruen* and Justice Scalia in *Heller*? Stated differently, does the Second Amendment entail a right to “bear Arms” to kill oneself? Do the “core” rights of the suicidal person to their own life potentially outweigh their “core” right to register a handgun? If legal interpretations encompass moral values, what happens to jurisprudence where the moral values are in economic terms subject to a cognitive dissonance critique—or incongruent behavior as measured by one’s own standards—such that in the context of abortion rights, we count a right to life, but in the context of handguns for suicide, we do not.

The problem suicide presents for Second Amendment law—where suicide might be the actual purpose for acquiring the handgun—was largely missed by the majority in the recent gun rights cases. The dissent by Justice Breyer in *Bruen* also introduced rather disturbing statistics of gun violence including mass shootings, which often encompass both homicide and suicidal intent.²¹⁹ Such events are increasing in recent years, especially the number of suicides by handgun.²²⁰ The mass shooter may in some cases intend to commit both murder and suicide, where the ready availability of handguns facilitates both objectives. Surely, if someone did attempt to register a handgun for the express purpose of suicide, there is potentially also a privacy right that deserves hearing if such a registration was denied.²²¹ Of course, that privacy right might be balanced against the potential for harm to the rights of others, if suicide by handgun is not considered a “core” right under the Second Amendment.

A. *Future Weapons: “Handgun” as a Category in Philosophical Terms*

The Court’s gun rights decisions also created a new category in philosophical terms, which is “handguns.”²²² The historical analysis of both *Heller* and *Bruen* is premised on this new undefined category, within which there apparently can be no parsing. For example, the Model 1911 .45 caliber

219. *Bruen*, 142 S. Ct. at 2163 (Breyer, J., dissenting).

220. *Id.* at 2164.

221. Thomas J. Marzen et al., *Suicide: A Constitutional Right?*, 24 DUQ. L. REV. 1, 102 (1985).

222. *Bruen*, 142 S. Ct. at 2143 (discussing “handguns” as a broad category).

handgun, specifically designed to stop a man with one shot in the trenches of World War I, may or may not be the same as the .22 caliber handgun in *Heller*. Stun guns have created a similar problem in the lower courts.²²³ The legal question has thus shifted to whether the weapon in question is “commonly used” to determine its coverage under the Second Amendment.²²⁴

The trouble is that “handguns” are not properly viewed as one broad category.²²⁵ This should be obvious when we consider future technological development in handgun design. Looking backward, the *Bruen* court discussed the barrel length of primitive Tudor era handguns, for example.²²⁶ Yet, differences in metallurgy from the Tudor era to modern times render the length of an unrifled barrel of a handgun in that era simply incommensurable. Any similarities are solely in appearance and not in functionality. A shorter barreled handgun manufactured with modern materials and specifications would be superior in every way to the primitive handguns of the Tudor period. Comparing a Tudor-era pistol to a modern handgun is roughly equivalent to comparing a Colt revolver to a Star Wars blaster. Based on Second Amendment jurisprudence after *Heller*, such a case should be expected to arise at some point in the near future as laser weapons are reduced in size.

Any future weapons, such as a powerful handheld laser, plasma sword, or flamethrower, might presumably be classifiable as a weapon or handgun and covered by “Arms” in the Second Amendment—if it were purchased frequently enough to be considered in common use.²²⁷ In addition, from the experience in the Ukraine conflict, handheld drones with attached handguns may also come into common use in the near future.²²⁸ When

223. *Caetano v. Massachusetts*, 577 U.S. 411, 411 (2016).

224. *Bruen*, 142 S. Ct. at 2143.

225. *But see Texas Federal Court Finds Interstate Handgun Sales Ban Unconstitutional: Handgun Sellers, Buyers Prevail in Cross-State Sales Battle*, YAHOO (Feb. 11, 2015), <https://www.yahoo.com/entertainment/news/texas-federal-court-finds-interstate-214217168.html> [<https://perma.cc/HA3G-EA3J>] (quoting Alan Gura, counsel for the plaintiffs in a gun rights case, who claimed “[t]here simply was no reason to differentiate between handguns on the one hand, and shotguns and long guns on the other”).

