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**HELLER ON THE THRESHOLD:  
CRAFTING A GUN INSURANCE MANDATE**

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INTRODUCTION

The United States suffers from a gun violence problem, but we disagree what that problem is. Some say we have too many guns<sup>1</sup> and too many

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<sup>1</sup> The Congressional Research Service estimates that Americans own approximately 310 million firearms. *Proposals to Reduce Gun Violence: Protecting Our Communities While Respecting the Second Amendment: Hearing Before the Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Judiciary Comm.*, 113th Cong. 24-25 (2013) (statement of Laurence Tribe, Carl M. Loeb University Professor and Professor of Constitutional Law,

irresponsible gun owners.<sup>2</sup> Others argue that we have too few guns in too few places.<sup>3</sup> Some say it's really a mental health problem—that our healthcare system has failed to treat and to monitor our mentally ill and, in doing so, has left them free to inflict harm on unsuspecting innocents.<sup>4</sup> Some believe it's a cultural problem, whereby the pervasiveness of violent images on our televisions has inspired violent acts in our schools and on our streets.<sup>5</sup> However we wish to characterize the problem, Americans overwhelmingly agree that our government must address the rising incidence of mass shootings,<sup>6</sup> and gun violence in general, through some kind of legislation.<sup>7</sup>

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Harvard Law School) (citing WILLIAM J. KROUSE, CONG. RES. SERV., RL32842, GUN CONTROL LEGISLATION 8 (2012)).

<sup>2</sup> Professor Amitai Etzioni called for domestic disarmament in February 2013. Amitai Etzioni, *Gun Control? We Need Domestic Disarmament*, HUFFINGTON POST, Feb. 19, 2013, [http://www.huffingtonpost.com/amitai-etzioni/gun-control-we-need-domes\\_b\\_2718536.html](http://www.huffingtonpost.com/amitai-etzioni/gun-control-we-need-domes_b_2718536.html), archived at <http://perma.cc/U7C4-KKMZ> (“Domestic disarmament is a vision that can educate future generations of voters about that which must be done and that which the Second Amendment fully permits.”).

<sup>3</sup> Wayne LaPierre, the Executive Vice President of the National Rifle Association, famously announced in the wake of the Newtown mass shooting that the NRA would support a federal law requiring all schools to hire armed guards. Wayne LaPierre, Exec. Vice President, Nat'l Rifle Ass'n, Nat'l Rifle Ass'n Press Conference (Dec. 21, 2012) (“The *only* thing that stops a *bad* guy with a gun is a *good* guy with a gun.”). Regarding the Newtown mass shooting generally, see James Barron, *Children Were All Shot Multiple Times With a Semiautomatic, Officials Say*, N.Y. TIMES, Dec. 15, 2012, <http://www.nytimes.com/2012/12/16/nyregion/gunman-kills-20-children-at-school-in-connecticut-28-dead-in-all.html>, archived at <http://perma.cc/E96Y-J2E2>.

<sup>4</sup> Jake McGuigan, the Director of Governmental Relations for the National Shooting Sports Foundation in Newtown, Connecticut, contended a few months after the Newtown mass shooting that “[i]t's a mental health issue, not a firearms issue.” Peter Applebome & Ray Rivera, *Connecticut Senate Votes for Gun Limits; House Passage Is Expected*, N.Y. TIMES, Apr. 4, 2013, at A21, available at <http://www.nytimes.com/2013/04/04/nyregion/connecticut-legislature-votes-on-sweeping-gun-limits.html>, archived at <http://perma.cc/6QJ6-BYUQ>.

<sup>5</sup> LaPierre specifically targeted violent media in his speech following the Newtown mass shooting. LaPierre, *supra* note 3 (“And here's another dirty little truth that the media try their best to conceal: There exists in this country a callous, corrupt and *corrupting* shadow industry that sells, and sows, violence against its own people. Through vicious, violent video games with names like *Bulletstorm*, *Grand Theft Auto*, *Mortal Kombat* and *Splatterhouse*. . . . Then there's the blood-soaked slasher films like ‘*American Psycho*’ and ‘*Natural Born Killers*’ that are aired like propaganda loops on ‘*Splatterdays*’ and *every* day, and a thousand music videos that portray life as a joke and murder as a way of life. And then they have the nerve to call it ‘entertainment.’”). One month after the Newtown mass shooting, Democratic Congressman Jim Matheson proposed the Video Games Ratings Enforcement Act that would impose \$5000 fines for selling “mature” or “adults only” video games to minors. H.R. 287, 113th Cong. (1st Sess. 2013).

<sup>6</sup> Six of the twelve deadliest mass shootings in United States history have occurred in the past seven years. See *Deadliest U.S. Shootings*, WASH. POST, Sept. 23, 2013,

Over the past few years, federal and state legislatures have responded by proposing, and sometimes passing, a wide array of gun-focused legislation. On the federal level, congressional Democrats have proposed assault weapons bans, high-capacity magazine bans, universal background checks, and anti-trafficking measures.<sup>8</sup> The New York and Connecticut state legislatures recently passed comprehensive laws restricting gun ownership, banning the sale and ownership of new assault weapons and high-capacity magazines, mandating registration for existing assault weapons and high-capacity magazines, expanding background checks, and increasing penalties for gun-related felonies.<sup>9</sup> Through these measures, legislators hope to limit access to guns, believing that fewer guns will mean less gun violence.<sup>10</sup>

Meanwhile, congressional Republicans have proposed measures to expand concealed-carry rights and veterans' gun-purchasing rights.<sup>11</sup> Oklahoma's

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<http://www.washingtonpost.com/wp-srv/special/nation/deadliest-us-shootings/>, archived at <http://perma.cc/TPT6-8P3P>.

<sup>7</sup> According to a Quinnipiac University Polling Institute poll, ninety-two percent of Americans would support a federal law mandating background checks on all gun sales—commonly known as universal background checks. QUINNIPIAC UNIV. POLLING INST., AMERICANS BACK WOMEN IN COMBAT 3-1, BUT LESS FOR DRAFT, QUINNIPIAC UNIVERSITY NATIONAL POLL FINDS; SUPPORT FOR UNIVERSAL GUN BACKGROUND CHECKS IS 92%, at 1 (2013), available at <http://www.quinnipiac.edu/images/polling/us/us02072013.pdf>, archived at <http://perma.cc/F5R2-YDF5>. In that same poll, fifty-six percent of respondents said they would support a federal assault weapons ban. *Id.* at 2. Likewise, according to a Washington Post-ABC poll from March 2013, ninety-one percent of Americans would support a federal law requiring all gun sellers at gun shows to perform background checks of prospective purchasers—otherwise known as “closing the gun show loophole.” *Post-ABC Poll: Gun Control Politics*, WASH. POST, Mar. 12, 2013, [http://www.washingtonpost.com/page/2010-2019/WashingtonPost/2013/03/12/National-Politics/Polling/release\\_217.xml?uuiid=Ehn7LIsBEeKbGt6yWKJPLQ](http://www.washingtonpost.com/page/2010-2019/WashingtonPost/2013/03/12/National-Politics/Polling/release_217.xml?uuiid=Ehn7LIsBEeKbGt6yWKJPLQ), archived at <http://perma.cc/3K8Z-TRK4>. In addition, fifty-percent of respondents said they would support a federal law requiring all schools to hire armed guards. *Id.*

<sup>8</sup> See S. 150, 113th Cong. (1st Sess. 2013) (proposing “[t]o regulate assault weapons, to ensure that the right to keep and bear arms is not unlimited”); Safe Communities, Safe Schools Act of 2013, S. 649, 113th Cong. (2013) (enacted) (proposing “[t]o ensure that all individuals who should be prohibited from buying a firearm are listed in the national instant criminal background check system and require a background check for every firearm sale”).

<sup>9</sup> See, Gun Violence Prevention and Children's Safety Act of 2013, S. 1160, 2013 Gen. Assemb., Jan. Sess. (Conn. 2013); Secure Ammunition and Firearms Enforcement Act of 2013, S. 2230, 2013-2014 S. Assemb., Reg. Sess. (N.Y. 2013).

<sup>10</sup> See, e.g., Press Release, Senator Dianne Feinstein, United States Senate Judiciary Committee (Feb. 27, 2013), available at <http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=c6287561-bbbf-4971-bfed-3b8f05e63c0f>, archived at <http://perma.cc/5TW3-U88G> (“California law enforcement tells me that our state’s assault weapons ban has been effective in reducing the availability of these deadly weapons . . .”).

<sup>11</sup> Constitutional Concealed Carry Reciprocity Act of 2014, S. 1908, 113th Cong. (2013)

legislature recently amended the state's gun laws to grant open-carry rights to licensed gun owners.<sup>12</sup> Many states have even introduced legislation intended to nullify existing federal gun regulations like the Gun Control Act<sup>13</sup> and the National Firearms Act.<sup>14</sup> With these measures, legislators intend to stem gun violence by increasing access to guns, whereby the prevalence of gun owners would theoretically deter gun violence.<sup>15</sup>

These conflicting legislative efforts have led to a patchwork of regulation and deregulation,<sup>16</sup> aptly reflecting the lack of consensus among Americans as to what the gun violence problem is and how to address it.<sup>17</sup>

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(enacted) (proposing “[t]o allow reciprocity for the carrying of certain concealed firearms”).

<sup>12</sup> S. 1733 (Okla. 2012) (adding the term “unconcealed” to existing laws permitting the concealed carry of guns). Free from requirements to conceal their weapons, many licensed gun owners in Oklahoma responded to the amendment by purchasing larger guns. Manny Fernandez, *Oklahomans Prepare for New Law That Will Make Guns a Common Sight*, N.Y. TIMES, Oct. 31, 2012, at A14.

<sup>13</sup> 18 U.S.C. § 921 (2012).

<sup>14</sup> The National Firearms Act of 1934, H.R. 9741, 73d Cong. (1934) (enacted). The New York Times reported in February 2013 that at least fifteen other states have introduced similar nullification bills focused on federal gun regulation. Jack Healy, *Some States Push Measures to Repel New U.S. Gun Laws*, N.Y. TIMES, Feb. 8, 2013, at A16. Today, at least thirty-seven state legislatures have introduced a nullification bill and at least nine state legislatures have passed one. See *State by State*, FIREARMS FREEDOM ACT, <http://firearmsfreedomact.com/state-by-state/#mt>, archived at <http://perma.cc/PWZ9-YJAG> (Mar. 30, 2015). The Bureau of Alcohol, Tobacco, Firearms and Explosives has responded to these bills by issuing letters asserting the supremacy of federal gun regulations. See, e.g., Letter from Debra S. Satkowiak, Chief, Firearms and Explosives Indust. Div., Bureau of Alcohol, Tobacco, Firearms and Explosives to All Kansas Federal Firearms Licensees (Jul. 8, 2013), available at <https://www.atf.gov/sites/default/files/assets/pdf-files/open-letter-to-all-kansas-federal-firearms-licensees-provides-guidance-regarding-the-kansas-second-amendment-protection-act.pdf>, archived at <https://perma.cc/7UH8-YFG7>.

<sup>15</sup> John R. Lott famously made this argument in his book, *More Guns, Less Crime*, where he purported to show the link between the increasing prevalence of concealed-carry permits and the decreasing national crime rate. JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS* 56-99 (2010).

<sup>16</sup> Maria De La O blames this regulatory patchwork for the Navy Yard mass shooting. Maria De La O, *A Patchwork of Gun Laws Leads to Tragedy, Again*, WASH. POST, Sept. 20, 2013, <http://www.washingtonpost.com/blogs/she-the-people/wp/2013/09/20/a-patchwork-of-gun-laws-leads-to-tragedy-again-2/>, archived at <http://perma.cc/KZ3L-L6TC>. Navy Yard Shooter Aaron Alexis purchased a gun in Virginia, a state without a waiting period, that he later used to gain access to the Navy Yard in Washington, DC, a jurisdiction with a ten-day waiting period. *Id.* Monica Davey also identified this regulatory patchwork as a source of Chicago's gun violence epidemic. Monica Davey, *Strict Chicago Gun Laws Can't Stem Fatal Shots*, N.Y. TIMES, Jan. 30, 2013, at A1 (“Chicago's experience reveals the complications inherent in carrying out local gun laws around the nation. Less restrictive laws in neighboring communities and states not only make guns easy to obtain nearby, but layers of differing laws—local and state—make it difficult to police violations.”).

<sup>17</sup> Universal background checks aside: QUINNIPIAC UNIV. POLLING INST., AMERICANS

This Note will analyze one of the more creative recent legislative proposals to address the gun violence problem: mandatory liability insurance for gun owners.<sup>18</sup> Legislatures in California,<sup>19</sup> Connecticut,<sup>20</sup> the District of Columbia,<sup>21</sup> Illinois,<sup>22</sup> Maryland,<sup>23</sup> Massachusetts,<sup>24</sup> New York,<sup>25</sup> and

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BACK WOMEN IN COMBAT 3-1, BUT LESS FOR DRAFT, QUINNIPIAC UNIVERSITY NATIONAL POLL FINDS; SUPPORT FOR UNIVERSAL GUN BACKGROUND CHECKS IS 92%, at 1 (2013) (“On gun-control, there is overwhelming 92 – 7 percent support for background checks for all gun buyers . . .”).

