COLUMBIA LAW REVIEW
*SIDEBAR*

VOL. 112 JULY 11, 2012 PAGES 158–170

# *HOUSTON*, WE HAVE A PROBLEM: DOES THE SECOND AMENDMENT CREATE A PROPERTY RIGHT TO A SPECIFIC FIREARM?

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## INTRODUCTION

Ever since the Supreme Court's 2008 decision in *District of Columbia v. Heller*,[1] lower federal courts have endeavored to answer outstanding questions about the contours of the Second Amendment right. One issue that has received scant attention, even from academic commentators, is whether the Second Amendment protects the right of an individual to own a specific weapon.[2] The Fifth Circuit addressed this question in March 2012 in *Houston v. City of New Orleans*, although the panel that heard the case withdrew its initial decision two months later and vacated and remanded the district court's ruling that had dismissed the defendant's Second Amendment claims.[3] While the Fifth Circuit's original *Houston* decision is no longer good law, it is the best example to date of a circuit court's attempt to grapple with whether the Second Amendment conveys a property right to a specific weapon. Consequently, this piece uses *Houston* as its central case study in the course of exploring the minimal existing caselaw regarding the extent to which the Second Amendment protects property ownership. All subsequent references to *Houston* are to the withdrawn opinion unless otherwise noted.

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1. 554 U.S. 570, 628 (2008).

2. Indeed, the authors of this piece have been unable to locate any academic literature that addresses this issue directly. A Westlaw search of all secondary sources that cite one of the six relatively recent federal cases that discuss in any detail whether the Second Amendment protects the right to a specific firearm (*Houston v. City of New Orleans*, *Walters v. Wolf*, *Garcha v. City of Beacon*, *Bane v. City of Philadelphia*, *McGuire v. Village of Tarrytown*, and *Tirado v. Cruz*) revealed no articles on the topic. See infra Part I (discussing these cases). This issue has been tangentially discussed by just a few scholars. See, e.g., Eugene Volokh, Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda, 56 UCLA L. Rev. 1443, 1485 (2009).

3. 675 F.3d 441 (5th Cir. 2012), withdrawn, No. 11–30198, 2012 WL 1839398 (5th Cir. May 22, 2012). The panel withdrew the earlier ruling on constitutional avoidance grounds. 2012 WL 1839398, at *2.

This piece contends that while the *Houston* majority and all other federal courts to consider the issue have reached the correct result (i.e., that the Second Amendment does not encompass a property right to a specific weapon), their reasoning has been brief and undertheorized. This piece will identify the gaps that exist in even the most analytically rigorous decision (the *Houston* majority opinion) and provide an analytical foundation to support that opinion against the *Houston* dissent's primary arguments. Part I details the background Supreme Court caselaw and the small number of federal court decisions that have considered whether the Second Amendment encompasses a property right to a specific weapon. Part II identifies the gaps in the *Houston* majority opinion and engages directly with the reasoning of the dissent. Part III suggests a new test for fleshing out the scope of the Second Amendment, which is a task that circuit courts have just begun to undertake.

## I. *HELLER*, *HOUSTON*, AND THE SCOPE OF THE SECOND AMENDMENT

This Part explores the legal backdrop of the *Houston* decision. Part I.A describes the recent rejuvenation of the Second Amendment. Part I.B examines the handful of federal court opinions addressing whether the Second Amendment protects an individual's right to a specific firearm. Part I.C discusses the facts of *Houston* before laying out the reasoning of the Fifth Circuit's majority opinion.

### A. *The Revitalized Second Amendment*

*Heller* marked a significant change in the Court's Second Amendment jurisprudence, which was previously virtually nonexistent.[4] Partially because of the dearth of Second Amendment precedent, the Court's holding in *Heller* was narrow and subject to several significant caveats. Specifically, the majority decision determined that the Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[5] The Court was explicit that "the right [is] not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose" and enumerated a nonexhaustive list of four specific limits to the scope of the Amendment.[6] *McDonald* subsequently recognized the same limits on the Second Amendment's protection even as it applied the right against the states.[7]

Thus, if *Heller* and *McDonald* clearly identified the basic scenario that the Second Amendment protects—use of a handgun, in the home, in self-

4. As one commentator noted, in deciding *Heller*, the Court wrote "on a slate that was almost clean." Lawrence B. Solum, *District of Columbia v. Heller* and Originalism, 103 Nw. U. L. Rev. 923, 925 (2009).

5. *Heller*, 554 U.S. at 635; see also United States v. Chester, 628 F.3d 673, 676 (4th Cir. 2010) (noting "the Court . . . clearly staked out the core of the Second Amendment").

6. *Heller*, 554 U.S. at 626–27 & n.26 (noting list of "presumptively lawful regulatory measures . . . does not purport to be exhaustive").

