

# LEGISLATING JUDICIAL REVIEW: AN INFRINGEMENT ON SEPARATION OF POWERS

*Holly Martin\**

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## INTRODUCTION

Today's government is rife with conflict. Every day we hear about struggles between political parties, between Congress and the president, between states and the federal government, and we consider

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how they affect the day-to-day lives of Americans. This Note analyzes another important conflict—separation of powers between the judicial and legislative branches—through the lens of a Louisiana constitutional amendment.<sup>1</sup> Passed by the Louisiana legislature and approved by a majority of citizens, the amendment says that the state courts must review all gun-related laws under a strict scrutiny standard.<sup>2</sup> Few laws emerge intact after undergoing judicial review according to this rigorous test, so there is a danger that Louisiana’s amendment will result in a significant relaxation in gun control in what is already a permissive state.<sup>3</sup> The consequences of this leniency are not only a threat to public safety in Louisiana but could impact the safety of citizens nationwide.<sup>4</sup>

In Part I, this Note analyzes the extent to which a legislature should be allowed to involve itself in the process of judicial review. Part I.A begins with an overview of the general theory of separation of powers and how it came to be incorporated into the state and federal constitutions of the United States. Part I.B looks in-depth at how the Louisiana state government specifically has implemented this theory. To simplify matters temporarily, Part I.C imagines a separation of powers challenge against an unconstitutional law rather than against an amendment and explains how such a claim may be brought. In Part II, this Note transitions to discuss the additional complications that arise when we talk about challenging, as in Louisiana, an unconstitutional constitutional amendment. Part II.A discusses the relatively uncontroversial method of procedural review by which the judiciary may strike down an amendment for failing to comply with the law during the amendment process. Part II.B then challenges the conventional wisdom that courts should not be able to review the substance of constitutional amendments. In support of this contention, Part II.C looks to the international community to find countries that incorporate substantive judicial review into their amendment processes and how their governments make use of that review.

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1. The fact that Louisiana uses a civil law rather than a common law system is not the topic of this Note and does not affect its substantive analysis.

2. LA. CONST. art. I, § 11.

3. Louisiana is tied in its rank as 47th out of 50 for states with good gun safety by the pro-gun control organization, the Brady Campaign. See *Brady Campaign 2013 Scorecards*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, <http://www.bradycampaign.org/sites/default/files/2013-scorecard.pdf> (last visited Nov. 5, 2014).

4. *Reciprocity Map of the United States*, GUN LAWS BY STATE, <http://www.gunlawsbystate.com/reciprocity-map/> (last visited Oct. 29, 2014) (displaying the fact that an individual who legally obtained a gun in one state may carry it to many other states).

This Note concludes that it is a violation of the principle of separation of powers for the legislature to instruct the judiciary as to what standard of review it ought to apply to any given law. This encroachment on judicial autonomy is sufficient to successfully challenge a law mandating the courts apply strict scrutiny to any gun-related law. Such an abuse should also be a basis upon which to challenge a constitutional amendment. The judicial branch should be able to substantively review amendments and strike them down for violating the underlying principles of government described in the pre-amended constitution.

## I.

### SEPARATION OF POWERS

#### A. *Judicial Review and the Balance Between Courts and the Legislature*

##### i. *History of Separation of Powers*

The roles laid out for each branch of government in the first three articles of the United States Constitution set the framework for the balance of power between those branches.<sup>5</sup> The choice to separate power into three branches in this manner was largely a result of centuries of struggle in many nations to construct a successful and stable government.<sup>6</sup> Though certainly influenced by this long history, the Framers' most immediate inspiration came from the prevailing model in eighteenth century England – the balanced constitution.<sup>7</sup> This model combined the traditional concept of mixed government with the ideas of separation of powers and legislative supremacy.<sup>8</sup> The balanced constitution reflected significant changes that the English government sought to incorporate following the Restoration at the end of the seventeenth century, which included increasing legislative power

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5. U.S. CONST. arts. I–III.

6. See generally 6 POLYBIUS, *THE HISTORIES*, (F.W. Walbank et al. eds., W.R. Paton trans, Harvard Univ. Press, 2012) (c. 146 B.C.E.) (prescribing a blended form of government that mixed democratic, monarchical, and aristocratic principles); NICCOLO MACCHIAVELLI, *DISCOURSES UPON THE FIRST TEN BOOKS OF TITUS LIVY 2–20* (Univ. of Chicago Press 1998) (1517) (struggling with how to apply classical political theory to a modern state); 11 MONTESQUIEU, *THE SPIRIT OF LAWS* (Cambridge University Press 1989) (1748) (arguing that England, with its republican form of monarchy, is the closest thing to an ideal government).

7. See M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 59 (2d ed. 1998).

8. *Id.* at 59 (describing how the three main classes of society—the monarchy, the aristocracy, and the commoners—translated into three branches of government and became the basis for the theory of the balanced constitution, which prevailed in England in the eighteenth century and shaped the formation of the American counterpart).

and preventing the King from superseding the supremacy of the law.<sup>9</sup> Elevating the rule of law above the monarch led to a newfound recognition that the courts ought to be able to decide the law independently of the King's influence.<sup>10</sup> Importantly, even the judiciary's increasing independence and autonomy emphasized legislative dominance as the House of Lords initially subsumed this "fourth branch."<sup>11</sup> As the American colonists began to establish their own governments, they adapted and applied the theory of the balanced constitution to fit their own circumstances.<sup>12</sup>

When the balanced government model was translated into the American context, it required reinterpretation.<sup>13</sup> Of the three main elements of the balanced constitution, separation of powers came to dominate the American model.<sup>14</sup> One reason for this was that American society was not comprised of the same social stratification as English society, and so there was a lesser need for the mixed government that prevailed in England to avoid class domination.<sup>15</sup> In America, the election of each member of government was dependent upon the same population of citizens regardless of which branch he served. Another reason that separation of powers became the predominant element of the balanced constitution was that the Americans who were attempting to structure new governments in the mid-eighteenth century were not comfortable with the idea of a supreme legislature.<sup>16</sup> They were simultaneously wary of a powerful executive—akin to a monarch—and a

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9. *Id.* at 58.

10. *See* Act of Settlement, 1701, 12 & 13 Will. 3, c. 2 (ensuring judicial independence by declaring that judges may remain in their positions during good behavior).

11. VILE, *supra* note 7, at 59–60; *see also supra* note 10 and accompanying text (providing that judges may only be removed by both Houses of Parliament).

12. *Id.* at 135 ("The remarkable achievement of the Americans was that they not only accepted and understood the constitutional theory and experience that they were heirs to, but that they took this heritage and refashioned it, effectively and successfully, to meet a new and extraordinarily difficult situation.").

13. *See* Robert J. Natelson, *The Constitutional Contributions of John Dickenson*, 108 PENN. ST. L. REV. 415, 442 (2003) (highlighting the importance the founders placed on institutionalizing "tension between the branches of government" in order to preserve governmental integrity).

14. VILE, *supra* note 7, at 166 ("Whereas in contemporary England the separation of powers was a necessary, but subordinate, element of a system in which three classes check and balance each other, in America the checks and balances became a necessary, but subordinate, element of a system in which the functionally divided branches of government can maintain their mutual independence.").

15. Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 215–16 (1989) (discussing how mixed government in Europe was largely aimed at balancing different classes and interests).

16. THE FEDERALIST NO. 48 (James Madison) (expressing wariness that the "legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex").

powerful legislature, the branch that traditionally represented the aristocracy.<sup>17</sup> Even though the class-based motivation behind dividing the legislature into two houses that guided the mixed constitution did not exist in the United States, the framers nevertheless divided the branch in order to limit the potential for tyranny available to the legislature.<sup>18</sup> This hesitation to imbue the legislature with supreme power manifested itself in its relationship with what would become the third branch of government—the judiciary. Similar to how the government treated the judiciary in England, the judiciary was initially seen as a subset of the legislature in the United States as well.<sup>19</sup> However, American courts were also separated and elevated above the legislature; they were seen as a place where the people could judge whether any given law the legislature passed was indeed in the name of the public good.<sup>20</sup> Thus, the concept of separation of powers emerged in the American context with a specific wariness towards legislative supremacy as well as a particular eye towards independence with respect to the judiciary.

## ii. *Development of Judicial Review*

Once the United States Constitution was written and ratified, each branch of government quickly began carving out powers for itself that did not neatly fit within the article that governed it. A strong example of this effort, the landmark case of *Marbury v. Madison*, took place only fourteen years after the adoption of the Constitution and established the Supreme Court's power of judicial review.<sup>21</sup> In this decision, the Supreme Court interpreted the language of the Constitution as granting it the final word on the constitutionality of laws passed by Congress or state legislatures.<sup>22</sup> The Constitution did not explicitly outline this power, but nonetheless it is a power we have come to understand the Supreme Court to possess, almost without

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17. See VILE, *supra* note 7, at 132 (arguing that the major characteristic of the new American constitution was a resistance to monarchical and aristocratic power).

