

# The N.R.A.'s Strict-Scrutiny Amendments

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*ABSTRACT: The National Rifle Association (“N.R.A.”) is urging states to declare in their constitutions that the right to keep and bear arms is fundamental and that any restraint on that right is invalid unless it meets the stringent demands of strict scrutiny. Three states have already embraced the N.R.A.’s proposal and Iowa is one-third of the way toward becoming the fourth. In this brief Essay, I make two overarching arguments. First, contrary to the apparent aims of the N.R.A. and its legislative partners, the proposed strict-scrutiny amendments leave courts with significant latitude to define the scope of the fundamental constitutional right to which the strict-scrutiny standard attaches. Second, courts can reasonably conclude that the right protected by these amendments is narrow in scope, encompassing little or no more than what federal courts today strongly protect under the Second Amendment. Far from securing the sweeping reform that many may desire and others may fear, therefore, the N.R.A.’s proposal may ultimately prove merely to ensure that, at the state level, the fundamental gun rights that receive powerful judicial protection cannot be reduced below the federal floor that the United States Supreme Court has already clearly established.*

## INTRODUCTION

Frustrated with state and federal judges who have evaluated gun-control laws under lenient standards of review,<sup>1</sup> the National Rifle Association (“N.R.A.”) is urging states to declare in their constitutions that the right to keep and bear arms is fundamental and that any state or local restraint on that right is invalid unless it satisfies strict scrutiny. The executive director of the N.R.A.’s Institute for Legislative Action told Louisiana voters in 2012, for example, that a constitutional amendment necessitating strict scrutiny would provide “an iron wall around” their gun rights by protecting “them from anti-

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1. See *infra* notes 40–60 and accompanying text (describing the lenient standards commonly deployed in state and federal cases).

gun, activist judges.”<sup>2</sup> In January 2018, the N.R.A. similarly encouraged its members in Iowa and elsewhere to protect their gun rights with “iron plating” by ensuring that judges are constitutionally obliged to evaluate gun restrictions under “the highest standards of justification.”<sup>3</sup> As every law student knows, the strict-scrutiny standard of review sets a daunting path for a challenged law to travel, demanding that the legislation be “narrowly tailored” to achieve a “compelling” objective.<sup>4</sup> “For decades,” the N.R.A. argues, “anti-gun judges and lawyers” have insisted that strict scrutiny is inappropriate for gun-rights claims, “because they know that without this gold standard of legal protection, gun-ban politicians are virtually unbound to pass any freedom-killing laws that infringe on your constitutional right to keep and bear arms.”<sup>5</sup>

By overwhelming margins, voters in Alabama,<sup>6</sup> Louisiana,<sup>7</sup> and Missouri<sup>8</sup> have adopted the N.R.A.’s recommendation. In March 2018, the Iowa

2. Chris W. Cox, *November 6: A Historic Opportunity for Louisiana Voters to Protect Their Gun Rights*, NRA-ILA (Sept. 25, 2012), <https://www.nra.org/articles/20120925/november-6-a-historic-opportunity-for-louisiana-voters-to-protect-their-gun-rights>. After the Louisiana legislature voted to send the measure to the state’s voters for ratification, Governor Bobby Jindal released a celebratory statement picking up on the ferric imagery, declaring that “[w]e are adopting the strongest, most iron-clad, constitutional protection for law-abiding gun owners.” Bill Barrow, *Gun Rights Constitutional Amendment Clears Senate, Headed for November Ballot*, NOLA.COM (May 29, 2012), [https://www.nola.com/politics/index.ssf/2012/05/gun\\_rights\\_constitutional\\_amen.html](https://www.nola.com/politics/index.ssf/2012/05/gun_rights_constitutional_amen.html) (quoting Governor Jindal).

3. “*Strict Scrutiny*” Amendments: *Iron Plating for the Right to Keep and Bear Arms*, NRA-ILA (Jan. 26, 2018), <https://www.nra.org/articles/20180126/strict-scrutiny-amendments-iron-plating-for-the-right-to-keep-and-bear-arms>.

4. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

5. Cox, *supra* note 2.

6. See *Alabama Right to Bear Arms, Amendment 3 (2014)*, BALLOTPEdia, [https://ballotpedia.org/Alabama\\_Right\\_to\\_Bear\\_Arms,\\_Amendment\\_3\\_\(2014\)](https://ballotpedia.org/Alabama_Right_to_Bear_Arms,_Amendment_3_(2014)) (last visited Jan. 3, 2019) (reporting that voters approved the amendment by a 73-27 margin); see also ALA. CONST. art. I, § 26(a) (amended 2014) (“Every citizen has a fundamental right to bear arms in defense of himself or herself and the state. Any restriction on this right shall be subject to strict scrutiny.”).

7. See *Louisiana Right to Bear Arms, Amendment 2 (2012)*, BALLOTPEdia, [https://ballotpedia.org/Louisiana\\_Right\\_to\\_Bear\\_Arms,\\_Amendment\\_2\\_\(2012\)](https://ballotpedia.org/Louisiana_Right_to_Bear_Arms,_Amendment_2_(2012)) (last visited Jan. 3, 2019) (reporting that voters approved the amendment by a 73-27 margin); see also LA. CONST. art. I, § 11 (amended 2012) (“The right of each citizen to keep and bear arms is fundamental and shall not be infringed. Any restriction on this right shall be subject to strict scrutiny.”). Louisiana lawmakers were driven in large part by a desire to ensure that, if changes on the United States Supreme Court resulted in a narrower interpretation of the Second Amendment, Louisianans would still have strongly protected gun rights. See *State v. Draughter*, 130 So. 3d 855, 861 n.6 (La. 2013); see also *infra* notes 107–08 and accompanying text (discussing the possible significance of this observation).

8. See *Missouri Right to Bear Arms, Amendment 5 (August 2014)*, BALLOTPEdia, [https://ballotpedia.org/Missouri\\_Right\\_to\\_Bear\\_Arms,\\_Amendment\\_5\\_\(August\\_2014\)](https://ballotpedia.org/Missouri_Right_to_Bear_Arms,_Amendment_5_(August_2014)) (last visited Jan. 3, 2019) (reporting that voters approved the amendment by a 61-39 margin); see also MO. CONST. art. I, § 23 (amended 2014) (“That the right of every citizen to keep and bear arms, ammunition, and accessories typical to the normal function of such arms, in defense of his home, person, family and property, or when lawfully summoned in aid of the civil power, shall not be questioned. The rights guaranteed by this section shall be unalienable. Any restriction on these

General Assembly approved an amendment that follows the N.R.A.'s proposal;<sup>9</sup> if lawmakers endorse the amendment again during their next session, Iowa voters will be asked to ratify or reject it.<sup>10</sup> With the N.R.A. urging Iowa and other states to join the “elite group that provides the strongest possible protection for” gun rights,<sup>11</sup> lawmakers and citizens across the country may soon find themselves in the thick of a debate about the proposal's merits.<sup>12</sup>

I take no position here on whether gun-control laws are typically desirable or undesirable. Focusing on the N.R.A.'s promise of an “iron wall” or “iron plating” for gun rights, my objective in this brief Essay is to consider the degree to which the N.R.A.'s proposal is or is not likely to have a significant impact in states that adopt it. My specific arguments are twofold. First, the proposed amendments leave courts with significant latitude to define the scope of the fundamental constitutional right to which the strict-scrutiny standard attaches. Strict scrutiny can be difficult to satisfy, but those difficulties will be irrelevant in all firearms cases in which courts conclude that the textually protected right to keep and bear arms is not even in play. Second, when adjudicating claims arising under these amendments, courts may reasonably conclude that the protected right's scope is narrow, encompassing little or no more than what federal courts already strongly protect under the Second Amendment. If gun-rights lawmakers want to secure impactful constitutional reform, they may need to tailor the language of their proposed

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rights shall be subject to strict scrutiny and the state of Missouri shall be obligated to uphold these rights and shall under no circumstances decline to protect against their infringement. Nothing in this section shall be construed to prevent the general assembly from enacting general laws which limit the rights of convicted violent felons or those adjudicated by a court to be a danger to self or others as result of a mental disorder or mental infirmity.”).

9. H.R.J. Res. 2009, 87th Gen. Assemb., Reg. Sess. (Iowa 2018) (“The right of the people to keep and bear arms shall not be infringed. The sovereign state of Iowa affirms and recognizes this right to be a fundamental individual right. Any and all restrictions of this right shall be subject to strict scrutiny.”); see also Rod Boshart, *Iowa Senate Passes Gun Rights Constitutional Amendment*, GAZETTE (Mar. 21, 2018), <https://www.thegazette.com/subject/news/government/iowa-senate-passes-gun-rights-constitutional-amendment-20180321> (reporting on the legislative debate).

10. See IOWA CONST. art. X, § 1. Iowa voters are authorized to ratify or reject constitutional amendments that have been proposed by the legislature in successive sessions with an intervening general election. *Id.*

11. See “*Strict Scrutiny*” Amendments, *supra* note 3.

12. Cf. Holly Martin, Note, *Legislating Judicial Review: An Infringement on Separation of Powers*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 1097, 1107–08, 1108 n.63 (2014) (noting that several additional states were actively considering the N.R.A.'s proposal). The N.R.A. and its allies are able to press their argument with even greater urgency when prominent individuals urge the nation to repeal the Second Amendment. See, e.g., John Paul Stevens, *Repeal the Second Amendment*, N.Y. TIMES (Mar. 27, 2018), <https://www.nytimes.com/2018/03/27/opinion/john-paul-stevens-repeal-second-amendment.html>; see also Aaron Blake, *John Paul Stevens's Supremely Unhelpful Call to Repeal the Second Amendment*, WASH. POST (Mar. 27, 2018), <https://www.washingtonpost.com/news/the-fix/wp/2018/03/27/john-paul-stevens-supremely-unhelpful-call-to-repeal-the-second-amendment> (arguing that Justice Stevens's op-ed “might as well be considered an in-kind contribution to the National Rifle Association”).

amendments far more closely to the specific gun rights they wish to protect. I make those arguments in Parts II and III, respectively, after explaining in Part I how standards of review for gun restrictions came to be a focal point of constitutional debate in the first place. I close in Part IV by pointing to some of the problems that arise when courts in states with strict-scrutiny amendments neglect the issues of scope on which I focus here.