7. McDonald v. City of Chicago, 130 S. Ct. 3020, 3047 (2010) (plurality opinion).

defense—the lower courts are engaged in determining precisely which laws regulating firearm use (if any) the Amendment prohibits.[8] To date, however, decisions have generally specified the rights left unprotected by the Second Amendment,[9] rather than those the Amendment protects.[10]

B. *The "Specific Firearm" Cases*

Federal courts had been presented with the issue of whether the Second Amendment protects a right to a specific weapon on at least four occasions prior to *Houston*. The *Houston* majority relied heavily on the Eighth Circuit's decision in *Walters v. Wolf*, which was the only circuit-level case on point.[11] But, as discussed below, *Wolf* largely sidestepped the question of whether the Second Amendment protects a particular weapon and focused, instead, on whether the seizure of the defendant's firearm violated the Due Process Clause.[12]

Similarly, the three district court cases on the issue failed to squarely explain why the Second Amendment does not protect the right to own a specific firearm. In *Garcha v. City of Beacon*, the court held that the "'right to bear arms' is not a right to hold some particular gun."[13] *Garcha*, however, predated the revitalization of the Second Amendment in *Heller* and the court believed that the pro se plaintiff had intended to state a Fourteenth Amendment claim.[14] *McGuire v. Village of Tarrytown* cited to *Garcha* in a brief paragraph rejecting the defendant's claim that the village had violated his Second Amendment rights by seizing his gun.[15] The *McGuire* court's terse dismissal essentially summarized *Garcha,* providing no additional analysis.[16] Finally, *Bane v. City of Philadelphia* is distinguishable because the issue presented was whether the police's

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8. See United States v. Masciandaro, 638 F.3d 458, 466 (4th Cir. 2011) ("[I]n reaching its holding, the [*Heller*] Court did not define the outer limits of the Second Amendment right to keep and bear arms.").

9. The lower courts have almost unanimously upheld the constitutionality of subdivisions of the main firearm regulation statute challenged. See United States v. Mahin, 668 F.3d 119, 123 (4th Cir. 2012) (noting that across circuits, "[t]he great majority" of decisions involving Second Amendment challenges to 18 U.S.C. § 922(g) have "affirmed [the convictions] outright").

10. See, e.g., *Masciandaro*, 638 F.3d at 475 (finding "it prudent to await direction from the [Supreme] [C]ourt itself" before "push[ing] *Heller* beyond its undisputed core holding"); see also *Mahin*, 668 F.3d at 124 (finding same). But see Ezell v. City of Chicago, 651 F.3d 684, 704 (7th Cir. 2011) (finding Chicago law placing "ban on firing ranges" implicates Second Amendment because "the core right wouldn't mean much without the training and practice that make it effective").

11. Houston v. City of New Orleans, 675 F.3d 441, 445 (5th Cir. 2012), withdrawn, No. 11–30198, 2012 WL 1839398 (5th Cir. May 22, 2012) (citing Walters v. Wolf, 660 F.3d 307, 318 (8th Cir. 2011)). A more recent case, *Tirado v. Cruz*, cited *Wolf* and held that in order to claim a Second Amendment violation, a plaintiff must show "that he has been kept from acquiring any other legal firearm." No. 10-2248, 2012 WL 525450, at *6 (D.P.R. Feb. 16, 2012).

12. For a full discussion of *Wolf*, see infra Part II.A.

13. 351 F. Supp. 2d 213, 217 (S.D.N.Y. 2005).

14. Id.

15. No. 08 Civ.2049, 2011 WL 2623466, at *7 (S.D.N.Y. June 22, 2011).

16. Id.

*initial* seizure of a gun, in connection with a criminal arrest, violated the Second Amendment.[17] The court held it did not.[18] Thus, *Houston v. City of New Orleans* was the first case to fully consider whether the Second Amendment protects an individual's right to a specific weapon.

C. Houston v. City of New Orleans

Errol Houston, Jr., was arrested by the New Orleans police on July 5, 2008 and charged with drug possession and possession of a firearm while in possession of a controlled substance.[19] During the arrest, officers seized Houston's registered firearm.[20] After the District Attorney declined to prosecute either charge, Houston requested the return of his weapon.[21] The District Attorney refused.[22]

Houston sued, claiming that the District Attorney's refusal to return his firearm violated, inter alia, rights guaranteed under the Second Amendment.[23] The district court dismissed the suit, holding that Houston's "Second Amendment right to bear arms was not violated because [he] does not have a Second Amendment right to the particular firearm seized, and . . . is not prohibited from acquiring another firearm."[24]