18. THE FEDERALIST NO. 51 (James Madison) (“In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election, and different principles of action, as little connected with each other, as the nature of their common functions, and their common dependence on the society, will admit.”).

19. See VILE, *supra* note 7, at 153.

20. See James Otis, *Rights of the British Colonies Asserted and Proved* (1764), reprinted in THE U.S. CONSTITUTION: A READER 73, 77–78 (Hillsdale College Press 2012), available at <http://cdn.constitutionreader.com/files/pdf/constitution/ch12.pdf>.

21. See *Marbury v. Madison*, 5 U.S. 137, 178 (1803).

22. *Id.*

question.<sup>23</sup> The entire U.S. judicial system is built on the principle of judicial review, even though it constitutes an expansion of the powers originally outlined in Article III.

One way to understand our compliance with this expansion in context is as an expression of the fear that the Constitution gave too much power to the legislative branch.<sup>24</sup> In fact, many of the Framers wanted to limit this constitutional grant of power as much as possible. The development of judicial review as a powerful and central role for the judiciary demonstrates how even after the Constitution was written, each branch of government attempted to gain power for itself within the delicate separation of powers framework contained therein.<sup>25</sup>

### *iii. Sources of Judicial Power*

The legitimacy of judicial review and the legality of similar expansions of constitutional power remain topics that attract considerable debate despite their centrality to our system of government.<sup>26</sup> Realistically, the power the Supreme Court possesses to provide the final word on constitutionality exists only because the other branches, and the American people, abide by that power; the Supreme Court has no army to enforce its decisions.<sup>27</sup> For example, during the Civil War, President Abraham Lincoln suspended the writ of habeas corpus despite Chief Justice Taney's decision that to do so was unconstitutional.<sup>28</sup> This episode demonstrates how little power the Court has to

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23. See Casper, *supra* note 15, at 221 (explaining that the separation of powers doctrine is not explicitly written into the text of the Constitution itself).

24. See Robert J. Reinstein, *Reconstructing Marbury*, 57 ARK. L. REV. 729, 735 (2005) (outlining the conventional wisdom that judicial review constituted a departure from parliamentary supremacy in England).

25. The idea that the branches of government have a political will of their own that needs to be contained is debatable. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2313 (2006) (arguing that the idea that the branches would check each other due to the political will and competition of each is erroneous and actually individual ambition is stronger than branch loyalty).

26. See, e.g., Ori Aronson, *Inferiorizing Judicial Review: Popular Constitutionalism in Trial Courts*, 43 U. MICH. J.L. REFORM 971, 971–72 (2010) (discussing the debate in U.S. legal scholarship over the legitimacy of judicial review).

27. Cf. ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND* 5 (2010) (arguing that the real constraints against the executive are extra-legal factors such as public opinion rather than legal ones such as the Constitution).

28. See *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487).

stop the President should he decide to act outside the constraints of the Constitution.<sup>29</sup>

Similarly, in perhaps the greatest modern challenge to judicial power, the Supreme Court saw massive resistance to its decision mandating public school desegregation in *Brown v. Board of Education*.<sup>30</sup> The Governor of Arkansas so opposed this decision that he sent troops from the Arkansas National Guard to Central High School in Little Rock to prevent African American students from entering.<sup>31</sup> Students were allowed into the school only after the district court issued an injunction stating that the Governor was obstructing court orders and directing the Governor to withdraw the troops.<sup>32</sup> At the same time, President Eisenhower sent federal troops to Arkansas to control the situation.<sup>33</sup> Following this incident, the Supreme Court issued a historic affirmation of judicial supremacy, restating that it is “emphatically the province and duty of the judicial department to say what the law is” and that the “interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land.”<sup>34</sup> Perhaps the Supreme Court felt a particularly strong need to assert its authority because the events in Little Rock revealed how limited its power was in the face of open defiance to its decisions. If the Arkansas Governor had refused to abide by the district court injunction or if President Eisenhower had not stepped in with federal troops, it is unclear how the supreme law issued in *Brown* would have withstood reality. As these examples demonstrate, the separation of power between the three branches may exist in large part only because each branch implicitly consents for it to remain. The consensual nature of separation of powers is evident in today’s government as well. The dramatic expansion of the executive branch that took place during the twentieth century through the formation of agencies reflects an effort by that branch to encroach on the power of Congress.<sup>35</sup> The extent to which Congress is willing to cede that power, by authorization

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29. See Emanuel Margolis, *National Security and the Constitution: A Titanic Collision*, 81 CONN. B.J. 271, 275–76 (2007) (providing a historical account of the *Ex parte Merryman* decision and President Abraham Lincoln’s subsequent actions).

30. See *Brown v. Board of Education*, 347 U.S. 483 (1954).

31. See *Cooper v. Aaron*, 358 U.S. 1, 9 (1958) (recounting the events that led to this case being brought to the Supreme Court).

32. *Id.* at 11–12.

33. *Id.*

34. *Id.* at 18.

35. See Richard A. Epstein, *Why the Modern Administrative State Is Inconsistent with the Rule of Law*, 3 N.Y.U. J.L. & LIBERTY 491, 496 (2008) (correlating the expansion of administrative agencies in the twentieth century with increasing government power generally).

through legislation, emphasizes the idea that the true source of power contained within any branch of government does not come from the Constitution so much as from the tacit permission of the other branches.

Centuries after the Supreme Court established its power of judicial review, it began to develop a doctrine of sorts to guide the exercise of that power. There now exist at least two standards for evaluating a law's constitutionality.<sup>36</sup> The Court applies a rational review standard to the large majority of laws. For a law to be deemed valid under this standard of review it must (1) be rationally related to (2) a legitimate government interest.<sup>37</sup> This test provides a relatively low bar that most laws easily pass. Strict scrutiny sits on the other end of the judicial review spectrum. For a law to meet this stronger standard, it must (1) be justified by a compelling government interest, (2) be narrowly tailored to achieve that interest, and (3) be the least restrictive means of doing so.<sup>38</sup> A law subjected to strict scrutiny is almost never held constitutional whereas one subjected to rational review almost always is.<sup>39</sup> The most fundamental example of laws subject to strict scrutiny stem from the line of cases beginning with *Brown v. Board of Education*, in which any laws that had to do with different treatment on the basis of race were analyzed according to this stricter standard and were found unconstitutional.<sup>40</sup>

The idea that judicial review may be stratified in this manner at all is controversial.<sup>41</sup> That the Supreme Court would develop standards for how to conduct judicial review was not a given. Indeed, there is nothing codified into law that dictates the manner in which to apply strict scrutiny or rational basis review. The judiciary was able to develop its own internal doctrine for the application of judicial review partially due to the idea of separation of powers. The legislative and executive branches tacitly accept the judiciary's expertise and comply with the results judicial review produces; if the Supreme Court de-

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36. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (setting up the framework for the process by which the Supreme Court will review some laws under closer scrutiny than others).

37. *Id.*

38. See *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (establishing the level of judicial review termed strict scrutiny).

39. See Gerald Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (describing the strict scrutiny standard as applied by the Warren Court as "'strict' in theory and fatal in fact").

40. See *Brown v. Board of Education*, 347 U.S. 483 (1954).

41. See generally Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1273–85 (2007) (analyzing the emergence of the strict scrutiny standard).

clares a law unconstitutional, then Congress abides by that decision. It stands to reason that since the other branches condone the idea that the Supreme Court has the right to develop a method for reviewing laws, then it must also have the power to conduct that evaluation in whatever way it sees fit. The Supreme Court determined that there ought to be a hierarchical structure for judicial review, established such a structure, and the judiciary is the only body to follow it.

If we accept the idea that judicial review is a doctrine that may be developed and honed, we must then ask who ought to participate in that process. The judiciary has expertise in the area of judicial review, especially after over two centuries of applying it, so perhaps we should trust that branch's judgment.<sup>42</sup> On the other hand, if we feel that the actions of the legislature represent the will of the people, we might not want the Supreme Court, which is not an elected body, interfering with that will. Indeed, the legislature has, at certain times throughout history, made attempts to limit the scope of judicial review. For example, in 1868, Congress proposed a law mandating that a two-thirds majority of the Supreme Court was necessary to declare any law unconstitutional.<sup>43</sup> The bill passed the House but died in the Senate. Part I.B will look at how legislatures today are still attempting to control what has traditionally been seen as the realm of the judiciary. This persistent struggle for power reflects the inherent tension between the branches that early Americans sought to resolve in writing their constitutions.