## I

The Second Amendment declares that “[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>13</sup> After evaluating that provision’s text and history, the Supreme Court found in 2008’s *District of Columbia v. Heller*<sup>14</sup> that, as a general matter, the Second Amendment protects “the individual right to possess and carry weapons in case of confrontation.”<sup>15</sup> Turning to the facts of the case before it, concerning a challenge brought against a set of District of Columbia handgun regulations, the Court held that—at a minimum—the Second Amendment protects individuals’ right to possess and carry handguns in their homes for self-defense.<sup>16</sup> Writing for the 5-4 majority, Justice Scalia also made clear, however, that “the right secured by the Second Amendment is not unlimited.”<sup>17</sup> With respect to the wide variety of firearms available in the world today, for example, the Court found “that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes.”<sup>18</sup> In what has proven to be one of the ruling’s most significant passages, the Court also emphasized that

nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.<sup>19</sup>

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13. U.S. CONST. amend. II.

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

15. *Id.* at 592.

16. *Id.* at 635 (“In sum, we hold that the District’s ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.”); *see also id.* (“[W]hatever else it leaves to future evaluation, [the Second Amendment] surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”).

17. *Id.* at 626; *see also id.* at 595 (“[W]e do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*.”).

18. *Id.* at 625.

19. *Id.* at 626–27.

Underscoring the point, Justice Scalia explained that he and his colleagues had listed “these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.”<sup>20</sup>

By virtue of what doctrinal analysis might the Second Amendment permit legislative restrictions of the sort that the Court approvingly identified? Justice Scalia did not say, but there are two plausible possibilities. First, it might be that convicted felons (to take one of *Heller*'s examples) are wholly outside the protection of the Second Amendment and thus do not share in “the right of the people to keep and bear Arms.” I will say more about this possibility in Part II. Second, it might be that the Second Amendment's protections do extend to convicted felons and the like, but that restrictions of the sort the Court listed can meet the standard of review that the Second Amendment requires. Efforts to assess the latter possibility are complicated by the fact that the *Heller* Court declined to announce a standard of review, and so we cannot know for sure what standard (if any) the justices in the majority favored. Instead, the Court disposed of the case by concluding that, when it comes to law-abiding citizens wishing to protect themselves from harm in their homes, the District of Columbia's handgun ban was impermissible “[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights.”<sup>21</sup>

*Heller* is not, however, entirely devoid of guidance regarding the appropriate standard of review for Second Amendment claims. Justice Scalia stressed that the level of scrutiny must be more demanding than run-of-the-mill rational-basis review, lest the amendment merely “be redundant with the separate constitutional prohibitions on irrational laws.”<sup>22</sup> He also rejected the dissent's proposal that the Court adopt “an interest-balancing inquiry” focused on whether a gun-restricting law “burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.”<sup>23</sup> In the majority's view, this was an unacceptably “judge-empowering” mode of analysis: “A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.”<sup>24</sup>

The Court's opinion contains a few additional clues regarding the standard of review toward which the majority might have been leaning, but those clues do not all point in the same direction. Some portions of the

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20. *Id.* at 627 n.26.

21. *Id.* at 628.

22. *Id.* at 628 n.27.

23. *Id.* at 689–90 (Breyer, J., dissenting).

24. *Id.* at 634–35.

opinion suggest that the justices might have envisioned something more accommodating than strict scrutiny. Consider, for example, the Court's approval of laws barring convicted felons from possessing firearms. Would the Court have so easily given its sweeping blessing to felon-in-possession laws if the justices believed strict scrutiny would apply to laws stripping convicted felons of their gun rights? It seems unlikely.<sup>25</sup> Felonies come in a wide variety of species, not all of which reveal a predilection for violence. A law keeping guns out of the hands of *all* convicted felons, regardless of the nature or circumstances of their crimes, is arguably not narrowly tailored to the government's compelling goal of protecting the public from harm.<sup>26</sup> And then there is the Court's statement that gun restrictions of the sort the Court listed are "presumptively lawful."<sup>27</sup> Such language is certainly not what one expects to hear when strict scrutiny is at work. To the contrary, it usually is a hallmark of rational-basis review.<sup>28</sup>

Perhaps *Heller's* strongest indication that strict scrutiny is appropriate for Second Amendment claims comes in the Court's finding that Second Amendment rights are "fundamental."<sup>29</sup> The justices undoubtedly did not choose that term casually, paying no regard to its implications. By choosing that verbiage and by making the historical findings necessary to justify it, for example, the Court laid the cornerstone for its conclusion two years later, in *McDonald v. City of Chicago*,<sup>30</sup> that—by operation of the Fourteenth Amendment's Due Process Clause—the Second Amendment applies to laws

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25. See Dennis A. Henigan, *The Heller Paradox*, 56 UCLA L. REV. 1171, 1197–98 (2009); 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, 1379–85 (2009). Writing for the dissent in *Heller*, Justice Breyer inferred from the Court's recitation of presumptively lawful gun restrictions that something less than strict scrutiny would apply. See *Heller*, 554 U.S. at 688 (Breyer, J., dissenting). As I indicated above and will discuss in Part II, it also is possible that the Court regarded convicted felons as being entirely beyond the Second Amendment's protection, such that one need not even worry about standards of review when evaluating their claims.

26. I say "arguably" because the supreme courts of Louisiana and Missouri have concluded that their states' felon-in-possession laws actually do survive strict scrutiny. See *State v. Eberhardt*, 145 So. 3d 377, 385 (La. 2014); *State v. Draughter*, 130 So. 3d 855, 867–68 (La. 2013); *State v. McCoy*, 468 S.W.3d 892, 897–99 (Mo. 2015); *State v. Merritt*, 467 S.W.3d 808, 813–16 (Mo. 2015).

27. *Heller*, 554 U.S. at 627 n.26.

28. See, e.g., *Heller v. Doe*, 509 U.S. 312, 320–21 (1993) ("A statute is presumed constitutional, and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record." (internal quotation marks omitted) (citations omitted)); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (stating that a law regulating commercial transactions satisfies due-process principles "unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators"). But see *infra* note 81 (noting the slim possibility that the Court meant merely to acknowledge the possibility of challenging a felon-in-possession law on non-Second Amendment grounds).

29. *Heller*, 554 U.S. at 593–94.

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

enacted by states and their political subdivisions, and not merely to laws enacted by the federal government.<sup>31</sup> As proponents of gun rights point out,<sup>32</sup> the Court often uses strict scrutiny to protect fundamental rights from infringement,<sup>33</sup> and so perhaps the *Heller* majority was laying a cornerstone for that doctrinal structure, as well. Then again, fundamental rights do not *always* draw this demanding standard of review. A content-neutral regulation of speech, for example, gets only intermediate scrutiny, requiring the government to show that its law furthers an important governmental objective and is not substantially broader than necessary.<sup>34</sup> Laws that burden a person's free exercise of religion are treated even more favorably—receiving mere rational-basis review—if they are neutral and generally applicable.<sup>35</sup>

Faced with this puzzle, what are lower courts to do when presented with a Second Amendment claim? Some judges have resisted committing to any of the familiar standards of review, finding instead that the required strength of the government's justification for a challenged law should fluidly correspond to the degree to which the law burdens the core, *Heller*-vindicated Second Amendment right of armed self-defense. That was the approach taken by Judge Richard Posner and his colleagues on a Seventh Circuit panel in 2012's *Moore v. Madigan*.<sup>36</sup> The dispute in *Moore* concerned an Illinois law banning the possession of handguns and other firearms outside the home. The court said the state's wide-reaching ban required a stronger justification than would be needed for a law banning firearms in public schools or other narrowly defined public places.<sup>37</sup> Striking down the statute, Judge Posner explained that the court's "analysis [was] not based on degrees of scrutiny, but on Illinois's failure to justify the most restrictive gun law of any of the 50 states."<sup>38</sup>

The analytic framework deployed in *Moore* is not, however, the norm. Courts do commonly agree that the required strength of the government's rationale for a gun-control law should be tied to the severity of the burdens

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31. See *id.* at 767–78, 791.

32. See, e.g., Brief for the Nat'l Rifle Ass'n & the NRA Civil Rights Def. Fund as Amici Curiae in Support of Respondent at 16–21, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290) (urging the Court to apply strict scrutiny to infringements of Second Amendment rights).

33. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546–47 (1993) (using strict scrutiny to strike down a law that targeted a disfavored group's free exercise of religion); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395–96 (1992) (using strict scrutiny to strike down a content-based regulation of speech).

34. See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) (using intermediate scrutiny to uphold must-carry provisions of a statute).

35. See *Emp't Div. v. Smith*, 494 U.S. 872, 879–81 (1990) (abandoning the strict-scrutiny standard for neutral and generally applicable laws that substantially burden a claimant's free exercise of religion); see also, e.g., *Miller v. Reed*, 176 F.3d 1202, 1206 (9th Cir. 1999) (finding that *Employment Division* requires rational-basis review for religion-burdening laws that are neutral and generally applicable).

36. *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012).

37. See *id.* at 939–40.

38. *Id.* at 941.

the law imposes, but they use that premise as a springboard for deploying a traditional standard of review. Nearly all federal courts that have addressed the issue have concluded that a lenient application of intermediate scrutiny is ordinarily appropriate, so long as the legislation at issue does not make it difficult for law-abiding people to possess (especially in their homes) the kinds of firearms that people have traditionally kept for self-defense and other lawful purposes.<sup>39</sup>

That approach, combined with the scope-defining categoricalism I will describe in Part II, is yielding an impressive win-loss record for the government in Second Amendment cases.<sup>40</sup> In a study of all Second Amendment claims adjudicated by federal and state courts between June 2008 and February 2016, Eric Ruben and Joseph Blocher recently found that the government prevailed more than ninety percent of the time.<sup>41</sup> In 2010, for example, the Third Circuit concluded that strict scrutiny was inappropriate for evaluating a federal law that outlaws firearms from which the serial numbers have been removed.<sup>42</sup> The restrictions imposed by the statute do not burden the right to armed self-defense nearly as much as the laws struck down in *Heller*, the court reasoned, and so a more permissive standard of review was in order. The court upheld the statute, concluding that it was reasonably adapted to serve important governmental interests.<sup>43</sup> In 2011, the D.C. Circuit similarly applied intermediate scrutiny when evaluating the District of Columbia's ban on "assault weapons" and on magazines holding more than ten rounds of ammunition.<sup>44</sup> Those restrictions were not as burdensome as laws banning the possession of handguns in the home, the court said, and so strict scrutiny was unwarranted.<sup>45</sup> Finding that the

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39. See Lawrence Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 WASH. U. L. REV. 1187, 1201 (2015) ("The vast majority of appellate decisions to consider the question have rejected the claim that regulations limiting the ability to keep and bear arms in common civilian use are necessarily subject to strict scrutiny . . ."); Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 706-07 (2012) (stating that lower courts "have effectively embraced the sort of interest-balancing approach that Justice Scalia condemned, adopting an intermediate scrutiny test and applying it in a way that is highly deferential to legislative determinations and that leads to all but the most drastic restrictions on guns being upheld").

