The Second Amendment: A Reasonable Interpretation in the 21st Century

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I. Introduction

In 2008, the Second Amendment found itself before the United States Supreme Court awaiting interpretation in a landmark case. In an opinion authored by Associate Justice Antonin Scalia, the Court provided, “[h]ere seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.1 In reaching a final decision, the Court conducted an in-depth analysis of the history and meaning of the text in the Second Amendment. The opinion addressed how the amendment applies to the individual, even though the word is not found in the actual text.2 In Heller, the Court affirmatively conferred a fundamental right for an individual to bear arms.3 The Court also stated that the “right to bear arms is not unlimited.”4 With the individual right, defendants challenging their convictions based on an asserted violation of the Second Amendment may become more prevalent. However, what is more prevalent is gun violence and the technology of the weapons used to effectuate the violence. The new technology of firearms is allowing for individuals to obtain more powerful and violent weaponry than ever before. Unfortunately, these weapons are being used to carry out massacres in our country. Most commonly, these massacres are in our schools where our children are being educated.

I do not contend that regulation will stop every instance of gun violence. However, if even one humble modification can save one life, it is worth doing so. With that stated, it should be noted that the right to bear arms is essential and fundamental to our Nation. Yet, our Nation has been evolving and the instances of gun related violence have been drastically increasing. Unfortunately, this violence cannot be impeded by continuing with the same regulation and

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2 Id.
3 Id.
4 Id. at 626.
enforcement we now exercise. The infringement on any fundamental right should be reasonable and commenced with the utmost caution. Reasonable infringement is not defined by stripping the citizens of their guns, or other inferences commonly made after merely hearing the words, “gun control.” Our Nation is thirsting for reasonable legislation to protect the lives of our citizens. Enacting this legislation will require bringing together the increasingly divided political parties. It will also require catering to the pallets of current members of the United States Supreme Court.

II. The Court’s Analysis

In *Heller*, the Court pronounced a “two prong analysis” to cases involving challenges to legislation under the Second Amendment.5 “Under [a] two-pronged approach to Second Amendment challenges, a court first asks whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee, and if it does not, the court's inquiry is complete, but if it does, the court evaluates the law under some form of means-end scrutiny, and if the law passes muster under that standard, it is constitutional, but if it fails, it is invalid.”6 Consequently, it seems the form of scrutiny has yet to be established. As noted above, under the law pronounced in *Heller*, an individual has a fundamental right to bear arms.7 Where fundamental rights are at issue, strict scrutiny is applied.8 Although Justice Scalia did not affirmatively provide that strict scrutiny is required for a Second Amendment analysis, he did indicate that something more than rational basis would be appropriate.9 Accordingly, any legislation regarding firearms will likely have to satisfy the requirements of strict scrutiny. Under a strict scrutiny review, the law must satisfy the words known all too well by any

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5 *Heller*, 554 U.S. at 595.
6 *Id.* at 578.
7 *Id.*
9 *Heller*, 554 U.S. at 628, note 27.
constitutional law student, “narrowly tailored to achieve a compelling state interest.”\textsuperscript{10}

According to Professor Chemerinsky, “narrowly tailored” requires the law to be the least restrictive alternative.\textsuperscript{11} Chemerinsky has interpreted “compelling state interest” to require the Court to regard the government’s purpose as “vital.”\textsuperscript{12}

The government’s interest is becoming more vital with each massacre and gun related death. I will suggest ideas for narrowly tailored and reasonable legislation of firearms. This legislation will include effective (hopefully) measures to reduce violence, while preserving the fundamental right to bear arms.

III. A “Safe Bet” with Strict Scrutiny

If legislation is framed to pass constitutional muster under strict scrutiny, \textit{arguendo}, the legislation will pass under a lesser standard. Consequently, it is a “safe bet” to create legislation with the intention of satisfying strict scrutiny.

a. Narrowly Tailored

Effective and reasonable are the guideposts to enact legislation that will be passed and upheld. Our political culture is becoming increasingly polarized. Unreasonable restrictions on the right to bear arms stand little chance of being passed and even less of a chance of being upheld. One of the current restrictions on the Second Amendment is the background check requirement. The background check should be continued, but also enhanced.

i. The “Hotline”

A large part of the background check is confirming the mental health of the applicant.\textsuperscript{13}