The Fifth Circuit upheld the dismissal of Houston's claims.[25] Citing tests from the D.C., Third, Fourth, Seventh, and Tenth Circuits, the majority stated that before determining the appropriate standard of review, it needed to establish whether the right to own a particular firearm was even encompassed within the Second Amendment.[26] The majority noted that the "'central'" element of the Second Amendment right is the "'lawful purpose of self-defense'"[27] and held that a "property-like right to a specific firearm" does not fall within the scope of a right to self-defense where the government does not prevent an individual from "'retaining or acquiring other firearms.'"[28]

## II. DECONSTRUCTING *HOUSTON*: A CRITICAL ANALYSIS

As with earlier cases dealing with the "specific firearm" question, the

17. No. 09-2798, 2009 WL 6614992, at *10 (E.D. Pa. June 18, 2009).
18. Id.
19. Houston v. City of New Orleans, No. 09-4245, slip op. at 1 (E.D. La. Sept. 20, 2010).
20. Id.
21. Id.
22. Id. at 2.
23. Id. at 3.
24. Id. at 7–8.
25. Houston v. City of New Orleans, 675 F.3d 441, 445 (5th Cir. 2012), withdrawn, No. 11–30198, 2012 WL 1839398 (5th Cir. May 22, 2012).
26. Id. (citing Heller v. District of Columbia, 670 F.3d 1244, 1251–52 (D.C. Cir. 2011); Ezell v. City of Chicago, 651 F.3d 684, 701–02 (7th Cir. 2011); United States v. Chester, 628 F.3d 673, 689 (4th Cir. 2010); United States v. Reese, 627 F.3d 792, 800–01 (10th Cir. 2010); United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010)).
27. Id. (quoting District of Columbia v. Heller, 554 U.S. 570, 628–30 (2008)).
28. Id. (quoting Walters v. Wolf, 660 F.3d 307, 318 (8th Cir. 2011)).

majority opinion in *Houston*, while ultimately arriving at the correct result, was undertheorized. Consequently, the dissent's lengthy rebuttal may appear at first blush more convincing than it truly is. Part II.A identifies the gaps in the majority's argument. Part II.B directly responds to the dissent's argument that the Second Amendment encompasses a right to a specific firearm.

### A. *The Majority Wrongly Cries* Wolf

As the sole support for the point that the Second Amendment does not protect a right to a specific firearm, the court cited the Eighth Circuit's decision in *Walters v. Wolf*.[29] In *Wolf*, the majority noted that the government's policy of refusing to return lawfully seized firearms without a court order resulted in the loss of only "*one* of Walters's firearms . . . [and] did not prohibit Walters from retaining or acquiring other firearms."[30]

*Wolf*, however, is insufficient to bolster the Fifth Circuit's assertion about the scope of the Second Amendment. First, the Eighth Circuit found that the government's policy had violated Walters's procedural due process rights under the Fourteenth Amendment. It believed that "Walters's valid Due Process claim addresses the gravamen of his complaint . . . [i.e.,] a meaningful procedural mechanism for return of his lawfully seized firearm."[31] Thus, the Second Amendment claim was less pressing in that case than it was in *Houston*, where the issue was squarely presented.[32] Second, the *Wolf* court refused to categorically state that the deprivation of a specific firearm could *never* implicate the Second Amendment—instead it held that "on this record, Walters has failed to make such a showing."[33]

Thus, while this piece argues that the *Houston* majority reached the correct result, because it essentially relied exclusively on *Wolf* to make its point, it failed to adequately support the notion that the Second Amendment does not protect a right to a specific firearm. Nor did it properly grapple with the dissent's arguments that the scope of the Second Amendment right should be determined by examining text and history, or that the majority's view of the Second Amendment contrasted with existing understandings of the scope of the First and Fourth Amendment rights. Due to these gaps in the majority's opinion, the dissent's arguments appear more compelling than they truly are.

### B. *A Critique of the Dissent: Text, History, and "Second-Class Right[s]" Reconsidered*

Judge Jennifer Elrod, adopting the text- and history-focused test

29. Id.

30. *Wolf*, 660 F.3d at 318.

31. Id. at 317.

32. In its analysis, the *Wolf* court cited *Garcha v. City of Beacon*, *McGuire v. Village of Tarrytown*, and *Bane v. City of Philadelphia*. *Wolf*, 660 F.3d at 316–17; see also supra Part I.B (discussing these cases).

33. *Wolf*, 660 F.3d at 318.

suggested in Judge Kavanaugh's dissent from the D.C. Circuit's decision on remand of *District of Columbia v. Heller*,[34] provided two counterarguments to the assertion that the Second Amendment does not protect a specific weapon. First, Judge Elrod argued that this assertion treated the Second Amendment as "'a second-class right subject to an entirely different body of rules than other Bill of Rights guarantees.'"[35] Second, she argued that the majority failed to undertake a historical and textual approach in determining the scope of the Amendment, as required by Supreme Court precedent.[36] This section will take up her two arguments in order.