<sup>18</sup> To be clear, I do not address the proposed imposition of liability on gun manufacturers or gun sellers. While recent reports have uncovered questionable behavior within the gun industry—namely concerted efforts to increase young children’s access to AR-15s and to oppose any industry regulations whatsoever—gun manufacturer liability and gun seller liability present distinct issues that existing scholarship has addressed extensively. See Mike McIntire & Michael Luo, *Gun Makers Saw No Role in Curbing Improper Sales*, N.Y. TIMES, May 28, 2013, at A1 (“The Glock executive testified that he would keep doing business with a gun dealer who had been indicted on a charge of violating firearms laws because ‘[t]his is still America’ and ‘[y]ou’re still innocent until proven guilty.’”); Mike McIntire, *Selling a New Generation on Guns*, N.Y. TIMES, Jan. 27, 2013, at A1 (“Threatened by long-term declining participation in shooting sports, the firearms industry has poured millions of dollars into a broad campaign to ensure its future by getting guns into the hands of more, and younger, children.”); see also Jean Macchiaroli Eggen & John G. Culhane, *Gun Torts: Defining a Cause of Action for Victims in Suits Against Gun Manufacturers*, 81 N.C. L. REV. 115, 210 (2002) (“It is time to hold gun manufacturers accountable for knowingly endangering the general public.”); Timothy D. Lytton, *Tort Claims Against Gun Manufacturers for Crime-Related Injuries: Defining a Suitable Role for the Tort System in Regulating the Firearms Industry*, 65 MO. L. REV. 1, 2 (2000) (“This Article argues that tort claims against gun manufacturers can complement legislative efforts to regulate the firearms industry and can thereby make a modest contribution to decreasing gun violence.”); George A. Nation III, *Respondeat Manufacturer: Imposing Vicarious Liability on Manufacturers of Criminal Products*, 60 BAYLOR L. REV. 155, 229 (2008) (“The criminal product manufacturer should pay, and the respondeat manufacturer doctrine is the best way to accomplish this result.”).

<sup>19</sup> Assemb. B. 231 (Ca. 2013). The California legislature ultimately removed the insurance provisions from the bill and, instead, enacted the remaining provisions imposing criminal liability on gun owners for negligent gun storage. See *id.*; Don Thompson, *California Bill Would Force Gun Owners to Buy Insurance*, INS. J., Feb. 7, 2013.

<sup>20</sup> H.R. 6656, 2013 Gen. Assemb., Jan. Sess. (Conn. 2013). The Connecticut General Assembly’s Insurance Committee withdrew the bill shortly after its March 2013 introduction. See *Connecticut’s Gun Liability Insurance Bill Withdrawn After Hearing*, INS. J., Mar. 26, 2013, <http://www.insurancejournal.com/news/east/2013/03/26/286098.htm>, archived at <http://perma.cc/J95X-HX7Y> (“Connecticut’s recently proposed bill that would require firearm owners to maintain excess personal liability insurance and self defense insurance was withdrawn last week following a two-hour hearing held earlier during the week, a local newspaper reported.”).

<sup>21</sup> DC-B20-170, D.C. Council (2013) (“To require that individuals secure liability insurance before obtaining a license to own a firearm”).

<sup>22</sup> H.B. 0687 (Ill. 2013) (“Provides that any person who owns a firearm in this State shall

Pennsylvania<sup>26</sup> have all introduced bills that would require gun owners to purchase liability insurance for their guns—although these bills vary considerably as to their content.<sup>27</sup> Moreover, congressional Democrats introduced the federal Firearms Risk Prevention Act, which would impose a nationwide liability insurance mandate.<sup>28</sup> At this point, none of these legislatures have passed their bills or any other similar measures. Yet, many continue to mull over these policies, questioning their practicality, constitutionality, and effectiveness.<sup>29</sup> So what exactly might a practical,

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maintain a policy of liability insurance in the amount of at least \$1,000,000 specifically covering any damages resulting from negligent or willful acts involving the use of such firearm while it is owned by such person.”).

<sup>23</sup> S. 577 (Md. 2013) (“requiring a person who possesses a firearm to maintain certain liability insurance; requiring a person who sells, rents, or transfers a firearm to verify that the purchaser, lessee, or transferee has certain liability insurance; establishing certain penalties for a violation of this Act”). The Maryland General Assembly introduced the bill in February 2013, and withdrew it within the month. *See Connecticut’s Gun Liability Insurance Bill Withdrawn*, *supra* note 20 (“Similarly, in Maryland, a bill that sought mandatory firearm liability insurance for gun owners was also withdrawn recently.”).

<sup>24</sup> H.R. 3253 (Mass. 2013) (“Whoever possess, carries, or owns a firearm, rifle or shotgun without a liability policy or bond or deposit required by the provisions of this chapter which has not been provided and maintained in accordance therewith shall be punished by a fine of not less than five hundred nor more than five thousand dollars or by imprisonment for not more than one year in a house of correction, or both such fine and imprisonment.”).

<sup>25</sup> Assemb. B. 3908 (N.Y. 2013) (“An Act to amend the insurance law, in relation to requiring owners of firearms to obtain liability insurance.”).

<sup>26</sup> H.R. 521 (Pa. 2013) (proposing an amendment to Title 18 to require gun-owners to maintain insurance).

<sup>27</sup> For example, Illinois’ proposal would require gun owners to maintain \$1,000,000 in liability coverage, *see* H.B. 0687 (Ill. 2013), while the District of Columbia’s and Maryland’s proposals would require \$250,000 in coverage. *See* DC-B20-170, D.C. Council (2013); S. 577 (Md. 2013). Connecticut’s bill would delegate the power to set minimum coverage requirements to the state’s Insurance Commissioner. H.R. 6656, 2013 Gen. Assemb., Jan. Sess. (Conn. 2013).

<sup>28</sup> H.R. 1369, 113th Cong. (1st Sess. 2013) (“To prohibit the sale of a firearm to, and the purchase of a firearm by, a person who is not covered by appropriate liability insurance coverage.”).

<sup>29</sup> After the problematic rollout of the Affordable Care Act’s insurance exchanges, *see* Jeffrey Young, *Obamacare Website Failure Threatens Health Coverage For Millions Of Americans*, HUFFINGTON POST, Oct. 18, 2013, [http://www.huffingtonpost.com/2013/10/18/obamacare-train-wreck\\_n\\_4118041.html](http://www.huffingtonpost.com/2013/10/18/obamacare-train-wreck_n_4118041.html), archived at <http://perma.cc/5ATA-W42G>, Alan Gottlieb of the Second Amendment Foundation said of proposed mandates, “I don’t believe [mandates are] going to gain any traction, particularly in light of the fact that we’ve got, at this juncture, a fiasco with Obamacare being mandatory . . . . I don’t think legislators want to get near any kind of mandatory insurance.” Marci Jacobs, *Gun Insurance Proposals Stall as Critics Cite Obamacare*, BLOOMBERG, Nov. 19, 2013, <http://www.bloomberg.com/news/2013-11->

constitutional, and effective mandate look like? Part I of this Note will consider the practicality of a mandate, reviewing insurance policy and law in the context of car insurance and drawing analogies from car safety to the gun violence problem. Part II will discuss the constitutionality of a mandate in light of *District of Columbia v. Heller*,<sup>30</sup> *McDonald v. City of Chicago*,<sup>31</sup> and subsequent lower court cases. Part III will examine key components of a practical, constitutional, and effective mandate and offer solutions for future legislative efforts.

## I. THE PRACTICALITY OF A GUN INSURANCE MANDATE

### A. *The Existing Insurance Framework*

Before evaluating the practicality of a new form of insurance, it might be helpful to discuss the existing framework of the American insurance market. In fact, today's insurance market already provides policies that will cover some acts of gun violence: homeowner's insurance policies. These common, multipurpose policies often cover any personal liability that one incurs from accidents that occur on the premises of one's home.<sup>32</sup> As a result, policyholders may be able to apply this coverage to accidental shootings that occur in their homes or backyards.<sup>33</sup>

Policyholders sometimes have been able to stretch this coverage beyond those spatial confines. For instance, following the Columbine mass shooting, the homeowner's insurance carriers for the shooters' families offered to settle many of the wrongful death claims brought forth by the victims' families.<sup>34</sup> However, this outcome remains an outlier, as subsequent attempts by gun

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19/firearm-insurance-proposals-languish-as-critics-invoke-obamacare.html, *archived at* <http://perma.cc/5NT3-3CAZ>.

<sup>30</sup> 554 U.S. 570 (2008).

<sup>31</sup> 561 U.S. 742 (2010).

<sup>32</sup> *See Are Hunting Rifles Covered Under My Homeowners Insurance?*, 360 Degrees of Financial Literacy, AM. INST. OF CERT. PUB. ACCOUNTANTS, <http://www.360financialliteracy.org/Topics/Home-Ownership/Homeowners-Insurance/Are-hunting-rifles-covered-under-my-homeowners-insurance>, *archived at* <http://perma.cc/94DN-SVPG> ("Hunting rifles, like personal stereos, VCRs, and other personal property, are covered under your homeowners insurance for loss, theft, or damage. . . . If you accidentally injure someone on your premises, your homeowners insurance will cover some or all of the damages . . .").

<sup>33</sup> *See id.*

<sup>34</sup> *See* Michael Cooper & Mary Williams Walsh, *Buying a Gun? States Consider Insurance Rule*, N.Y. TIMES, Feb. 22, 2013, at A1 ("The families of the two students responsible for the 1999 killings at Columbine High School in Colorado were able to use money from their homeowners' policies to settle a lawsuit brought by families of most of the victims.").

violence victims to reach settlements with gun violence perpetrators' homeowner's insurance carriers have failed.<sup>35</sup>

B. *The Legislative Purposes Behind Gun Insurance Mandates*

In light of the current insurance framework, one can discern at least three legislative purposes behind recent gun insurance mandate proposals. First, as illustrated by the limits of homeowner's insurance policies, gun violence victims who incur injuries away from perpetrators' homes are less likely to receive compensation for their injuries than those victims who incur injuries within or closer to those perpetrators' homes. Legislators might believe that location should not have any bearing on victims' compensation. More generally, legislators might wish to reduce the likelihood that victims will be left without compensation, like in the case of a judgment-proof perpetrator. Gun insurance mandates would mitigate these issues by creating reserves of additional funds to compensate gun violence victims, regardless of where those victims incurred injuries.<sup>36</sup> Thus, legislators might, through these measures, seek to expand the scope of financial protections for gun violence victims.

Second, gun violence frequently imposes crippling financial costs on gun owners.<sup>37</sup> A handgun owner whose child accidentally shoots another child with that handgun could face a wrongful death suit carrying devastating damages

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<sup>35</sup> See *id.* ("In 2001, a California court ordered an insurance company to defend a policyholder whose 16-year-old son shot and killed a friend with a Beretta handgun that he had found in his mother's coat. But the year before, a North Carolina court ruled that an insurance company did not have to cover the expenses of a policyholder who had shot and wounded a prowler on his property."); Tim Hoover, *Aurora Theater Shooting Liability Lawsuits Stand Little Chance, Legal Experts Say*, DENVER POST, July 25, 2012, [http://www.denverpost.com/ci\\_21150830/legal-experts-say-liability-lawsuits-stand-little-chance](http://www.denverpost.com/ci_21150830/legal-experts-say-liability-lawsuits-stand-little-chance), archived at <http://perma.cc/UM7L-8BFR> ("Survivors of the Aurora movie theater shootings and the families of those killed will have a high hurdle to clear if they try to sue the theater or others, legal experts say.").

<sup>36</sup> See Chris Molina, *A Private Sector Solution to a Public Problem*, 41 HASTINGS CONST. L.Q. 421, 441-42 (2014) ("[T]he mandate would ensure that more victims are compensated for their losses."); Stephen G. Gilles & Nelson Lund, *Mandatory Liability Insurance for Firearm Owners: Design Choices and Second Amendment Limits*, 14 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 18, 18 (2013) ("Mandatory insurance would also increase the likelihood that victims of firearms-related injuries would be able to recover damages through the tort system.").

<sup>37</sup> The NRA uses this scenario as a selling point for the gun insurance policies it endorses. See *Personal Firearms Liability Insurance for NRA Members*, NAT'L RIFLE ASS'N, <http://www.locktonrisk.com/nrains/excess.htm>, archived at <http://www.locktonrisk.com/nrains/excess.htm> (last visited Apr. 1, 2015) ("Most homeowner's policies fall far short of adequate protection for liability claims. We recognized this gap in coverage and created a custom plan to protect National Rifle Association members.").



totals.<sup>38</sup> Legislators might believe either that gun owners might not always deserve such severe penalties in these unfortunate situations, or that severe penalties unnecessarily increase the aggregate damage of gun violence episodes. Either way, gun insurance mandates would reduce the financial burden of such incidents on policyholders, thereby reducing the likelihood that gun violence would have collateral victims—bankrupt individuals and families. Legislators, therefore, might wish to fortify gun owners’ financial protections through these measures.

Third, while homeowner’s insurance policies provide funds for victims, they might not provide an effective incentive for responsible gun ownership. An insurance company may adjust a policy’s premiums according to the existence or absence of safe conditions on the policyholder’s premises.<sup>39</sup> Yet, the comprehensive nature of the homeowner’s insurance policy might dissipate potential incentives for specific conduct, like the purchase and use of a gun safe.<sup>40</sup> Homeowner’s insurance policies cover all accidents in and around the home, not just gun accidents; incentives for responsible gun ownership dissolve within this larger pool of coverage.<sup>41</sup> In contrast, gun insurance mandates could present clearer incentives through narrower policies.<sup>42</sup> For instance, a gun owner could purchase a liability policy covering his hunting rifle. The premiums on that liability policy would tie solely to that individual’s conduct with that hunting rifle. Any disregard for safe practices—like failing to purchase a gun safe, use a gun safe, or unload the hunting rifle after hunting

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<sup>38</sup> See e.g., Lee Coleman, *Suit Filed in Gun Death of Wilton Boy*, DAILY GAZETTE, Dec. 20, 2011, at A1 (“The parents of the 12-year-old Wilton boy accidentally shot and killed by his friend last Dec. 22 have filed a wrongful death civil lawsuit against the child and his father.”).

<sup>39</sup> See Letter from Erin Collins, State Affairs Manager, National Association of Mutual Insurance Companies, to Councilmember Vincent Orange, Chairman, Committee on Business, Consumer and Regulatory Affairs, Washington D.C. City Council (May 16, 2013) (“[I]nsurance products are priced and developed based on an insurance company’s ability to assess a risk and predict the likelihood of the event.”).