### B. *The Louisiana Amendment*

On March 1, 2012, Senator Neil Riser introduced Senate Bill 303 to the Louisiana State Senate.<sup>44</sup> The bill called for an amendment to Article 1, Section 11 of the state constitution, adding language that the right of each citizen to keep and bear arms is "fundamental" and that

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42. The branches frequently defer to each other in areas in which one branch has more expertise than another. See Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 89 VA. L. REV. 649, 663 (2000) (discussing the Court's deference to administrative interpretations in realms such as foreign affairs where the executive branch has expertise); Stephen Breyer, *The Executive Branch, Administrative Action, and Comparative Expertise*, 32 CARDOZO L. REV. 2189, 2193–95 (2011) (analyzing the deference courts grant to administrative decisions); Emily Hammond Meazell, *Presidential Control, Expertise, and the Deference Dilemma*, 61 DUKE L.J. 1763, 1764–65 (2012) (arguing that courts justify their deference to decisions made by administrative agencies because of the expertise those agencies possess).

43. BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT* 141 (1993).

44. S.B. 303, 2012 Leg., Reg. Sess. (La. 2012).

“any restriction on this right will be subject to strict scrutiny.”<sup>45</sup> As a legislative-referred constitutional amendment, the bill required a two-thirds vote in both houses, which it received in the House on May 24, 2012 and in the Senate (with a minor House amendment) five days later on May 29.<sup>46</sup> Throughout the spring and summer of 2012, enthusiasm for this proposed constitutional amendment grew. The NRA and a number of elected officials in the state including Governor Bobby Jindal threw their full support behind this “historic” effort to protect citizens’ right to arms.<sup>47</sup> Governor Jindal indicated that if the bill should pass the required statewide ballot measure in November 2012, he would sign it into law.<sup>48</sup> The ballot measure was approved by a 73% majority of Louisiana voters on November 6, 2012<sup>49</sup> and became effective in December of that year.<sup>50</sup>

Louisiana judges are already using “Constitutional Amendment 2,” as it came to be known, to strike down gun-related laws. The Criminal District Court for the Parish of Orleans heard a case just two months after Constitutional Amendment 2 became effective in which the defendant was charged with violating a state law, La. R.S. 14:95.1, which prohibited convicted felons from possessing firearms.<sup>51</sup> The defendant challenged the law as unconstitutional and pointed to the recently amended Article 1 Section 11 of the state constitution as the foundation of his argument.<sup>52</sup> The Court noted at the outset that statutes are usually presumed constitutional and that the burden is on the party challenging constitutionality to point to a specific constitutional provision that prohibits the legislative action. However, where the law in question is an infringement of a fundamental right, the government action is *not* presumed to be constitutional and will be upheld only if it passes strict scrutiny.<sup>53</sup> In this case, the District Court found that the

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45. *Id.* (“The right of each individual to keep and bear arms is fundamental and shall not be infringed. Any restriction to this right shall be subject to strict scrutiny.”).

46. *Id.*

47. *See Vote Yes on 2*, INT. FOR LEGISLATIVE ACTION, <http://www.nraila.org/YESon2> (last visited Oct. 29, 2014).

48. *Louisiana: Governor Jindal Announces Support of Constitutional Amendment*, INT. FOR LEGISLATIVE ACTION (Apr. 17, 2012), <http://www.nraila.org/legislation/state-legislation/2012/4/governor-jindal-announces-support-of-constitutional-amendment.aspx>.

49. *Official Election Results, Results for Election Date: 11/6/2012*, LOUISIANA SECRETARY OF STATE, [http://staticresults.sos.la.gov/11062012/11062012\\_Statewide.html](http://staticresults.sos.la.gov/11062012/11062012_Statewide.html) (last visited Oct. 29, 2014).

50. *See* LA. CONST. art. I, § 11.

51. *See State v. Draughter*, No. 512-135, 2013 WL 8180576, at \*1 (La. Crim. Dist. Ct. Mar. 22, 2013), *vacated*, 130 So.3d 855 (La. 2013).

52. *Id.*

53. *Id.*

right to bear arms is a fundamental right and that the law restricting that right does not pass strict scrutiny; it is not “narrowly tailored” because it applies to every felony in the criminal code. In dicta, the court further noted that it declined to “question the wisdom of fundamental law and frustrate the will of the people” by overstepping its role, which it saw as merely to interpret the legislative will.<sup>54</sup> Interestingly, Governor Jindal disagreed with the court’s ruling and stated that he believed the constitution was not in conflict with the law in question.<sup>55</sup>

On December 10, 2013, the Louisiana Supreme Court reversed the trial court’s decision.<sup>56</sup> Despite the fact that La. R.S. 14:95.1 had already been evaluated and upheld in 1977 under a reasonableness standard, the Louisiana Supreme Court evaluated the statute under the new strict scrutiny standard.<sup>57</sup> The court defined the scope of its inquiry as whether the law “unconstitutionally infringes upon Draughter’s right to possess a firearm as a convicted felon who was still under the state’s supervision but no longer in its physical custody.”<sup>58</sup> The key here was that the defendant committed the instant offense *while still on parole for his initial felony conviction*.<sup>59</sup> As to similarly situated felons still under state supervision, the court held that the statute does not unconstitutionally infringe upon the right to bear arms as secured by Article 1, Section 11 of the Louisiana Constitution.<sup>60</sup> La. R.S. 14:95.1 serves a compelling government interest, is narrowly tailored to serve that interest, and is thus upheld under a strict scrutiny evaluation.<sup>61</sup> Importantly, this decision leaves open the possibility that the law as applied to other categories of felons might be held unconstitutional in the future.<sup>62</sup>

Since Louisiana introduced its amendment, several other states have followed its example. In recent years, South Dakota, Illinois, Al-

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54. *Id.*

55. See Brandon Curran, *After Louisiana Constitutional Amendment Passes, Felons Petition State Courts for Gun Ownership Rights*, THE TULANE HULLABALOO (Apr. 4, 2013, 12:54 PM), <http://issuu.com/hullabaloo/docs/04.04.13>.

56. See *Draughter*, 130 So.3d at 855.

57. *Id.* at 863.

58. *Id.* at 867.

59. *Id.*

60. *Id.*

61. *Id.* at 867–68.

62. Since *Draughter*, the Louisiana Supreme Court has continued to uphold gun-control laws despite the legislature’s strict scrutiny mandate. In *Louisiana ex rel. J.M.*, the Louisiana Supreme Court overruled a lower court’s decision and held that statutes restricting handgun possession by a minor under 17 (LRS 14:95.8) and concealed carry (LRS 14:95(A)(1)) were constitutional even as interpreted under the 2012 amendment. See *Louisiana ex rel. J.M.*, 144 So.3d 853 (La. 2014).

abama, Iowa, Minnesota, Missouri, and Oklahoma have proposed bills similar to Louisiana's.<sup>63</sup> Thus far, only Alabama and Missouri have enacted these proposed amendments.<sup>64</sup> Oklahoma, like Louisiana, required the state population to vote on its referendum during a regular election in order to pass the amendment. Though the Oklahoma state legislature voted down the resolution, it is worth exploring the following procedural challenge to referenda that would require approval through an election by the people.

One possible objection that could have been brought against the Louisiana amendment, and still may be brought in Oklahoma, involves a procedural question about the language used in the statewide referendum. That language does not fully and accurately explain the measure's practical impact. The text of the Louisiana ballot measure read: "Do you support an amendment to the Constitution of the State of Louisiana to provide that the right to keep and bear arms is a fundamental right and any restriction of that right requires the highest standard of review by a court?"<sup>65</sup> Prior to this constitutional amendment, Louisiana courts had determined that gun-related laws ought to receive rational-basis scrutiny, a relatively easy bar for laws to meet.<sup>66</sup> However, it is much more difficult for a law to pass strict scrutiny. Without this background knowledge, it is somewhat misleading to voters to ask if all laws related to a right that they judge to be fundamental ought to be subjected to the highest level of scrutiny. Voters would likely agree with this language as applied to a whole slew of rights. Without knowing that consequently the courts would strike down virtually *all* laws related to gun ownership, the question be-

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63. See H.B. 8, 34th Leg. Assemb., Reg. Sess. (Ala. 2013); S. Con.Res. 12, 98th Gen. Assemb. (Ill. 2013) (adding that the right to bear arms is "fundamental and shall not be denied or infringed, and any restriction shall be subject to strict scrutiny"); H.J. Res. 4, 85th Gen. Assemb. (Iowa 2013); S.F. No. 2537, 87th Leg. Sess. (Minn. 2012); S.J. Res. 36, 97th Gen. Assemb., Reg. Sess. (Mo. 2014); H.R. Res. 1026, 54th Leg. (Okla. 2014) (listing as "fundamental right" to carry "handguns, rifles, shotguns, knives and other common arms" and subjecting regulations of that right to strict scrutiny); S.J. Res. 3, 88th Leg. Assemb. (S.D. 2013) (adding that the right to bear arms is "fundamental," it shall not be "infringed" and "[a]ny restriction of this right shall be subject to strict scrutiny").