The cause of most of the mass gun violence is the failure to detect mental health problems of the

\textsuperscript{11} Erwin Chemerinsky, Constitutional Law: Principles and Policies, 788-791, (4\textsuperscript{th} ed. 2011).
\textsuperscript{12} \textit{Id}.
\textsuperscript{13} \textit{See supra} note 14.
persons carrying out these attacks. The background check should be thorough in identifying the applicants past history for mental illness. This should stretch beyond simply asking the applicant questions. An in-depth consideration of the applicant’s medical record and instances of violence at home or in the work place should be considered. In recent instances of large scale gun violence, the mental health of the assailants has been called into question. However, considering only their medical records, there may have been no reason to question their mental condition. The reports that the assailants had signs of mental issues have come from their families and friends. When their family, friends, or others know they have firearms and a possible mental condition, they should have a means of reporting their suspicions.

The current background check program is known as the “National Instant Criminal Background Check System” or “NICS.”\textsuperscript{14} Promulgated by the Brady Handgun Prevention Act, the system is intended to provide an efficient means of evaluating a person’s eligibility to purchase a firearm.\textsuperscript{15} The NICS has a database of “federally-prohibiting” records.\textsuperscript{16} These records are accessed by entities licensed by the Federal government to sell firearms.\textsuperscript{17} Improvements have been made to this database in recent years.\textsuperscript{18} One of the most improved aspects of the system is the large increase in the number of records the system now contains.\textsuperscript{19} From December of 2010 to December of 2011, the number of records in the system increased by 868,100.\textsuperscript{20} With this increase, the total number of federally-prohibiting records totaled 7,310,

\textsuperscript{14} Federal Bureau of Investigation, National Instant Criminal Background Check System, http://www.fbi.gov/about-us/cjis/nics
\textsuperscript{15} Id.
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{19} Id.
\textsuperscript{20} Id.
These enhancements are significant in combating gun violence, but there is room for improvement.

The vocal point of the current NICS system appears to be the consideration of a person’s criminal record. Though important in assessing the capability of a person to own a firearm, one’s criminal record should not be determinative. Based on empirical data, the criminal record is decisive in a strong majority of background inquiries. Other concerns, such as mental health, should receive more attention prior to the approval of a background check.

One way of focusing on mental health is to create a NICS database containing reports of suspected mental illnesses. This concept is achieved by providing a means to contact the FBI and report concerns about another person’s mental condition. Currently, a similar approach to this model is utilized by the NICS. In the current system, the ATF is notified if an application is denied after an individual has purchased a firearm. The ATF is informed that a prohibited person possesses a firearm. Along with this notification, a “Firearm Retrieval Action” is commenced. This Action attempts to prevent the individual from having a firearm. This is an efficient approach, but the reporting system does not need to be limited to those with a Federal license to sell firearms.

Thus, a “hotline” should be established making this report more proficient. The public should be allowed to report their suspicions of a person having a firearm who also has a mental condition. The names of these reported persons should be entered into the NICS. This process

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21 Id.
23 Id.
24 Id.
26 Id.
27 In 2011, 3,166 “firearm retrieval referrals” were sent to the ATF. Id.
will allow the ATF to verify whether the person has a licensed firearm. This ability is crucial to operating a thorough background check system. Opening up the line to the public will allow the people who know us best a way to report their concerns. Our family, friends, and co-workers know us best, and have the best chance of determining if a person is having mental problems and should not be in the possession of a firearm. In most scenarios, I expect the report to be reliable. However, the report should be verified and should not operate to automatically terminate one’s right to purchase and/or possess a firearm. Depending on the severity of the allegation, the receptor of the report will contact the respective local authority. The local authority, presumptively the sheriff’s office, would then conduct an investigation. Based on the investigation, the person in question would be prevented from possessing a firearm or purchasing a firearm in the future. The local authority would have discretion to utilize one, both, or none of the above measures.\(^\text{28}\) Once an individual is prevented from the possession or future purchase of a firearm, these abilities should not be restored except by court decree. This modification to the NICS will enhance its capability of providing a useful and comprehensive verification of a person’s suitability to possess or purchase firearms.