40. Of course, intermediate scrutiny does not *always* yield an easy win for the government. In *Tyler v. Hillsdale County Sheriff's Department*, 837 F.3d 678 (6th Cir. 2016) (en banc), for example, the judges tentatively held that the government had failed to justify 18 U.S.C. § 922(g)(4)'s lifetime ban on gun possession by anyone "who has been adjudicated as a mental defective or who has been committed to a mental institution." *Tyler*, 837 F.3d at 681 (quoting 18 U.S.C. § 922(g)(4) (2012)). The court remanded the case for further consideration. *Id.* at 699.

41. See Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 DUKE L.J. 1433, 1455, 1472 (2018).

42. See *United States v. Marzarella*, 614 F.3d 85, 97 (3d Cir. 2010) (evaluating 18 U.S.C. § 922(k)), *cert. denied*, 562 U.S. 1158 (2011).

43. See *id.* at 98-99.

44. See *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1253 (D.C. Cir. 2011).

45. See *id.* at 1257, 1261-62.

challenged restrictions were substantially related to important governmental objectives, the court deemed them constitutionally permissible.<sup>46</sup> Applying intermediate scrutiny, courts have rejected Second Amendment challenges to numerous other varieties of federal gun-control legislation, including laws barring gun possession by convicted felons,<sup>47</sup> by individuals subject to certain protective orders,<sup>48</sup> by individuals who have been convicted of domestic violence misdemeanors,<sup>49</sup> by individuals who illegally use (or are addicted to) controlled substances,<sup>50</sup> by noncitizens who are in the country unlawfully,<sup>51</sup> and by persons on property owned by the U.S. Postal Service,<sup>52</sup> among others.

When it comes to state and local gun-control measures, the Second Amendment is, of course, only half the story, because state and local officials must also act within any constraints imposed by their states' constitutions. It turns out, however, that—setting aside Alabama, Louisiana, and Missouri, which have adopted strict-scrutiny amendments<sup>53</sup>—the law on the right to keep and bear arms is even more pro-government at the state level. Most states have provisions that purport to protect that right in their constitutions, but courts have concluded that those provisions merely require that gun restrictions be reasonable. In 2007, Adam Winkler described the landscape this way:

Forty-two states have constitutional provisions guaranteeing an individual right to bear arms and, tellingly, the courts of every state to consider the question apply a deferential “reasonable regulation” standard in arms rights cases. No state’s courts apply strict scrutiny or any other type of heightened review to gun laws. Under the standard uniformly applied by the states, any law that is a “reasonable regulation” of the arms right is constitutionally permissible. Since

46. See *id.* at 1262–64.

47. See, e.g., *United States v. Williams*, 616 F.3d 685, 692–94 (7th Cir.) (upholding 18 U.S.C. § 922(g)(1) as applied to those convicted of violent felonies), *cert. denied*, 562 U.S. 1092 (2010).

48. See, e.g., *United States v. Mahin*, 668 F.3d 119, 124–26 (4th Cir. 2012) (upholding 18 U.S.C. § 922(g)(8)); *United States v. Reese*, 627 F.3d 792, 802–05 (10th Cir. 2010) (same), *cert. denied*, 563 U.S. 990 (2011).

49. See, e.g., *United States v. Chovan*, 735 F.3d 1127, 1138–41 (9th Cir. 2013) (upholding 18 U.S.C. § 922(g)(9)), *cert. denied*, 135 S. Ct. 187 (2014); *United States v. Staten*, 666 F.3d 154, 159–68 (4th Cir. 2011) (same), *cert. denied*, 566 U.S. 950 (2012); *United States v. Booker*, 644 F.3d 12, 25–26 (1st Cir. 2011) (same), *cert. denied*, 565 U.S. 1204 (2012); *United States v. Skoien*, 614 F.3d 638, 641–45 (7th Cir. 2010) (en banc) (same), *cert. denied*, 562 U.S. 1303 (2011).

50. See, e.g., *United States v. Carter*, 750 F.3d 462, 465–70 (4th Cir.) (upholding 18 U.S.C. § 922(g)(3)), *cert. denied sub nom.* 135 S. Ct. 273 (2014); *United States v. Yancey*, 621 F.3d 681, 683–87 (7th Cir. 2010) (same).

51. See, e.g., *United States v. Meza-Rodriguez*, 798 F.3d 664, 672–73 (7th Cir. 2015) (upholding 18 U.S.C. § 922(g)(5)), *cert. denied*, 136 S. Ct. 1655 (2016); *United States v. Huitron-Guizar*, 678 F.3d 1164, 1169–70 (10th Cir.) (same), *cert. denied*, 568 U.S. 893 (2012).

52. See, e.g., *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126–29 (10th Cir. 2015) (upholding 39 C.F.R. § 232.1(l)), *cert. denied*, 136 S. Ct. 1486 (2016).

53. See *supra* notes 6–8 and accompanying text.

World War II, state courts have authored hundreds of opinions using this test to determine the constitutionality of all sorts of gun control laws. All but a tiny fraction of these decisions uphold the challenged gun control laws as reasonable measures to protect public safety.<sup>54</sup>

As Winkler explains, the states' reasonableness requirement is not identical to traditional rational-basis review; assessing a law's reasonableness entails evaluating the significance of the burdens the law imposes, for example, while rational-basis review typically does not.<sup>55</sup> But the reasonableness standard is certainly highly deferential and is less stringent than intermediate scrutiny.

Upholding a state ban on magazines capable of holding more than fifteen rounds of ammunition, for example, the Colorado Court of Appeals recently explained that firearms restrictions are permissible under the Colorado Constitution so long as they constitute "a 'reasonable exercise of the state's police power.'"<sup>56</sup> When presented with a challenge to a state restriction on concealed weapons, the Wisconsin Supreme Court similarly asked whether the law was "a reasonable exercise of the State's inherent police powers" and concluded that it was.<sup>57</sup> The Connecticut Supreme Court upheld the state's ban on "assault weapons," reasoning that the right to bear arms "is not infringed by reasonable regulation by the state in the exercise of its police power to protect the health, safety and morals of the citizenry."<sup>58</sup> The

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54. Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 686–87 (2007) (footnotes omitted). *But see* David B. Kopel & Clayton Cramer, *State Court Standards of Review for the Right to Keep and Bear Arms*, 50 SANTA CLARA L. REV. 1113, 1119–20, 1185–218 (2010) (arguing that, more frequently than Winkler acknowledges, state courts have demanded more than mere reasonableness).

55. *See* Winkler, *supra* note 54, at 716–26.

56. *Rocky Mountain Gun Owners v. Hickenlooper*, 371 P.3d 768, 774 (Colo. App. 2016) (quoting *Robertson v. City & Cty. of Denver*, 874 P.2d 325, 329 (Colo. 1994)) (interpreting COLO. CONST. art. II, § 13 ("The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons.")).

57. *State v. Cole*, 665 N.W.2d 328, 338–45 (Wis. 2003) (interpreting WIS. CONST. art. I, § 25 ("The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose.")). Other states' courts have upheld concealed-weapons laws on comparable reasoning. *See, e.g.*, *Bleiler v. Chief of Dover Police Dep't*, 927 A.2d 1216, 1220–23 (N.H. 2007) (interpreting N.H. CONST. pt. I, art. 2–a ("All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state.")); *Klein v. Leis*, 795 N.E.2d 633, 638 (Ohio 2003) (interpreting OHIO CONST. art. I, § 4 ("The people have the right to bear arms for their defense and security . . .")); *Mosby v. Devine*, 851 A.2d 1031, 1038–45 (R.I. 2004) (interpreting R.I. CONST. art. I, § 22 ("The right of the people to keep and bear arms shall not be infringed.")); *State v. McAdams*, 714 P.2d 1236, 1237–38 (Wyo. 1986) (interpreting WYO. CONST. art. I, § 24 ("The right of citizens to bear arms in defense of themselves and of the state shall not be denied.")); *see also* *State v. Robinson*, 48 N.E.3d 1030, 1035–36 (Ohio Ct. App. 2015) (reaffirming the reasoning of *Klein v. Leis*).

58. *Benjamin v. Bailey*, 662 A.2d 1226, 1233 (Conn. 1995) (interpreting CONN. CONST. art. I, § 15 ("Every citizen has a right to bear arms in defense of himself and the state.")); *see also* *State*

Michigan Court of Appeals upheld that state's felon-in-possession statute because, in the court's judgment, it was "a reasonable regulation by the state in the exercise of its police power to protect the health, safety, and welfare of Michigan citizens."<sup>59</sup>

With federal courts coalescing around a permissive application of intermediate scrutiny for gun-rights claims that do not closely resemble the claims vindicated in *Heller* and *McDonald*, and with most state courts firmly attached to a highly accommodating reasonableness standard, the N.R.A. and its allies hope to turn the tide with their campaign for strict-scrutiny amendments at the state level.<sup>60</sup> They argue that state and federal judges have relegated gun rights to "second class" status,<sup>61</sup> and so the time has come for state legislators and voters to take decisive action. As I will now show, however, the proposed strict-scrutiny amendments may fall far short of securing significant reform.

## II

The N.R.A.'s amendment campaign focuses on adopting the word "fundamental" to describe the right to keep and bear arms and on requiring strict scrutiny for any governmental restraints placed upon that right. As ratified in Alabama, Louisiana, and Missouri, and as currently on the table in Iowa, those amendments yield somewhat different final texts. In Alabama, the constitution had already declared "that 'every citizen has a right to bear arms in defense of himself and the state.'"<sup>62</sup> When voters amended that provision in 2014, they retained the textual link between defense and the right to bear arms, added the adjective "fundamental" to describe the right, and inserted a statement declaring that "[a]ny restriction on this right shall be subject to strict scrutiny."<sup>63</sup> In Louisiana, the constitution had already protected "[t]he

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v. Jacobsen, No. H17CR140057617S, 2016 WL 4582164, at \*5 (Conn. Super. Ct. Aug. 1, 2016) (reaffirming the reasoning of *Benjamin v. Bailey*).