<sup>40</sup> Twenty-eight states, plus Washington D.C., have passed “Child Access Prevention” laws that impose criminal penalties against gun owners who “give children unsupervised access to firearms.” *Child Access Prevention Policy Summary*, LAW CENT. TO PREVENT GUN VIOLENCE (Aug. 1, 2013), <http://smartgunlaws.org/child-access-prevention-policy-summary/>, archived at <http://perma.cc/V23V-NK4T> (“Researchers have found that millions of children live in homes with easily accessible guns.”). These laws are meant to incentivize gun owners to purchase and use gun safes and to supervise minors using their guns. See *id.*

<sup>41</sup> See *Are Hunting Rifles Covered Under My Homeowners Insurance?*, *supra* note 32.

<sup>42</sup> See Molina, *supra* note 36, at 441-42 (“Further, if the mandate were implemented in such a way that requires sellers to verify proof of insurance before making the sale, gun owners would be unable to avoid the increased costs associated with owning more dangerous weapons.”); Gilles & Lund, *supra* note 36, at 18 (“[A] mandatory insurance system is likely to make more reasonable trade-offs between public safety and individual rights than a system in which legislatures make politically driven decisions about who may possess what kinds of firearms.”).

trips—at the time of a regular inspection or a gun violence episode could lead directly to a premium increase.<sup>43</sup> Accordingly, a gun insurance mandate could create stronger incentives than existing insurance policies currently provide for gun owners to store and use their guns properly.

### C. *Pricing Out the Poor*

Considering these legislative purposes, one can see why some legislators have endorsed gun insurance mandates instead of accepting the status quo. Whether these legislators could write, and insurance carriers could implement, such a mandate within the constraints of the existing insurance market is not so clear. Yet, interestingly enough, several insurance carriers currently sell personal liability policies that specifically cover the costs of bodily injury and property damage stemming from the policyholders' accidental shootings.<sup>44</sup> Some of these carriers even sell self-defense insurance, which covers the costs of criminal defense, civil defense, medical bills, and property damage stemming from the policyholders' self-defense shootings.<sup>45</sup> The National Rifle Association ("NRA"), the United States' largest gun rights lobby,<sup>46</sup> openly endorses a number of these policies.<sup>47</sup> But the NRA supports these plans only as means for gun owners *voluntarily* to extend the reach of their insurance

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<sup>43</sup> Gilles & Lund, *supra* note 36, at 18 ("The most important advantage of using an insurance requirement as an alternative to direct government regulation arises from the incentives that insurance companies face in a competitive market. Competitive pressures would lead insurance carriers to keep the premiums for low-risk gun owners low, while charging higher premiums to those who are more likely to cause injuries to other people. At the margin, such a system can be expected to reduce the possession and use of firearms by high-risk individuals, and the threat of increased premiums might induce greater care in using and storing firearms by those who were previously uninsured."); Cooper & Walsh, *supra* note 34, at A1 ("Lawmakers in at least half a dozen states, including California, Connecticut, Maryland, Massachusetts, New York and Pennsylvania, have proposed legislation this year that would require gun owners to buy liability insurance—much as car owners are required to buy auto insurance. Doing so would give a financial incentive for safe behavior, they hope, as people with less dangerous weapons or safety locks could qualify for lower rates.").

<sup>44</sup> See *The NRA Endorsed Insurance Program*, NAT'L RIFLE ASS'N, <http://www.locktonrisk.com/nra/ins/default.htm>, archived at <http://perma.cc/5DAS-PN7Y>.

<sup>45</sup> *NRA Self-Defense Insurance*, NAT'L RIFLE ASS'N, <http://www.locktonrisk.com/nra/ins/defense.htm>, archived at <http://perma.cc/CN43-XGDZ> ("Most people don't realize that many homeowner's policies don't include coverage for acts of self-defense, concealed carry liability insurance, or the related legal costs for criminal defense charges. We recognized this gap in coverage and created a plan to help protect National Rifle Association members should the unthinkable happen.").

<sup>46</sup> See David Kopel, *The N.R.A. is Still Vital Because the 2nd Amendment Is*, N.Y. TIMES, Jan. 3, 2013, <http://www.nytimes.com/roomfordebate/2012/12/17/is-the-gun-lobby-invincible/the-nra-is-still-vital-because-the-2nd-amendment-is>, archived at <http://perma.cc/RJ8E-WNDP>.

<sup>47</sup> See *The NRA Endorsed Insurance Program*, *supra* note 44.

coverage beyond their homeowner's insurance policies.<sup>48</sup> The NRA has vigorously opposed all proposed mandates, arguing, among other points, that any mandate would "price the poor out" of owning guns.<sup>49</sup>

But is that really the case? Has compulsory insurance presented such a burden in its most common context: car insurance?<sup>50</sup> Today, forty-nine states require drivers to maintain car insurance policies.<sup>51</sup> A typical compulsory car

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<sup>48</sup> Trevor W. Santos, State Liason, Nat'l Rifle Ass'n-Inst. for Legis. Action, Testimony in Opposition to DC Bill 20-170 (May 29, 2013) ("The National Rifle Association strongly opposes any sort of government mandate requiring gun owners to purchase liability insurance in order to own and possess a firearm.").

<sup>49</sup> *Id.* The NRA even likened mandating gun owner insurance to "imposing a poll tax . . . on minorities and the poor" and "requiring publishers to obtain insurance or post a bond against possible defamation actions in order to operate a newspaper or periodical." *Id.*

<sup>50</sup> Gun-control advocates frequently draw this analogy when supporting gun insurance mandates. Cooper & Walsh, *supra* note 34, at A1 (observing that requiring gun owners to buy liability insurance is similar to car owners being required to buy auto insurance); *Democracy in America: Insurance Policy*, ECONOMIST, Dec. 26, 2012, <http://www.economist.com/blogs/democracyinamerica/2012/12/gun-control-0>, archived at <http://perma.cc/JYJ4-ND25> (quoting a tweet by Nouriel Roubini calling for gun-owners to buy insurance just like car-owners); Robert Cyran & Reynolds Holding, *Congress Should Push for Mandatory Gun Insurance*, SLATE, Dec. 18, 2012, [http://www.slate.com/blogs/breakingviews/2012/12/18/congress\\_should\\_push\\_for\\_mandatory\\_gun\\_insurance.html](http://www.slate.com/blogs/breakingviews/2012/12/18/congress_should_push_for_mandatory_gun_insurance.html), archived at <http://perma.cc/8HP9-WAH4> ("Requiring liability coverage could be one way to keep the most dangerous weapons from unstable hands without infringing the law.").

The legislative purposes behind compulsory car insurance statutes share striking similarities with those supporting gun insurance mandates. For example, many state legislators justify compulsory car insurance statutes as necessary means to protect "victims against the cost of suffering otherwise uncompensated injury" and "negligent drivers against the risk of financially disastrous liability." KENNETH S. ABRAHAM, *INSURANCE LAW AND REGULATION: CASES AND MATERIALS* 702 (5th ed. 2010); *see also* 7 AM. JUR. 2D *AUTOMOBILE INSURANCE* § 149 ("Generally, the purpose of compulsory automobile liability insurance is to protect members of the general public injured on the highways through the operation of the covered motor vehicle by giving them security for the payment of their damages.").

Some also contend that car insurance premiums effectively incentivize safe driving. *See, e.g., Auto Insurance*, NEW YORK PUBLIC INTEREST RESEARCH GROUP, [http://www.nypirg.org/consumer/auto\\_insurance/](http://www.nypirg.org/consumer/auto_insurance/), archived at <http://perma.cc/TB8L-4ZTH> (last visited Apr. 15, 2015) ("We think auto insurance rates should be based on *how you drive* . . . . That will not only ensure that rates are set fairly, but it will incentivize safe driving habits."); *cf.* Mary A. Weiss, Sharon Tennyson, & Lauren Regan, *The Effects of Regulated Premium Subsidies on Insurance Costs: An Empirical Analysis of Automobile Insurance*, 77 J. RISK & INS. 597, 598 (2010).

<sup>51</sup> Stephen Brobeck & J. Robert Hunter, *Lower-Income Households and the Auto Insurance Marketplace: Challenges and Opportunities*, CONSUMER FED'N OF AM. (January 30, 2012), <http://www.consumerfed.org/news/450>, archived at <http://perma.cc/CBT6-XB8R> ("All states but New Hampshire require drivers to carry liability insurance."). *Cf.* ABRAHAM,

insurance statute requires a driver to maintain coverage minimums of \$20,000 per person injured in the policyholder's accidents for medical bills, \$40,000 per accident for total medical bills, and \$5000 per accident for total property damage.<sup>52</sup> According to several recent studies, the average household spends between \$1000 and \$2000 per year on car insurance premiums.<sup>53</sup> The Consumer Federation of America contends that these figures represent a significant financial burden on low-income individuals and families, potentially pricing them out of the car insurance market and thereby denying them access to a critical means of transportation.<sup>54</sup> Nonetheless, no court has ever struck down these minimum coverage requirements as unduly burdensome to the poor, and compulsory car insurance remains a popular policy generating a profitable industry. Thus, nothing in the history of compulsory car insurance laws in the United States suggests that legislators and insurance carriers could not craft gun insurance mandates.

Opponents to these measures might assert that guns pose higher risks to persons and property than cars, meaning that insurance carriers would charge higher premiums for gun insurance policies than car insurance policies.<sup>55</sup> Gun insurance mandates, in that case, would present greater financial burdens to gun owners than compulsory car insurance laws do to car owners. However, the premiums on the NRA-endorsed insurance policies suggest that these risks are not all that disparate. For instance, a personal liability policy with \$250,000 of coverage carries a \$67 monthly premium—or an \$804 yearly premium.<sup>56</sup> Holding the ratio between the premium and the coverage constant, a personal liability policy with \$40,000 of coverage (a common car insurance coverage

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*supra* note 50, at 702 (“Every state has enacted some form of statutory requirement regarding automobile insurance”).

<sup>52</sup> Brobeck & Hunter, *supra* note 51 (observing that these coverage amounts vary by state).

<sup>53</sup> *Id.* (“In 2007, according to industry sources, all households spent \$160 billion on private passenger auto insurance premiums, nearly two-thirds of all personal insurance premiums and an average of \$1379 per household. In the same year, the federal government’s Consumer Expenditure Survey (CES) reported average household auto insurance expenditures of \$1071.”).

<sup>54</sup> *Id.* (“While some of these issues can be debated, what is undeniable is that high auto insurance costs for LMI households either impose a substantial financial burden or greatly limit economic opportunity, especially access to jobs. Only state regulators can take the lead in mitigating these problems.”).

<sup>55</sup> See Collins, *supra* note 39 (“[I]nsurance products are priced and developed based on an insurance company’s ability to assess a risk and predict the likelihood of the event.”). Of course, people likely drive cars much more frequently than they use their guns. The frequency of the covered activity will likely have a significant impact on the calculation of a liability insurance premium.

<sup>56</sup> *Apply for Personal Firearms Liability*, NAT’L RIFLE ASS’N, <http://www.locktonaffinity.com/nra/excess.htm>, archived at <http://perma.cc/7QGP-LT6S> (last visited Mar. 20, 2015) (providing plan and rate summaries).

minimum) would carry approximately a \$10 monthly premium—or a \$120 yearly premium. Of course, the price of a new Bushmaster AR-15, one of the most popular guns in the country,<sup>57</sup> is approximately \$1000<sup>58</sup> and the price of a new Toyota Camry, the top-selling sedan in the country,<sup>59</sup> is approximately \$22,000,<sup>60</sup> so the costs of these activities in the absence of regulation differ significantly. Even so, a gun insurance mandate likely would not bar a significant segment of consumers from owning a gun, considering the low price of potential gun insurance premiums and the potential risks of gun ownership. Therefore, legislators should be able to enact gun insurance mandates without “pricing out” poorer consumers.

#### D. *Indemnified Recklessness*

It should be noted that some still question whether compulsory car insurance has improved public safety.<sup>61</sup> A series of studies have linked the rise in car insurance coverage with increases in unsafe driving and traffic fatalities.<sup>62</sup> This link is somewhat intuitive, as a driver with financial protection from

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<sup>57</sup> See Natasha Singer, *The Most Wanted Gun in America*, N.Y. TIMES, Feb. 3, 2013, at BU1 (calling the AR-15 “America’s most wanted gun”).

<sup>58</sup> *Bushmaster Firearms AR-15 Rifles*, CABELAS, <http://www.cabelas.com/product/Bushmaster-Firearms-AR-Rifles/707356.uts>, archived at <http://perma.cc/44TS-BQBW> (last visited Mar. 20, 2015) (selling Bushmaster AR-15 for a Regular Price of \$1049.99-\$1199.99 and a Sale Price of \$807.88-\$1099.99).

<sup>59</sup> Alan Ohnsman, *Toyota Camry’s Run as No. 1 U.S. Sedan May End Next Year*, BLOOMBERG, Sept. 26, 2013, <http://www.bloomberg.com/news/2013-09-26/toyota-camry-s-run-as-no-1-u-s-sedan-may-end-next-year.html>, archived at <http://perma.cc/ARG4-VSVC> (characterizing the Camry as “America’s best-selling car for more than a decade.”).

<sup>60</sup> 2015 *Toyota Camry*, TOYOTA, <http://www.toyota.com/camry/#!/Welcome>, archived at <http://perma.cc/URQ4-7YDD> (last visited Mar. 20, 2015) (advertising the Camry starting at \$22,970).

<sup>61</sup> See, e.g., Alma Cohen & Rajeev Dehejia, *The Effect of Automobile Insurance and Accident Liability Laws on Traffic Fatalities*, 47 J. L. & ECON. 357, 358 (2004) (“Using compulsory insurance as an instrument for the proportion of uninsured motorists, we find that automobile insurance has significant moral hazard costs, namely, reducing precautions and increasing traffic fatalities. . . . [W]hatever benefits flow from increasing the incidence of automobile insurance and from moves to a no-fault system, there are also significant moral hazard costs to doing so.”); J. David Cummins, Richard D. Phillips, & Mary A. Weiss, *The Incentive Effects of No-Fault Automobile Insurance*, 44 J. LAW & ECON. 427, 428 (2001) (Theorizing that no-fault auto insurance “may weaken the deterrent effect of tort law and therefore lead to an increase in automobile accidents”); Elisabeth M. Landes, *Insurance, Liability, and Accidents: A Theoretical and Empirical Investigation of the Effect of No-Fault Accidents*, 25 J. L. & ECON. 49, 49 (1982) (investigating the effect of no-fault insurance on accidents).