1. *A Second-Class Right?* — According to the dissent, the majority's "*per se* exception for particular exercises of the right at stake (so long as other exercises of that right are permitted)" had never been applied to other enumerated Constitutional rights. In support of this position, Judge Elrod analogized to the potential absurdity of applying such a rule to other portions of the Bill of Rights, including the First Amendment: "Consider, for example, a court holding that the Free Speech Clause affords no protection against the government preventing publication of a particular editorial in the *New York Times* because there are plenty of other newspapers that might publish the piece."[37]

It is far from clear that this analogy proves the point that particular exercises of a constitutional right may not be subject to a per se exception. To begin, while numerous scholars have noted the congruity between the First and Second Amendments,[38] the comparison is imperfect at best. For example, the First Amendment does not permit total exclusion of particular groups of people (such as felons or the mentally ill) from its broad protection.[39] In addition, at least one commentator has argued that

34. Heller v. District of Columbia, 670 F.3d 1244, 1271–73 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("In my view, *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny.").

35. Houston v. City of New Orleans, 675 F.3d 441, 450 (5th Cir. 2012), withdrawn, No. 11–30198, 2012 WL 1839398 (5th Cir. May 22, 2012) (Elrod, J., dissenting) (quoting McDonald v. City of Chicago, 130 S. Ct. 3020, 3044 (2010)).

36. Id. at 449–50 ("*Heller* and *McDonald* require a textual and historical approach . . . .").

37. Id. at 450. Judge Elrod also analogized to "a court holding that the Fourth Amendment is inapplicable to the unreasonable seizure of a specific automobile so long as the government does not prevent the owner from borrowing, renting, or purchasing a replacement vehicle." Id. This analogy is inapt. The Fourth Amendment does not secure to the people the right to own, or drive, a car. It guarantees "the right of the people to be secure in their persons, houses, papers and effects . . . ." U.S. Const. amend. IV. The unreasonable seizure of a particular car impinges on that personal sphere regardless of the availability of alternate vehicular transportation. Reasonability is ascertained by balancing the interests at stake, not by applying a categorical rule. See infra note 46 (discussing Fourth Amendment balancing).

38. See, e.g., Joseph Blocher, Categoricalism and Balancing in First and Second Amendment Analysis, 84 N.Y.U. L. Rev. 375, 400–01 (2009) (discussing "dissent-promoting values" and "apparent textual similarities" of the two Amendments); Volokh, supra note 2, at 1458–59 (applying First Amendment principles to Second Amendment inquiry).

39. See United States v. Skoien, 614 F.3d 638, 650 (7th Cir. 2010) (Sykes, J., dissenting) ("[I]t is one thing to say . . . certain narrowly limited categories of speech have long been

the Second Amendment's "originalist categoricalism" (which does not permit judges to balance the governmental and individual interests at stake) is distinct from the First Amendment's "categoricalism" (which does).[40]

Furthermore, the Supreme Court has recognized exceptions to other enumerated rights. Consider that the Jury Clause of the Sixth Amendment provides that the accused has a right to an impartial jury "[i]n all criminal prosecutions," but the Supreme Court has held on numerous occasions that this right does not extend to so-called petty offenses.[41] Or consider that border searches are per se reasonable and, therefore, cannot violate the Fourth Amendment.[42]

Of course, Judge Elrod's precise argument is that the majority treats the Second Amendment as inferior by providing an exception for a specific exercise of the right *because* other exercises of that right are permitted.[43] That argument, however, reads the "second-class right" language of *McDonald* too stringently. In *McDonald*, the Court stated that creating a "special incorporation test applicable only to the Second Amendment" would, in effect, be treating the right as "second-class."[44] To do so, the Court would have needed to "disregard 50 years of incorporation precedent."[45] Although under this reasoning the various amendments must be subjected to the same incorporation analysis, it does not necessarily follow that the scope of the right guaranteed by each amendment must be measured in exactly the same manner.

In fact, the Supreme Court has evaluated the scope of different constitutional rights in different ways.[46] And existing precedent and commentary suggest that possession of a particular weapon may fall outside the contours of the Second Amendment—e.g., if such a weapon is unusual or dangerous.[47] A particular handgun may be an unprotected, dangerous weapon if, for example, its serial number has been

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understood to fall outside the boundaries of the free-speech right . . . . It is another to say that a certain category of *persons* has long been understood to fall outside . . . the Second Amendment . . . .").

40. Blocher, supra note 38, at 405.

41. See, e.g., Duncan v. Louisiana, 391 U.S. 145, 159 (1968) ("[T]here is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision.").

42. See United States v. Ramsey, 431 U.S. 606, 616 (1977) ("[S]earches made at the border . . . are reasonable simply by virtue of the fact that they occur at the border.").

43. Houston v. City of New Orleans, 675 F.3d 441, 450 (5th Cir. 2012), withdrawn, No. 11–30198, 2012 WL 1839398 (5th Cir. May 22, 2012) (Elrod, J., dissenting).