59. *People v. Swint*, 572 N.W.2d 666, 671 (Mich. Ct. App. 1997) (interpreting MICH. CONST. art. I, § 6 ("Every person has a right to keep and bear arms for the defense of himself and the state.)); see also *People v. Brady*, No. 329037, 2017 WL 127745, at \*2 (Mich. Ct. App. Jan. 12, 2017) (reaffirming the reasoning of *People v. Swint*). Other states' courts have upheld felon-in-possession laws using the same deferential standard. See, e.g., *State v. Ricehill*, 415 N.W.2d 481, 483–84 (N.D. 1987) (interpreting N.D. CONST. art. I, § 1 ("All individuals . . . have certain inalienable rights . . . [including the right] to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.")).

60. See, e.g., "Strict Scrutiny" Amendments, *supra* note 3 (arguing that lower courts "have largely ignored" *Heller* and *McDonald* by adopting "'intermediate scrutiny,' a toothless standard that allows antigun officials broad leeway to infringe the rights of law-abiding Americans").

61. See Ruben & Blocher, *supra* note 41, at 1447–49 (recounting utterances of the "second class" charge).

62. See *Alabama Right to Bear Arms*, *supra* note 6 (providing the pre-amendment text of Article I, Section 26).

63. See *id.*

right of each citizen to keep and bear arms,” but allowed the legislature “to prohibit the carrying of weapons concealed on the person.”<sup>64</sup> Voters in 2012 struck the latter provision, added the adjective “fundamental” to describe the right, and inserted a strict-scrutiny provision.<sup>65</sup> In Missouri, the original text and the alterations were comparable (in relevant part) to those in Louisiana.<sup>66</sup> Today, Iowa is among the few states that do not have a right-to-bear-arms constitutional provision,<sup>67</sup> and so the proposed amendment would add entirely new language: “The right of the people to keep and bear arms shall not be infringed. The sovereign state of Iowa affirms and recognizes this right to be a fundamental individual right. Any and all restrictions of this right shall be subject to strict scrutiny.”<sup>68</sup> On a quick reading, it might be easy to overlook one small but significant feature that all of those provisions (except Alabama’s) have in common: they refer to “*the* right” to keep and bear arms. That is where the N.R.A.’s “iron wall” first begins to weaken.<sup>69</sup>

Recall that the Second Amendment similarly protects “*the* right of the people to keep and bear Arms.”<sup>70</sup> In its landmark rulings in *Heller* and *McDonald*, the Court found this phrasing significant because it suggests that those who wrote and ratified the amendment were not creating a right *ab initio*, but rather were taking action on a right with which they were already familiar. Having pointed out that the text of the amendment indicates that it concerns “a pre-existing right,” Justice Scalia’s majority in *Heller* relied heavily upon English, colonial, and early American history to illuminate that right’s contours—contours that would have been discernable at the time of the Second Amendment’s ratification.<sup>71</sup> In *McDonald*, the Court relied upon that same historical record to support its conclusion that the Second Amendment

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64. See Richard P. Bullock, *The Declaration of Rights of the Louisiana Constitution of 1974: The Louisiana Supreme Court and Civil Liberties*, 51 LA. L. REV. 787, 814 (1991) (quoting the pre-amendment text of Article I, Section 11).

65. See *Louisiana Right to Bear Arms*, *supra* note 7.

66. See *Missouri Right to Bear Arms*, *supra* note 8. Missouri voters added additional language that is not relevant for my purposes here. See *supra* note 8 (parenthetically quoting the full provision as amended).

67. See TODD E. PETTYS, *THE IOWA STATE CONSTITUTION* 103 (2d ed. 2018) (noting the delegates’ refusal to include such a provision during Iowa’s 1857 constitutional convention). The other states lacking arms provisions in their constitutions are California, Maryland, Minnesota, New Jersey, and New York. See *Guarantees of the Right to Arms in State Constitutions*, NRA-ILA (July 3, 2014), <https://www.nraila.org/articles/20140703/guarantees-of-the-right-to-arms-in-stat>.

68. See H.R.J. Res. 2009, 87th Gen. Assemb., Reg. Sess. § 1 (A) (Iowa 2018).

69. Provisions like Alabama’s, which use the formulation “a right,” are not exempt from the kind of categorical analysis that I will describe here in Part II—no constitutional right is entirely unbounded. But the indefinite article would loosen the text’s ties to the historical baggage that I will describe in a moment. Of course, that loosening would come at the cost of giving judges even greater interpretive freedom.

70. U.S. CONST. amend. II (emphasis added).

71. See *District of Columbia v. Heller*, 554 U.S. 570, 592–95 (2008).

protects a fundamental, “deeply rooted” right and thus constrains state and local governments just as much as it constrains their federal counterparts.<sup>72</sup>

When one combines the Court’s emphasis on the right’s historical roots, the Court’s insistence that “[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them,”<sup>73</sup> the Court’s finding that the right “is not unlimited,”<sup>74</sup> and the Court’s illustrative list of “presumptively lawful regulatory measures,”<sup>75</sup> one is plainly led to the possibility that there are many gun-control laws that are constitutionally permissible because they do not even bring the Second Amendment into play. In other words, when presented with a Second Amendment claim, courts should ask a threshold question before getting tangled up in levels of scrutiny: Does this case involve a scenario to which the Second Amendment’s circumscribed protections extend?<sup>76</sup>

That is precisely the analytic framework that most lower federal courts are adopting in the post-*Heller* era. In an influential ruling, the Third Circuit in *United States v. Marzarella*<sup>77</sup> concluded that *Heller* necessitates a two-step analytic process whenever a court adjudicates the merits of a Second Amendment claim:

As we read *Heller*, it suggests a two-pronged approach to Second Amendment challenges. First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee. . . . If it does not, our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid.<sup>78</sup>

Before ever reaching questions concerning the applicable standard of review, therefore, courts might conclude that there is something about many of the

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72. *McDonald v. City of Chicago*, 561 U.S. 742, 768 (2010) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

73. *Heller*, 554 U.S. at 634–35.

74. *Id.* at 626; *see also id.* (stating that the mere fact that a constitutional provision protects something called “the right to keep and bear arms” does not mean that people within that jurisdiction have “a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose”).

75. *Id.* at 627 n.26; *see also supra* text accompanying notes 19–20.

76. 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, 1449–53 (2009) (arguing that it would be proper for courts to reject some of the firearms claims that come before them on the ground that those claims fall beyond the Second Amendment’s scope, with the amendment’s scope determined by text, original meaning, tradition, and background legal principles); *cf.* *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 790–92, 795–98 (2011) (emphasizing the importance of examining the historical record when identifying categories of speech not encompassed by the First Amendment’s reference to “the freedom of speech”).

77. *United States v. Marzarella*, 614 F.3d 85 (3d Cir. 2010), *cert. denied*, 562 U.S. 1158 (2011).

78. *Id.* at 89 (citations omitted).

rights-invoking claimants who appear before them, or something about those claimants' weapons or other circumstances, that categorically pushes their claims beyond the Second Amendment's reach. The Third Circuit concluded that this is what the *Heller* majority likely had in mind when offering examples of "presumptively lawful" gun-control measures, such as laws making it a crime for convicted felons or persons suffering from mental illness to possess firearms.<sup>79</sup> The court posited that those individuals simply do not possess the right that the Second Amendment protects.

In rulings across the country, federal courts are deploying *Marzzarella's* two-step methodology.<sup>80</sup> In many cases, courts have upheld gun restrictions at the first step. Based upon a combination of historical analysis and an interpretation of *Heller*, some circuits have concluded, for example, that the federal ban on firearm possession by convicted felons is permissible because—unless they can favorably distinguish their circumstances from the norm<sup>81</sup>—convicted felons are not protected by the Second Amendment.<sup>82</sup> Courts have reached similar conclusions regarding juveniles,<sup>83</sup> non-citizens who are in the country unlawfully,<sup>84</sup> individuals who illegally use controlled

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79. See *id.* at 91–92; see also *Heller*, 554 U.S. at 626–27 n.26 (offering examples of "presumptively lawful" gun-control measures). For a critical discussion of *Heller's* categoricalism, see Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 404–29 (2009).

80. See *Binderup v. Attorney General*, 836 F.3d 336, 346 (3d Cir. 2016) ("Nearly every court of appeals has cited *Marzzarella* favorably. Indeed, it has escaped disparagement by any circuit court." (citations omitted)), *cert. denied*, 137 S. Ct. 2323 (2017).

81. The possibility that one's status as a convicted felon does not automatically doom one's Second Amendment claim flows from *Heller's* statement that felon-in-possession laws and the like are "presumptively lawful." *Heller*, 554 U.S. at 627 n.26 (emphasis added). As the Seventh Circuit has noted, "*Heller* referred to felon disarmament bans only as 'presumptively lawful,' which, by implication, means that there must exist the possibility that the ban could be unconstitutional in the face of an as-applied challenge." *United States v. Williams*, 616 F.3d 685, 692 (7th Cir.), *cert. denied*, 562 U.S. 1092 (2010). Although it is not the most natural reading of the text, perhaps the *Heller* Court meant merely to acknowledge that there might be other grounds—having nothing to do with the Second Amendment—on which a convicted felon might challenge the ban, such that the Court was not speaking the language of formal presumptions.

82. See, e.g., *Binderup*, 836 F.3d at 348–53 (upholding 18 U.S.C. § 922(g)(1), at least as applied to those who have been convicted of "serious" felonies); *United States v. Moore*, 666 F.3d 313, 316–20 (4th Cir. 2012); *United States v. Rozier*, 598 F.3d 768, 770–71 (11th Cir.), *cert. denied*, 560 U.S. 958 (2010); *United States v. Vongxay*, 594 F.3d 1111, 1116–18 (9th Cir.), *cert. denied*, 562 U.S. 921 (2010). Presented with cases arising under states' felon-in-possession laws, some state courts have reached the same conclusion. See, e.g., *State v. Craig*, 826 N.W.2d 789, 793–98 (Minn. 2013). Some federal courts have relied entirely upon *Heller's* dicta, seeing no need for deeper analysis. See, e.g., *United States v. Bogle*, 717 F.3d 281, 281–82 (2d Cir. 2013); *United States v. Khami*, 362 F. App'x 501, 507–08 (6th Cir.), *cert. denied*, 560 U.S. 934 (2010); *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009), *cert. denied*, 559 U.S. 970 (2010); *United States v. Irish*, 285 F. App'x 326, 327 (8th Cir. 2008).

83. See, e.g., *United States v. Rene E.*, 583 F.3d 8, 12–16 (1st Cir. 2009) (upholding 18 U.S.C. § 922(x)(2)(A)), *cert. denied*, 558 U.S. 1133 (2010).