<sup>62</sup> See, Cohen & Dehejia, *supra* note 61, at 359-60 (reviewing literature documenting moral hazard costs to insurance).

catastrophic loss may have less of an incentive to drive safely than a driver without such protection.<sup>63</sup>

However, one can carry this “indemnified recklessness” reasoning only so far. People presumably value their lives and comprehend the risks of reckless driving sufficiently to drive with some measure of care.<sup>64</sup> The argument that car insurance causes reckless driving presupposes that a significant number of drivers are irrational—specifically, these drivers believe that the benefits of reckless driving outweigh its risks. Many studies have failed to find such widespread irrationality.<sup>65</sup> Moreover, insurance carriers could limit the influence of such irrationality through precise premium pricing.<sup>66</sup> Thus, this “indemnified recklessness” argument is a highly questionable criticism of compulsory car insurance laws.

More important, this “indemnified recklessness” argument is also an odd criticism of gun insurance mandates. Applying its principles to gun insurance mandates, one would again have to presuppose that a significant number of gun owners are irrational. Like irrationally reckless drivers, irrationally reckless gun owners would be willing to put their lives and the lives of others at undue risk by failing to recognize basic gun safety protocols—like directing muzzles away from persons and using safety locks during periods of inactivity—simply because they had insurance coverage.<sup>67</sup> But, as the NRA and other groups supporting expanded gun rights consistently remind their detractors, “gun owners are some of the most responsible people” in the country.<sup>68</sup> At the very least, gun owners likely value their lives and others’ lives sufficiently to handle their guns with care. Thus, gun insurance mandates

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<sup>63</sup> See *id.* at 358-59 (“As a theoretical matter, insurance does have the moral hazard cost of reducing the policyholder’s incentives to take precautions against the insured loss.”).

<sup>64</sup> See *id.* at 359.

<sup>65</sup> See *id.* 359-60 (“Early work by M. Elisabeth Landes suggested that by reducing incentives to drive carefully, such laws have led to an increase in traffic fatalities in the United States. Subsequent results have been mixed . . .”).

<sup>66</sup> See Weiss, Tennyson, & Regan, *supra* note 50, at 601 (“Regulatory price suppression reduces the links between a driver’s loss experience and insurance premium changes. For example, regulations that limit annual premium increases for all drivers reduce expected premium increases in the event of a bad outcome. This will dampen safety incentives for drivers.”).

<sup>67</sup> See *Firearms Safety—10 Rules of Safe Gun Handling*, NAT’L SHOOTING SPORTS FOUND., <http://www.nssf.org/safety/basics/>, archived at <http://perma.cc/QW6R-MWX8> (last visited Mar. 25, 2014) (providing a list of “10 Rules of Safe Gun Handling”).

<sup>68</sup> Fernandez, *supra* note 12 (“‘This enhances Oklahomans’ ability to exercise their Second Amendment rights,’ said the Republican state senator who wrote Senate Bill 1733, Anthony Sykes. ‘I think the evidence is clear that gun owners are some of the most responsible people, and they’ve shown that in not just Oklahoma, where we’ve had conceal carry for quite some time and there’s never been an incident, but in these other states as well.’”).

would not render themselves impotent through the creation of perverse incentives.

E. *Intentional Conduct*

Some recently proposed gun insurance mandates would go beyond the scope of compulsory car insurance statutes by requiring gun owners to purchase policies that cover both negligent and intentional conduct.<sup>69</sup> Recent history suggests that insurance carriers would cover some intentional conduct. For example, while the NRA-endorsed personal liability policy covers only costs stemming from negligent conduct (i.e., accidental shootings of persons and property), the self-defense policy covers costs stemming from intentional conduct (i.e., self-defense shootings of persons and property).<sup>70</sup> Thus, insurance carriers have the capability—and, presumably, the economic incentive—to provide gun insurance policies that cover some forms of intentional conduct.<sup>71</sup>

However, as a number of insurance industry associations have predicted, insurance carriers likely would refuse to cover the intentional *tortious* or *criminal* conduct of gun owners—unjustified self-defense shootings, malicious shootings, and the like.<sup>72</sup> Insurance carriers traditionally have incorporated intentional act exclusions into car insurance and homeowner’s insurance

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<sup>69</sup> H.R. 6656, Gen. Assemb., Jan. Sess. (Conn. 2013) (“Any person who possesses or owns a firearm . . . shall procure and maintain . . . personal liability insurance that provides coverage for bodily injury and property damage caused by a firearm, and . . . self defense insurance that provides coverage for civil and criminal defense costs and provides for reimbursement of criminal defense costs if such person uses a firearm in self defense.”); DC-B20-170, D.C. Council (2013) (“The insurance policy required . . . shall specifically cover any damages resulting from negligent acts, or willful acts that are not undertaken in self-defense, involving the use of the firearm while it is owned by the policy holder.”); H.R. 521 Gen. Assemb., 2013 Sess. (Pa. 2013) (“The insurance policy shall . . . [s]atisfy any judgment for personal injuries or property damages arising out of negligent or willful acts involving the use of an insured firearm.”); H.B. 0687 96th Gen. Assemb., 2009 and 2010 Sess. (Ill. 2010) (“[A]ny person who owns a firearm in this State shall maintain a policy of liability insurance . . . covering any damages resulting from negligent or willful acts involving the use of such firearm while it is owned by such person.”).

<sup>70</sup> *Personal Firearms Liability Insurance for NRA Members*, *supra* note 37; *NRA Self-Defense Insurance*, *supra* note 45.

<sup>71</sup> Molina, *supra* note 36, at 437-38 (“A number of reputable insurance companies already offer liability insurance for gun owners, although such coverage is simply part of a more expansive homeowner’s or renter’s insurance policy.”).

<sup>72</sup> See Collins, *supra* note 39 (“Insurance does not cover intentional and criminal acts for both practical and public policy reasons.”); Cooper & Walsh, *supra* note 34 (“Robert P. Hartwig, the president of the Insurance Information Institute, said that insurance generally covered accidents and unintentional acts—not intentional or illegal ones. ‘Insurance will cover you if your home burns down in an electrical fire, but it will not cover you if you burn down your own house, and you cannot insure yourself for arson,’ he said.”).

policies to avoid covering such conduct.<sup>73</sup> Erin Collins of the National Association of Mutual Insurance Companies explicates the rationale behind these exclusions:

If a person predisposed to committing a crime were relieved of economic responsibility for that act via paying an insurance premium that would indemnify the act itself, it would remove a disincentive to committing the act. Extension of such coverage by the insurance industry could thus actually lead to more violence by creating a moral hazard. In much the same way that a person would not be covered by their auto insurance if they chose to run someone down with their car, a person is not covered by their homeowners insurance if they choose to hurt someone with a gun.<sup>74</sup>

Clearly, when faced with the prospect of compensating shooters for their malicious shootings, insurance carriers would incorporate similar exclusions into gun insurance policies. Yet, these exclusions are neither self-enforcing nor ironclad: an insurer must prove the insured's "intention" by the traditional demanding standards when defending against a suit challenging the validity of an intentional act exclusion.<sup>75</sup> Furthermore, while courts regularly enforce intentional act exclusions on the grounds of contract construction or public policy—that tortfeasors and criminals should not profit from their torts and crimes—courts have been less willing to do so when insureds seek to cover the intentional acts of other insureds.<sup>76</sup> Some courts have found such intentional

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<sup>73</sup> See Gary Wickert, *Does Automobile Insurance Follow the Car or the Driver?*, CLAIMS J., June 5, 2014, <http://www.claimsjournal.com/news/national/2014/06/05/249762.htm>, archived at <http://perma.cc/WK85-QFC3> (last visited Apr. 15, 2015).

<sup>74</sup> Collins, *supra* note 39.

<sup>75</sup> The insurer must show either: (1) that the actor intended to commit the act and cause some kind of harm; or (2) that the actor intended to commit the act and the results were reasonably foreseeable. James L. Rigelhaupt, Jr., Annotation, *Construction and Application of Provision of Liability Insurance Policy Expressly Excluding Injuries Intended or Expected by Insured*, 31 A.L.R. (4th) 957 § 5(a) & (d) (1984). In addition, courts have at times refused to apply these exclusions to the insureds' employees or children.

<sup>76</sup> See *McFarland v. Utica Fire Ins. Co.*, 814 F. Supp. 518, 526 (S.D. Miss. 1992) (holding that an intentional acts exclusion posed no bar to recovery by an innocent insured for damages caused by the wrongful acts of a coinsured); *Armstrong v. Sec. Ins. Grp.* 288 So. 2d 134, 137 (Ala. 1973) ("[W]here a third person seeks to recover from an insured on the basis of injuries or damages allegedly caused by some person other than the named insured, in the absence of a showing that the injury complained of was 'at the direction of' the named insured, a liability insurer is not relieved of its obligation to the insured by an 'intentional injury or damage' clause." (quoting Annotation, *Liability Insurance—Willful Injury*, 2 A.L.R. (3d) 1238, § 5); *Talley v. MFA Mut. Ins. Co.*, 620 S.W. 2d 260, 263 (Ark. 1981) ("[T]he court erred in awarding summary judgment against the parents of Tony, the insureds or policy holders. Their rights are severable under the policy. Under the terms of the policy, whether the act was 'expected or intended' must also be looked at from the 'standpoint of the insured,' the parents, the Davises. As to them, the injuries were not alleged to be intentional.").



act exclusions severable, preserving coverage for the uninvolved insureds that could not have reasonably expected the intentional acts of the involved coinsureds.<sup>77</sup> Hence, legislators may still be able to write gun insurance mandates that would compensate the victims of tragedies like the Columbine mass shooting and the Newtown mass shooting, where the insureds' children carried out the intentional acts.

While the exact confines of a gun insurance mandate may be difficult to calibrate—considering the complexities of premium pricing and intentional act exclusions—legislators clearly could craft a mandate. Such a law would not price out significant numbers of poor gun owners or incentivize reckless behavior. Such a law could also have an expanded scope, covering both unintentional and some intentional conduct—enough to compensate some victims of mass shootings. But, aside from passing these technical tests, any mandate also must overcome the legal hurdle of the Constitution. Is a gun insurance mandate unconstitutional? What elements of gun insurance mandates might implicate the Constitution? Part II explores these questions.

## II. THE CONSTITUTIONALITY OF A GUN INSURANCE MANDATE

### A. *Heller's Baseline*

In 2008, the Supreme Court issued a landmark opinion interpreting the Second Amendment in *District Columbia v. Heller*<sup>78</sup>—the first Supreme Court opinion to do so in decades—that recognized an individual right to keep and bear arms for self-defense.<sup>79</sup> The case involved Dick Heller, who during the early 2000s was a police officer in Washington, D.C.<sup>80</sup> He was authorized to carry a handgun while on duty.<sup>81</sup> Yet, under D.C. law, he was barred from doing so at home unless he obtained a license from the D.C. police chief—who could grant licenses in his discretion.<sup>82</sup> Heller wanted to keep a handgun in his

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<sup>77</sup> See *Talley*, 620 S.W. 2d at 263 (“[The uninvolved insureds’] rights are severable under the policy.”).

<sup>78</sup> 554 U.S. 570 (2008).

<sup>79</sup> *Proposals to Reduce Gun Violence*, *supra* note 1, at 5 (“Although many in the community advocating gun rights had long assumed that the individual rights interpretation governed the scope of the Second Amendment, it was not until the Supreme Court’s 2008 ruling in *District of Columbia v. Heller* that a majority of the Court’s Justices agreed.”) (footnote omitted). The last time the Court explicated a new interpretation of the Second Amendment was in 1939’s *United States v. Miller*, 307 U.S. 174 (1939). While the Court addressed a Second Amendment claim more recently in 1980’s *Lewis v. United States*, 445 U.S. 55 (1980), the Court essentially applied the *Miller* interpretation to the challenged statute.

<sup>80</sup> See *Parker v. District of Columbia*, 311 F. Supp. 2d 103, 103 (D.D.C. 2004).

<sup>81</sup> *Heller*, 554 U.S. at 575.

<sup>82</sup> *Id.*

home for self-defense.<sup>83</sup> He requested a license from the police chief, but the police chief refused to issue him one.<sup>84</sup> As a result, Heller could not legally keep a handgun in his home.<sup>85</sup> If he wanted to defend himself with a gun in his home within the bounds of D.C. law, he would have to settle for an “unloaded and disassembled [long gun] bound by a trigger lock.”<sup>86</sup> Unsatisfied with this state of affairs, he and six other D.C. residents filed suit against the District, a purely federal jurisdiction.<sup>87</sup> Specifically, they sought to enjoin the District from enforcing the three laws that shaped this *de facto* ban on private ownership of handguns: (1) a bar on registering handguns, accompanying a bar on carrying unregistered handguns; (2) a bar on carrying handguns without licenses, which only the D.C. police chief may issue for one-year periods; and (3) a requirement that residents keep all lawfully owned guns “unloaded and disassembled or bound by a trigger lock or similar device” unless they are kept in a place of business or they are being used for lawful recreational purposes.<sup>88</sup> The D.C. District Court dismissed their complaint, but the D.C. Court of Appeals reversed, finding that D.C.’s ban on the private ownership of handguns, as well as its requirement that residents disable other legally permissible guns when such guns are in the home, violated residents’ right to self-defense under the Second Amendment.<sup>89</sup> D.C. appealed to the Supreme Court of the United States, which then issued its landmark opinion.

Writing for the majority, Justice Scalia performed a labored exegesis<sup>90</sup> of the Second Amendment, initially breaking the Amendment into operative and prefatory clauses and then breaking those clauses into distinct phrases.<sup>91</sup> Justice Scalia identified the operative clause as: “the right of the people to keep and bear Arms, shall not be infringed.”<sup>92</sup> After discussing Ratification-Era

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<sup>83</sup> *Id.*

<sup>84</sup> *See id.* (mentioning the rejection of Heller’s application prior to suit); *Parker*, 311 F. Supp. 2d at 103 (“Plaintiff Heller has applied for a permit to possess a handgun in his home and has been rejected.”).