226. *Bruen*, 142 S. Ct. at 2143.

227. *See* William A. Raven, *Packing Plastic: How a Federal Ban on 3D Printed Firearms May Protect the Public While Retaining Constitutionality*, 21 J. HIGH TECH. L. 70, 97 (2021) (expecting 3D printed firearms to be excluded from Second Amendment based on their unusual character).

228. *See* Michael Martínez et al., *Handgun-Firing Drone Appears Legal in Video, but FAA, Police Probe Further*, CNN (July 21, 2015, 8:15 PM EDT), <https://www.cnn.com/2015/07/21/us/gun->

viewed in the context of future weapons, forward looking methodologies are necessary in the context of rapid technological change. As Justice Breyer stated in the *Heller* dissent:

On the majority's reasoning, if tomorrow someone invents a particularly useful, highly dangerous self-defense weapon, Congress and the States had better ban it immediately, for once it becomes popular Congress will no longer possess the constitutional authority to do so. In essence, the majority determines what regulations are permissible by looking to see what existing regulations permit. There is no basis for believing that the Framers intended such circular reasoning.²²⁹

The historical textualism applied in *Bruen* is retrospective and seems to compare handguns of prior historical periods as if they were still in use today. Accordingly, Justice Thomas' methodological approach in the *Bruen* decision with the broad category of "handgun" as a "core" right is not sustainable given the likely technology developments of even a few years. For example, some balancing may be needed with respect to gun-mounted drones highly suited for the assassination of public figures, for common use in self-defense, or even property defense. Notably, a shotgun drone with a digital link seems distinguishable from shotgun traps, the illegality of which is hornbook law in many legal textbooks.²³⁰ The right of privacy to own such weapons seems eminently more suited for categorizing new weapons than a broad, undefined category of "handguns" that require judges to look backward and measure barrel lengths across prior centuries to determine whether one gun is similar to another and so forth.

B. *Confusion of the Lower Courts*

The *Heller* decision was a major change in the law and resulted in problems of meaning in the lower courts. In *Chester*,²³¹ the Fourth Circuit was uncertain whether restrictions on handguns related to concealment,

drone-connecticut/index.html [https://perma.cc/7MMJ-9R7V] (reporting about a gun drone built and operated by a college student in Connecticut).

229. *District of Columbia v. Heller*, 554 U.S. 570, 721 (2008) (Breyer, J., dissenting).

230. *See Katko v. Briney*, 183 N.W.2d 657, 657 (Iowa 1971) (affirming the trial court's judgment holding the defendant liable for the injuries sustained by the plaintiff after being shot by a spring gun set up by the defendant in an abandoned farmhouse).

231. *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010).

dangerousness, or similar longstanding restrictions remained in force.²³² The “dangerous and unusual” test also has been applied to restrictions, especially on handguns.²³³ In *Hollis*,²³⁴ the court addressed whether machine guns are dangerous and unusual.²³⁵ Kopel and Greenlee explained as follows: “Every post-*Heller* case to grapple with whether a weapon is ‘popular’ enough to be considered ‘in common use’ has relied on statistical data of some form, creating a consensus that ‘common use is an objective and largely statistical inquiry.’”²³⁶

One question that arises is: How does a desirable firearm that is newly developed come into “common use” if the weapon is banned by the state? States that are inclined to restrict handgun ownership seem to have an incentive after *Heller* to ban anything that is new. The common use of weapons would seem to relate in part to the length of time the weapon has been in existence or how it is categorized. The magazine capacity of handguns has caused confusion in this regard, even with a handgun of longstanding use.²³⁷ After *Bruen*, all handguns are ostensibly grouped together unless the respective court decides that grouping is not appropriate in that particular case, such as with stun guns. But this is far from an “objective” process. For example, new handheld weapons, such as plasma swords, are not in common use. If one jurisdiction, say Illinois, bans plasma swords, and another, say Mississippi, does not, does Illinois need to revisit the issue once plasma swords come into common use in Mississippi? What if large capacity magazines are deemed to be dangerous when used for home defense in urban areas but not in rural areas? The base jurisprudential question is not related to objectivity because statistics might be involved; instead, it is whether a “core” right subject to many exceptions related to common use, sensitive places, and dangerousness is superior to a balancing