44. 130 S. Ct. 3020, 3046 (2010).

45. Id. at 3044.

46. Compare District of Columbia v. Heller, 554 U.S. 570, 634–35 (2008) (rejecting interest balancing test for determining Second Amendment's scope), with Hudson v. Palmer, 468 U.S. 517, 527 (1984) (stating determination of reasonable expectation of privacy for purposes of Fourth Amendment "necessarily entails a balancing of interests").

47. *Heller*, 554 U.S. at 626 (holding unusual or dangerous weapons unprotected by the Second Amendment); cf. Mullenix v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, No. 5:07-CV-154-D, 2008 WL 2620175, at *2 (E.D.N.C. July 2, 2008) (holding reproduction of World War II German machine gun not protected under Second Amendment).

obliterated.[48] While Houston's handgun was evidently lawfully registered, it is not clear that dangerousness alone delineates the bounds of the Second Amendment. The *Heller* Court held that the Second Amendment did not reach certain arms, including, presumably, semi-automatic assault weapons.[49] But as Professor Eugene Volokh has argued, "'[a]ssault weapons' are no more 'high power' than [legal guns]" and are often differentiated on the basis of "features that have little relation to dangerousness."[50] Even given a lack of dangerousness, Professor Volokh asserts that assault weapon bans may be constitutional precisely because other, presumptively constitutional, weapons are available and these weapons are equally effective when engaging in self-defense.[51] If this reasoning is correct, it should apply with equal force to a particular, lawful, non-dangerous handgun.

There are, however, at least two alternate understandings of how assault weapon bans interact with the Second Amendment. The first is that narrow bans on particular types of assault weapons are unconstitutional, a result that contradicts the D.C. Circuit's ruling when it heard *Heller* on remand.[52] The second is that bans may be constitutional because an assault weapon can be dangerous due to something other than functionality: for example, the preference of criminals for using such guns.[53] But if dangerousness for Second Amendment purposes is measured by something beyond functionality, then Houston's handgun might well be considered dangerous: It is a weapon confiscated as part of a legitimate arrest and it might still be used in prosecuting Houston for the activities that led to that arrest.[54] Thus, even under this alternate approach to evaluating dangerousness, Houston likely had no right to the particular gun at the center of his case.

2. *Does the Second Amendment Create a "Property-Like Right to a Specific Firearm?"* — Judge Elrod's dissenting opinion criticized the majority for failing to provide evidence based on "text and history" for "this exception to the Second Amendment."[55] While text and history are

48. United States v. Marzzarella, 614 F.3d 85, 95 (3d Cir. 2010).

49. A full discussion of the constitutionality of assault weapon bans is beyond the scope of this piece but it is significant that on remand in *Heller* the D.C. Court of Appeals upheld the District of Columbia's ban on semi-automatic rifles. Heller v. District of Columbia, 670 F.3d 1244, 1262–64 (D.C. Cir. 2011).

50. Volokh, supra note 2, at 1484.

51. Id.; cf. *Heller*, 670 F.3d at 1268 (distinguishing handguns from semi-automatic rifles because while handguns are a "'quintessential' self-defense weapon . . . [t]he same cannot be said of semi-automatic rifles").

52. See *Heller*, 670 F.3d at 1262–64. Judge Kavanaugh dissented on the grounds that "[i]t follows from *Heller*'s protection of semi-automatic handguns that semi-automatic rifles are also constitutionally protected." Id. at 1270 (Kavanaugh, J., dissenting).

53. Id. at 1262–63 (majority opinion).

54. Because the District Attorney had "nolle prossed" the charges against Houston, rather than dismissing them, the D.A. retained the ability to prosecute Houston until the statute of limitations expired. Houston v. City of New Orleans, No. 09-4245, slip op. at 7 (E.D. La. Sept. 20, 2010).

55. Houston v. City of New Orleans, 675 F.3d 441, 448 (5th Cir. 2012).

certainly central to Second Amendment analyses, Judge Elrod's method for allocating the burden of proof for determining whether the Second Amendment protects conduct beyond the core home/self-defense/handgun scenario—i.e., a party has an obligation to demonstrate via text and history that conduct involving firearms falls *outside* the Second Amendment's scope (as opposed to an obligation to demonstrate via text and history that conduct *is* protected by the Second Amendment)[56]—appears flawed for two reasons.

First, the *Heller* Court acknowledged that the conduct protected by the Amendment "is not unlimited" and carefully set out a narrow definition of the core right. Both *Heller* and *McDonald* identified "individual self-defense" as the "core component" of the right guaranteed by the Second Amendment, and it is that specific protection that was incorporated against the states.[57] The sense of caution the Court demonstrated in narrowly defining the right suggests lower courts should be hesitant to expand the Second Amendment's scope and should not simply assume that any firearm-related act is protected unless it falls into the enumerated *Heller* exceptions or it is explicitly proven that it is not protected.