The practical concerns with creating a “hotline” should also be addressed. Currently, when a background check is conducted, the entity selling the firearm calls one of three NICS Contracted Call Centers. From there, the applicant’s information is entered into the NICS database and a background check is performed. Modifying this system by creating a “hotline” would not be a drastic measure. The current facilities can be expanded by hiring new employees whose wages can be paid by a slight increase in the application fee. The addition of the “hotline,” though reasonable in nature, would likely be challenged.

\(^{28}\) This discretion is important to avoid a challenge under the Tenth Amendment.
As provided above, the NICS is part of a scheme established by the Brady Handgun Violence Prevention Act.\(^{29}\) In 1997, in *Printz v. United States*, a challenge to the legislation reached the United States Supreme Court.\(^{30}\) The plaintiff alleged that the provision requiring local authorities to conduct background checks on handgun purchasers violated the Tenth Amendment.\(^{31}\) The Tenth Amendment prevents Congress from “commandeering state legislatures” or “conscripting state officers directly.”\(^{32}\) In a majority opinion written by Justice Scalia, the Court held the provision unconstitutional.\(^{33}\)

The modification to the background check system does not violate the principles set forth in *Printz*. The local authorities will have the discretion whether or not to act on the report. Hence, the authorities are not “conscripted” directly. This is an example where greater enforcement of the existing regulation can be revamped to provide more protection to our citizens. Enhancement of the background check system by adding a public “hotline” is glittered with indicia of reasonableness. Reasonableness that will appeal to both sides of the political spectrum.

ii. High Capacity Ammunition Clips

Staying within the necessary theme of reasonableness, the size of ammunition clips available to the public should be limited. I emphasize that this proposal is not made with the intention to solve all of the problems with firearms. It is intended to reduce the instances of gun violence and their severity. Recently, Vice President Joe Biden was tasked with overseeing a White House gun control task force in response to the events at Sandy Hook Elementary School

\(^{29}\) *Supra* at note 21.
\(^{31}\) *Id.*
\(^{32}\) “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. Const. amend. X.
\(^{33}\) *Supra* at note 29.
in Newtown, Connecticut.\textsuperscript{34} Biden suggests that Congress should require background checks for all gun sales and ban “military-style” assault weapons and high capacity magazines.\textsuperscript{35} Biden notes that assailants who carry out mass shootings could be slowed if there was a limitation on the number of rounds in their magazines.\textsuperscript{36} Former Vice President Dick Cheney has also advocated limiting the gun magazine size.\textsuperscript{37} Thus, there is at least some amount of consensus between party lines.\textsuperscript{38} For the specifics, I propose that no magazine should be permitted which holds more than ten rounds of ammunition.

The standard clip size for a 9 mm semiautomatic handgun is seventeen rounds.\textsuperscript{39} Most assault-weapons carry thirty.\textsuperscript{40} Ten rounds of ammunition is presumably enough to ward off criminals or to embark on a successful hunting expedition. However, it is not enough to effectuate a massacre. Quite frankly, the reasoning escapes me for why, us, the public, should be lawfully permitted to have high-capacity magazines. Concededly, limiting the capacity of an ammunition clip may impede a person’s ability to defend their self. This concern is noted and that is why I propose only a reduced clip size in contrast to something more radical such as an outright ban on assault weapons.\textsuperscript{41}

\begin{footnotesize}  

\textsuperscript{34} On December 14, 2012, a heavily armed man walked into a Connecticut elementary school and opened fire. Within minutes, 26 people were dead at Sandy Hook Elementary School, 20 of them children. Susan Candiotti and Sarah Aarthun, \textit{Police: 20 children among 26 victims of Connecticut school shooting} (Dec. 15, 2012 12:19 a.m. EST), http://www.cnn.com/2012/12/14/us/connecticut-school-shooting


\textsuperscript{36} Id.


\textsuperscript{38} Id.

\textsuperscript{39} Jason Ross, \textit{To save lives, shrink gun magazines} (Jan. 15, 2013), http://articles.washingtonpost.com/2013-01-15/opinions/36385741_1_assault-style-rifles-assault-rifle-ar-15s

\textsuperscript{40} Id.