232. *Id.* at 679 (“It is unclear to us whether *Heller* was suggesting that ‘longstanding prohibitions’ such as these were historically understood to be valid limitations on the right to bear arms or did not violate the Second Amendment for some other reason.”); *United States v. Masciandro*, 638 F.3d 458, 472 (4th Cir. 2011) (asking whether “sensitive places” alter the Second Amendment’s scope or just change the analysis in certain situations).

233. *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 962 (9th Cir. 2014).

234. *Hollis v. Lynch*, 827 F.3d 436 (5th Cir. 2016).

235. *Id.* at 439.

236. Kopel & Greenlee, *supra* note 61, at 240.

237. *Fyock v. Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015) (finding Sunnyvale’s “evidence regarding the increased danger posed by large-capacity magazines” was insufficient to demonstrate that they are “unusual,” but also determining Fyock’s “marketing materials and sales statistics . . . [did] not necessarily show that large-capacity magazines are in fact commonly possessed by law-abiding citizens for lawful purposes”).

approach. Probably not. Allowing states and judges to balance constitutional rights and government interests seems to be more closely related to the desired end of protecting the right to self-defense, rather than comparing the relative characteristics of handguns. The latter approach has proven a mighty struggle for the judiciary, as epitomized in *Bruen* where the Court referenced barrel lengths of Tudor-era handguns.²³⁸

VII. CONCLUSION

The Second Amendment makes practical sense primarily in relation to its military objectives. Contemporary events in Ukraine emphasize the continuing importance of militia in modern conflict. Historically, Imperial Japan considered invading the west coast of the United States during the early part of the Second World War,²³⁹ and had the naval forces to do so,²⁴⁰ but decided not to invade partly because “[t]here would be a rifle behind each blade of grass.”²⁴¹ The prior quote was historically attributed to Admiral Yamamoto although that attribution has since been cast into doubt but not the general idea behind it.²⁴² The Japanese high command would have considered private gun ownership in the United States while determining whether it could first invade and then control a large American city, like Honolulu. Of course, Admiral Yamamoto traveled in the United States before the war and is known to have reported back to Japanese leadership on American society, including the gun culture, possibly.²⁴³ If such reports were not recorded at the time or later documented by U.S.

238. N.Y. State Rifle & Pistol Ass’n. v. Bruen, 142 S. Ct. 2111, 2143–44 (2022).

239. Angelo N. Caravaggio, “Winning” the Pacific War: The Masterful Strategy of Commander Minoru Genda, 67 NAVAL WAR COLL. REV. 85, 86 (2014) (explaining how Minoru Genda of the Imperial Japanese Navy advocated for invading Hawaii after attacking Oahu on December 7, 1941, believing that Japan could use Hawaii as a base to threaten the contiguous United States, and perhaps as a negotiating tool for ending the war).

240. Various sources suggest Japan could not have invaded Hawaii or the West Coast, *see, e.g., Invasion!*, RESEARCH AT LARGE, <http://www.researcheratlarge.com/Pacific/PearlHarbor/invasion.html> [<https://perma.cc/58DF-S6E3>], but they are mistaken. Japan invaded and captured various U.S. military bases across the Pacific and occupied major population centers in China and Southeast Asia. *The Pacific Strategy, 1941–1944*, NAT’L WWII MUSEUM, <https://www.nationalww2museum.org/war/articles/pacific-strategy-1941-1944> [<https://perma.cc/GSW2-S3GM>].

241. Brooks Jackson, *Misquoting Yamamoto*, FACTCHECK (May 11, 2009), <https://www.factcheck.org/2009/05/misquoting-yamamoto/> [<https://perma.cc/M9UZ-8TJM>].