64. See ALA. CONST. art. I, § 26; MO. CONST. art. I § 23.

65. S.B. 303, 2012 Leg., Reg. Sess. (La. 2012).

66. Evaluating gun-related laws under rational basis scrutiny is not inconsistent with the Supreme Court's decision in *McDonald v. City of Chicago*, which did not address the standard of review courts ought to apply in such cases. See Eugene Volokh, *McDonald v. City of Chicago and the Standard of Review for Gun Control Laws*, SCOTUSBLOG (June 29, 2010, 3:48 PM), <http://www.scotusblog.com/2010/06/mcdonald-v-city-of-chicago-and-the-standard-of-review-for-gun-control-laws/>.

comes whether Louisiana voters were given the opportunity to make an educated decision.

Louisiana law provides guidelines for the construction of state-wide ballot measures. All questions to be submitted to the voters in an election must be “comprised of simple, unbiased, concise, and easily understood language” and must be no longer than 200 words.<sup>67</sup> The Secretary of State is responsible for ensuring all ballot measures comply with the law, including that they are submitted in a timely fashion and that their language is finalized far enough in advance of the election in which they will appear.<sup>68</sup> There is some foundation in these guidelines for the argument that the language of Constitutional Amendment 2 is potentially biased and/or difficult to understand. Though at the time of writing there have not been any cases in Louisiana challenging referenda on these grounds, there is some case law in other states that raises similar issues.<sup>69</sup> In many of these cases, the challenged language was upheld despite hints of ambiguity, which indicates a potentially high bar for successfully challenging ballot language.<sup>70</sup>

However, there are some indications that the failure of language in a ballot measure to fully apprise voters of that measure’s implications could form the basis for a successful challenge. In one Ohio case, a zoning referendum was found to be too ambiguous and misleading because it did not disclose to voters the current state of the law and the changes being made to it.<sup>71</sup> Similarly, an Arkansas referendum was struck down despite factually correct language because it fell short of communicating an intelligible idea of the scope of the proposed law.<sup>72</sup> Thus, it is possible that the language in a proposed referendum—such as “fundamental right” and “strict scrutiny”—could be struck down despite being factually accurate because it fails to convey the full scope and impact of the proposal.

The challenge analyzed above is procedural, but the next question is what options exist to confront a constitutional amendment on

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67. LA. REV. STAT. ANN. § 18:1299.1 (2013) (the quoted language was added during the 2012 legislative session).

68. *Id.*; see also LA. REV. STAT. ANN. § 18:1300 (2013).

69. See, e.g., *Long v. City of Shreveport*, 151 La. 423, 435 (1921); *Kelly v. Vote Know Coalition of Maryland, Inc.*, 626 A.2d 959, 965 (Md. 1993); *Bergman v. Mills*, 988 S.W.2d 84, 91–92 (Mo. Ct. App. 1999).

70. See *Sitkans for Responsible Gov’t v. City & Borough of Sitka*, 274 P.3d 486, 488 (Alaska 2012) (construing ballot initiatives broadly to preserve them wherever possible).

71. See *Shelly & Sands, Inc. v. Franklin Cnty. Bd. of Elections*, 465 N.E.2d 883, 885 (Ohio 2003).

72. See *Shepard v. McDonald*, 70 S.W.2d 566, 567 (Ark. 1934).

substantive grounds. In Part II, this Note addresses in detail the additional complications that arise due to the nature of challenging a constitutional amendment. As a foundation for that discussion, Part I.C analyzes the specifics of bringing a separation of powers challenge against a law enacted by a legislature, state or federal, that mandates that courts apply a certain level of scrutiny when exercising judicial review.

### C. *Separation of Powers Challenges*

There is a fundamental difficulty in applying the typical understanding of judicial review, based in large part on *Marbury v. Madison*, to the evaluation of a separation of powers claim. Some take the view that in order to constitutionally challenge a law, you must be able to point to specific text in the Constitution that the law violates.<sup>73</sup> A legal claim ought to be as specific as possible, and it is unclear whether basing a claim in a background norm—foundational as it may be to our legal system—is valid. Another view, however, is that constitutional statutory interpretation should not be limited to the literal language contained in discreet clauses in the Constitution.<sup>74</sup> When literalism is the only mode of interpretation, courts are forced to either make functionalist decisions that are vulnerable to attack because they fail to adhere to the letter of the Constitution, or formalist decisions that may lose sight of the document's larger meaning and purpose.<sup>75</sup> Since the Constitution contains no separation of powers clause as such, judges must rely on an alternative basis when deciding whether a law is unconstitutional because it violates this principle.

#### i. *Textual Interpretation*

In actual separation of powers cases, courts do prefer to rely on a textual basis for their decisions.<sup>76</sup> The powers described in Articles I, II, and III detail the responsibilities of each branch of the federal government.<sup>77</sup> However, if there is no directly applicable text to look at to resolve a controversy, a court will ask whether the issue in question

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73. John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1943–44 (2011).

74. E. Donald Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506, 508 (1989).

75. *Id.*

76. See Jack Beermann, *An Inductive Understanding of Separation of Powers*, 63 ADMIN. L. REV. 467, 497 (2011) (arguing that the first question asked when resolving a separation of powers controversy will be whether a specific structural or procedural provision has been violated).

77. U.S. CONST. arts. I–III.

“unduly interferes with a branch’s ability to perform its assigned function in the government.”<sup>78</sup> Ultimately, to evaluate possible separation of powers violations, a court will ask whether the action in question (1) accretes power to a single branch of government that is more appropriately diffused among the separate branches, or (2) undermines the authority and independence of one or another coordinate branch.<sup>79</sup> Though the Supreme Court asserts that it has never hesitated to strike down a law that violates the principle of separation of powers,<sup>80</sup> this type of balancing test is somewhat vague, and it is unclear exactly how courts will apply it in any given case.

The above test arose during the resolution of a power struggle between the executive and legislative branches; however, the Supreme Court must make the same evaluation when a congressional action infringes on judicial power as well. In 1993, Congress enacted the Religious Freedom Restoration Act (“RFRA”), which prohibited any government, state or federal, from “substantially burdening” a person’s exercise of religion even if that burden results from a law of general applicability.<sup>81</sup> This law came in direct response to the decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, a case in which the Supreme Court upheld a state law of general applicability criminalizing peyote use against a challenge by Native Americans seeking unemployment benefits.<sup>82</sup> The RFRA also contained an effort to restore the balancing test set forth in a previous decision,<sup>83</sup> which the Court declined to follow in *Smith*.<sup>84</sup> Congress, unhappy with the Supreme Court’s decision in *Smith*, tried to overrule its judgment regarding the constitutionality of a law as well as to dictate the manner in which the Court ought to arrive at that judgment. In this way, the function of the RFRA was similar to that of the constitutional amendments discussed in the previous section that seek to control the form and level of judicial scrutiny. Congress’ effort to effectively overrule the Supreme Court was frustrated in *City of Boerne v. Flores*.<sup>85</sup> The Supreme Court held that by enacting the

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78. Beermann, *supra* note 76, at 497.

79. See *United States v. Mardis*, 670 F. Supp. 2d 696, 700 (W.D. Tenn. 2009).

80. See *Morrison v. Olson*, 487 U.S. 684, 693 (1988).

81. 42 U.S.C. §2000bb-1 (2013).

82. 494 U.S. 872 (1990); see also *City of Boerne v. Flores*, 521 U.S. 507, 512 (2007).

83. See *Sherbert v. Verner*, 374 U.S. 398, 402–03 (1963) (developing a test in the context of unemployment compensation whereby government actions that substantially burden a religious practice must be justified by a “compelling government interest”).

84. *Smith*, 494 U.S. at 882–83.

85. 521 U.S. at 508.

RFRA, Congress had contradicted “vital principles necessary to maintain separation of powers” and the federal-state balance.<sup>86</sup> *Boerne* thus represents a struggle of power between the judicial and legislative branches, in which the Supreme Court asserted its position as the final word on constitutional interpretation.