84. See, e.g., *United States v. Carpio-Leon*, 701 F.3d 974, 983 (4th Cir. 2012) (upholding 18 U.S.C. § 922(g)(5)), *cert. denied*, 571 U.S. 831 (2013); *United States v. Portillo-Munoz*, 643 F.3d 437, 439–42 (5th Cir. 2011) (same), *cert. denied*, 566 U.S. 963 (2012); cf. *United States*

substances,<sup>85</sup> individuals who are subject to certain kinds of protective orders,<sup>86</sup> and individuals who have been convicted of domestic violence misdemeanors.<sup>87</sup>

By referring to “the right . . . to keep and bear arms,” the proposed strict-scrutiny amendment in Iowa and the constitutional provisions recently adopted in Louisiana and Missouri explicitly invite the same kind of historical analysis aimed at discerning the contours of the familiar, preexisting right to which those constitutional texts refer.<sup>88</sup> Some people, weapons, and circumstances will fall within the protected right’s historically recognized ambit (and the government’s rationale for intervening in a given instance either will or will not satisfy the applicable standard of review), while other people, weapons, and circumstances will fall beyond the right’s boundaries entirely.

Categoricalism of this sort has occasionally appeared in state courts’ past gun-rights rulings. The Oregon Supreme Court observed in 1980, for example, that the Oregon Constitution’s protection of the right to possess “arms” does not extend to heavy weaponry “used exclusively by the military.”<sup>89</sup> But determining whether certain categories of people, weapons, and circumstances fall wholly outside the boundaries of the state constitutional right to keep and bear arms has not been a dominant mode of judicial decision-making. Nor should one have expected otherwise. Because state courts have required that gun-control legislation merely be a reasonable exercise of the legislature’s police power to protect citizens’ health, safety, and welfare,<sup>90</sup> not much has depended on whether claimants and their circumstances actually fall within the state constitutional right’s scope. Adopting the N.R.A.’s proposed “fundamental” and “strict scrutiny” language, however, should place scope-defining inquiries squarely in the foreground of judicial analysis. Just as lower federal courts have developed a two-step analytic framework in response to *Heller* and *McDonald*’s recognition of a fundamental, strongly protected individual right with historically defined boundaries,<sup>91</sup> strict-scrutiny amendments ought to spur state courts to consider categorical

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v. Flores, 663 F.3d 1022, 1022–23 (8th Cir. 2011) (incorporating by reference the analysis in *Portillo-Munoz*), *cert. denied*, 567 U.S. 938 (2012).

85. See, e.g., *United States v. Seay*, 620 F.3d 919, 924–25 (8th Cir. 2010) (upholding 18 U.S.C. § 922(g)(3)), *cert. denied*, 562 U.S. 1191 (2011); cf. *United States v. Richard*, 350 F. App’x 252, 260 (10th Cir. 2009) (upholding § 922(g)(3) entirely on the strength of *Heller*).

86. See, e.g., *United States v. Bena*, 664 F.3d 1180, 1182–85 (8th Cir. 2011) (upholding 18 U.S.C. § 922(g)(8)).

87. See, e.g., *United States v. White*, 593 F.3d 1199, 1205–06 (11th Cir. 2010) (upholding 18 U.S.C. § 922(g)(9)).

88. With respect to states that use the formulation “a right,” see *supra* note 69.

89. *State v. Kessler*, 614 P.2d 94, 99 (Or. 1980) (interpreting article 1, section 27 of the Oregon Constitution).

90. See *supra* notes 54–59 and accompanying text.

91. See *supra* notes 77–87 and accompanying text.

questions of scope before evaluating how a challenged law fares under the prescribed standard of review.<sup>92</sup>

If the N.R.A.'s aim is to help states build an "iron wall" around a broad range of gun rights by greatly reducing judges' decision-making flexibility,<sup>93</sup> one can see already that the proposed strict-scrutiny amendments are not a recipe for assured success. The job of ascertaining the scope of the strongly protected fundamental right to keep and bear arms will fall to judges—the very same people whose purported "anti-gun activism" the N.R.A. says necessitates these amendments in the first place.<sup>94</sup> On each occasion when a court finds that a claim lies beyond the boundaries of the fundamental right protected by that state's arms provision, the strict-scrutiny language at the heart of the N.R.A.'s amendment campaign will be inconsequential. The court will uphold the contested legislation without ever having to determine whether the government's interest is compelling or whether the government is pursuing that interest in a narrowly tailored manner. A strict-scrutiny amendment may deepen the protection that the fundamental firearms right receives under a state's constitution, but it will do nothing to ensure the right's breadth.

### III

Once strict-scrutiny amendments push state courts to carefully evaluate who and what are encompassed by the fundamental, powerfully protected right to keep and bear arms, what will those courts conclude? For a number of reasons, state courts may find that the range of people and activities protected by these amendments is little or no greater than the range already strongly protected by the Second Amendment in the post-*Heller* era.

At the outset, familiar separation-of-powers principles tilt the playing field against individuals seeking to overturn gun-control legislation under an expansive judicial interpretation of the fundamental right to keep and bear arms. To ensure that courts do not overstep their proper role in our democratic system of government, they have repeatedly underscored their reluctance to find duly enacted legislation unconstitutional in close cases. The Iowa Supreme Court declared long ago, for example, that it will strike down a statute only when the constitutional violation is "clear, palpable and plain."<sup>95</sup> The Missouri Supreme Court explained much more recently—in a case concerning that state's newly ratified strict-scrutiny amendment—that it is obliged to uphold challenged legislation if doing so "is possible . . . by any

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92. Because state courts are accustomed to moving directly to standard-of-review analysis when presented with gun-rights claims, it may take some time before they fully recognize the importance of attending to questions of scope. See *infra* notes 149–55 and accompanying text.

93. See Cox, *supra* note 2.

94. See *supra* note 2 and accompanying text.

95. *Morrison v. Springer*, 15 Iowa 304, 347 (1863).

reasonable construction of the Constitution.”<sup>96</sup> In a recent case involving Louisiana’s strict-scrutiny amendment, the Louisiana Supreme Court similarly emphasized that a litigant who alleges a statute is unconstitutional “must demonstrate clearly and convincingly that it was the constitutional aim of that provision to deny the legislature the power to enact the legislative instrument in question.”<sup>97</sup> If a court has doubts about whether the protections afforded by that state’s strict-scrutiny amendment extend to a particular claimant or set of circumstances, therefore, the court should resolve that uncertainty in favor of the challenged statute and thereby leave the matter in the hands of the state’s politically accountable policymakers. Absent a clear showing that a strict-scrutiny amendment precludes gun-control legislation of the kind that a litigant is challenging, a court likely cannot strike down the challenged legislation without practicing the same kind of judicial activism that the N.R.A. accuses judges of practicing when their firearms rulings cut in the other direction.<sup>98</sup>

With that overarching separation-of-powers orientation in mind, consider some of the more specific obstacles that a claimant may face when arguing that a strict-scrutiny amendment was ratified in order to provide “iron-clad”<sup>99</sup> protection to people in circumstances like his or her own. Some of those obstacles are fairly practical in nature. Consider a scenario, for example, in which a claimant challenges a gun-control statute that was on the books when his or her state’s strict-scrutiny amendment was ratified. If the lawmakers who proposed that amendment saw the challenged law as part of the problem they were aiming to solve,<sup>100</sup> a court might well ask, why didn’t they repeal the legislation, rather than launch the cumbersome amendment process and leave the objectionable law’s fate to the vagaries of future litigation?

A claimant challenging a law that was on the books at the time of ratification might face similar obstacles in the form of statements made by the lawmakers themselves. When campaigning to secure the political support necessary for ratification, the amendment’s legislative proponents may have assured voters that the amendment would not disrupt the regulatory status quo. In a 2018 televised interview, for example, an Iowa legislator told viewers that the proposed strict-scrutiny amendment “isn’t going to take us into a path

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96. *State v. Clay*, 481 S.W.3d 531, 537 (Mo. 2016) (quoting *Liberty Oil Co. v. Dir. of Revenue*, 813 S.W.2d 296, 297 (Mo. 1991)).

97. *State v. Webb*, 144 So. 3d 971, 976 (La. 2014) (quoting *La. Fed’n of Teachers v. State*, 118 So. 3d 1033, 1048 (La. 2013)).

98. See *supra* notes 2–5 and accompanying text.

99. Barrow, *supra* note 2 (quoting Louisiana’s then-Governor Bobby Jindal, who picked up the ferric imagery from the N.R.A.).

100. See generally *Amending State Constitutions*, BALLOTPEDIA, [https://ballotpedia.org/Amending\\_state\\_constitutions](https://ballotpedia.org/Amending_state_constitutions) (last visited Jan. 3, 2019) (noting that legislators in all 50 states are authorized to launch the amendment process).

or down a road that is extreme where we're undoing the regulations we have in the books now."<sup>101</sup> Such statements will never be fully dispositive when courts confront questions of constitutional interpretation, but courts nevertheless do commonly take them into account. When upholding Louisiana's long-established felon-in-possession law against a challenge brought under that state's strict-scrutiny amendment, for example, the Louisiana Supreme Court noted that one of the amendment's legislative sponsors had said that the state had "close to forty gun laws right now and those laws will stay in effect."<sup>102</sup>

So far as ordinary voters' role in the ratification process is concerned,<sup>103</sup> public opinion polling conducted during the ratification period may similarly shape later assessments of the protected right's scope. The Wisconsin Supreme Court cited such polling data, for example, when concluding in 2003 that voters had not intended to undercut the state's ban on carrying concealed weapons when they placed a right-to-bear-arms provision in their constitution.<sup>104</sup> If gun-control advocates worry that a proposed strict-scrutiny amendment would confer undesirable gun rights of a particular kind, and if they think polling would reveal that the larger public shares their normative convictions,<sup>105</sup> they could try to shore up the government's future litigation position by commissioning the appropriate polling during the ratification campaign. They would advance their cause still further if they found legislators willing to publicly declare that they support the proposed amendment on the understanding that it will not protect rights of that particular variety.

Litigants hoping to secure robust firearms protections broader than those already available under the Second Amendment may also find themselves facing difficulties arising from a surprising source: the Court's opinion in *Heller* itself. To ascertain the content of the arms right that the founding generation intended the Second Amendment to protect, the *Heller* Court examined legal authorities that were in place in late eighteenth-century and early nineteenth-century America, including firearms provisions contained in early state constitutions.<sup>106</sup> By identifying the protections that

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101. See, e.g., *Gun Control and Second Amendment-Related Issues*, IOWA PRESS (Mar. 30, 2018), <http://www.iptv.org/iowapress/story/30301/gun-control-and-second-amendment-related-issues> (featuring an interview with Iowa Representative Matt Windschitl).