Second, although the *Heller* majority suggested that "exhaustive historical analysis" could determine "the full scope" of the Amendment's protection,[58] the notion that its scope can be ascertained solely by examining existing law and custom in place at the time of its ratification is belied by other portions of the majority opinion.[59] The Seventh Circuit, among others, has explicitly "rejected the notion that only exclusions in existence at the time of the Second Amendment's ratification are permitted."[60] For example, *Heller* recognizes that "longstanding" regulations prohibiting felons and the mentally ill from possessing firearms are presumptively lawful.[61] But, as the Fourth Circuit noted, federal statutes prohibiting felons from possessing firearms only appeared in the last century and the evidence regarding "whether felons were protected by the Second Amendment at the time of its ratification is

56. See also Ezell v. City of Chicago, 651 F.3d 684, 702–03 (7th Cir. 2011) (placing burden on government to establish that relevant statute or government action "regulates activity falling outside the scope of the Second Amendment right").

57. McDonald v. City of Chicago, 130 S. Ct. 3020, 3047 (2010) (quoting District of Columbia v. Heller, 554 U.S. 570, 599 (2008)).

58. *Heller*, 554 U.S. at 626.

59. See, e.g., Carlton F.W. Larson, Four Exceptions in Search of a Theory: *District of Columbia v. Heller* and Judicial *Ipse Dixit*, 60 Hastings L.J. 1371, 1372 (2009) ("The *Heller* exceptions lack the historical grounding that would normally justify an exception to a significant constitutional right. Whatever the Court is doing here, it is not rigorously grounded in eighteenth-century sources.").

60. United States v. Yancey, 621 F.3d 681, 683 (7th Cir. 2010) (explaining "[i]t was not until 1968 that Congress barred the mentally ill from possessing guns, and it was in that same legislation that habitual drug abusers were prohibited from having guns" (citations omitted)).

61 *Heller*, 554 U.S. at 626–27.

inconclusive."[62] Further, relying on the length of time that a statute has been codified to determine whether a firearm regulation is valid (i.e., arguing that a gun law is valid because it has been in place for nearly a century and thus is "longstanding") leads to an incongruous result: "It would be weird to say that [a firearm regulation enacted in 1996] is unconstitutional in 2010 but will become constitutional by 2043, when it will be as 'longstanding' as [the first federal felon dispossession statute] was when the Court decided *Heller*."[63]

The remainder of this subpart will assume that establishing that the Second Amendment protects an absolute "property-like" right to a particular firearm requires affirmative textual and historical evidence.[64] Accordingly, a proponent of the view that the Second Amendment does not protect an individual's property right in a particular firearm need only show that the relevant textual and historical evidence is inconclusive.

a. *The Text of the Second Amendment*. — The plain language of the Amendment protects the right to bear "*Arms*" rather than a single or particular weapon.[65] Significantly, at least one prominent member of the Revolutionary War generation proposed adding a provision to the 1789 Constitution that would have protected the right of the people to keep "their own arms,"[66] but this language was not used in the Second Amendment. Indeed, the *Heller* Court's various explications of the right suggested that it was meant to protect access to weapons in general.[67] As the *Houston* majority observed in passing, the Court primarily focused on the Amendment as a right "to keep and bear arms" as a means of providing for the end of "self-defense."[68]

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62. United States v. Chester, 628 F.3d 673, 679 (4th Cir. 2010); see also C. Kevin Marshall, Why Can't Martha Stewart Have a Gun?, 32 Harv. J.L. & Pub. Pol'y 695, 697 (2009) ("[A] lifetime ban on any felon possessing any firearm is not 'longstanding' in America.").

63. United States v. Skoien, 614 F.3d 638, 641 (7th Cir. 2010) (en banc) (Easterbrook, J.). Some Burkeans might disagree with Judge Easterbrook's conclusion, but scholars have noted that Burkean interpretation is perhaps most appropriate in the separation of powers and national security contexts. See Cass Sunstein, Burkean Minimalism, 105 Mich. L. Rev. 353, 361, 405–07 (2006).

64. Cf. Lawrence Rosenthal & Joyce Lee Malcolm, *McDonald v. Chicago*: Which Standard of Scrutiny Should Apply to Gun-Control Laws?, 105 Nw. U. L. Rev. Colloquy 85, 91–92 (2010), available at http://www.law.northwestern.edu/lawreview/colloquy/2010/24/LRColl2010n24Rosenthal&Malcom.pdf (on file with the *Columbia Law Review*) ("Commentators have suggested that the Court took a categorical approach in which 'core' Second Amendment interests receive something close to absolute protection, while more penumbral interests are subject to greater regulation.").