<sup>85</sup> *See Heller*, 554 U.S. at 574-76 (citing D.C. Code §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4), 7-2507.02, 22-4504(a), 22-4506 (2001)).

<sup>86</sup> *Id.* (citing D.C. Code § 7-2507.02).

<sup>87</sup> Sanford Levinson, *Assessing Heller*, 7 INT’L J. CONST. L. 316, 316 (2009) (“Because Washington, D.C., is not a ‘state’ within the American constitutional structure—it is, rather, a constitutionally created ‘federal enclave’—it is subject to whatever direct constraints may be placed on the national government by the Constitution.”).

<sup>88</sup> *Heller*, 554 U.S. at 574-76 (citing D.C. Code §§ 7-2501.01(12), 7-2502.01(a), 7-2502.02(a)(4), 7-2507.02, 22-4504(a), 22-4506 (2001)); *see Parker*, 311 F. Supp. 2d at 103-04 (summarizing Heller’s arguments).

<sup>89</sup> *See Heller*, 554 U.S. at 576.

<sup>90</sup> Justice Stevens, in his dissenting opinion, characterized Justice Scalia’s opinion as such. *Id.* at 679 (Stevens, J., dissenting).

<sup>91</sup> *Id.* at 577 (majority opinion) (“The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause.”).

<sup>92</sup> *Id.* at 576, 579-95 (discussing the operative clause).

understandings of its terms, he held that the operative clause refers to the pre-existing individual right to keep and bear arms for self-defense.<sup>93</sup> Justice Scalia rejected D.C.'s and the dissent's arguments that the clause referred to a collective right (one held by a militia) or a right to keep and bear arms only for the defense of a state or the nation (presumably the job of a militia).<sup>94</sup> With regard to the prefatory clause, Justice Scalia identified it as: "A well regulated Militia, being necessary to the security of a free State . . ."<sup>95</sup> Scalia discussed Article I's Militia Clauses and the contemporaneous understanding of the term "State," and concluded that the prefatory clause did not restrict the operative clause's meaning, but merely declared the general "purpose for which the [individual] right was codified: to prevent elimination of the militia."<sup>96</sup> He rejected D.C.'s and the dissent's arguments that the clause referred to state-regulated militias.<sup>97</sup> To further support his interpretation, Justice Scalia cited several contemporaneous state constitutional provisions, many "unequivocally" protecting an individual right to self-defense.<sup>98</sup>

But how are we to understand this individual right today? Justice Scalia sketched what is now a controversial framework<sup>99</sup> through his discussion of the

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<sup>93</sup> *Id.* at 592 ("Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation . . . . The very text of the Second Amendment implicitly recognizes the pre-existence of the right . . . ."). Justice Scalia stressed the "libertarian political principles" that inspired the individual right to keep and bear arms for self-defense. *Id.* at 593 (citing LOIS G. SCHWOERER, *THE DECLARATION OF RIGHTS*, 1689, at 283 (1981)).

<sup>94</sup> *Id.* at 576-592 (construing the Second Amendment as conferring an individual right).

<sup>95</sup> *Id.* at 595. Justice Scalia likened this prefatory clause to "whereas" clauses commonly used in federal legislation. *Id.* at 578 n.3.

<sup>96</sup> *Id.* at 597, 599 ("The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self defense and hunting."). In other words, the operative clause "secur[es] the militia by ensuring a populace familiar with arms. . . ." *Id.* at 617.

<sup>97</sup> *Id.* at 596-97 (examining the text of the Second Amendment to dispose with to D.C.'s "narrower view" of the militia).

<sup>98</sup> *Id.* at 603 ("That of the nine state constitutional protections for the right to bear arms enacted immediately after 1789 at least seven unequivocally protected an individual citizen's right to self-defense is strong evidence that that is how the founding generation conceived of the right. . . . The historical narrative that petitioners must endorse would . . . treat the Federal Second Amendment as an odd outlier, protecting a right unknown in state constitutions or at English common law, based on little more than an over-reading of the prefatory clause."). In a curious break from his originalist methodology, he also referenced post-ratification commentary, case law, and legislation that expressed similar conceptions of the Second Amendment. *Id.* at 605-19.

<sup>99</sup> Originalists and nonoriginalists have met Justice Scalia's methodology in *Heller* with "castigation." Levinson, *supra* note 87, at 318. In fact, Nelson Lund, a Second Amendment scholar and avowed originalist, accused Justice Scalia of "devot[ing] little thought and less research" to his opinion, and characterized that opinion as "defective" and, in some respects, "an indefensible canard." Nelson Lund, *The Second Amendment, Heller, and Originalist*

Supreme Court's brief Second Amendment jurisprudence.<sup>100</sup> He focused on *United States v. Miller*,<sup>101</sup> a case from 1939 in which the Court reinstated the respondent's indictment for transporting an unregistered short-barreled shotgun across state lines.<sup>102</sup> The following passage, in particular, informed his framework:

In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.<sup>103</sup>

From *Miller*, Justice Scalia distilled this general limiting principle: "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes."<sup>104</sup> So, clearly, the Court doesn't believe the Second Amendment establishes an absolute right for all citizens to own and carry whatever arms they desire whenever they desire.<sup>105</sup> Instead, the Second Amendment contemplates restrictions on who may own guns (like prohibitions concerning felons and the mentally ill) and where people may carry their guns (like prohibitions against carrying guns in schools or government buildings).<sup>106</sup> It permits the government to "impos[e] conditions and qualifications on the commercial sale of arms."<sup>107</sup> Justice Scalia, in fact,

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*Jurisprudence*, 56 UCLA L. REV. 1343, 1345, 1366, 1368 (2009). Lund went as far as to say that "if Justice Scalia's explanation of the Court's handgun holding rests on any kind of originalist analysis at all, it is pretty well disguised." *Id.* at 1356.

<sup>100</sup> See *Heller*, 554 U.S. at 626 ("[W]e do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment . . ."). Lund characterized Scalia's analysis as equally unexhaustive and unhistorical. Lund, *supra* note 99, at 1356 ("Justice Scalia seems to promise an 'exhaustive historical analysis' supporting these conclusions in future cases. If that turns out to be anything like the analysis he used in ruling on the D.C. handgun ban, it will not be exhaustive and it will not be historical.").

<sup>101</sup> 307 U.S. 174 (1939).

<sup>102</sup> *Id.* at 183 (reversing the District Court and remanding for reinstatement of indictment and further proceedings).

<sup>103</sup> *Id.* at 178.

<sup>104</sup> *Heller*, 554 U.S. at 625.

<sup>105</sup> In fact, Justice Scalia said as much when he explicitly held: "Like most rights, the right secured by the Second Amendment is not unlimited." *Id.* at 626.

<sup>106</sup> *Id.* ("[N]othing 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 . . ."); *id.* at 627, n. 26 ("We identify these presumptively valid regulatory measures as examples; our list does not purport to be exhaustive.").

<sup>107</sup> *Id.* at 626-27.

acknowledged each of these kinds of restrictions as “longstanding” and, thus, reflected in the text’s original meaning.<sup>108</sup> Up to this point, Justice Scalia’s interpretation, while ad hoc, seems both reasonable and instructive.

Yet, Justice Scalia introduced some disconcerting ambiguity into the Supreme Court’s Second Amendment jurisprudence when he addressed what types of arms the government may prohibit without violating the Second Amendment.<sup>109</sup> He extrapolated from a passage in *Miller*,<sup>110</sup> a half-dozen historic treatises, and a few nineteenth-century state court cases that the Amendment allows the government to prohibit “dangerous and unusual weapons.”<sup>111</sup> He then sidestepped developing this thought any further.<sup>112</sup> While he recognized one of the obvious complications of this interpretation—the application of the Second Amendment to sophisticated modern weaponry<sup>113</sup>—Justice Scalia summarily concluded that this complication “cannot change our interpretation of the right.”<sup>114</sup> He did not try to reconcile the glaring contradiction in terms: that all guns pose substantial dangers and that many common guns are particularly dangerous.<sup>115</sup>

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<sup>108</sup> *Id.* at 626. Justice Scalia famously wrote in his dissent in *United States v. Virginia*, that “longstanding national traditions [are] the primary determinant of what the Constitution means.” 518 U.S. 515, 570 (1996) (Scalia, J., dissenting).

<sup>109</sup> Lund called this portion of Justice Scalia’s opinion “an astounding series of dubious obiter dicta pronouncing on the constitutionality of a wide range of gun control regulations that were not before the Court.” Lund, *supra* note 99, at 1356.

<sup>110</sup> That passage reads: “The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense. ‘A body of citizens enrolled for military discipline.’ And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind *in common use at the time.*” *Miller*, 307 U.S. at 179 (emphasis added).

<sup>111</sup> *Heller*, 554 U.S. at 627.

<sup>112</sup> *Id.* (ending the paragraph and thought immediately after the initial citations).

<sup>113</sup> *Id.* (“It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks.”).

<sup>114</sup> *Id.* at 627-28.

<sup>115</sup> The National Shooting Sports Foundation claims that the AR-15 is “among the most popular firearms being sold.” *Modern Sporting Rifle Facts*, NAT’L SHOOTING SPORTS FOUND., <http://www.nssf.org/msr/facts.cfm#item11>, archived at <http://perma.cc/QZ48-AXVE> (last visited Mar. 14, 2015). The NRA claims that “Americans own about five million AR-15s . . . .” *Not Quite All “The Facts” About the AR-15*, NAT’L RIFLE ASS’N (Nov. 8, 2013), <http://www.nraila.org/news-issues/articles/2013/11/not-quite-all-the-facts-about-the-ar-15.aspx>, archived at <http://perma.cc/MDF8-STPB>. On July 20, 2012, James Holmes used an AR-15-style rifle to kill twelve people and injure fifty-eight more in a Colorado movie theater. James Dao, *Aurora Gunman’s Arsenal: Shotgun, Semiautomatic Rifle and, at the End, a Pistol*, N.Y. TIMES, July 24, 2012, at A12. On December 11, 2012, a

How are the lower courts to apply this standard when faced with concrete legislative choices? Justice Scalia did reference two types of guns and these references might help to guide the lower courts. Before dodging further analysis of the “dangerous and unusual weapons,” he mentioned M-16 rifles: what he surmised to be “most useful in military service.”<sup>116</sup> While he did so to fashion a hypothetical objection to his interpretation,<sup>117</sup> he may have implied that the Second Amendment allows the government to ban private ownership of “M-16 rifles and the like.”<sup>118</sup> If so, then M-16s might present a useful upper bound for the “dangerous and unusual weapons” standard.

Justice Scalia also discussed handguns at length while applying his Second Amendment framework to D.C.’s handgun laws. He branded handguns as “the quintessential self-defense weapon”—one chosen “overwhelmingly . . . by American society for that lawful purpose.”<sup>119</sup> He also lauded handguns as “easier to store,” “readily accessible,” “easier to use for those without the upper-body strength to lift and aim a long gun,” easier to use “with one hand,” and harder for attackers to redirect or wrest away.<sup>120</sup> In doing so, Justice Scalia stressed handguns’ utility for “self-defense in the home”—what is now known as the core of the right.<sup>121</sup> In light of all this, the Court held that “a complete

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gunman used an AR-15-style rifle to kill three people, including himself, and critically injure one more. Rachel La Corte & Steven Dubois, *Oregon Mall Shooting: Gunman Open Fires at Clackamas Town Center Mall in Portland, Kills 2, Self*, HUFFINGTON POST, December 12, 2012, [http://www.huffingtonpost.com/2012/12/12/oregon-mall-shooting\\_n\\_2285243.html](http://www.huffingtonpost.com/2012/12/12/oregon-mall-shooting_n_2285243.html), archived at <http://perma.cc/PV6Y-VT39>. On December 15, 2012, Adam Lanza used an AR-15-style rifle to kill twenty-six people, including twenty children under the age of seven. See Erica Goode, *Rifle Used in Killings, America’s Most Popular, Highlights Regulation Debate*, N.Y. TIMES, Dec. 17, 2012, at A25. The New York Times reported that AR-15-style rifles “are increasingly being used in the killings of police officers, whose vests often provide little protection against such firearms.” *Id.*

<sup>116</sup> *Heller*, 554 U.S. at 627.

<sup>117</sup> *Id.* (“It may be objected that if weapons that are most useful in military service—M-16 rifles and the like—may be banned, then the Second Amendment right is completely detached from the prefatory clause.”).

<sup>118</sup> *Id.* Professor Darrell A.H. Miller deems this language to “disclaim[] an individual right to own an M-16 rifle or an aircraft carrier . . . .” Darrell A.H. Miller, *Analogies and Institutions in the First and Second Amendments: A Response to Professor Magarian*, 91 TEX. L. REV. 137, 147 (2013).

<sup>119</sup> *Heller*, 554 U.S. at 628-29.

<sup>120</sup> *Id.* at 629. Lund strongly disapproved of the methodology that Justice Scalia employed to derive these conclusions. Lund, *supra* note 99, at 1355-56 (“[I]s [this] the result of a covertly Breyer-esque judicial interest balancing, in which the Court has concluded that Americans should be allowed to keep handguns because their advantages over long guns outweigh their disadvantages? Whatever it is, this is not the result of an historical study of the scope of the preexisting eighteenth-century right to arms.”).

<sup>121</sup> *Heller*, 554 U.S. at 629; *Proposals to Reduce Gun Violence*, *supra* note 1, at 5 (“[T]he Court recognized that the core individual liberty protected by the amendment affords Americans the right to purchase and store operable firearms for self-defense in the home.”).

prohibition [on handgun] use is invalid.”<sup>122</sup> Thus, handguns present an instructive lower bound for the “dangerous and unusual weapons” standard.