102. *State v. Eberhardt*, 145 So. 3d 377, 384 (La. 2014) (quoting Louisiana Senator Neil Riser).

103. See generally Jennie Drage Bowser, *Constitutions: Amend with Care*, NAT'L CONF. OF STATE LEGISLATURES (Sept. 1, 2015), <http://www.ncsl.org/research/elections-and-campaigns/constitution-amend-with-care.aspx> ("Delaware is the only state that allows the legislature to amend the constitution without a popular vote.").

104. *State v. Cole*, 665 N.W.2d 328, 345 (Wis. 2003) (interpreting WIS. CONST. art. I, § 25).

105. For a sample of national polling indicating popular support for gun-control laws, see *Guns*, GALLUP, <https://news.gallup.com/poll/1645/guns.aspx> (last visited Jan. 3, 2019).

106. See *District of Columbia v. Heller*, 554 U.S. 570, 584–85, 585 n.8, 600–03 (2008) (examining the constitutions of Alabama, Connecticut, Indiana, Kentucky, Maine, Massachusetts,

were available during that period at the state level, the *Heller* Court believed it was better able to discern the contours of the pre-existing right that the founding generation wished to protect at the federal level. Fast-forward to the present day, when a strict-scrutiny amendment obliges a court to define the contours of the firearms right that a state's people have declared to be fundamental and worthy of strict scrutiny. Tracking *Heller's* own methodology, a court could sensibly look to the U.S. Supreme Court's pre-ratification pronouncements for illumination. After all, the Court's declaration in *Heller* that the Second Amendment strongly protects a fundamental right to keep an operable handgun in one's home for self-defense provides state courts with precisely the same kind of contextual evidence of the public's ratification-era understanding that the *Heller* Court itself seized upon when trying to uncover the founding generation's intentions. Drawing upon both the mode of reasoning and the holding in *Heller*, therefore, a state court might conclude that voters' chief purpose when ratifying a strict-scrutiny amendment was to provide state-level protection for the same right that was honored at the federal level in *Heller*. Indeed, a state court might struggle to find comparably clear evidence that voters wanted a strict-scrutiny amendment to accomplish much else.

Of course, using *Heller's* interpretive methodology in this way would be virtually a non-starter if it left a strict-scrutiny amendment with no legal function to serve. As we frequently see in the context of statutory interpretation, courts are reluctant to interpret a legal text in a manner that renders it pointless.<sup>107</sup> What is the purpose of a strict-scrutiny amendment if it does no more than protect the same core right already deemed fundamental in *Heller* and already held applicable to the states in *McDonald*? The Louisiana Supreme Court has pointed toward an answer. Upholding that state's felon-in-possession statute, the court found that Louisiana's lawmakers had not proposed a strict-scrutiny amendment in order to extend strong protection to the likes of convicted felons; rather, lawmakers had simply feared that the Court's 5-4 rulings in *Heller* and *McDonald* "might later be threatened by a change in the composition of the Supreme Court."<sup>108</sup> Depending on the interpretive evidence available to them, courts in other states could reach similar conclusions, finding that strict-scrutiny

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Mississippi, Missouri, North Carolina, Ohio, Pennsylvania, Tennessee, and Vermont); *see also supra* notes 71-72 and accompanying text (discussing the *Heller* Court's reasoning).

107. *See, e.g.,* *Rowley v. Yarnall*, 22 F.3d 190, 192 (8th Cir. 1994) (acknowledging "the very important and well-settled canon of statutory construction that the legislature is presumed not to have done a vain thing, inserting language for no purpose").

108. *See, e.g.,* *State v. Draughter*, 130 So. 3d 855, 861 n.6 (La. 2013); *see also id.* at 861 (stating that "[t]he slim majority supporting the holdings in *Heller* and *McDonald* prompted Louisiana legislators to introduce legislation which ultimately resulted in the amendment of the state constitution" and that lawmakers' goal "was to secure a continued individual right to bear arms by Louisiana citizens under the Louisiana Constitution, protected from possible future judicial or legislative erosion"); *State v. Eberhardt*, 145 So. 3d 377, 383 n.3 (La. 2014) (making the same observations).

amendments were adopted principally to provide state-level assurance that strongly protected gun rights cannot fall below the threshold that *Heller* and *McDonald* have clearly established.

A state's own regulatory history may create additional obstacles in the path of those seeking a broad interpretation of a state constitutional right to keep and bear arms. The manner in which a state has historically regulated firearms might reveal quite a lot about the contours of the pre-existing firearms right (whether natural or constitutional in nature<sup>109</sup>) that a state's lawmakers and voters have opted to describe as fundamental and deserving of strict scrutiny. To be sure, a state's sovereign people might ratify a strict-scrutiny amendment precisely because they wish to *reject* the state's historically narrow perception of gun rights. But that is a proposition that would have to be clearly borne out by the available evidence, and locating such evidence might not be easy. In Iowa, for example, the proposed amendment states that there already exists a right to keep and bear arms ("*the* right"), but the amendment's text does nothing to disclaim Iowans' longstanding perception of what that right encompasses. Unless they believe that *all* of their state's gun laws can survive strict scrutiny, lawmakers themselves implicitly acknowledge the probative value of their state's regulatory background when they assure voters that a proposed strict-scrutiny amendment will not invalidate *any* existing gun restrictions.

Let us assume, then, that a state court concludes that examining the local history of firearms regulation could help it better understand the scope of the pre-existing right that the state's people regard as fundamental and worthy of powerful protection. What would the court discover? Although a state-by-state survey of the history of firearms regulation is well beyond the scope of this Essay,<sup>110</sup> consider, by way of illustration, several features of the historical record in Iowa. There is room for lawyers to disagree about the best inferences to draw from Iowa's record; I do not aim to provide an unassailable interpretation of that record here. My purpose is simply to show how readily

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109. Iowa is among the few states that do not currently have arms provisions in their constitutions, see *supra* note 67 and accompanying text, but the history of firearms regulation in a state like Iowa can nonetheless help to illuminate lawmakers' and citizens' historic perception of their gun rights. The absence of an explicit arms provision in their constitution hardly means that Iowans have historically disclaimed gun rights altogether. The first provision of its bill of rights declares, for example, that "[a]ll men and women . . . have certain inalienable rights—among which are those of enjoying *and defending* life and liberty, acquiring, possessing *and protecting* property, and pursuing and obtaining safety and happiness." IOWA CONST. art. I, § 1 (emphasis added). And, of course, people commonly believe they have natural or constitutional rights regardless of what the text of their constitution declares. I thus reject Kopel and Cramer's suggestion that, in a state like Iowa, "legislators may have enacted gun control laws without paying the slightest attention to whether those laws infringed the right to keep and bear arms." Kopel & Cramer, *supra* note 54, at 1122–23.

110. See generally PATRICK J. CHARLES, ARMED IN AMERICA: A HISTORY OF GUN RIGHTS FROM COLONIAL MILITIAS TO CONCEALED CARRY *passim* (2018) (discussing the history of firearms regulation in America).

one can use regulatory histories of the sort one finds in Iowa to try to demonstrate that citizens have a narrow conception of the fundamental firearms right that a strict-scrutiny amendment would protect.

For roughly a century, Iowa's lawmakers have identified certain types of firearms that citizens ordinarily are not authorized to possess. In 1927, for example, the legislature made it a crime to possess a "machine gun."<sup>111</sup> In 1976, lawmakers revised the definition of that species of firearm, they placed machine guns within a newly announced category of "offensive weapons," and they placed numerous other kinds of weapons on the proscribed list.<sup>112</sup> With minor modifications, that regulatory arrangement remains in place today.<sup>113</sup> This history suggests that Iowans do not perceive they have a fundamental right to possess weapons of these kinds, and that the pending strict-scrutiny amendment thus would not protect them. With respect to especially dangerous weapons that become available in the future, or currently existing weapons that prove to be more dangerous than now believed, this history might further suggest to a reviewing court that Iowans do not believe they should have a strongly protected right to possess firearms that future legislatures identify as unusually offensive to Iowans' public-safety sensibilities.

Iowa's lawmakers have also long identified certain classes of people who, as a general rule, are not permitted to possess one or more types of guns. In 1884, for example, the Iowa legislature made it a crime to "sell, present or give any pistol [or] revolver . . . to any minor,"<sup>114</sup> a restrictive regime that (with narrow exceptions) remains in place today.<sup>115</sup> In 1976, the Iowa General Assembly made it illegal for convicted felons to possess firearms of any kind, a ban that still stands today.<sup>116</sup> In 2010, lawmakers expanded the ban to include individuals "who ha[ve] been convicted of a misdemeanor crime of domestic violence" and those against whom courts have issued specific kinds of protective orders.<sup>117</sup> These statutory enactments suggest that, in Iowans' judgment, individuals falling into these specified groups do not possess the

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111. Act of Apr. 19, 1927, ch. 234, § 1, 1927 Iowa Acts 201. The legislature defined a machine gun as a gun "capable of being fired from the shoulder or hip of a person, and by the recoil of such gun." *Id.* Four years later, the legislature broadened the ban to encompass "any machine gun of any nature or kind." Act of Apr. 4, 1931, ch. 239, § 1, 1931 Iowa Acts 173.

112. Act of June 28, 1976, ch. 1245, § 2401, 1976 Iowa Acts 549, 574. The legislature defined a machine gun as "a firearm which shoots or is designed to shoot more than one shot, without manual reloading, by a single function of the trigger." *Id.* § 2401(1).

113. See IOWA CODE §§ 724.1, 724.3 (2017). Exceptions are made for narrowly defined groups of people, such as "peace officer[s]" and members of the military. *Id.* § 724.2.

114. Act of Mar. 29, 1884, ch. 78, § 1, 1884 Iowa Acts 86.

115. See IOWA CODE § 724.22 (making it a crime to sell, give, or loan a rifle, shotgun, pistol, or revolver to a person under the age of 21).

116. See Act of June 28, 1976, ch. 1245, § 2426, 1976 Iowa Acts 549, 579 (codified as amended at IOWA CODE § 724.26).

117. Act of Mar. 22, 2010, ch. 1083, § 4(2)(a), 2010 Iowa Acts 358, 358 (codified as amended at IOWA CODE § 724.26).

fundamental right that the proposed strict-scrutiny amendment would powerfully protect. Just as with especially dangerous weapons, perhaps this regulatory history further suggests that Iowans do not believe the right enshrined in the proposed strict-scrutiny amendment should extend to additional groups of people whom future legislatures identify as presenting an unacceptably high risk of harm.