\textsuperscript{41} Legislation calling for an outright ban on assault-rifles will likely not stand a chance of passing through Congress and thus will never make it to the United States Supreme Court. The key is reasonableness.
\end{footnotesize}
iii. “Smart” Guns

A bolder approach to our Nation’s gun control issues involves the use of technology. Some have proposed personalizing guns with a mechanism that would prevent them from firing if the guns get into the wrong hands.\(^\text{42}\)

In the 1990s, Colt Manufacturing Co. produced a gun with a microchip which would prevent the weapon from firing unless the user was wearing a special wristband.\(^\text{43}\) The microchip began to attract attention from lawmakers.\(^\text{44}\) Three years after the technology went onto the market, New Jersey passed a law requiring all new handguns to be equipped with the microchip.\(^\text{45}\) At first, this technology seemed promising.\(^\text{46}\) However, it drew negative attention from both sides of the gun control debate.\(^\text{47}\) Gun control activists were concerned because the government was funding the research.\(^\text{48}\) Gun rights activists were concerned that people would not be able to defend themselves.\(^\text{49}\)

New Jersey’s legislation drew particular attention from a group affiliated with the National Rifle Association (NRA).\(^\text{50}\) The Coalition of New Jersey Sportsmen instigated a boycott of all Colt Manufacturing Co. products.\(^\text{51}\) Soon after, the CEO of Colt was replaced and the company’s efforts relating to personalized guns were terminated.\(^\text{52}\) In 1999, the New Jersey Institute of Technology (NJIT) continued research on “smart” or personalized guns.\(^\text{53}\)


\(^{43}\) Id.

\(^{44}\) Id.

\(^{45}\) Id.

\(^{46}\) Id.

\(^{47}\) Id.

\(^{48}\) Id.

\(^{49}\) Id.

\(^{50}\) Id.

\(^{51}\) Id.

\(^{52}\) Id.

\(^{53}\) Id.
research focused on developing a “transducer” which would detect the grip of the gun user.\textsuperscript{54} This innovative and bold technology, like that of the microchip, eventually led to another boycott when Former President Bill Clinton’s administration entered into an agreement with Smith and Wesson.\textsuperscript{55} This agreement included, among others, a promise to produce “smart” guns.\textsuperscript{56}

“Boycotting” seems to be gun rights activists’ primary means of preventing the implementation of “smart” guns. However, several foreign organizations have expressed interest in research and development of such weapons.\textsuperscript{57} TriggerSmart Ltd. of Ireland, and Armatix GmbH of Germany, both have developed technology similar to the “wristband” concept.\textsuperscript{58} The foreign manufacturers produced Radio Frequency Identification technology which would be activated by a device the size of a grain of rice in the users ring or bracelet.\textsuperscript{59} The Bureau of Alcohol, Tobacco, and Firearms approved Armatix’s technology in 2011.\textsuperscript{60}

At first glance, this state-of-the-art technology seems like something out of an episode of the Jetsons.\textsuperscript{61} However, we are all aware of the speed that technology is advancing. Whether it be a “transducer,” “microchip,” or “radio frequency technology,” we could see significant changes soon. Armatix expects to begin marketing their product in the United States in 2013.\textsuperscript{62}

iv. Gun Education

Education is vital for our Nation’s prosperity, health, and safety. Teaching our people, of any age, about firearms and the proper way to handle them is important to reducing gun violence.

\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} The Jetsons TV show was an animated kids TV series about the Jetson family who lived in the future. Some of their “state-of-the-art” amenities in their “high rise home” included a space car, ionic showers, and instant food preparation. The Show aired during the 1960s and again during the 1980s. \textit{The Jetsons TV Show}, http://www.crazyabouttv.com/jets.com/jetsons.html
\textsuperscript{62} Supra note 59.
The NRA has devoted an entire division to firearm education. The NRA’s Education and Training Division is comprised of more than ninety-three thousand instructors, over fifty-two hundred coaches, and seventeen-hundred counselors. The NRA provides this training for persons of any age or expertise. Though NRA’s program is significant, a shortfall exists.

Gun education is not a part of our education system. Gun education should become mandatory at some stage in our countries administration of primary education. Missouri State Senator Dan Brown (Republican) has advocated that gun-safety should be a mandatory part of first-grade education. Interestingly, Brown’s legislation was filed the day before the tragedy at Sandy Hook Elementary School. I do believe that first-grade may be premature in the education process for such a program. However, I agree with Brown’s purpose and would expand it. Brown suggests that children should be taught what to do if they find a weapon. This would prevent them from injuring themselves or someone else. I would expand the program by ensuring that children are taught the proper way to handle a firearm. I believe it to be vital that children know basic skills such as not aiming a firearm at another person, understanding that a firearm is not a toy, and that they should not be using them without adult supervision. These types of skills should be taught at some level in elementary school. However, additional gun education should be required at the middle school and high school level also.