242. *Id.*

243. James A. Field, Jr., *Admiral Yamamoto*, U.S. NAVAL INST., (Oct. 1949), <https://www.usni.org/magazines/proceedings/1949/october/admiral-yamamoto> [<https://perma.cc/3CMV-ZVBM>] (describing a letter Yamamoto wrote to Ryoichi Sasakawa in January 24, 1941, while he was an attaché in Washington, D.C.).

historians, that seems less than surprising given that Yamamoto was killed in a special military ambush during the war.²⁴⁴

Gun advocates have zealously relied on the Yamamoto quote to claim that Americans' private gun ownership was the primary reason the Japanese did not invade the United States mainland.²⁴⁵ This causal claim has been attributed as "false" by some fact checkers, albeit with additional dubious claims that Japan was a "small island state" that could never invade the United States, incongruous references to Japanese military strategy in 1942, and other claims that American civilians were not armed with assault rifles, such as AK-47s, and were therefore not a threat to the Japanese military in the event of invasion.²⁴⁶

Perhaps a quick fact-check of the fact-checkers is in order—the Japanese were not armed with modern assault rifles such as the AK-47 either. The primary Japanese rifle in World War II was the Type 38 single-shot bolt action rifle.²⁴⁷ Hunting rifles in the United States at the time were roughly comparable in range, firepower, and accuracy. Any Japanese marine armed with a Type 38 ought to have been very concerned about American-made Winchester and Remington hunting rifles of the day. Furthermore, Japan was the dominant naval power in the Pacific prior to World War II and had documented plans to invade Madagascar, which is roughly equidistant to Japan as the West Coast of the United States.²⁴⁸ Therefore, Japan has never been regarded as a small island nation in relative size, military strength, or capability, even to this day.²⁴⁹

According to PolitiFact, the chair of the U.S. Naval War College stated the private gun armament of American civilians was plausibly a factor for

244. Jim Stempel, *Operation Vengeance—Inside the Improbable U.S. Mission to Kill Japan's Admiral Yamamoto*, MIL. HIST. NOW (Oct. 24, 2020), <https://militaryhistorynow.com/2020/10/24/operation-vengeance-inside-the-improbable-u-s-mission-to-kill-japans-admiral-yamamoto/> [https://perma.cc/8795-98A2].

245. Jackson, *supra* note 241.

246. Tom Kertscher, *After Pearl Harbor, Japanese Didn't Invade US Because They Feared Armed Citizens*, POLITIFACT (Jan. 14, 2020), <https://www.politifact.com/factchecks/2020/jan/14/facebook-posts/after-pearl-harbor-japanese-didnt-invade-us-becaus/> [https://perma.cc/BK3Q-PT46].

247. JR Potts et al., *Arisaka Type 38*, MIL. FACTORY (Aug. 26, 2019), https://www.militaryfactory.com/smallarms/detail.php?smallarms_id=249 [https://perma.cc/S9ZB-MUCC].

248. Peter Suci, *Nazi Germany and Imperial Japan Each Had Eyes on Madagascar*, NAT'L INT. (Dec. 3, 2021), <https://nationalinterest.org/blog/buzz/nazi-germany-and-imperial-japan-each-had-eyes-madagascar-197468> [https://perma.cc/5MBV-ESRV].

249. Letter from Joseph C. Grew, U.S. Ambassador to Japan, to Cordell Hull, U.S. Sec'y of State (May 11, 1933), <https://www.pbs.org/wgbh/americanexperience/features/fdr-japan/> [https://perma.cc/7VFU-YZFU].

the Japanese, “but not the dominant factor.”²⁵⁰ The relevant point is not that the supposed Yamamoto quote is wrong as a matter of scholarly citation, but that gun ownership was indeed a plausible factor in Japanese military planning on Pacific strategy. This factor alone should be significant to Supreme Court justices or other legal scholars who may continue to think that military purpose of the Second Amendment is unspeakable.²⁵¹