Iowa's legislature has also identified circumstances in which people who would otherwise qualify to carry a firearm become (at least temporarily) unqualified to do so.<sup>118</sup> In 1976, for example, lawmakers declared that a person could not obtain a permit to carry firearms if he or she was "addicted to the use of alcohol or any controlled substance."<sup>119</sup> Under the law as it stands today, those who are "addicted to the use of alcohol" remain ineligible for a permit.<sup>120</sup> As for people who do *not* have an alcohol addiction and who obtain a permit, their permits are invalid during those times when they are "under the influence of an alcoholic beverage or other drug," have a blood-alcohol concentration of .08 or more, or have "any amount of a controlled substance" in their "blood or urine."<sup>121</sup> What underlying presuppositions might that regulatory arrangement reflect? One theory might be that a person continues to have a right to possess a firearm even when any of those disqualifying criteria are met, but that the intoxication provides the government with a sufficient justification for restricting that right. This theory is at least superficially plausible, though one wonders whether all of those restrictions could withstand strict scrutiny. For example, is the provision invalidating a permit when there is "*any amount*" of *any* "controlled substance" in a person's blood or urine truly narrowly tailored to serve compelling public-safety concerns? Here is an alternative theory: maybe these statutory provisions reflect Iowans' judgment that a person simply does not have a fundamental right to possess a firearm in any location where a permit has traditionally been required, and that the legislature accordingly has greater latitude to regulate in those domains.<sup>122</sup> Might that be true?

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118. For an example that is plainly outdated in its specifics but is consistent with the larger theme, consider the following. In 1890, Iowa lawmakers barred possession of firearms by "tramps," defined as males "sixteen years of age or over, who [are] physically able to" work, not making any good-faith effort to find employment, and "wandering about having no visible calling or business to maintain [themselves]." See Act of May 3, 1890, ch. 43, §§ 2, 4, 1890 Iowa Acts 68, 68-69. That law remained on the books for three-quarters of a century, until the legislature repealed it in 1976 as part of a major overhaul of the state's criminal code. See Act of June 28, 1976, ch. 1245, § 526, 1976 Iowa Acts 549, 774-75 (repealing section 746.3 of the 1975 Iowa Code).

119. Act of June 28, 1976, ch. 1245, § 2408(3), 1976 Iowa Acts 549, 576.

120. IOWA CODE § 724.8(2).

121. Act of Apr. 29, 2010, ch. 1178, § 4, 2010 Iowa Acts 600, 601 (codified at IOWA CODE § 724.4C and incorporating by reference the definition of intoxication found at IOWA CODE § 321J.2); see also IOWA CODE § 321J.1(4) (defining a "controlled substance" as a substance listed in section 124.204 or section 124.206 of the Iowa Code).

122. Today, unless a statutory exception applies, a person needs a permit to carry a concealed firearm in any geographic location, to carry "a pistol or revolver, or any loaded firearm of any

Consider what Iowa lawmakers have historically said about where it is lawful to carry a firearm *without* a permit. Consistent with *Heller's* emphasis on the primacy “of hearth and home,”<sup>123</sup> numerous legislative enactments have signaled that one’s home, land, and place of business are places where Iowa officials should leave law-abiding adults largely to their own devices when it comes to possessing ordinary firearms. In 1935, for example, the legislature declared that no permit was required to carry a concealed weapon on one’s own land or in one’s own home or place of business,<sup>124</sup> a rule that remains in place today.<sup>125</sup> Legislation that traces its roots to 1970 allows operators of snowmobiles and all-terrain vehicles to carry loaded firearms without a permit if they are on land that they own or possess.<sup>126</sup> In 1976, the legislature enacted a law stating that, when the governor declares “a state of public disorder emergency,” the governor could also bar ordinary civilians from carrying firearms anywhere other than their “place of residence or business.”<sup>127</sup> That authorization remained in place until April 2017, when lawmakers struck it from the code.<sup>128</sup> When one places those rules alongside the restrictions concerning alcohol and controlled substances,<sup>129</sup> a picture begins to take shape. Perhaps Iowans have long perceived that—with the possible exception of periods of governor-declared public disorder—their core right to keep and bear arms is limited primarily to their own dwellings, land, and businesses, and that once they step beyond those locations they are properly subject to greater regulation.<sup>130</sup>

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kind, whether concealed or not” within a city’s limits, or to carry “in a vehicle a pistol or revolver.” IOWA CODE § 724.4(1). Other laws speak to the legality of carrying guns in other specified places. *See, e.g., id.* § 724.4B (barring carrying guns on school grounds, with limited exceptions).

123. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

124. *See* Act of May 4, 1935, ch. 122, § 4, 1935 Iowa Acts 171, 171–72.

125. *See* IOWA CODE § 724.4(1), (4)(a).

126. *See* Act of Apr. 6, 2016, ch. 1070, 2016 Iowa Acts 127 (codified at IOWA CODE §§ 321G.13(2), 321I.14(2)) (addressing snowmobiles and all-terrain vehicles, respectively). That legislation has several predecessors. *See* Act of June 4, 1991, ch. 236, § 3, 1991 Iowa Acts 488, 488 (current version at IOWA CODE § 321G.13(2)(a)) (authorizing “nonambulatory person[s]” to operate snowmobiles and all-terrain vehicles while “carry[ing] an uncased and unloaded firearm”); Act of May 27, 1989, ch. 244, § 25, 1989 Iowa Acts 477, 482–83 (current version at IOWA CODE § 321I.14(2)) (extending the rules governing operators of snowmobiles to operators of all-terrain vehicles); Act of May 27, 1974, ch. 1196, § 8, 1974 Iowa Acts 695, 697 (current version at IOWA CODE § 321G.13(2)(a)) (allowing firearms on snowmobiles so long as they were “unloaded and enclosed in a carrying case”); Act of Mar. 4, 1970, ch. 1158, § 13(6), 1970 Iowa Acts 202, 205 (banning all firearms on snowmobiles).

127. Act of June 23, 1976, ch. 1074, § 4(e), 1976 Iowa Acts 120, 121 (repealed 2017).

128. *See* Act of Apr. 13, 2017, ch. 69, § 34, 2017 Iowa Acts 168, 176 (repealing IOWA CODE § 29C.3(4)(e)).

129. *See supra* notes 119–20 and accompanying text.

130. Other legislative enactments suggest that this might well be the case. In 1965, for example, lawmakers declared that a person could publicly carry an *unloaded* pistol or revolver without a permit, so long as it was for a lawful purpose and the weapon was placed either in the trunk of a vehicle or was stored in a closed container too large to be concealed on the person or

That theory grows even more plausible when one considers the ways in which Iowa has historically handled the issuance of permits to carry firearms. From 1913 until 2010—nearly a century—the decision whether to issue such permits rested with sheriffs or other chief law enforcement officers.<sup>131</sup> The law tasked those individuals with making discretionary judgments about the merits of permit applications as they came in. That longstanding, government-empowering arrangement certainly did not suggest that Iowans believed they had a powerful right to carry firearms in locations where the law required permits.

In 2010, Iowa lawmakers stripped law enforcement officers of their permit-issuing discretion (and thereby made Iowa a “shall issue” state),<sup>132</sup> a move that might signal a broadened perception of Iowans’ fundamental gun freedoms. But one should take a careful look at the 2010 legislation before concluding that Iowans have indeed jettisoned a century-long understanding. Rather than wholly discard the permit regime, the legislature in 2010 shifted to its own shoulders the task of identifying all of the requirements that an applicant for a permit must meet.<sup>133</sup> Under the legislation in place today, a person is not eligible for a “nonprofessional” permit to carry a firearm if he or she is under 21 years old,<sup>134</sup> has not completed a training course,<sup>135</sup> has not filed the paperwork that triggers a background check,<sup>136</sup> “[i]s addicted to the

his or her clothing. *See* Act of May 26, 1965, ch. 437, § 2, 1965 Iowa Acts 828–29; *see also* Act of Mar. 6, 1980, ch. 1015, § 68, 1980 Iowa Acts 126, 141 (adding “securely wrapped package[s]” to the list of authorized bulky carrying devices). Today, those rules remain largely in place. *See* IOWA CODE § 724.4(4)(e), (f); *cf. id.* § 483A.36 (“A person, except as permitted by law, shall not have or carry a gun in or on a vehicle on a public highway, unless the gun is taken down or totally contained in a securely fastened case, and its barrels and attached magazines are unloaded.”). The requirement that a weapon be unloaded and securely boxed or wrapped is in tension with *Heller’s* finding that, when it comes to handguns that one keeps at home for self-defense, the government cannot require that the weapons be kept unloaded and either disassembled or locked. *See* *District of Columbia v. Heller*, 554 U.S. 570, 630 (2008). Of course, that tension dissolves if the fundamental right recognized in *Heller* does not extend to the kinds of public places to which these Iowa statutes speak.

131. *See, e.g.*, Act of Apr. 19, 1913, ch. 297, §§ 1, 3, 4, 1913 Iowa Acts 307, 307–08 (making it a crime to carry a concealed weapon without a permit and stating that the decision whether to issue a permit rested with the sheriff, who was to determine whether, in his “judgment,” the applicant “should be permitted to go so armed”); Act of June 28, 1976, ch. 1245, §§ 2406, 2410, 1976 Iowa Acts 549, 576–77 (stating that an applicant had to “reasonably justify his or her going armed” and that “the issuance of the permit shall be by and at the discretion of the sheriff or commissioner”).

132. *See* Act of Apr. 29, 2010, ch. 1178, § 5, 2010 Iowa Acts 600, 601 (codified as amended at IOWA CODE § 724.7).

133. Some of the requirements that the legislature imposed had already been statutorily in place. *See, e.g.*, Act of June 28, 1976, ch. 1245, § 2408, 1976 Iowa Acts 549, 576–77 (imposing a variety of requirements).

134. IOWA CODE § 724.8(1).

135. *See id.* §§ 724.7(1), 724.9.