At the middle school level, more focus should be on the proper use of firearms. Presumably, students at the middle school level are more actively using guns for activities such as

64 Id.
65 Id.
66 Id.
67 John Celock, Dan Brown, Missouri State Senator, Wants Gun Education In First Grade (Jan. 30, 2013, 6:35 p.m. EST, updated Jan 31, 2013, 4:28 p.m. EST), http://www.huffingtonpost.com/2013/01/30missouri-gun-education_n_2585217.html
68 Id.
69 Id.
as hunting. Proper handling techniques, transportation, and storage of firearms should be taught. Additionally, perhaps more importantly, students should be taught what to do if they suspect someone has access to a firearm and could possibly use it improperly. Unfortunately, it is our Nation’s children who are most privy to violence in places such as the home. If a child suspects that a parent intends to use a firearm in a violent manner, the child should know to call the police or perhaps the “hotline” discussed above. Also, children are sometimes more keen in discovering a classmates intention to bring and use a firearm at school. Children should be taught who to inform so that some type of authority can intervene.

At the high school level, focus should be mostly on teaching students how to determine if a family member, friend, or classmate should not be in possession of a firearm. Also, students should be taught what signs are most prevalent or most frequently occur before a shooting takes place. As noted, students are often in the best position to discern these signs because it is virtually impossible for teachers and administrators to monitor each student’s individual behavior. I propose that a comprehensive study in to the behavior of those who have been involved in recent massacres be conducted. This study would provide educators with the exact type of information that would be most beneficial to students learning about firearm safety.

A model for including gun-education as part of primary education is the NRA’s “Eddie Eagle GunSafe” Program. The NRA describes this Program as a “groundbreaking gun accident prevention program for children in pre-K through the third grades, [which] has achieved a new milestone, reaching 18 million children in all 50 states, Canada, and Puerto Rico.” The motto of the Program is “[i]f you see a gun, STOP! Don't Touch. Leave the Area. Tell an Adult.”

71 Id.
72 Id.
NRA developed this Program in 1988 through the assistance of qualified professionals such as clinical psychologists, reading specialists, curriculum specialists, urban housing safety officials, and law enforcement personnel. The purpose of the Program is to promote the protection and safety of children. Also, the NRA provides that the Program can be easily implemented as a part of existing school curriculum. In the Program, students are educated through the use of workbooks, animated DVD, instructor guides, brochures, and student reward stickers. The NRA uses no firearms in the program and treats them “like swimming pools, electrical outlets, matchbooks, and household poison.”

The NRA’s education model has been noted by the National Safety Council, the United States Department of Justice, and twenty-four governors. Furthermore, according to the National Center for Health Statistics, fatal firearm accidents involving children between pre-K and the third grade have been reduced by two-thirds since inception of the Program. The NRA “feels that gun accident prevention programs such as Eddie Eagle are a significant factor in that decline.”

Educating our Nation about firearms is the most important means of addressing the growing rate of gun violence. If we instill good judgment and responsibility about firearms into the children of our Nation, the instances of gun violence are certain to be reduced. This education must be comprehensive and address rudimentary issues such as the proper handling of firearms. Also, this education must include more complex issues such as what signs to look for in a person that should not be in possession of a firearm.

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73 Id.
74 Id.
75 Id.
76 Id.
77 Id.
78 Id.
79 Id.
80 Id.
b. Compelling State Interest

Gun violence in the United States of America is pandemic. Establishing a compelling state interest is not a difficult endeavor. According to the National Center for Injury Prevention and Control, an appalling 31,076 American lives were lost due to gun violence in 2010.81 This equals 85 deaths per day and more than 3 deaths each hour.82

Perhaps some perspective is helpful to strengthen the compelling state interest. From 1955 to 1975, the Vietnam War killed over 58,000 American soldiers.83 In an average 2 year period, more civilians are killed with guns in the United States than during the entire Vietnam War. 84 A survey of the first seven years of the U.S.-Iraq conflict provides that over 4,400 American soldiers were killed.85 In the United States, almost as many civilians are killed with firearms every 7 weeks.86