The United States military and public took the threat of Japanese invasion of the West Coast very seriously. Blackouts were enforced in the major cities along the West Coast.²⁵² The U.S. military fired full artillery barrages in Los Angeles at phantom targets thought to be part of a Japanese invasion.²⁵³ Indeed, several uninhabited Aleutian Islands of Alaska were invaded and occupied by Imperial Japan.²⁵⁴ Various major U.S. naval bases across the Pacific were also occupied at the outset of the war.²⁵⁵

Perhaps more importantly, on December 7, 1941, the Imperial Japanese fleet withdrew from battle without launching a “third wave” against Pearl Harbor that would have precipitated a landing on the Hawaiian Islands.²⁵⁶

The point is, even if one does not think an invasion of the U.S. mainland was considered in Japanese military pre-war planning at all, private ownership of guns may still have influenced the sequence of wartime events in favor of the United States. Interestingly, immediately after the war, President Eisenhower sponsored the construction of an interstate highway system designed to shift military forces from coast-to-coast in case of need—just as Germany had attempted to do with the autobahn for similar

250. Kertscher, *supra* note 246.

251. See, e.g., Levinson, *supra* note 156, at 644–45 (criticizing the military purpose interpretation by asking “why the Framers did not simply say something like ‘Congress shall have no power to prohibit state-organized and directed militias’” and opining the Framers may have “meant to do something else”).

252. *Phantom Japanese Raid on Los Angeles During World War II*, HISTORYNET (June 12, 2006), <https://www.historynet.com/phantom-japanese-raid-on-los-angeles-during-world-war-ii/> [<https://perma.cc/ZWF3-DCX7>].

253. *Id.*

254. Tony Palomo, *The War in the Pacific: Rising Sun Dawns on Guam*, NAT’L PARK SERV., https://www.nps.gov/parkhistory/online_books/npswapa/extcontent/lib/liberation4.htm [<https://perma.cc/3KXL-489L>].

255. *Id.*

256. Mark Loproto, *Pearl Harbor: The Third Wave That Never Came*, PEARL HARBOR (Aug. 16, 2017), <https://pearlharbor.org/pearl-harbor-third-wave-never-came/> [<https://perma.cc/949S-4LU5>].

military purposes.²⁵⁷ The purpose of the interstate system was to counter the threat of foreign invasion of the mainland United States, which has only been seriously threatened by the United Kingdom, twice—during the American Revolution and the War of 1812—and by Japan.²⁵⁸ If the Japanese military commanders had not feared the militia forces on the ground in Hawaii or elsewhere, then it seems very possible the naval commanders might have pressed the attack against Pearl Harbor on December 7 with a third wave intending to cripple and occupy Hawaii. The Japanese targets included the drydocks, submarine pens, and fuel storage facilities, and the failure to launch that third wave can be regarded as a tactical decision that changed the course of the war against Japan and in favor of the United States' Pacific Fleet.²⁵⁹

The Prefatory Clause of the Second Amendment understood as the collective right to keep and bear Arms related to militia service was indeed also at issue with the British seizure of firearms and pikes around the colonies, which culminated in their disastrous attempt to seize the stockpiles at Lexington and Concord in 1775.²⁶⁰ The British seizure of these weapons and other stockpiled arms, of course, precipitated the sequence of events during the American Revolution.²⁶¹ The correspondence of the collective rights idea of the Prefatory Clause to actual events in American history seems to lend credence to the view that the military purpose of the Second Amendment may be important, particularly from an originalist method of legal interpretation. Other supposedly originalist references throughout the majority opinion in *Heller* have also been severely criticized by scholars.²⁶²

257. Lee Lacy, *Dwight D. Eisenhower and the Birth of the Interstate Highway System*, U.S. ARMY (Feb. 20, 2018), https://www.army.mil/article/198095/dwight_d_eisenhower_and_the_birth_of_the_interstate_highway_system [<https://perma.cc/7V3P-46WY>].