In *Boerne*, the Supreme Court also placed the clause-less background norms of separation of powers and federalism well within the scope of its interpretation. Looking to the text of the Constitution, the Court tells us that the RFRA’s “most serious shortcoming” was that it exceeded the scope of the power granted to Congress in Section 5 of the Fourteenth Amendment.<sup>87</sup> Section 5 contains a positive grant of power to Congress to “enforce, by appropriate legislation, the provisions of” the amendment.<sup>88</sup> However, the Supreme Court has held that the scope of Congress’s authority under this clause is limited to remedial or preventative legislation.<sup>89</sup> This is not dissimilar from the way Congress’s power has been narrowed under the parallel enforcement power of the Fifteenth Amendment. There, in order to ensure the right to vote, Congress may suspend literacy tests and other voting requirements in an effort to combat discrimination but it may not effect a substantive change in constitutional protections.<sup>90</sup> Similarly, Congress has authority to enact legislation enforcing any provision of the Fourteenth Amendment, as long as that legislation is remedial. *Boerne* reaffirms the idea that Congress does not have the authority under its Section 5 enforcement power to determine the criteria of a constitutional violation.<sup>91</sup> Using constitutional text as a basis for its decision, the Supreme Court was able to successfully consider and decide the constitutionality of a law based on the claim that it violated the idea of separation of powers.

*ii. Legislative History and Judicial Precedent*

The Supreme Court has also used other modes of interpretation beyond the text, such as looking to judicial precedent and legislative history, to interpret limits of congressional power. An influential decision that applied this approach was the Court’s 1883 judgment in *The Civil Rights Cases*. There, the Court invalidated parts of the Civil

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86. *Id.*

87. *Id.* at 509.

88. U.S. CONST. amend. XIV, § 5.

89. *See* *South Carolina v. Katzenbach*, 383 U.S. 301, 325–26 (1966).

90. *Id.* at 308.

91. *See Boerne*, 521 U.S. at 519.

Rights Act of 1875 that dealt with private action.<sup>92</sup> It cabined congressional authority, limiting it to correcting discriminatory state action and prohibiting it from regulating private conduct.<sup>93</sup> This interpretation severely restrained what Congress could do under the Fourteenth Amendment and affirmed the Court's authority to limit that power. The legislative history of the Fourteenth Amendment also influenced the Supreme Court's decision in *Boerne*. In that decision, the Court considered that the writers of the Fourteenth Amendment were wary of enacting an overbroad grant of authority to the legislative branch, specifically at the expense of the judiciary (with respect to separation of powers)<sup>94</sup> and the states (with respect to federalism).<sup>95</sup> The fact that the Supreme Court has relied on several canons of interpretation beyond analyzing constitutional text demonstrates how a law may violate a background norm such as separation of powers even if it does not violate a specific constitutional clause.

Based on the above analysis, if Congress tried to enact a law asserting that gun ownership is a fundamental right subject to strict scrutiny by the judiciary, that law could be challenged by bringing a separation of powers claim. Such a law compromises the independence of the judicial branch and interferes with its ability to properly function. *Boerne* provides support for the contention that an attempt by Congress to step outside of the scope of its authority and obstruct the duties of the courts will be struck down. As in the case of Congress's Section 5 enforcement power, the Supreme Court has evaluated the extent to which Congress can exercise authority that is usually delegated to the judiciary—such as the authority to interpret constitutional provisions—and has ruled that it is limited.<sup>96</sup>

### *iii. Separation of Powers Encroachments Upheld*

A government founded on the principle of separation of powers, however, does not result in three completely independent branches, neither in purpose nor in practice. Throughout the twentieth century, the lines between branches became increasingly blurred resulting in much overlap between the duties of each branch considered perfectly constitutional by the courts. The Supreme Court has never required that the branches act with complete independence and has both invali-

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92. 109 U.S. 3, 13–14 (1883).

93. *Id.*

94. *See Boerne*, 521 U.S. at 523–24.

95. *Id.* at 519–21.

96. *Id.* at 519–20.

dated and upheld overreaches of power between all three of the branches.<sup>97</sup>

A more recent example in which the Court justified an overreach of power was in *Mistretta v. United States*.<sup>98</sup> The Sentencing Reform Act of 1984 created an independent commission within the judicial branch with the power to promulgate binding sentencing guidelines for a range of federal crimes.<sup>99</sup> In *Mistretta*, this law was challenged for violating the separation of powers.<sup>100</sup> The defendant contended that Congress delegated excessive authority to the Commission to structure sentencing guidelines.<sup>101</sup> However, the Supreme Court disagreed, holding that the Commission did not violate the separation of powers principle.<sup>102</sup> The Court applied the same standard to this Commission as it does to legislatively-created agencies in the executive branch—as long as Congress provides an intelligible principle to which the body imbued with authority must conform, the grant of legislative power shall not be prohibited.<sup>103</sup>

Although the law in *Mistretta* was upheld, it is distinguishable from the type of law at issue in this Note. Instead of being a theft of judicial authority by the legislature, the Sentencing Reform Act was a positive grant of legislative authority to the judiciary; the case focused on whether Congress was allowed to ask for help from the other branches. Furthermore, one of the bases for rejecting the separation of powers claim in *Mistretta* was that the relative expertise of the branches ought to be taken into account.<sup>104</sup> In that case, this meant that it made sense to allow judges some input into minimum sentencing guidelines, an area in which they have considerable experience. In the instant case, however, it means allowing Congressional representatives to set a level of judicial scrutiny and mandate that the courts apply it to a certain subset of cases. In balancing levels of expertise,

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97. See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 722–23 (1986); *INS v. Chadha*, 462 U.S. 919, 951 (1983); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–88 (1952).

98. 488 U.S. 361, 412 (1989).

99. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976, 1984.

100. See *Mistretta*, 488 U.S. at 370.

101. *Id.*

102. *Id.* at 372 (“[T]he separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches.”).

103. *Id.*; see also *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

104. See *Mistretta*, 488 U.S. at 396; see also *United States v. Huerta*, 878 F.2d 89, 92 (2d Cir. 1989).

the judiciary has considerably more experience than the legislature in dealing with judicial review.

Sentencing guidelines raise another possible separation of powers challenge that courts have been reluctant to recognize. In the past, mandatory minimum statutes have been upheld under separation of powers challenges as constitutional constraints on judicial discretion.<sup>105</sup> Courts have found that it is not a separation of powers violation to limit judicial discretion to impose sentences lower than statutorily required. In *United States v. Huerta*, the Second Circuit upheld a statute requiring that the government make a motion before a sentencing court was allowed to impose a sentence more lenient than the statutory minimum based on the defendant's cooperation with the government.<sup>106</sup> The Court decided that the statute does not usurp a judge's authority to exercise his or her constitutional prerogatives because sentencing is not "inherently or exclusively a judicial function."<sup>107</sup> Thus, another factor in deciding how far the legislature may go in guiding judicial discretion is the extent to which that discretion is inherent and exclusive to the judiciary. While discretion may be not inherent and exclusive to the judiciary for sentencing for federal crimes, there is a much stronger case that it is for judicial review.

#### *iv. The State Level*

On the state level, a separation of powers challenge would work much the same way as on the federal level. A challenge would involve an analysis of the particular state's constitution and the way it divides power among the branches, as well as a review of any jurisprudence involving past separation of powers challenges. To continue with the Louisiana case, the Louisiana state constitution not only lays out the powers of each of three branches in Articles III, IV, and V, but it also explicitly describes the principle of separation of powers in Article II: "Except as otherwise provided by this constitution, no one of these branches, nor any person holding office in one of them, shall exercise power belonging to either of the others."<sup>108</sup> Since there is a clear separation of powers provision in the state constitution, the Louisiana case

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105. See *Huerta*, 878 F.2d. at 94 (holding "Congress may constitutionally prescribe mandatory sentences or otherwise constrain the exercise of judicial discretion so long as such constraints have a rational basis."); see also *U.S. v. Vargas*, 294 F. App'x 92, 95 (2d Cir. 2006).

106. 878 F.2d at 91–92; see also 18 U.S.C. § 3553(b)(2)(A)(iii) (2013).

107. See *Huerta*, 878 F.2d at 93.

108. LA. CONST. art. II, § 2; see also LA. CONST. arts. III–V.

differs slightly from a federal case or a case in a state that lacks such a provision.

It might be easier for a court to find a law unconstitutional where there is a textual separation of powers provision upon which to base that decision.<sup>109</sup> The Supreme Court of Louisiana finds a violation of Article II only where “one branch of government or its members exercise power belonging to either of the others,”<sup>110</sup> but importantly that court has tended to nullify laws that encroach upon the judgment of the other two branches.<sup>111</sup> These cases lend support to the position that a Louisiana court would find a law that mandated the judiciary to evaluate certain laws under a strict scrutiny framework to be unconstitutional.