65. Cf. Volokh, supra note 2, at 1548 ("[T]he right to keep and bear arms in self-defense should be understood as protecting a right to own some arms that amply provide for self-defense, not a right to own any particular brand or design of gun.").

66. 6 Documentary History of the Ratification of the Constitution 188 (John P. Kaminski et al. eds., 1995).

67. See, e.g., 554 U.S. 570, 582 (2008) ("[T]he most natural reading of 'keep Arms' in the Second Amendment is to 'have weapons.'"); see also id. at 581 ("The term was applied, then as now, to *weapons* that were not specifically designed for military use and were not employed in a military capacity." (emphasis added)).

68. Houston v. City of New Orleans, 675 F.3d 441, 445 (5th Cir. 2012) (citing *Heller*, 554 U.S. at 628–30). An amicus brief filed by the NRA compared the government's refusal to

Further, the text of the Second Amendment should be evaluated in light of other Bill of Rights provisions.[69] First, the Framers knew how to write an Amendment that protects a specific piece of property from government interference, as the Third Amendment provides that "no Soldier shall, in time of peace be quartered in any *house*, without the consent of the Owner . . . ."[70] The Second Amendment does not use such explicit language to protect "the right of the people" to own a particular gun, and thus should not be interpreted to grant such a right.

Second, the Bill of Rights includes several provisions that discuss property rights more generally—the Fourth Amendment and the Fifth Amendment's Takings Clause and Due Process Clause.[71] In light of the absence of explicit property-rights language in the Second Amendment, these three provisions seem to be the more natural place for someone in Houston's position to look for constitutional protection. Thus, he may very well have a right to due process (or possibly just compensation) before his gun could constitutionally be held indefinitely but this right would be derived from the Fifth Amendment, not the Second.[72]

Even if the Second Amendment does provide some kind of property right, it is instructive that none of the Bill of Rights provisions that explicitly protect property from government seizure provide absolute protection to property owners. If the government takes private property for public use, it must provide "just compensation." Otherwise, the government may by implication "deprive[]" an individual of property so long as the seizure is not "unreasonable" and he or she receives "due process of law."[73] Thus, even if the Second Amendment provides an individual with some type of "property-like" protection for her personal firearm, that protection is likely subject to limitations.

b. *The History of the Second Amendment*. — The history surrounding the question of whether the Second Amendment protects a property-like

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return Houston's gun to a government ban on a "particular book." Brief Amicus Curiae of the National Rifle Ass'n of America in Support of Appellant and in Support of Reversal at 10, Houston v. City of New Orleans, 675 F.3d 441 (5th Cir. 2012) (No. 11–30198), withdrawn, 2012 WL 1839398 (5th Cir. May 22, 2012) [hereinafter Brief Amicus Curiae]. But if a book (say *Huckleberry Finn*) was banned, an individual would not be able to obtain a copy through legal means. Here, if the police had acted the same way toward a copy of *Huckleberry Finn* owned by Houston as they did toward his gun (i.e., seized and refused to return it), Houston still would have been able to go out to the bookstore and buy another copy, just as he could still have bought another nearly identical gun.

69. For example, the *Heller* majority catalogued other provisions in the Bill of Rights beyond the Second Amendment that employ the phrase "the right of the people" in order to demonstrate that the term is used to "refer to individual rights, not . . . rights that may be exercised only through participation in some corporate body." *Heller*, 554 U.S. at 579.

70. U.S. Const. amend. III (emphasis added). See generally Thomas G. Sprankling, Note, Does Five Equal Three? Reading the Takings Clause in Light of the Third Amendment's Protection of Houses, 112 Colum. L. Rev. 112 (2012).

71. U.S. Const. amend. IV; id. amend. V.

72. Indeed, Houston initially filed claims alleging that the government's actions violated the Due Process and Takings Clauses.

73. See U.S. Const. amend. IV; id. amend V.

right in an individual handgun is inconclusive and thus does not support Houston's claim.[74] In *Heller* and *McDonald*, the Court relied heavily on historical evidence ranging from British understandings of the right in the years before the Revolutionary War to the understandings of the right in the era immediately preceding the passage of the Fourteenth Amendment. True, the Seventh Circuit noted in a recent opinion that "when state- or local-government action is challenged, the focus of the original-meaning inquiry is carried forward in time; the Second Amendment's scope as a limitation on the States depends on how the right was understood when the Fourteenth Amendment was ratified."[75] Still, the *Heller* Court determined that the text of the Amendment "codified a *pre-existing* right"[76] and thus earlier writings are still relevant in determining the basic scope of the provision.[77] Therefore, it is significant that pre-Revolutionary War writings "understood the right [secured by the Second Amendment] to enable individuals to defend themselves."[78] For example, Blackstone conceptualized the right to keep and bear arms as "the natural right of resistance and self-preservation[;] . . . the right of having and using arms for self-preservation and defense."[79] Thus, as long as someone like Houston is able to purchase a replacement handgun even after the police confiscated his original weapon, his Second Amendment rights have not been infringed.[80]