258. *Id.*

259. *Id.*

260. Kates, *supra* note 11, at 229.

261. *Id.* (“The Virginia delegates, remembering that the Revolutionary War had been sparked by the British attempt to confiscate the patriots’ privately owned arms at Lexington and Concord, apparently agreed.”).

262. See Mark Tushnet, *Heller and the New Originalism*, 69 OHIO ST. L.J. 609, 610 (2008) (“Unfortunately, the new originalism cannot deliver on its promises, as *Heller* shows.”); Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L.J. 625, 626 (2008) (“Scalia’s decision demonstrates that plain-meaning originalism is not a neutral interpretive methodology, but little more than a lawyer’s version of a magician’s parlor trick . . .”); Lawrence Rosenthal, *Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated*

Handguns were used in mounted militia forces during the Western period,²⁶³ but that ended with the Gentlemen's Agreement between Colt and Winchester in 1884.²⁶⁴ Primitive handguns were potentially militia armament in sixteenth century Europe but only deployed with heavy cavalry (non-militia) units in the historical period surrounding the American Revolution. Hollywood depictions of handguns in the French and Indian War and by guerilla forces in the American Revolution are stylized for dramatic effect and are not historically accurate.

Both *Heller* and *Bruen* referred to handguns as “the most popular weapon chosen by Americans for self-defense in the home.”²⁶⁵ But, this assertion does not appear to be true. Handguns appear to be just the weapon most likely to be identified as exclusively for self-defense in the home. If a person in a rural area owns a rifle used principally for hunting and was asked whether he owned it for home defense, the answer would be “No, the rifle is not for self-defense in the home.” However, the rifle may be used for home defense in the case of a home invasion, even though it is normally used for other farm or hunting purposes. Furthermore, people have been documented to lie about how they use handguns.²⁶⁶ The references to “popularity” appear to be wordplay presented as a statistic intended to overstate the importance of handguns in comparison to rifles and shotguns, despite the fact that many people throughout the rural United States use rifles and shotguns for many purposes, including home defense.

In the overruling of *Miller*, the military objectives of the Second Amendment were obviously excluded from the legal framework.²⁶⁷

Militias, and Criminal Street Gangs, 41 URB. LAW. 1, 76 (2009) (“Indeed, the most sophisticated originalists acknowledge that originalism cannot be the exclusive method of constitutional interpretation because original meaning is sometimes vague or ambiguous.”).

263. DOUGLAS C. MCCHRISTIAN, *THE U.S. ARMY IN THE WEST, 1870-1880*, at 116–21 (1995).

264. See *supra* notes 175–79 and accompanying text (describing the use of handguns in the West, leading up to the “Gentlemen’s Agreement”).

265. N.Y. State Rifle & Pistol Ass’n. v. Bruen, 142 S. Ct. 2111, 2128 (2022) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008)).

266. See *U.S. Attorney and ATF Target Those Who “Lie-And-Try” to Purchase Firearms*, U.S. ATT’Y’S OFF., N. DIST. OF OKLA. (Apr. 12, 2019), <https://www.justice.gov/usao-ndok/pr/us-attorney-and-atf-target-those-who-lie-and-try-purchase-firearms> [https://perma.cc/E6E9-9XTN] (reporting U.S. Attorney Trent Shore’s and ATF’s mission “to hold accountable those who lie on federal forms and try to purchase a gun”); William J. Vizzard, *The Current and Future State of Gun Policy in the United States*, 104 J. CRIM. L. & CRIMINOLOGY 879, 890 (2015) (acknowledging the possible existence of “a small number of respondents [who] are exaggerating or lying”).

267. Kopel & Greenlee, *supra* note 61, at 209 (quoting *Heller*, 554 U.S. at 571) (explaining *Heller*’s exclusion of “dangerous and unusual” arms, regardless of how suitable they are for militia use).