The above discussion focuses on what would happen if a legislature—state or federal—passed a law mandating the level of judicial review a court must apply. However, the case in Louisiana involves not a law but a constitutional amendment, and there are important differences between the two. Constitutions, both state and federal, protect the minority from infringements on its rights by the majority.<sup>112</sup> In fact, this was the principle behind including the Bill of Rights in the United States Constitution in the first place.<sup>113</sup> However, through a constitutional amendment, fundamental rights may be successfully altered through a majority vote. Part II will address how, if at all, a legal challenge might be brought against such an amendment.

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109. Beermann, *supra* note 76, at 506.

110. *See State ex rel. Guste v. Legislative Budget Comm.*, 347 So.2d 160, 165 (La. 1977) (finding the law in question did not violate Article II based on this standard).

111. *See, e.g., ASFCME, Council #17 v. State ex rel. Dept. of Health & Hospitals*, 789 So.2d 1263, 1269 (La. 2001) (holding that a law specifying a “cause” for which a classified employee must be terminated interfered with the Civil Service Commission’s ability to define cause); *State ex rel. A.C.*, 643 So.2d 719, 734 (La. 1994) (upholding the judiciary’s independence to determine facts and administrate justice despite an unconstitutional attempt by the legislature to give certain expert testimony greater weight than other testimony). *But see In re Angus Chemical Co.*, 679 So. 2d 454, 458–59 (La. Ct. App. 1996), (upholding a provision making a law apply retroactively including to cases pending in the Louisiana Court of Appeal).

112. *See Mary Jane Morrison, Amending the Minnesota Constitution in Context: The Two Proposals in 2012*, 73 *HAMLIN J. PUB. L. & POL’Y* 115, 117 (2013) (questioning whether fundamental rights ought to ever be put up for a vote in an election).

113. *Id.*

## II.

## CHALLENGING A CONSTITUTIONAL AMENDMENT

A. *Procedural Review*

There is general agreement that the judiciary may and sometimes should play a role in ensuring the amendment process complies with the law.<sup>114</sup> Safeguarding the political process in this way is an important role the judicial branch often serves. For example, the Voting Rights Act of 1965 required preclearance from the United States Attorney General or a panel of District Court judges in order for certain states with a history of discrimination to change their voting procedures.<sup>115</sup> At a time when states were violating the rights of certain subsets of their citizens, Congress wanted the courts to become involved in reviewing those procedural rules in order to ensure fairness and equal access to the voting process. Similarly, most state legislatures sanction the judiciary to evaluate the procedures by which amendments are enacted in pursuit of the same principle of fair play. Amendment procedures include such things as limiting content to only one subject and prohibiting those proposals that are local or special in character.<sup>116</sup> As mentioned already, Louisiana requires that questions submitted to voters must be no longer than 200 words.<sup>117</sup> The result of this system is that courts may indeed review constitutional amendments as to whether they comply with procedural requirements and may invalidate them if they do not.<sup>118</sup>

State governments differ in their approach to procedural review of the amendment process. Courts usually play a role but their level of involvement will vary depending on the way states allow voters to amend their respective constitutions. There are two main ways to amend a state constitution in the United States.<sup>119</sup> The first allows

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114. Teresa Stanton Collett, *Judicial Independence and Accountability in the Age of Unconstitutional Constitutional Amendments*, 41 *LOY. U. CHI. L.J.* 327, 337 (2010) (“There seems to be a broad consensus that courts may (and often should) review the process by a constitutional amendment is enacted. . . .”).

115. The Voting Rights Act, 42 U.S.C. §§ 1973–1973bb-1 (2012). Even though the Supreme Court declared this provision of the Voting Rights Act unconstitutional based on the fact that it is no longer responsive to current needs, it still supports this point as the provision was relied upon for forty years. *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2620 (2013).

116. See Michael J. Farrell, *The Judiciary and Popular Democracy: Should Courts Review Ballot Measures Prior to Elections?*, 53 *FORDHAM L. REV.* 919, 920–21 (1984).

117. See *LA. REV. STAT. ANN.* § 18:1299.1 (2013).

118. See Farrell, *supra* note 116, at 922.

119. This list excludes state constitutional commissions and conventions. See Collett, *supra* note 114, at 334–35.

citizens to vote on and adopt legislatively referred proposals<sup>120</sup> and the second allows citizens to initiate and adopt their own proposals.<sup>121</sup> Each of these methods may be applied in different circumstances. Specifically, state governments recognize an important distinction between a constitutional “revision” and an “amendment.” An amendment involves a limited change that may be proposed by the legislature or citizens and then voted on and adopted by voters. A revision on the other hand deals with a more substantive change to the constitution and may only be adopted by a constitutional convention.<sup>122</sup> The process for reviewing these types of constitutional changes may vary. Courts may review a revision with more caution both because it may have little to no voter participation in its formation and because it concerns a more fundamental change to the constitutional structure.<sup>123</sup>

In *Strauss v. Horton*, the Supreme Court of California heard challenges to Proposition 8, a voter-approved referendum banning same-sex marriage.<sup>124</sup> One of the central issues in that case was whether the ban was a constitutional amendment or a revision. Though there had been little-to-no discussion prior to this case distinguishing the two concepts, the court ultimately held that a revision is a “wholesale or fundamental alteration of the constitutional structure.”<sup>125</sup> In resolving the amendment/revision question, a court must look to the meaning and the scope of the constitutional change at issue as well as the effect that change would have on the “basic governmental plan or framework embodied in the preexisting provisions” of that constitution.<sup>126</sup> The court ultimately decided in *Strauss* that the scope of Proposition 8 was narrow and the effect was small, defining it as an amendment rather than a revision.<sup>127</sup> As such, the amendment was upheld.<sup>128</sup>

On the federal level, the Supreme Court has taken a hands-off approach to evaluating constitutional amendments. All of the current amendments to the United States Constitution have been passed as per Article V procedures, which require a bill proposing the amendment to

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120. *See id.* at 333–34.

121. *Id.* at 334.

122. *See* Op. of the Justices of the Sup. Ct. in Response to a Questions Propounded by the Governor of Del., 264 A.2d 342, 346 (Del. 1970); *see also* *Strauss v. Horton*, 207 P.3d 48, 61 (Cal. 2009).

123. *See* Collet, *supra* note 114 at 336.

124. 207 P.3d at 48.

125. *Id.* at 61.

126. *Id.*

127. *Id.* at 102.

128. *Id.* at 122.

be approved by a two-thirds majority of both the House of Representatives and the Senate and then ratified by three-quarters of the state legislatures.<sup>129</sup> The Supreme Court has given Congress much of the power for establishing procedural requirements for amendment passage<sup>130</sup> and tends to defer to the principles of federalism in leaving state amendment requirements up to state legislatures.<sup>131</sup> Though there is no bar preventing the Supreme Court from evaluating constitutional amendments at least with respect to procedural requirements, its reluctance to do so in the past might preclude an expansion of that power going forward.

### B. Substantive Review

Though constitutional amendments are subject to some level of procedural review by the judiciary, there is general agreement that courts should not be able to weigh in on the substance of such amendments.<sup>132</sup> The argument is that allowing courts to strike down a constitutional amendment would subvert the democratic process.<sup>133</sup> It also raises concerns that the judiciary would overreach and violate separation of powers principles.<sup>134</sup> It has been argued that because the judiciary is not an elected body, it should not serve as the final arbiter of decision-making, capable of defeating the will of the people.<sup>135</sup> On the other hand, even though constitutional amendments are much harder to pass than pieces of legislation, the same concerns that underlie ordinary judicial review are also present with respect to amendments. There is just as much potential for a majority of voters to approve of a discriminatory constitutional amendment as there is for voters to approve an unconstitutional law.

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129. U.S. CONST. art. V.

130. See *Coleman v. Miller*, 307 U.S. 433, 450 (1939) (granting Congress the discretion to set the time period for amendment adoption rather than reserving it for the Supreme Court).

131. See Collett, *supra* note 114, at 336.

132. See Morrison, *supra* note 112, at 117 (explaining that though an amendment *might* be subject to procedural safeguards, the concept of a substantively “unconstitutional constitutional amendment” is an oxymoron in the United States).

133. See Farrell, *supra* note 116, at 930 (arguing that courts should not be involved in reviewing ballot measures proposed by the people before an election).

134. See *Bowe v. Sec’y of the Commonwealth*, 69 N.E.2d 115, 126 (Mass. 1946) (arguing that since a statute is only reviewed and struck down based on a certain set of circumstances, the court has no jurisdiction to preemptively strike down a ballot measure).

135. See Sam Brooke, *Constitution-Making and Immutable Principles* 56 (Spring 2005) (unpublished M.A. thesis, Tufts University), available at <http://dl.tufts.edu/catalog/tufts:UA015.012.DO.00074>.