Justice Scalia’s majority opinion ultimately held that D.C.’s handgun registration prohibition and trigger-lock requirement violated the Second Amendment.<sup>123</sup> He remarked that, “[f]ew laws in the history of our Nation have come close to the severe restriction of the District’s handgun ban.”<sup>124</sup> Yet, notably, he did not hold that the District’s licensing requirement violated any right.<sup>125</sup> This decision likely reflects his earlier acknowledgement that the government may condition the sale of guns.<sup>126</sup> It might also have important implications for a gun insurance mandate.

#### B. McDonald’s Extension

Two years after *Heller*, the Supreme Court took up the issue of gun control again in *McDonald*.<sup>127</sup> That case involved strikingly similar parties and issues: namely, a group of residents<sup>128</sup> filed suits against their local governments to challenge the constitutionality of local handgun bans.<sup>129</sup> Yet, this time around, the local governments facing suits were state, not federal, jurisdictions.<sup>130</sup> Much like D.C. had done, those state jurisdictions—Chicago, Illinois and Oak Park, Illinois—had responded to local gun violence by enacting handgun bans.<sup>131</sup> Specifically, Chicago enacted a licensing requirement and a handgun ban, while Oak Park enacted a broader law making it “unlawful for any person to possess . . . any firearm,” a term that includes ‘pistols, revolvers, guns and small arms . . . commonly known as handguns.’”<sup>132</sup> When Otis

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<sup>122</sup> *Heller*, 554 U.S. at 629.

<sup>123</sup> *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.”).

<sup>124</sup> *Id.* at 629.

<sup>125</sup> *Id.* at 630-31 (“Respondent conceded at oral argument that . . . the District’s [licensing requirement] is permissible so long as it is ‘not enforced in an arbitrary and capricious manner.’ We therefore assume that petitioners’ issuance of a license will satisfy respondent’s prayer for relief and do not address the licensing requirement.”).

<sup>126</sup> *See id.* at 626-27 (“[N]othing 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>127</sup> *McDonald v. City of Chi.*, 561 U.S. 742 (2010).

<sup>128</sup> This time the residents were openly backed by the NRA. *Id.* at 747.

<sup>129</sup> *Id.* at 752. In fact, McDonald and his fellow plaintiffs filed their suit against Chicago one day after the Supreme Court announced *Heller*, and presumably drafted their complaint in anticipation of the outcome. *Nat’l Rifle Ass’n of Am. v. Oak Park*, 617 F. Supp. 2d 752, 752 n.1 (N.D. Ill. 2008).

<sup>130</sup> *McDonald*, 561 U.S. at 750.

<sup>131</sup> *Id.* at 750-51.

<sup>132</sup> *Id.* at 750 (citing CHI., ILL., MUNICIPAL CODE § 8-20-040(a) (2009); CHI., ILL.,

McDonald and his fellow plaintiffs filed suits against Chicago and Oak Park, seeking to a declaratory judgment that the those municipalities' laws were unconstitutional, the District Court for the Northern District of Illinois ruled in favor of the municipalities and upheld the handgun bans.<sup>133</sup> The district court based its ruling upon a Seventh Circuit case<sup>134</sup> that held that the Fourteenth Amendment did not incorporate the Second Amendment and that *Heller* was silent as to the incorporation question.<sup>135</sup>

The Seventh Circuit affirmed the district court's holding, employing a similarly cautious approach to the issue.<sup>136</sup> It rested its ruling on three nineteenth-century Supreme Court cases that rejected the Second Amendment's incorporation through the Fourteenth Amendment<sup>137</sup> and then invited the Supreme Court to overturn its own precedents.<sup>138</sup> Yet, Chief Judge Easterbrook, who wrote the Seventh Circuit's opinion, was more willing than the district court to interpret *Heller* as affirming the rejection of the Second Amendment's incorporation.<sup>139</sup> In support of this interpretation, he invoked

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MUNICIPAL CODE § 8–20–050(c) (2009); OAK PARK, ILL., MUNICIPAL CODE § 27–1–1 (2009); OAK PARK, ILL., MUNICIPAL CODE § 27–2–1 (2007)).

<sup>133</sup> *Nat'l Rifle Ass'n of Am.*, 617 F. Supp. 2d at 754 (“In sum, this Court—duty bound as it is to adhere to the holding in *Quilici*, rather than accepting plaintiffs' invitation to “overrule” it (!)—declines to rule that the Second Amendment is incorporated into the Fourteenth Amendment so as to be applicable to the Chicago or Oak Park ordinances.”).

<sup>134</sup> *Quilici v. Morton Grove*, 695 F.2d 261 (7th Cir. 1982).

<sup>135</sup> *Nat'l Rifle Ass'n of Am.*, 617 F. Supp. 2d at 753-54 (“In doing so, *Quilici* rejected arguments (1) that later Supreme Court decisions that had incorporated other Bill of Rights provisions into the Fourteenth Amendment had effectively overruled *Presser* and (2) that the entire Bill of Rights had been implicitly incorporated into the Fourteenth Amendment to apply to the states. *Heller* deliberately and properly did not opine on the subject of incorporation vel non of the Second Amendment (after all, that question was not before the Court.)” (citation omitted).

<sup>136</sup> *Nat'l Rifle Ass'n of Am. v. City of Chi.*, 567 F.3d 856, 860 (7th Cir. 2009).

<sup>137</sup> *Miller v. Texas*, 153 U.S. 535 (1894); *Presser v. Illinois*, 116 U.S. 252 (1886); *United States v. Cruikshank*, 92 U.S. 542 (1876).

<sup>138</sup> *Nat'l Rifle Ass'n of Am.*, 567 F.3d at 857 (“Repeatedly, in decisions that no one thinks fossilized, the Justices have directed trial and appellate judges to implement the Supreme Court's holdings even if the reasoning in later opinions has undermined their rationale. ‘If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.’”) (quoting *Rodriguez de Quijas v. Shearson*, 490 U.S. 477, 484 (1989)).

<sup>139</sup> *Id.* at 858 (“Anyone who doubts that *Cruikshank*, *Presser*, and *Miller* have ‘direct application in [this] case’ need only read footnote 23 in *Heller*. It says that *Presser* and *Miller* ‘reaffirmed [*Cruikshank*'s holding] that the Second Amendment applies only to the Federal Government.’ The Court did not say that *Cruikshank*, *Presser*, and *Miller* rejected a particular *argument* for applying the second amendment to the states. It said that they hold ‘that the Second Amendment applies only to the Federal Government.’” (citation omitted) (quoting *Rodriguez de Quijas v. Shearson*, 490 U.S. 477, 484 (1989)).



Justice Brandeis's principle that, within the federal system, states act as laboratories for "novel social and economic experiments."<sup>140</sup> States should thus be free to determine which weapons are appropriate for use in self-defense.<sup>141</sup> Chief Judge Easterbrook proposed that this determination is much like the determination states make when they require people to retreat from or use non-lethal force against attackers—even when those people are in their homes.<sup>142</sup> Therefore, Chicago and Oak Park were free to place reasonable limits on self-defense, like their handgun bans, in the name of public safety.<sup>143</sup>

The Supreme Court ultimately granted certiorari and accepted Chief Judge Easterbrook's invitation to overturn precedents rejecting incorporation—namely *United States v. Cruikshank*,<sup>144</sup> *Presser v. Illinois*,<sup>145</sup> and *Miller*. Justice Alito, writing for the majority, applied the selective incorporation doctrine, which incorporates through the Due Process Clause of the Fourteenth Amendment those Bill of Rights Amendments that are "fundamental to our scheme of ordered liberty and system of justice."<sup>146</sup> He conducted a similar historical analysis as Justice Scalia did in *Heller*, yet this time expanding the scope to include conceptions of the right around 1868—the year of the Fourteenth Amendment's ratification.<sup>147</sup> In view of the totality of the evidence, he held that the right to keep and bears arms is fundamental to our scheme of

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<sup>140</sup> *Id.* at 860 (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)); see also *Liebmann*, 285 U.S. at 311 ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

<sup>141</sup> *Id.* ("[I]t is difficult to argue that legislative evaluation of which weapons are appropriate for use in self-defense has been out of the people's hands since 1868. The way to evaluate the relation between guns and crime is in scholarly journals and the political process, rather than invocation of ambiguous texts that long precede the contemporary debate.").

<sup>142</sup> *Id.* at 859 ("Self-defense is a common-law gloss on criminal statutes, a defense that many states have modified by requiring people to retreat when possible, and to use non-lethal force when retreat is not possible.").

<sup>143</sup> See *id.* at 860 ("A modification of the self-defense defense may or may not be in the best interest of public safety—whether guns deter or facilitate crime is an empirical question—but it is difficult to argue that legislative evaluation of which weapons are appropriate for use in self-defense has been out of the people's hands since 1868.") (citations omitted).

<sup>144</sup> 92 U.S. 542 (1876).

<sup>145</sup> 116 U.S. 252 (1886).

<sup>146</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 764 (2010). Alternatively, Justice Alito offers the formulation from *Washington v. Glucksberg*, 521 U.S. 702 (1997), that ordered liberty includes those rights "deeply rooted in this Nation's history and tradition." *McDonald*, 561 U.S. at 767.

<sup>147</sup> *Id.* at 776 ("Evidence from the period immediately following the ratification of the Fourteenth Amendment only confirms that the right to keep and bear arms was considered fundamental.").

ordered liberty and, thus, the Due Process Clause of the Fourteenth Amendment.<sup>148</sup>

Justice Alito also addressed Chief Judge Easterbrook's *Liebmann* experimentation argument. He first pointed to a long line of cases where the Court has unflinchingly applied the selective incorporation doctrine, without regard to the *Liebmann* experimentation argument.<sup>149</sup> He then agreed with several state amicus briefs that the incorporated Second Amendment provides states ample room to experiment with "reasonable firearms regulation[.]"<sup>150</sup> In fact, he dismissed Chicago and Oak Park's concerns as "doomsday proclamations" and repeated *Heller*'s examples of permissible gun regulations<sup>151</sup> to demonstrate that "incorporation does not imperil every law regulating firearms."<sup>152</sup>

While *McDonald* did not add much substance to the Supreme Court's Second Amendment analysis, it did affirm that federal, state, and local governments have a fairly large policy sandbox in which they may develop solutions to gun violence. But just how big is the sandbox?

### C. Lower Court Applications to Recent Gun Violence Legislation

Courts across the country are currently grappling with the ambiguities and implications of Justice Scalia's *Heller* opinion—and, to a lesser extent, Justice Alito's *McDonald* opinion—to determine the scope of the Second Amendment.<sup>153</sup> They seem to have arrived at a consensus as to the core principle of *Heller*: the right to keep and bear arms in the home for self-

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<sup>148</sup> *Id.* at 778 ("In sum, it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.").

<sup>149</sup> *Id.* at 784 ("Throughout the era of 'selective incorporation,' Justice Harlan in particular, invoking the values of federalism and state experimentation, fought a determined rearguard action to preserve the two-track approach. Time and again, however, those pleas failed.") (citations omitted).

<sup>150</sup> *Id.* at 785 ("As noted by the 38 States that have appeared in this case as *amici* supporting petitioners, '[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment.'") (quoting Brief for State of Texas et al. as *Amici Curiae* 23.).

<sup>151</sup> *Id.* at 786.

<sup>152</sup> *Id.* ("We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill,' '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>153</sup> Sanford Levinson predicts that "some five or ten years from now, [*Heller*], for all of its rhetorical bombast, in fact signified relatively little of anything." Levinson, *supra* note 87, at 323. Nonetheless, as evidenced below, a cursory scan of the most recent Second Amendment cases from any jurisdiction shows that *Heller* remains the foundation for Second Amendment jurisprudence.

defense.<sup>154</sup> Starting from this principle, some courts have initially interpreted *Heller* to call for intermediate scrutiny of any regulation implicating the core right. This approach requires only that the government present an important governmental interest to justify any restriction of the right—a threshold met by efforts to address the threat of gun violence to public safety—substantially related to the regulation’s effect.<sup>155</sup> Hence, this approach provides legislators plenty of room to craft restrictions on gun ownership outside the home, as courts would review restrictions that did not bar a person from using a handgun for self-defense in the home with rational basis scrutiny.<sup>156</sup> Legislators seeking to enact gun insurance mandates could easily establish legitimate governmental interests rationally related to their regulation’s effects: restrictions on gun ownership clearly address the gun violence problem.<sup>157</sup>

However, many circuits seem to have settled on a more flexible standard, similar to the Supreme Court’s First Amendment jurisprudence, where different factual scenarios trigger strict, intermediate, or rational basis scrutiny.<sup>158</sup> Under this approach, any regulation “severely restrict[ing]” the

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<sup>154</sup> See *Hightower v. City of Boston*, 693 F.3d 61, 72 (1st Cir. 2012) (“Courts have consistently recognized that *Heller* established that the possession of operative firearms for use in defense of the home constitutes the ‘core’ of the Second Amendment.”).

<sup>155</sup> See *Heller v. District of Columbia*, 698 F. Supp. 2d 179, 188 (D.D.C. 2010) (“[T]he court joins the majority of courts to have considered this issue in holding that intermediate scrutiny is the most appropriate standard of review to apply to the challenged laws. This standard satisfies the *Heller* Court’s directive that courts apply an exacting measure of scrutiny to laws limiting the exercise of this specific, constitutionally enumerated right, while avoiding the inconsistencies that would arise were it to apply strict scrutiny.”) (citations omitted).

<sup>156</sup> For a quintessential example of rational basis review, see *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

<sup>157</sup> See *id.* at 487-88 (“[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”).