## III. FOLLOWING IN THE SUPREME COURT'S FOOTSTEPS: A MINIMALIST APPROACH TO THE SECOND AMENDMENT

This Part briefly lays out the standard that federal courts should employ when determining whether to read the Second Amendment right to encompass protections not articulated in *Heller*. In the over four years since *Heller* was decided, few circuit courts have chosen to specify precisely what firearm-related conduct is protected by the Second Amendment beyond the core right.[81] Such judicial restraint is laudable.

74. The NRA's twenty-seven page amicus brief included a little less than five pages of largely anecdotal historical evidence, which lacked an explicit statement from an authoritative source that the Framers intended the Second Amendment to extend to Houston's case. Brief Amicus Curiae, supra note 68, at 11–16.

75. Ezell v. City of Chicago, 651 F.3d 684, 702 (7th Cir. 2011).

76. District of Columbia v. Heller, 554 U.S. 570, 592 (2008) (emphasis added).

77. It is also significant that the *McDonald* Court emphasized that the Second Amendment extended the same level of protection in both the federal and the state/local context. McDonald v. City of Chicago, 130 S. Ct. 3020, 3048 (2010). This statement is difficult to square with the Seventh Circuit's suggestion that the Second Amendment as applied against the states relies on different historical understandings than it does when applied against the federal government.

78. *Heller*, 554 U.S. at 595.

79. Id. at 594 (quoting 1 William Blackstone, Commentaries *136, *139–*140).

80. Cf. Walters v. Wolf, 660 F.3d 307, 318 (8th Cir. 2011) (finding no Second Amendment violation where city government seized one of defendant's firearms but "did not prohibit [the defendant] from retaining or acquiring other firearms").

81. See, e.g., United States v. Masciandaro, 638 F.3d 458, 475 (4th Cir. 2011) ("The whole matter [of whether the Second Amendment's protection extends beyond the home]

The Supreme Court itself has tread cautiously in explicating the rights affirmatively protected by the Second Amendment. Following the test implicitly suggested by the *Houston* dissent, however, would grant Second Amendment protection to nearly any firearm-related conduct unless it is explicitly proven that text and history demand a different result.[82] As the Supreme Court's caselaw, the decisions of lower federal courts, and the Fifth Circuit's withdrawal of the *Houston* opinion all indicate, unless and until the nation's highest court chooses to move forward, lower courts should refrain from enlarging the scope of the Second Amendment right.[83]

To advocate that the lower courts should move slowly is not to argue that they should be inert. There may be circumstances where the Amendment's text and history make it very clear that a particular form of firearm-related conduct is constitutionally protected. As discussed above, if an individual litigant can provide significant, affirmative historical and textual evidence that indicates that her conduct is protected by the Second Amendment, the lower federal courts should recognize the right. Indeed, at best it would be a violation of the spirit of *Heller* and *McDonald* not to do so. But, if the evidence is inconclusive, lower courts should refrain from expanding the scope of a right that the Supreme Court has only recently revitalized.

## CONCLUSION

The *Houston* majority opinion and other lower federal courts to consider the issue have reached the correct conclusion—the Second Amendment does not encompass a right to a specific firearm. More importantly, these decisions demonstrate admirable restraint, even though they lack satisfying analytical frameworks. Moving forward, lower federal courts should chart a cautious course when expanding the scope of the Second Amendment, recognizing a new right only when a litigant can provide significant, affirmative historical and textual evidence that certain firearm-related conduct is encompassed within the right to keep and bear arms.

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Preferred Citation: John L. Schwab & Thomas G. Sprankling, Houston*, We Have a Problem: Does the Second Amendment Create a Property Right to a*

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strikes us as a vast *terra incognita* that courts should enter only upon necessity and only then by small degree.").

82. This is not to say that the Second Amendment could never extend to protect a particular firearm from seizure by the government. Cf. *Wolf*, 660 F.3d at 318 (noting that city had not prevented defendant from "retaining or acquiring other firearms" after initial seizure). This protection, however, would be derived from the *Heller* holding rather than the notion that the Second Amendment creates a "property-like" right to a specific firearm.

83. But see Case Comment, Fourth Circuit Upholds Federal Firearms Regulation: *United States v. Masciandaro*, 125 Harv. L. Rev. 843, 846 (2012) ("[T]he federal courts of appeals should actively address Second Amendment constitutional questions . . . .").

*Specific Firearm?*, 112 COLUM. L. REV. SIDEBAR 158 (2012), http://www.columbialawreview.org/assets/sidebar/volume/112/158_Schwab.pdf