One way for courts to exercise substantive review is to compare a constitutional amendment to some principle of natural law that is binding on the community outside of the constitution in question.<sup>136</sup> Typically, the Supreme Court evaluates the constitutionality of a law by determining whether that law violates any given provision of the Constitution. However, in some ways, constitutional amendments by nature “violate” the Constitution by permanently changing its meaning. Thus, in order to review the substance of an amendment there must be some extra-constitutional basis for evaluating its validity.<sup>137</sup> In this way, reviewing a constitutional amendment is to natural law what reviewing a law is to the constitution. The problem with this approach is that there is no consensus regarding the content of natural law.<sup>138</sup> Further, there is no particular reason to believe judges or courts ought to be the ones determining the content of natural law and whether any given amendment comports with that law. Judges already frequently disagree amongst themselves when deciding issues that are clearly addressed in the Constitution and even more so in cases involving unenumerated rights. Thus, pinning the evaluation of constitutional amendments to some legal structure outside of the text and principles underlying the government in general is not likely to succeed.

Another approach to substantive review is to declare certain portions of a constitution so fundamental that they may not be altered in any way.<sup>139</sup> Here, the judiciary would ascertain some overarching or fundamental principles necessary to safeguard that are not written explicitly in the text of a constitution but are inferred from it.<sup>140</sup> Some states, which allow pre-election substantive review of proposed ballot initiatives, may provide a roadmap for this alternative framework. In Massachusetts, the state courts may review a ballot initiative before an

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136. See Collett, *supra* note 114, at 340.

137. See Brooke, *supra* note 135, at 54–55 (explaining that one approach to reviewing constitutional amendments is to look outside the explicit text to fundamental concepts that must not be violated).

138. The international community has often faced this dilemma with respect to human rights. Countries vary widely, legally and culturally, in terms of what rights they see as inherent to all human beings. The disagreement is not much easier to overcome domestically.

139. See Brooke, *supra* note 135, at 54 (explaining that the other theoretical approach to reviewing amendments is to explicitly declare certain portions of the constitution unalterable); see also Rivka Weill, *Hybrid Constitutionalism: The Israeli Case for Judicial Review and Why We Should Care*, 30 BERKELEY J. INT’L L. 349, 354 (2012) (explaining the foundationalist theory whereby certain values and rights are so fundamental to a constitutional system that they are beyond the authority of the people to alter).

140. See Brooke, *supra* note 135, at 55.

election to ensure that it does not violate “another state constitutional provision as presently interpreted.”<sup>141</sup> The Massachusetts Constitution outlines specific rights that are off-limits to ballot initiatives such as freedom of speech, protection from unreasonable searches, and the right to trial by jury.<sup>142</sup> Those areas of constitutional law are notoriously complicated to interpret, so any initiative concerning them must be reviewed in the context of a great deal of ambiguity. Importantly, the right to evaluate initiative amendments is granted to the judiciary by the people in the sense that the right was explicitly written into the state constitution.<sup>143</sup> This suggests the possibility that substantive judicial review of constitutional amendments is not implicit in the principles of government but rather is contingent upon an expression by the people that such review is necessary.

Massachusetts courts have also briefly considered post-election substantive review of initiative amendments. *Schulman v. Attorney General* addressed an initiative that sought to define marriage as between one man and one woman.<sup>144</sup> Though the case was decided on an alternative basis, Justice Greaney raised issues in his concurrence about “whether the initiative procedure may be used to add a constitutional provision that purposefully discriminates against an oppressed and disfavored minority of our citizens in direct contravention of the principles of liberty and equality protected by art. 1 of the Massachusetts Declaration of Rights.”<sup>145</sup> Justice Greaney suggests, but does not conclude, that a constitution should not be able to contain provisions that are “mutually inconsistent and irreconcilable.”<sup>146</sup> Indeed, other cases suggest that the courts do not tolerate discriminatory constitutional provisions that contradict the “basic premises of individual liberty and equality under the law protected by the Massachusetts Constitution.”<sup>147</sup> Thus, although there is no precedent for challenging a state constitutional amendment post-enactment, it may be possible to do so based solely on the notion that it violates pre-amendment constitutional principles.<sup>148</sup>

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141. Scott L. Kafker & David A. Russcol, *The Eye of a Constitutional Storm: Pre-election Review by the State Judiciary of Initiative Amendments to State Constitutions*, 2012 MICH. ST. L. REV. 1279, 1314 (2012).

142. MASS. CONST. art. XLVIII, pt. II, § 2.

143. See *id.*; see also *Bowe v. Sec’y of the Commonwealth*, 69 N.E.2d 115, 127–28 (1946) (arguing the people granted courts the power to evaluate which initiative measures fall under categories excluded by the Massachusetts Constitution).

144. 850 N.E.2d 505, 506 (Mass. 2006).

145. *Id.* at 512 (Greaney, J., concurring).

146. *Id.*

147. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003).

148. See Kafker & Russcol, *supra* note 141, at 1316–17.

As discussed above in Part II.A, the California Supreme Court faced and sidestepped a similar substantive challenge to Proposition 8 in *Strauss v. Horton*. The petitioners in that case argued that, as an effort to ban same-sex marriage, Proposition 8 “conflicts with an assertedly fundamental constitutional principle that protects a minority group from having its constitutional rights diminished in any respect by majority vote.”<sup>149</sup> Specifically, it fundamentally alters the meaning of the equal protection principles articulated in the state constitution. Interestingly, this substantive challenge was couched as a procedural one—the argument was made to persuade the court to declare Proposition 8 a revision instead of an amendment. The only reference to a purely substantive argument came from the Attorney General, who argued that even if the proposition was defined as an amendment it should still be invalidated because “inalienable rights” embodied in Article 1 of the California Constitution may not be abrogated by constitutional amendment without a compelling state interest.<sup>150</sup> The court dismissed this argument as overstating the proposition’s effect; in reality, the court said, this is a narrow exception regarding only the application of the term “marriage.”<sup>151</sup> This decision leaves open the possibility that a court may invalidate an amendment if indeed it abrogates some fundamental right or principle delineated in the constitution.<sup>152</sup>

Inherent to the federal amendment process is the idea that if a majority of the people want to change, add, or subtract a basic principle of our government it may lawfully do so. In a sense, this is the principle upon which our democracy rests—the will of the (majority of the) people is the law.<sup>153</sup> However, as in Louisiana, the fact that the people may pass an amendment undermining the very constitutional structure of government is problematic. If the majority of states decides to abolish the Bill of Rights, create a king instead of a president, or re-institute slavery it may amend the Constitution to reflect this

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149. *Strauss v. Horton*, 207 P.3d 48, 62 (Cal. 2009).

150. *Id.* at 63.

151. *Id.*

152. Notably, the petitioners in *Strauss* also raised a separation of powers claim, which the court dismissed in one paragraph. The court argued the voters’ effort to amend their state constitution does not infringe on a judicial function. *Id.* at 62. Importantly, this claim rests merely on the question of whether the voters have usurped a power allocated to the judiciary alone and thus differs from the one I would seek to raise against the Louisiana statute.

153. See Conrado Mendes, *Judicial Review of Constitutional Amendments in the Brazilian Supreme Court*, 17 FLA. J. INT’L L. 449, 461 (2005) (pointing out that the amendment process is the “last institutional route the will of the majority has to make itself heard”).

belief.<sup>154</sup> More troublingly, it may do so without any input from the judicial branch. If we do not trust the wisdom of the people enough to allow Congress to pass a single law without the safeguard of judicial review, why should we trust that wisdom to change the very foundation of governmental and legal structure?

### C. *The International Approach*

Though the United States has ideological difficulties when it comes to judicial review of constitutional amendments, this is not such a foreign concept for other governments worldwide. The constitutions of Germany and India both allow for the notion of “unconstitutional constitutional amendments.”<sup>155</sup> Brazil’s Constitution carves out specific individual rights that may not be altered by an amendment.<sup>156</sup> Other countries also consider certain fundamental ideas outside the authority of a democratic majority to alter.<sup>157</sup> In the United Kingdom, courts have indicated that if the legislature were to abolish judicial review in such a way that it violated human rights, they might find such an act invalid.<sup>158</sup> Importantly, this is an example where separation of powers is determined to be a strong enough overarching principle of government such that the court has the right to stop the legislature’s attempt to subvert it. Israel can also trace the development of its system of judicial review to this type of “foundationalist theory” whereby certain fundamental rights and/or tenants of government are beyond the power of the amending body to alter and may be reviewed and struck down by the courts.<sup>159</sup> The following sections take a comparative look at the ways other countries approach this issue and how those approaches might be applied in the United States.