<sup>158</sup> *United States v. Decastro*, 682 F.3d 160, 166 (2d Cir. 2012) (observing instances where the Third, Fourth, Seventh, Ninth, and the D.C. Circuit applied this flexible standard); see also *Nordyke v. King*, 644 F.3d 776, 786 (9th Cir. 2011) (discussing the preferred flexible approach to determining the level of scrutiny in gun control cases, and then holding that “only regulations which substantially burden the right to keep and to bear arms trigger heightened scrutiny under the Second Amendment.”); *United States v. Masciandaro*, 638 F.3d 458, 467 (4th Cir. 2011) (“[T]here now exists a clearly-defined fundamental right to possess firearms for self-defense within the home. But a considerable degree of uncertainty remains as to the scope of that right beyond the home and the standards for determining whether and how the right can be burdened by governmental regulation.”); *United States v. Marzzarella*, 614 F.3d 85, 96-97 (3d Cir. 2010) (“Whether or not strict scrutiny may apply to particular Second Amendment challenges, it is not the case that it must be applied to all Second Amendment challenges. Strict scrutiny does not apply automatically any time an enumerated right is involved. We do not treat First Amendment challenges that way. Strict scrutiny is triggered by content-based restrictions on speech in a public forum, but content-

core right calls for strict scrutiny—requiring a compelling governmental interest and narrowly-tailored means—but other regulations call for lesser scrutiny based on their affinities to different levels of First Amendment analysis.<sup>159</sup>

Three cases applying *Heller* illustrate how this standard applies to other regulations.<sup>160</sup> First, in *United States v. Marzzarella*,<sup>161</sup> the United States Court of Appeals for the Third Circuit upheld a provision of the Gun Control Act of 1968 requiring guns to bear serial numbers.<sup>162</sup> The Third Circuit applied intermediate scrutiny to the provision, reasoning that: (1) the provision does not “severely limit the possession” of guns for self-defense in the home; (2) Congress did not enact the provision to burden lawful use of firearms; and (3) the provision is similar to a time, place, or manner restriction of speech.<sup>163</sup> It then found that Congress had provided an important governmental interest—namely, “to keep firearms away from the persons Congress classified as potentially irresponsible and dangerous,”<sup>164</sup> and “to assist law enforcement by making it possible to use the serial number of a firearm recovered in a crime to trace and identify its owner and source.”<sup>165</sup> In fact, the Third Circuit held that such interests would constitute compelling governmental interests.<sup>166</sup>

neutral time, place, and manner restrictions in a public forum trigger a form of intermediate scrutiny. Regulations on nonmisleading commercial speech trigger another form of intermediate scrutiny, whereas disclosure requirements for commercial speech trigger a rational basis test. In sum, the right to free speech, an undeniably enumerated fundamental right, is susceptible to several standards of scrutiny, depending upon the type of law challenged and the type of speech at issue. We see no reason why the Second Amendment would be any different.” (citations omitted). *Cf.* *Heller v. District of Columbia*, 670 F.3d 1244, 1256 (D.C. Cir. 2011) (“*Heller* clearly does reject any kind of ‘rational basis’ or reasonableness test, but it leaves open the question what level of scrutiny we are to apply to laws regulating firearms.” (citation omitted)); *Ezell v. City of Chicago*, 651 F.3d 684, 701 (7th Cir. 2011) (“For our purposes, however, we know that *Heller*’s reference to ‘any standard of scrutiny’ means any heightened standard of scrutiny; the Court specifically excluded rational-basis review.”).

<sup>159</sup> *Masciandaro*, 638 F.3d at 470 (“[A]ny law that would burden the ‘fundamental,’ core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny.”); *United States v. Skoien*, 587 F.3d 803, 811 (7th Cir. 2009) (“[*Heller*] suggests, at a minimum, that gun laws that severely restrict the core Second Amendment right . . . of ‘law-abiding, responsible citizens to use arms in defense of hearth and home,’ . . . should receive exacting scrutiny.” (citations omitted)).

<sup>160</sup>

<sup>161</sup> 614 F.3d 85 (3d Cir. 2010).

<sup>162</sup> *Id.* at 87.

<sup>163</sup> *Id.* at 97.

<sup>164</sup> *Id.* at 98 (quoting *Barrett v. United States*, 423 U.S. 212, 218 (1976)) (internal quotation marks omitted).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 99 (“Because [the serial number requirement] assists law enforcement in [gathering vital information from recovered firearms], we find its preservation is not only a

Second, in *United States v. Decastro*,<sup>167</sup> the United States Court of Appeals for the Second Circuit upheld a different provision of the Gun Control Act through a slightly different *Heller* analysis. The provision at issue barred anyone other than licensed manufacturers, importers, dealers, and collectors from purchasing a gun outside of his state of residence and transporting that gun into his state of residence.<sup>168</sup> The Second Circuit stressed the hefty burden of the handgun bans in *Heller* and *McDonald*,<sup>169</sup> and concluded that neither of those cases call for strict, or even intermediate, scrutiny of all gun regulations.<sup>170</sup> In fact, *Heller*, according to the Second Circuit, treated many existing gun regulations like time, place, and manner restrictions of speech, prohibiting only those gun regulations that “significantly impair” Second Amendment rights.<sup>171</sup> Accordingly, the Second Circuit held that “heightened scrutiny is triggered only by those restrictions that (like the complete prohibition on handguns struck down in *Heller*) operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense (or for other lawful purposes).”<sup>172</sup> The court likened this analysis to that of “other fundamental constitutional rights,” like marriage, speech, voting, and abortion—in which the weight of the burden at issue dictates the level of scrutiny applicable.<sup>173</sup> The Second Circuit then found that the subject provision left prospective gun owners with “ample alternative means [for] acquiring firearms for self-defense purposes”—they simply need to purchase their guns through in-state manufacturers or dealers—and that it, therefore, did not operate as a substantial burden on the exercise of Second Amendment rights.<sup>174</sup>

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substantial but a compelling interest.”).

<sup>167</sup> 682 F.3d 160 (2d Cir. 2012).

<sup>168</sup> 18 U.S.C. § 922(a)(3) (2012) (“It shall be unlawful . . . for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector to transport into or receive in the State where he resides . . . any firearm purchased or otherwise obtained by such person outside that State . . .”).

<sup>169</sup> *Decastro*, 682 F.3d at 165 (“The [*Heller*] Court emphasized . . . that the mandate to disable all firearms ‘makes it *impossible* for citizens to use them for the core lawful purpose of self-defense . . .”).

<sup>170</sup> *Id.* at 166 (“Given *Heller*’s emphasis on the weight of the burden imposed by the D.C. gun laws, we do not read the case to mandate that any marginal, incremental or even appreciable restraint on the right to keep and bear arms be subject to heightened scrutiny.”).

<sup>171</sup> *Id.* at 165 (“Although the Court did not expand on why these two classes of restrictions would be permissible, the natural explanation is that time, place and manner restrictions may not significantly impair the right to possess a firearm for self-defense, and may impose no appreciable burden on Second Amendment rights.”).

<sup>172</sup> *Id.* at 166.

<sup>173</sup> *Id.* at 167-68.

<sup>174</sup> *Id.* at 168 (“Section 922(a)(3) prohibits the transportation into one’s state of residence of firearms acquired outside the state; but it does nothing to keep someone from purchasing a firearm in her home state, which is presumptively the most convenient place to buy anything.”).

As a result, the Second Circuit applied rational basis scrutiny to the provision and accepted the governmental interest in preventing the circumvention of state gun regulations as legitimate and rationally related to the statute's effect.<sup>175</sup>

The Second Circuit clarified its Second Amendment analysis two years later in *Kachalsky v. County of Westchester*,<sup>176</sup> when it upheld New York State's licensing law for concealed-carry handgun permits.<sup>177</sup> The Second Circuit initially held that the law,<sup>178</sup> which required applicants to prove "a special-need for self-protection distinguishable from that of the general community or . . . the same profession,"<sup>179</sup> operated as a substantial burden on the exercise of Second Amendment rights.<sup>180</sup> Nonetheless, the Second Circuit did not apply strict scrutiny to the law. It instead applied intermediate scrutiny, stressing that, while the Second Amendment's protections are strong within the home, the Second Amendment's protections are more constrained in public, where the state has traditionally played a substantial regulatory role in the name of public safety.<sup>181</sup> Notably, the court declined to decide whether strict scrutiny applied to all regulations that implicated the exercise of Second Amendment rights within the home.<sup>182</sup> The Second Circuit characterized the state's interest in public safety and crime prevention as "substantial, indeed compelling" and substantially related to the law's effect.<sup>183</sup> The law's specific carve-outs for hunters, target shooters, storekeepers, judges, and correctional officers, in tandem with its permissive test for "actual and articulable . . . need for self-defense," exhibited sufficient efforts to promote public safety while protecting those with reason to carry guns.<sup>184</sup>

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<sup>175</sup> *Id.* ("The evident purpose of the statute is to stop circumvention of state laws regulating gun possession . . .").

<sup>176</sup> 701 F.3d 81 (2d Cir. 2012).

<sup>177</sup> *Id.* at 101 ("[W]e decline . . . [to] question the state's traditional authority to extensively regulate handgun possession in public.").

<sup>178</sup> N.Y. PENAL LAW § 400.00(2)(f) ("A license for a pistol or revolver . . . shall be issued to . . . have and carry concealed, without regard to employment . . . when proper cause exists . . .").

<sup>179</sup> *Kachalsky*, 701 F.3d at 86 (quoting *Klenosky v. N.Y. City Police Dep't*, 75 A.D.2d 793, 793 (N.Y. App. Div. 1980)).

<sup>180</sup> *Id.* at 93 ("New York's proper cause requirement places substantial limits on the ability of law-abiding citizens to possess firearms for self-defense in public. And unlike *Decastro*, there are no alternative options for obtaining a license to carry a handgun.").

<sup>181</sup> *Id.* at 96 ("Because our tradition so clearly indicates a substantial role for state regulation of the carrying of firearms in public, we conclude that intermediate scrutiny is appropriate in this case.").

<sup>182</sup> *Id.* ("[W]e have no occasion to decide what level of scrutiny should apply to laws that burden the 'core' Second Amendment protection identified in *Heller* . . .").

<sup>183</sup> *Id.* at 97.

<sup>184</sup> *Id.* at 98 (describing the "shall issue" elements of New York State's licensing law).

More recently, in *New York State Rifle & Pistol Ass'n v. Cuomo*,<sup>185</sup> the District Court for the Western District of New York applied the Second Circuit's Second Amendment analysis to a gun regulation that implicates the exercise of gun rights within the home.<sup>186</sup> The District Court upheld the principle provisions of New York's Secure Ammunition and Firearms Enforcement ("SAFE") Act<sup>187</sup>—namely the expanded assault weapons ban and the new high-capacity magazine ban.<sup>188</sup> Both bans clearly affect a gun owner's ability to defend himself in his home. In particular, the expanded assault weapons ban prohibits the purchase of new semiautomatic weapons with more than one feature "commonly associated with military weapons" and requires the registration of any such weapons already in existence.<sup>189</sup> The District Court acknowledged this and held that the SAFE Act operated as a substantial burden on the exercise of Second Amendment rights.<sup>190</sup> The court even found that "the SAFE Act unquestionably affects Plaintiffs' ownership rights in their home."<sup>191</sup> However, the court did not apply strict scrutiny; it held that applying strict scrutiny would be inconsistent with *Heller*, *McDonald*, other circuits' interpretations of those cases, and First Amendment jurisprudence.<sup>192</sup> Instead,

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<sup>185</sup> 990 F. Supp. 2d 349 (W.D.N.Y. 2013).

<sup>186</sup> *Id.* at 366 ("Although the SAFE Act unquestionably affects Plaintiffs' ownership rights in their home . . . intermediate scrutiny remains the appropriate standard under which to evaluate the law.").

<sup>187</sup> N.Y. Penal Law § 265.00 (McKinney 2013).

<sup>188</sup> *Id.* at 381 (finding that "the challenged provisions of the SAFE Act—including the Act's definition and regulation of assault weapons and its ban on large-capacity magazines—further the state's important interest in public safety, and do not impermissibly infringe on Plaintiffs' Second Amendment rights."). Some have dubbed the SAFE Act "the most comprehensive [gun control] package in the nation." Thomas Kaplan & Danny Hakim, *New York Has Gun Deal, with Focus on Mental Ills; Obama's Plan to Be Broad: State Lawmakers Approve Bill by 43 to 18*, N.Y. TIMES, Jan. 15, 2013, at A1 (quoting Gov. Andrew M. Cuomo). The enactment of the SAFE Act spurred calls from gun rights groups for its repeal and for the impeachment of Governor Andrew Cuomo. Thomas Kaplan, *Gun Rights Backers, Stung by Cuomo's Law, Push to Undo It*, N.Y. TIMES, Jan. 30, 2013, at A22. Some have predicted that courts will strike the SAFE Act down as a violation of the Second Amendment. *Id.* ("Much of what the governor has gotten in New York is liable to fall because of court challenges and the like because much of it's unconstitutional," the N.R.A. president, David Keene, said in a recent interview on an Albany radio station.").

<sup>189</sup> *Cuomo*, 990 F. Supp. 2d. at 356.

<sup>190</sup> *Id.* at 365 ("[T]he restrictions at issue more than 'minimally affect' Plaintiffs' ability to acquire and use the firearms, and they therefore impose a substantial burden on Plaintiffs' Second Amendment rights.").

<sup>191</sup> *Id.* at 366.