Homicide statistics are also indicative of the gun violence pandemic. For the years 2005-2010, an average of 33 homicides involving guns were committed each day.87 Guns were used in 11,078 homicides in 2010, which is over 68% of the total number of homicides.88 Also, a correlation has been found between a state’s rate of gun ownership and a state’s rate of

82 Id.
84 Id.
86 Id.
87 Supra note 39.
88 Id.
homicide.\textsuperscript{89} States with a high rate of gun ownership have “significantly” higher rates of homicide as compared to states with lower rates of gun ownership.\textsuperscript{90}

The compelling state interest for firearm legislation, or, yes, “an infringement on Second Amendment rights,” can also be established by tuning into the evening news. It is these smaller, lower scale instances of gun related violence that can be impeded with reasonable legislation. Unfortunately, mass shootings will be difficult to stop by legislation.

There is no law or technology that will rid the United States of all gun related violence. However, there are reasonable steps we can take as a country that will reduce the number of deaths and injuries caused by the improper use of firearms. Reasonable legislation that is narrowly tailored to achieve the compelling state interest must be passed. This legislation must be passed while considering those who will have the final “say so,” the current members of the United States Supreme Court.

IV. Current United States Supreme Court – The Last Word

It would be to no surprise that when, if at all, gun legislation is passed, a case finds its way to the Supreme Court. One of the most significant pronouncements by the Court in recent years was \textit{District of Columbia v. Heller}.\textsuperscript{91} Along with conferring an \textit{individual} “right to keep and bear arms,” Associate Justice Antonin Scalia provided an in-depth history of the Second Amendment and its progeny. Justice Scalia led the majority of the Court in striking down the District of Columbia’s legislation pertaining to the use of handguns. It will likely be difficult to convince Justice Scalia to uphold legislation pertaining to firearms. However, other members on the Court may be more inclined.

\textsuperscript{90} \textit{Id.}
\textsuperscript{91} \textit{Heller}, 554 U.S. at 570.
The Court has changed since 2008 with the appointment of Associate Justices Maria Sotomayor and Elena Kagan. Thus, two of the dissenting justices in *Heller* are no longer on the Court. However, a look into Justice Scalia’s pronouncement in *Heller* is likely indicative of how he will decide future cases. Also, the Court’s more recent decision in *McDonald v. City of Chicago, Ill.* will likely foreshadow some of the other justice’s views on gun legislation.\(^92\)

Justice Scalia and the other conservative members of the Court took a more polarized approach to the question presented in *Heller* than more reasonable gun legislation would attract.\(^93\) The District of Columbia prohibited the possession of handguns in general.\(^94\) Justice Scalia acknowledged the gun violence problem and provided that other legislation in the District of Columbia was *arguendo* valid. Justice Scalia noted the legitimacy of laws prohibiting the possession of firearms by persons convicted of felonies and persons who are mentally ill.\(^95\) However, an outright ban of a certain type of weapon, such as assault rifles, or as in *Heller*, handguns, is likely to never be upheld by Justice Scalia. Notwithstanding the likelihood of failure in the legislature, outright bans will inflame the conservative tendencies of some other members of the Court. Reasonable legislation, such as more comprehensive background checks and ammunition clip limits, may perhaps be more attractive to Justice Scalia. However, I predict he will be reluctant to uphold a law infringing upon the “enshrinement of certain fundamental rights.”\(^96\)

In 2010, the Court decided *McDonald v. City of Chicago, Ill.* which involved a constitutional challenge to the City of Chicago’s law effectively banning handgun possession by

\(^92\) *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020, (2010).
\(^93\) *Heller*, 554 U.S. at 570.
\(^94\) *Id.* at 575.
\(^95\) *Id.* at 626.
\(^96\) *Id.* at 636.
all private citizens.\footnote{McDonald, 130 S. Ct. at 3026.} The petitioners argued the law violated the privileges and immunities clause and due process clause of the Fourteenth Amendment.\footnote{Id.} In a 5-4 decision, the Court held that the Second Amendment right to keep and bear arms is fully applicable to the States by virtue of the Fourteenth Amendment.\footnote{Id. at 3050.} Associate Justice Samuel Alito wrote the majority opinion.\footnote{Id.} There were two concurring opinions and two dissenting opinions.\footnote{Id.} Again, a consideration of the opinions is helpful in attempting to predict how the justices will rule in future challenges to gun legislation. Justice Stevens has retired since the McDonald decision. However, all of the other justices remain on the Court.