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154. *See* *State of Rhode Island v. Palmer* (National Prohibition Cases), 253 U.S. 350, 362, 386 (1920) (holding that the Eighteenth Amendment was within the power to amend reserved by Article V of the Constitution despite the fact that in substance and effect it concerned “merely a police regulation or statute” rather than the powers or organization of government).

155. GRUNDGESETZ FÜR DIE BUNDESREPUBLICK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, RGBL. I, art. 79, cl. 3 (Ger.) (creating specific areas of the constitutional structure that cannot be altered); INDIA CONST. art. 368, amended by The Constitution (Eightieth Amendment) Act, 2000.

156. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 60 (Braz.).

157. Other scholarly articles have discussed the handling of unconstitutional constitutional amendments in Bosnia-Herzegovina, Nepal, Norway, Romania, Namibia, Djibouti, Italy and France. *See generally* Brooke, *supra* note 135, at 58–73.

158. *See* Weill, *supra* note 139, at 391–92.

159. *See generally id.* at 352–54 (outlining four theoretical bases for Israeli judicial review and constitutional development).

*i. Germany*

Article 79 of the German Constitution precludes certain amendments from being enacted. Among other restrictions, it provides that “[a]mendments to this Basic Law affecting . . . the principles laid down in Articles 1 and 20 shall be inadmissible.”<sup>160</sup> The two main concepts that are outlined in Articles 1 and 20 are the basic rights of German citizens and the basic form of German government.<sup>161</sup> This mimics the two areas where substantive review has come up in the American context. For example, amendments defining marriage between one man and one woman concern the fundamental rights of citizens, while amendments such as Louisiana’s “Constitutional Amendment 2” concern the basic structure of government. The German courts have broad discretion in interpreting the meaning of Article 79 due mostly to the fact that its language is quite vague.<sup>162</sup> The courts are also expected to interpret the language of the proposed amendments that come under its jurisdiction.<sup>163</sup> This is not dissimilar to the American system of judicial review whereby the courts use various methods of statutory interpretation to discern the meaning of often ambiguously written laws and the Constitution. Despite the potential for abuse inherent in such a great level of discretion, the Federal Constitutional Court has only ever heard three cases regarding the validity of proposed amendments—all three of which it upheld.<sup>164</sup>

*ii. India*

India also recognizes the concept of unconstitutional constitutional amendments by making the basic form of government unalterable through Article 368 of its constitution.<sup>165</sup> Rather than this principle being gleaned from the text of the constitution itself, India’s approach is more one of linguistic interpretation. Narrowly read, the meaning of the word “amend” stops short of permitting a change that is “fundamentally different” from what is already written.<sup>166</sup> In Indian history there are instances of invalidation of both amendments that alter individual rights and amendments that change the basic structure of government. In 1975, following a long period in which the judiciary

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160. GRUNDGESETZ FÜR DIE BUNDESREPUBLICK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], art. 79, cl. 3 (Ger.).

161. *See id.* at art. 1, 20 (Ger.).

162. *See Brooke, supra* note 135, at 58–62.

163. *Id.* at 60.

164. *Id.* at 60–62.

165. *See* INDIA CONST. art. 368, *amended* by The Constitution (Eightieth Amendment) Act, 2000.

166. *See Brooke, supra* note 135, at 63.

constrained the legislature's law-making power, the Indian Parliament declared an "emergency rule" and began suspending many fundamental rights.<sup>167</sup> The abuse of power that followed provides a glaring example of what can happen if a legislative body is allowed to amend without any judicial check. Likewise, the Indian Supreme Court has addressed issues pertaining to the basic structure of government. In 1980, it decided that an amendment prohibiting the Court from ruling on future amendments initiated by Parliament was invalid.<sup>168</sup> One measure of a judiciary's strength is a commitment to "uphold certain core values."<sup>169</sup> India has decided that the Court ought to uphold those values that it defines as basic or fundamental even against a proposed constitutional amendment.

### iii. *Brazil*

The Brazilian Constitution lays out a number of individual rights that may not be amended, thus extracting a "normative core not to be changed by future generations."<sup>170</sup> Though previous iterations of the Brazilian Constitution included prohibitions on altering the basic form of government, none of these versions protected individual rights the way the current document does.<sup>171</sup> In order to evaluate the constitutionality of amendments, the Brazilian Supreme Court uses "the same logic [it] uses to test the constitutionality of ordinary laws."<sup>172</sup> Over the years, the Brazilian Supreme Court has declared three amendments unconstitutional.<sup>173</sup> This power is accepted in Brazil as easily as the power of judicial review is accepted in this country (i.e., through inferences drawn in *Marbury v. Madison*).<sup>174</sup>

The presence of judicial review of amendments to the constitutions of other countries is certainly reconcilable with the norms that create a foundation for our own constitutional democracy. Democracy is not only about decisions made by a statistical majority of the people, but it is also concerned with the independent principles that underlie democratic decisions. These principles are substantive, and it is

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167. *Id.* at 63–64.

168. *Minerva Mills Ltd. v. Union of India*, (1981) S.C.R. 206–07 (India).

169. See Madhav Khosla, *Addressing Judicial Activism in the Indian Supreme Court: Towards an Evolved Debate*, 32 HASTINGS INT'L & COMP. L. REV. 55, 58, 80 (2009).

170. Mendes, *supra* note 153, at 452.

171. See *id.*

172. *Id.* at 455.

173. *Id.* at 456.

174. See *id.* at 456 (discussing the "assumptions which guide and justify different constitutional formats").

up to judicial review to “safeguard this ethical minimum of democratic regimes.”<sup>175</sup>

Our own Supreme Court does just this when it reviews statutes passed by Congress. The Justices interpret the Constitution using a variety of devices. They look to the plain meaning of the text, the original intent of the founders, and even background norms and principles.<sup>176</sup> They then analyze the law by looking at the text, the legislative history, and again at background norms and principles this time with respect to the law. The idea that a court could use the text of a constitution to glean ideals upon which it can base future judicial determinations is by no means foreign to the American legal system. Brazil and India do this with respect to both laws and constitutional amendments and it is possible to apply the same techniques they use in the United States, as well.

#### CONCLUSION

The balance of power between the branches of the United States government has practical implications for the everyday lives of the citizens those branches serve. Louisiana’s Constitutional Amendment 2 attempts to subvert that balance by elevating the majority will above the question of whether that will is in line with the United States Constitution. The idea that the legislature can command the judiciary to review gun-related laws under a strict scrutiny standard violates separation of powers. Judicial review falls squarely into the expertise of the judicial branch and exists to protect the people from instances in which the majority seeks to impose an unconstitutional law. In fact, we have already seen some resistance from the Louisiana Supreme Court to this encroachment when it exercised its own judgment in finding a restrictive gun-related law valid under the strict scrutiny standard it was bound to use to review the law.

The fact that in Louisiana the constitutional violation comes in the form of an amendment rather than a law should not stand in the way of its correction. The idea of an unconstitutional constitutional amendment is common in other countries. If a proposed amendment violates the theoretical underpinnings of the existing constitution, then it is reviewed by the judiciary and struck down. In such a system, there is no “last resort” whereby the will of the people may be imposed without being checked. A court ought to be able to evaluate the

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175. *Id.* at 457 (summarizing various works of Ronald Dworkin about judicial protagonism and arguing that true democracy goes beyond statistical democracy).

176. They even come up with judicially created Clear Statement Principles such as constitutional avoidance and retroactivity that guide their future legal interpretations.

substance of a constitutional amendment to ensure that it comports with the basic principles of government written into the constitution.<sup>177</sup> The court may be deferential to the will of the people, as it generally is when it evaluates laws, and strike down an amendment only in the most extreme of situations.

The United States Constitution was written against a set of background norms that the democratic majority of people at the time thought would form the foundation for a successful government. That we continue to defer to this document over two hundred years after it was written demonstrates that we still respect it and choose to live by the ideals it reflects. In this way, we have pre-committed ourselves to following those background norms even if the will of the majority today is to veer away from them.<sup>178</sup> One of the principles included in the Constitution is the notion that the executive, legislative, and judicial branches ought to remain independent from one another. Though today's world requires a significant amount of cooperation within and between government bodies, separation of powers is a fundamental principle of American government that is still important today.

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177. The issues of standing and jurisdiction would still apply in this context. The issue of standing is highlighted in a debate in the states over when an amendment may be substantively reviewed – pre-election or post-election. See Kafker & Russcol, *supra* note 141; cf. *Schulman v. Att’y Gen.*, 850 N.E.2d 505 (Mass. 2006).

178. Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 660–61 (2011) (analyzing the motivations that ensure that we continue to bind ourselves to constitutional rules despite the conflicts that often arise between those rules and our contemporary will).