136. *See id.* §§ 724.7(1), 724.10.

use of alcohol,”<sup>137</sup> has been convicted of a felony,<sup>138</sup> is subject to a specified kind of protective order or has been convicted of a domestic-violence misdemeanor,<sup>139</sup> has “been convicted of any serious or aggravated misdemeanor” assault within the past three years,<sup>140</sup> has committed “documented specific actions”—with “at least one of [those] actions” being committed within two years of the permit application—that provide probable cause to believe that the applicant will use the weapon unlawfully,<sup>141</sup> or “[i]s prohibited by federal law from shipping, transporting, possessing, or receiving a firearm.”<sup>142</sup> Unless one supposes that every one of those requirements corresponds either (1) to a category of individuals who are wholly excluded from the right to keep and bear arms or (2) to circumstances in which the restrictions would survive strict scrutiny—a doubtful proposition<sup>143</sup>—a court could reasonably conclude that Iowans continue to disclaim a fundamental, strongly protected right to carry firearms in places where permits have traditionally been required.

On the reading I have tentatively sketched here, Iowa’s regulatory history harmonizes remarkably well with the Second Amendment regime that now prevails in our post-*Heller* era. There are narrowly defined realms in which the government should not interfere with law-abiding adults’ freedom to possess traditional firearms, absent an exceptionally powerful justification: one’s home in *Heller* and *McDonald*,<sup>144</sup> or one’s home, land, or place of business under Iowa legislation. Beyond those domains, however, the government can (and often does) exert far greater regulatory control.<sup>145</sup>

137. *Id.* § 724.8(2).

138. *See id.* § 724.8(4) (referencing persons subject to section 724.26).

139. *See id.* (referencing persons subject to section 724.26).

140. *Id.* § 724.8(5).

141. *Id.* § 724.8(3).

142. *Id.* § 724.8(6).

143. Assume, for example, that Iowans do not believe people categorically lose their right to keep and bear arms immediately upon developing an addiction to alcohol, just as today’s statutory law suggests Iowans do not believe people categorically lose their firearms rights upon first developing an addiction to mind-altering substances of other varieties. If the legislature is concerned about harms caused by people who—for substance-abuse reasons—lack the capacity to handle firearms responsibly, isn’t the focus on alcohol addiction plainly both over- and under-inclusive? There are many who suffer from alcohol dependency but manage to remain functional at high levels of society; why conclude that they merit more unyielding treatment than the users of controlled substances who merely have their permits temporarily invalidated pursuant to section 724.4C? *See supra* note 120 and accompanying text. Such questions lose much of their force, of course, if the right to carry a firearm in locations where permits have traditionally been required is not fundamental in nature and if something less than strict scrutiny should accordingly be put to work.

144. *See supra* notes 13–31 (discussing *Heller* and *McDonald*).

145. *See supra* notes 39–52, 77–87 and accompanying text (describing the regulatory freedom that the Second Amendment currently affords to state and federal policymakers).

Absent clear evidence that there are key portions of Iowa's regulatory regime that Iowans now wish to reject, what does Iowa's history enable one to say about the contours of the already extant firearms right that the proposed constitutional amendment would describe as fundamental and worthy of strict scrutiny? One can say with considerable confidence that the right encompasses law-abiding adults who wish to possess ordinary firearms in their own homes and businesses and on their own property, just as the victorious claimants in *Heller* and *McDonald* had a right to possess handguns in their homes for self-defense. Beyond those narrowly circumscribed realms, however, Iowa's regulatory history may very well present obstacles that litigants cannot overcome.<sup>146</sup>

#### IV

When you put everything together—the proposed strict-scrutiny amendments' silence regarding the hallmarks of gun rights that are fundamental in nature, courts' reluctance to strike down legislation unless the constitutional violation is clear, the factors favoring retention of firearms restrictions that are already on a state's books when a strict-scrutiny amendment is ratified, the influence of any public opinion polls that reveal a favorable disposition toward gun-control laws of particular types, the scope-narrowing effects of deploying *Heller's* own interpretive methodology, and the insights one gleans from studying a state's own history of firearms regulations—the odds are stacked against anyone who hopes that the N.R.A.'s proposed strict-scrutiny amendments will guarantee strong judicial enforcement of a broad range of gun rights. Indeed, those amendments might do no more than ensure powerful state-level protection of individual rights that federal courts already strongly protect under the Second Amendment. Whether these amendments are worth the political and financial resources it takes to enact them might thus depend, in the end, on how likely one thinks it is that the nation will repeal the Second Amendment or that the U.S. Supreme Court will retreat from its holdings in *Heller* and *McDonald*.

For states that do ratify strict-scrutiny amendments, some closing words of caution are in order. Because state courts have long reviewed gun-control legislation under a highly forgiving reasonableness standard, they are not accustomed to systematically evaluating whether the facts of gun-rights claimants' cases place them within the scope of state constitutional protection.<sup>147</sup> After all, why devote valuable judicial time to answering questions about the constitutionally protected firearms right's boundaries

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146. Cf. *State ex rel. J.M.*, 144 So. 3d 853, 860 (La. 2014) (finding that Louisiana's strict-scrutiny amendment "reflects an expectation of sensible firearm regulation held by the voters, and comports with historical restrictions with respect to the acquisition, possession or use of firearms for lawful purposes found in Louisiana law").

147. See *supra* notes 54–59, 89–90 and accompanying text.

when the requisite reasonableness analysis will almost certainly produce a win for the government in any event? As I have argued, the N.R.A.'s proposed amendments should impel courts in ratifying states to consider, as a threshold matter, whether the facts in a given claimant's case bring the fundamental right to keep and bear arms into play.<sup>148</sup> Thus far, however, courts in states with strict-scrutiny amendments have largely failed to give this gateway question its due, resulting in occasionally problematic rulings.

In some instances, the problem is analytic murkiness. In *State v. Dixon*,<sup>149</sup> for example, the Louisiana Court of Appeal first determined that Louisiana's felon-in-possession statute satisfied strict scrutiny,<sup>150</sup> but the court then pivoted toward categoricalism in the ruling's final passages. The court wrote that "[t]he restrictions imposed on firearm possession . . . for convicted felons do not fall within the scope of liberties that [Louisiana's strict-scrutiny amendment] was enacted or ratified to protect" and that "the right to bear arms does not extend to the defendant as a convicted felon."<sup>151</sup> Why work through strict-scrutiny analysis if convicted felons do not even qualify for the constitutional provision's protection in the first place? To which of the court's two competing rationales should litigants most closely pay attention in future cases?

More worryingly, when courts' judicial sensibilities incline them to believe that certain firearms claims lack merit, but those courts fail to consider the scope of the fundamental right that the claimants are invoking, their rulings can threaten to degrade the meaning of strict scrutiny and thereby blunt that standard of review's ability to serve its historic purposes when deployed in other contexts. After all, strict scrutiny is a mode of legal analysis whose demands do not typically change as one carries it from one legal battleground to another; if a court waters down strict scrutiny's requirements in one setting, it thus threatens to water down those requirements in all of the other settings in which that standard applies. Consider two examples, one drawn from Louisiana and the other from Missouri.

In *State ex rel. J.M.*,<sup>152</sup> the Louisiana Supreme Court held that the state's bans on carrying concealed weapons and on juveniles' possession of handguns both survived strict scrutiny.<sup>153</sup> One of its chief rationales, however, was that these were longstanding bans with which voters were familiar when they ratified the state's strict-scrutiny amendment.<sup>154</sup> Voters' apparent

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148. See *supra* notes 77–87 and accompanying text.

149. *State v. Dixon*, 146 So. 3d 662 (La. Ct. App. 2014).

150. See *id.* at 668–74.

151. *Id.* at 675.

152. *State ex rel. J.M.*, 144 So. 3d 853 (La. 2014).

153. See *id.* at 866.

154. See *id.* at 860 ("In our opinion, the reference to restrictions on the right to keep and bear arms in [Louisiana's strict-scrutiny amendment] reflects an expectation of sensible firearm regulation held by the voters, and comports with historical restrictions with respect to the

intentions seem far more useful for determining the scope of the protected right than they are for determining whether the challenged bans are narrowly tailored to achieve compelling public-safety goals. Will strict scrutiny's rigor in Louisiana's future cases—including cases having nothing to do with firearms—now be diluted by attention to the electorate's longstanding embrace of the challenged governmental regulations?

In *State v. McCoy*,<sup>155</sup> the Missouri Supreme Court held that the state's felon-in-possession statute satisfied strict scrutiny.<sup>156</sup> Remarkably, the court introduced its discussion by emphasizing that “[c]ourts routinely uphold laws when applying strict scrutiny”<sup>157</sup> and “that laws regulating the right to bear arms are not ‘presumptively invalid’”<sup>158</sup>—hardly the kind of framing one typically finds at the beginning of an opinion in which full-blooded strict scrutiny is about to be unleashed. That framing, coupled with the brevity of the *McCoy* court's narrow-tailoring discussion, leaves one wondering just how perfunctorily strict scrutiny might be applied in future Missouri cases.

If *J.M.* and *McCoy* do illustrate judicial missteps, they underscore the importance of attending to the threshold questions of scope on which I have focused here. If juveniles, convicted felons, and others lie beyond the boundaries of the fundamental firearms right that a state's strict-scrutiny amendment protects, courts would do well to find their way to the resulting conclusions without threatening to diminish the vitality of the strict-scrutiny standard of review in the process. In any state where a strict-scrutiny amendment is being considered but has not yet been ratified, lawmakers and voters should ask themselves a related pair of questions: What are we trying to achieve, and is the language of the proposed amendment likely to achieve it?

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acquisition, possession or use of firearms for lawful purposes found in Louisiana law.”); *id.* at 862 (stating that the ban “on the juvenile possession of . . . handgun[s] is the type of long-standing limitation on the right to keep and bear arms with which voters were familiar” when they ratified the strict-scrutiny amendment); *id.* at 865 (stating that the ban on concealed weapons is “a long-standing limitation on the right to keep and bear arms in Louisiana”); *id.* (stating that the ban on concealed weapons “is the kind of historical restriction of which the voters of Louisiana were aware when they voted for the constitutional amendment”).

155. *State v. McCoy*, 468 S.W.3d 892 (Mo. 2015). The *McCoy* court determined that Missouri's strict-scrutiny amendment was not retroactively applicable to this defendant's case, but that strict scrutiny was nevertheless appropriate because it was the standard that Missouri courts would have applied regardless of the amendment's ratification. *See id.* at 895–97.

156. *Id.* at 899.

157. *Id.* at 897 (quoting Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795 (2006)).

158. *Id.* (quoting *Dotson v. Kander*, 464 S.W.3d 190, 198 (Mo. 2015)). The Missouri Supreme Court deployed the same reasoning in another ruling handed down the same day. *See State v. Merritt*, 467 S.W.3d 808, 813–15 (Mo. 2015).