In McDonald, Justice Alito determined the Fourteenth Amendment incorporates the Second Amendment.\footnote{Id.} Justice Alito reasoned that the Second Amendment right to keep and bear arms is “fundamental to our scheme of ordered liberty” and “deeply rooted in this Nation’s history and tradition.” Justice Alito considered the history of the Second Amendment including Congress’s intent and the events leading up to its enactment in making his decision.\footnote{Id. at 3022, citing Duncan v. State of La., 391 U.S. 145 (1968) and Washington v. Glucksberg, 521 U.S. 702, (1997).} Also, Justice Alito included in his opinion that during 2010, the number of homicide victims in the City of Chicago equaled the number of American soldiers killed during the same time period in Afghanistan and Iraq.\footnote{Id. at 3021.} In conclusion, Justice Alito noted that pursuant to Heller, the Second Amendment protects the right to possess a handgun in the home for the purpose of self-
defense. Justice Alito provided, “[u]nless considerations of stare decisis counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal government and the States. Accordingly, it is likely that Justice Alito and Justice Scalia will not be inclined to uphold most types of gun legislation. It is also probable that Chief Justice John Roberts would join Justice Alito and Justice Scalia. However, two of their conservative counterparts may have different views with respect to more reasonable gun legislation.

Justice Scalia, in his concurring opinion in McDonald, agreed with Justice Alito’s incorporation theory and wrote significantly against the reasoning of Justice Stevens. However, Justice Thomas based his conclusion on the privileges and immunities clause. Justice Thomas provided, “the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment’s Privileges and Immunities Clause.” Justice Thomas also provided an in-depth history of the Second Amendment but also wrote extensively about the Fourteenth Amendment. Though Justice Thomas agreed the handgun ban was unconstitutional, he did note concern about the reasoning of the majority by stating, “[t]here was nothing foreordained about today’s outcome.” Justice Thomas further provided “[T]he consequences could prove far more destructive—quite literally—to our Nation’s communities and to our constitutional structure. Thankfully, the Second Amendment right identified in Heller and its newly minted Fourteenth Amendment analogue are limited, at least

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106 Id. at 3023.
107 Supra note 103.
108 Id. at 3048.
109 Id.
110 Id.
111 Id.
112 Id. at 3119.
for now, to the home.”

I predict that if additional gun legislation reaches the Court, Justice Thomas will find that it does not pass constitutional muster.

In *McDonald*, Associate Justice Stephen Breyer concluded that the Fourteenth Amendment’s guarantee does not include a general right to keep and bear firearms for purposes of private self-defense. Justice Breyer agreed with Justice Stevens’ pronouncement that “unlike other forms of substantive liberty, the carrying of arms for that purpose often puts others’ lives at risk.” Again, Justice Breyer cited to Justice Stevens’ statement that “[t]he use of arms for private self-defense does not warrant Federal constitution protection from state regulation.” Justice Breyer noted the majority’s reliance on history in making the showing that the Second Amendment is “fundamental to the American scheme of justice.” Justice Breyer also mentioned his belief that the majority failed to make the showing. Further, Justice Breyer noted in his opinion that “[p]rivate gun regulation is the quintessential exercise of a State’s ‘police power’—i.e., the power to protect…the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State,’ by enacting ‘all kinds of restraints and burdens’ on both ‘persons and property.’” Also, Justice Breyer’s dissenting opinion noted that Chicago’s handgun ban had saved several hundred lives since it was enacted in 1983, according to some experts. Several hypothetical questions were posed such as, “[d]oes the right to possess weapons for self-defense extend outside?” and “[w]hat sorts of guns are necessary for self-defense?” Justice Breyer followed these questions by stating, “[t]he

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113 *Id.* at 3120.
114 *Id.* at 3049.
115 *Supra* note 112.
116 *Id.*
117 *Supra* note 103.
118 *Id.* at 3053.
119 *Id.* at 3125 *citing Slaughter House Cases.*
120 *Id.* at 3126.
121 *Id.* at 3127.
difficulty of finding answers to these questions is exceeded only by the importance of doing so.”122 In conclusion, Justice Breyer noted that “incorporating the right recognized in *Heller* would change the law in many of the 50 States” and that “ambiguous history cannot show that the Fourteenth Amendment incorporates a private right of self-defense against the States.”123 Accordingly, if Justice Breyer would have upheld a law banning the possession of a handgun, it can be presumed that he would uphold other types of legislation that are more reasonable in nature.