One possible explanation, not previously discussed, is that this approach was a sledgehammer to solve the *Warin*²⁶⁸ problem of what to do about machine guns that are ordinary military armament under the *Miller* standard.²⁶⁹ Whatever the reason, since the overruling of *Miller*, law journals are now littered with street law ideas, such as: (1) gun rights superseding any criminal usage of handguns,²⁷⁰ (2) the Constitution providing for an unlimited right to “bear” a loaded handgun around town,²⁷¹ and (3) the idea that the Founders were concerned with the use of handguns for the defense of the person.²⁷² These ideas have coalesced with the mysticism of the handgun into a legal standard that is perhaps the worst policy outcome possible for society—at least if we are concerned with the “casualties” as Justice Breyer describes the many human victims of guns.²⁷³ The particular firearm most desirable to criminals²⁷⁴—the handgun—has been granted “core” constitutional protection, even though the handgun is less desirable for home defense than a shotgun, and over twice as likely to result in the death of a person within the household than anyone else.²⁷⁵ Both handguns and Bowie knives are furthermore without any military value to militia units,

268. *United States v. Warin*, 530 F.2d 103 (6th Cir. 1976).

269. *Id.* at 104; *see Heller*, 554 U.S. at 625 (considering whether machine gun restrictions would be unconstitutional under *Miller*).

270. *See* Kopel & Greenlee, *supra* note 61, at 292 (“Misuse by criminals is no reason to deprive law-abiding citizens of common arms.”).

271. *See id.* at 258–60 (quoting *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012)) (calling attention to the notion that the right to self-defense includes the right to carry loaded weapons outside the home).

272. *See supra* Part I (explaining where scholars go wrong in concluding the Founders intended for “Arms” to include handguns).

273. *McDonald v. City of Chicago*, 561 U.S. 742, 902 (2010) (Stevens, J., dissenting).

274. *Heller*, 554 U.S. at 698 (Breyer, J., dissenting) (“Handguns also appear to be a very popular weapon among criminals. In a 1997 survey of inmates who were armed during the crime for which they were incarcerated, 83.2% of state inmates and 86.7% of federal inmates said that they were armed with a handgun.”).

275. *See* David LaPell, *Shotguns vs Handguns for Home Defense: Which Is the Better Fit?*, GUNS (Aug. 31, 2017, 3:44 PM), <https://www.guns.com/news/review/shotguns-vs-handguns-for-home-defense-which-is-the-better-fit> [<https://perma.cc/3LPB-FBZC>] (explaining how a shotgun is more effective for home-defense than a handgun); *see also* Beth Duff-Brown, *Californians Living With Handgun Owners More Than Twice as Likely to Die by Homicide, Study Finds*, STAN. MED. (Apr. 4, 2022), <https://med.stanford.edu/news/all-news/2022/04/handguns-homicide-risk.html> [<https://perma.cc/J9AK-VUS5>] (reporting about research that found “people who lived with handgun owners were 2.33 times as likely to become victims of homicide and 2.83 times as likely to die from homicides involving firearms”).

at least not any more so than spoons, and this was true both in 1791 and remains so to the present day.²⁷⁶

A balancing of interests pursuant to a privacy right to possess handguns would potentially cognize the rights of handgun victims, including those relatives of the handgun owner who are at the highest risk of becoming a victim. The widespread use of handguns by criminals given their portability and ease of concealment suggests these are other primary purposes for handgun ownership. Law-abiding handgun owners might be expected to consider long rifles or shotguns for personal defense, as is common in many areas of the United States. Other legal means might be possible to address the reckless or negligent leaving of a handgun around the home where a minor uses it as such might be available to the states, such as in the mental states for criminal intent related to assisted suicide. States might also impose suicide prevention training for purchasers of handguns because that is the likely use or outcome of handgun ownership. The Second Amendment “core” right to bear “Arms” relates to the militia purposes of the respective “Arms,” historically referring to the musket, and today referring to rifles, whereas the ownership of handguns can be better balanced as a privacy right.

276. *But see* Kopel & Greenlee, *supra* note 61, at 209 (“*Heller* elucidated that *Miller* does not limit the Second Amendment right to militia purposes, but instead limits which weapons the militia aspect of the right protects.”).