Justice Ruth Ginsberg and Justice Sonia Sotomayor are the members of the Court who joined Justice Breyer’s dissenting opinion in *McDonald*.124 Based on the same reasoning for Justice Breyer explained above, I predict Justice Ginsburg and Justice Sotomayor will likely be in favor of additional gun legislation.125 It can also be expected, with reasonable certainty, that Justice Elena Kagan will vote to uphold new legislation.126

Associate Justice Anthony Kennedy, once again, could be the “swing vote” on gun legislation. In past decisions, Justice Kennedy has taken public opinion into consideration.127 Recently, public opinion seems to be supporting gun laws.128 This public support has likely been

122 *Id.*
123 *Id.* at 3136.
124 *Id.*
125 *Supra* note 97.
126 During Associate Justice Elena Kagan’s confirmation testimony to the Senate Judiciary Committee in June of 2010, she noted that *Heller* and *McDonald* are precedent, and inferred that they could be overturned. Justice Kagan stated, “[I]t has long been thought, starting from the ‘Miller’ case, that the Second Amendment did not protect such a right. . . . Now the Heller decision has marked a very fundamental moment in the court’s jurisprudence with respect to the Second Amendment. And as I suggested to Senator Feinstein there is not question going forward that ‘Heller’ is the law, that it is entitled to all the precedent that any decision is entitled to and that is true to the ‘McDonald’ case as well…” John Lott, *A Vote for Kagan Is a Vote to Take Away Your Guns* (June 30, 2010), http://www.foxnews.com/opinion/2010/06/30/john-lott-elena-kagan-sonia-sotomayor-gun-ownership-self-defense-second/
128 *Id.*
created by the drastic increase in gun violence.\textsuperscript{129} If, in Justice Kennedy’s view, there is a compelling state interest, a narrowly tailored law, and public support, reasonable gun legislation will be upheld by the current United States Supreme Court.

V. Conclusion

Ideas for the solution to our Nation’s gun violence pandemic are numerous. However, these ideas must be transformed into reasonable legislation that will be enacted and upheld. Framing legislation to pass constitutional muster under a strict scrutiny analysis is the most effective way to solve our Nation’s problem.

I have proposed changes to the background check process, limits on ammunition clips, “smart” guns, and increased education. In an attempt to cater to the current legislature and United States Supreme Court, these ideas are reasonable. The suggested modifications to the background check and education systems have the greatest chance of being enacted and upheld. “Smart” guns and limited ammunition clips are more radical proposals. These more radical proposals are not likely to be passed and thus will not make it to the Court.\textsuperscript{130} However, I predict that an enhanced background check and education system would eventually pass through Congress and be upheld by the Court.

It is not a persuasive argument that our legislature should refrain from doing anything because of the fact that legislation will not prevent all future gun violence. It is not acceptable that an average of 33 homicides involving firearms occurred every day in the United States in 2010. It is not acceptable that civilians are killed more frequently here in our homeland than in

\textsuperscript{129} See supra note 81.

\textsuperscript{130} Despite polls showing 90% support, the U.S. Senate defeated a compromise plan to expand background checks on firearms sales as well as a proposal to ban some semi-automatic weapons modeled after military assault weapons. The votes were on a series of amendments to a broad package of gun laws pushed by President Barack Obama and Democratic leaders in the aftermath of the Newtown school massacre in December. Ted Barrett and Tom Cohen, Senate rejects expanded gun background checks (April 18, 2013, 11:02 a.m. EDT), http://www.cnn.com/2013/04/17/politics/senate-guns-vote/index.html
areas of war overseas. It is not acceptable for our legislature to allow this violence to continue. They must work together to write reasonable legislation that has a chance of being enacted and upheld.