<sup>192</sup> *Id.* at 366-67 (observing that the application of strict scrutiny to cases involving Second Amendment rights would lack precedent and would contravene recent Third Circuit holdings that found no reason to apply a standard of scrutiny that extended beyond that applied to cases involving First Amendment rights).

the District Court found that the SAFE Act triggered intermediate scrutiny.<sup>193</sup> The District Court likened the SAFE Act to a “time, place, and manner restriction” of speech that only imposed moderate burdens on the exercise of that right.<sup>194</sup> Here, the SAFE Act only barred residents from keeping a certain class of weapons—residents could still purchase qualifying semiautomatic weapons and lesser guns to defend themselves in their homes.<sup>195</sup> This restriction, according to the court, did not “meaningfully jeopardize [residents’] right to self-defense.”<sup>196</sup> Moreover, the District Court, following *Decastro*’s lead, held this restriction was substantially related to the compelling governmental interests of public safety and crime prevention.<sup>197</sup>

Notably, beyond these three cases and despite these differences in approach, courts have approved a wide range of gun violence legislation using *Heller*’s reasoning.<sup>198</sup> According to Adam Winkler, out of the 150 post-*Heller* decisions on challenges to gun violence legislation that he sampled, only a handful invalidated the challenged provisions.<sup>199</sup>

#### D. *The Constitutionality of a Gun Insurance Mandate*

If courts embrace some form of the Third Circuit’s or Second Circuit’s approach to Second Amendment analysis, then legislators undoubtedly have enough room in the policy sandbox to craft gun insurance mandates. Gun insurance mandates do not severely limit the possession of guns for self-defense in the home—people may own guns for lawful purposes as long as they maintain insurance policies on those guns. Such mandates certainly bear no resemblance to the handgun bans at issue in *Heller* and *McDonald*. Further, legislatures enacting mandates could point to legislative purposes like indemnification, compensation, and behavioral modification to distinguish their legislative intent from a bare desire to burden Second Amendment rights. Courts, moreover, could easily analogize between gun insurance mandates and time, place, and manner restrictions of speech, which trigger intermediate scrutiny under First Amendment jurisprudence—rather than content-based

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<sup>193</sup> *Id.* at 367 (finding “that intermediate scrutiny is the most suitable standard under which to evaluate each challenged aspect of the law”).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* (“New Yorkers can still purchase, own, and sell all manner of semiautomatic weapons that lack the features outlawed by the SAFE Act.”).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 371 (finding “that New York has satisfied its burden to demonstrate a substantial link . . . between the SAFE Act’s regulation of assault weapons and the compelling interest of public safety”).

<sup>198</sup> James E. Fleming & Linda C. McClain, *Ordered Gun Liberty: Rights with Responsibilities and Regulation*, 94 B.U. L. REV. 859-60 (2014) (quoting ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 289 (2011)).

<sup>199</sup> WINKLER, *supra* note 198, at 289.



restrictions on speech, which trigger strict scrutiny.<sup>200</sup> Such mandates do not prohibit gun ownership; they merely dictate the manner in which gun owners may exercise their rights. More cogently, as the United States Court of Appeals for the District of Columbia held on remand of *Heller*, these measures would “not effectively disarm individuals or substantially affect their ability to defend themselves.”<sup>201</sup> Thus, mandates would qualify for intermediate scrutiny.

Gun insurance mandates also clearly serve important, even compelling, governmental interests. Beyond indemnifying gun owners and compensating gun violence victims, gun insurance mandates clearly would promote public safety. If gun owners had to maintain liability insurance on their guns, then “irresponsible and dangerous” gun owners likely would face prohibitive premiums, discouraging them from gun ownership.<sup>202</sup> Likewise, insurance carriers presumably will keep detailed records of policyholders’ personal information. Gun insurance mandates could yield a comprehensive network of data about gun owners to aid law enforcement in the investigation of gun violence crimes.<sup>203</sup> Police could send insurance carriers serial numbers and other circumstances of gun violence crimes and insurance carriers could return pertinent information about the relevant gun owners—thereby bolstering crime investigation and prevention. Therefore, under the Third Circuit’s or Second Circuit’s interpretation of *Heller*, gun insurance mandates could withstand even strict scrutiny.

### III. CRAFTING A PRACTICAL, CONSTITUTIONAL, AND EFFECTIVE GUN INSURANCE MANDATE

As mentioned above, several states and Congress have recently proposed gun insurance mandates.<sup>204</sup> Unfortunately, these legislatures have proposed only basic outlines for their mandates. Nonetheless, these bills may provide some helpful insights for future legislative efforts. To begin with, each requires all gun owners within their respective jurisdictions to maintain some form of excess liability insurance.<sup>205</sup> Some then delegate authority to agencies to

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<sup>200</sup> *See id.* at 367.

<sup>201</sup> *Id.* (quoting *Heller v. District of Columbia*, 670 F.3d 1244, 1262 (D.C. Cir. 2011)).

<sup>202</sup> *See supra* text accompanying note 164.

<sup>203</sup> *See Molina, supra* note 36, at 442-43 (describing the benefits that subsequent business records would provide to law enforcement). While some gun rights groups cite gun registration as a key step toward an insidious governmental effort to disarm Americans, these groups might have lesser concerns if private entities like insurance companies were to keep these records. *See Gilles & Lund, supra* note 36, at 20 (“Recordkeeping requirements in a mandatory insurance regulation should be analyzed in the same way that general registration laws should be analyzed.”).

<sup>204</sup> *See supra* notes 18-29 and accompanying text (reviewing recent gun insurance mandate legislation throughout the United States).

<sup>205</sup> H.R. 1369, 113th Cong. (2013) (“It shall be unlawful for a person who owns a firearm . . . not to be covered by a qualified liability insurance policy.”); H.R. 6656, Gen. Assemb.,

promulgate regulations establishing the terms of the mandate.<sup>206</sup> Delegation might be the wisest approach, since crafting a successful mandate will likely require technical expertise that a legislative body may not have.<sup>207</sup> Others attempt to define key components of their mandates, addressing coverage minimums and defining the conduct that qualifying policies must cover. For example, some bills require policies to cover only negligent shootings, while other bills require policies to cover negligent and intentional shootings.<sup>208</sup> The Connecticut bill even specifies that policies need to cover self-defense shootings, but not other intentional shootings.<sup>209</sup> Considering these legislative variations together with the technical and legal limitations discussed above, what are the essential elements of a practical, constitutional, and effective gun insurance mandate?

#### A. *Criminal Sanction*

Clearly, any mandate, to be effective, must have the support of criminal penalties. Without imposing criminal penalties for non-compliance, gun insurance mandates would be toothless and serve none of the legislative

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Jan. Sess. (Conn. 2013) (“Any person who possesses or owns a firearm . . . shall procure and maintain . . . excess personal liability insurance . . . .”); DC-B20-170, D.C. Council (2013) (“A person in the District who owns a firearm shall obtain and continuously maintain a policy of liability insurance . . . .”); H.B. 0687, 96th Gen. Assemb., 2009 and 2010 Sess. (Ill. 2010) (“[A]ny person who owns a firearm in this State shall maintain a policy of liability insurance . . . .”); S. 577 (Md. 2013) (“A person that possesses a firearm shall maintain liability insurance . . . .”); H.R. 3253 (Mass. 2013) (“Whoever possesses, carries, or owns a firearm, rifle, or shotgun without a liability policy . . . shall be punished . . . .”); Assemb. A. 3908 (N.Y. 2013) (“Any person in this state who shall own a firearm shall, prior to such ownership, obtain and continuously maintain a policy of liability insurance . . . .”); H.R. 521, Gen. Assemb., 2013 Sess. (Pa. 2013) (“No individual shall be issued a license . . . without providing the licensing authority with a certificate of liability insurance . . . .”).

<sup>206</sup> H.R. 3253 (Mass. 2013) (“The commissioner of insurance shall promulgate regulations set forth for the minimum terms of liability insurance policies which shall satisfy the requirements of this section.”).

<sup>207</sup> See *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 865 (1984) (“Perhaps [Congress] consciously desired the [agency] to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to [interpret ‘stationary source’] . . . .”); Emily Hammond Mezell, *Presidential Control, Expertise, and the Deference Dilemma*, 61 DUKE L.J. 1763, 1772 (2012) (“Delegation to [agencies] is a pragmatic way to get the work of regulating done by those who can bring special expertise to bear on any number of complex issues.”).

<sup>208</sup> See *supra* note 69 and accompanying text (reviewing the specific requirements of state legislation in D.C., Pennsylvania, Connecticut and Illinois).

<sup>209</sup> H.R. 6656, Gen. Assemb., Jan. Sess. (Conn. 2013) (“Any person who possesses or owns a firearm . . . shall procure and maintain . . . excess personal liability insurance . . . [and] self defense insurance that provides coverage for civil and criminal defense costs and provides for reimbursement of criminal defense costs if such person uses a firearm in self defense.”).

purposes discussed above. Gun owners would continue to buy, store, and use their guns without maintaining any gun-specific liability insurance—outside of whomever voluntarily purchases existing policies—leaving themselves with less financial protection and gun violence victims with less compensation. Moreover, without gun insurance, gun owners would not be responsive to the economic incentives of behavior-based insurance premiums. Compulsory car insurance statutes are instructive on this point. Massachusetts’s compulsory car insurance statute imposes a minimum fine of \$500 for driving without sufficient car insurance.<sup>210</sup> Similarly, the proposed gun insurance mandate in Massachusetts would impose fines up to \$5000 and jail sentences up to one year.<sup>211</sup> Of course, legislators must strike a balance between encouraging all gun owners to maintain gun insurance and imposing excessive penalties for a crime of omission—which might possibly render a mandate unconstitutional.<sup>212</sup>

#### B. *Coverage Subjects*

Beyond the imposition of criminal penalties, legislators should pay careful attention to the subjects of qualifying gun insurance policies. Again, the car insurance context is instructive on this point. A standard liability policy may cover only bodily injury and property damage caused by a specific driver named in that policy.<sup>213</sup> In light of this, a car owner may then broaden his insurance coverage with a comprehensive policy that covers bodily injuries and property damage caused by a specific car indicated in that policy.<sup>214</sup> However, this comprehensive coverage extends only so far: if an individual drives the covered car without permission, neither the liability policy nor the comprehensive policy will cover the resulting harms. Often times, such policies will not even cover individuals driving with permission; they will cover only named insureds or those named insureds’ cohabitants.<sup>215</sup> Thus, in

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<sup>210</sup> Mass. Gen. Laws ch. 90, § 34J (2012) (capping the fine at \$5000 and/or up to one year in prison).

<sup>211</sup> H.R. 3253 § 207(a) (Mass. 2013) (“Whoever possess, carries, or owns a firearm, rifle or shotgun without a liability policy . . . shall be punished by a fine of not less than five hundred nor more than five thousand dollars or by imprisonment for not more than one year . . .”).

<sup>212</sup> See *Lambert v. California*, 355 U.S. 225, 227 (1957) (finding a registration law that imposed criminal penalties upon a person who “has no actual knowledge of his duty to register” to be a violation of due process).

<sup>213</sup> Wickert, *supra* note 73.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*; see also, e.g., *Thomas v. Progressive Cas. Ins. Co.*, 749 N.W.2d 678 (Iowa 2008) (finding insurer’s policy of avoiding liability through a named-driver exclusion to be valid); *Pierce v. Oklahoma Prop. & Cas. Ins. Co.*, 901 P.2d 819, 820 (Okla. 1995) (determining that an insurer may exclude a named driver and thus avoid liability even when the named driver “drives with consent of the insured person”). *But see, e.g., Ball v. Wilshire Ins. Co.*, 221 P.3d 717, 722 (Okla. 2009) (finding a “loaned vehicle exclusion,” which excluded coverage

many cases, victims of the policyholder's joyriding friend or car thief will be left without compensation from these policies, and the policyholder will be left without indemnification.

Now, if gun insurance carriers were similarly allowed to exclude coverage for shootings on the basis of shooters' identities, they could leave victims without compensation and insureds without indemnification in cases where gun owners' spouses, children, friends, or thieves harm others' persons or property with the insureds' guns. Accordingly, if legislators wish to advance these legislative purposes, they should require policies to cover bodily injury and property damage caused by specific guns rather than named gun owners. The personal liability policy that the NRA endorses does exactly that, suggesting that insurance carriers would want to sell such policies.<sup>216</sup> In addition, such a requirement would likely not raise any constitutional issues.

### C. Coverage Minimum

Coverage minimums also stand out as key components to any gun insurance mandate. The most recent proposed bills vary drastically from jurisdiction to jurisdiction as to the magnitude of their coverage minimums. The District of Columbia's measure contains a common coverage minimum, requiring gun owners to maintain at least \$250,000 in coverage.<sup>217</sup> Illinois's measure, on the other hand, represents an extreme, requiring gun owners to maintain "at least \$1,000,000" in coverage.<sup>218</sup> As discussed above, legislators must be careful when deciding coverage minimums so they do not effectively price out low-income individuals and families—which some might argue would constitute a *de facto* violation of the core right laid out in *Heller*.<sup>219</sup> While the chances that any mandate would price out a significant segment of prospective gun owners

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of customers operating loaned vehicles from an auto mechanic repair shop to be contrary to public policy); *State Farm Mut. Auto. Ins. Co. v. Nissen*, 851 P.2d 165, 166 (Colo. 1993) (rejecting insurer's contention that coverage did not extend to injuries received by plaintiff following attempted theft of plaintiff's car, because the thief was an impermissible driver).

<sup>216</sup> The NRA uses this scenario as a selling point for the gun insurance policies it endorses. See *Personal Firearms Liability Insurance for NRA Members*, *supra* note 37 ("The NRA-endorsed Personal Firearms Liability Insurance provides: [c]overage for bodily injury or property damage caused by the use of a firearm . . . when you are legally obligated for damages.").

<sup>217</sup> DC-B20-170, D.C. Council (2013) ("A person in the District who owns a firearm shall obtain and continuously maintain a policy of liability insurance in an amount of no less than \$250,000."). Maryland's bill also proposes "coverage of at least \$250,000." S. 577 (Md. 2013).

<sup>218</sup> H.B. 0687, 96th Gen. Assemb. (Ill. 2010) (requiring a liability policy of at least \$1,000,000 "specifically covering any damages resulting from negligent or willful acts involving the use of such firearm while it is owned by such person").

<sup>219</sup> See *supra* notes 54-60 and accompanying text (reviewing the potential impact that an insurance mandate could have on low-income gun owners).

are slim, and the constitutionality of such an outcome is debatable,<sup>220</sup> legislators should balance that concern against the legislative purposes of providing financial protection for gun owners and compensation for gun violence victims. Understanding the delicacy of this task, some legislatures have proposed bills that delegate the setting of coverage minimums to agencies.<sup>221</sup> This component may be particularly appropriate to delegate to an agency.

#### D. Covered Conduct

While legislators have little guidance as to how to set coverage minimums, they do have a clear answer as to what kinds of conduct they should require policies to cover. As discussed above, while insurance carriers have plenty of economic incentive to cover insureds for unintentional conduct, they have almost no economic incentive to indemnify anyone for their intentional conduct.<sup>222</sup> Thus, a bill that would require gun owners to carry insurance coverage for all intentional shootings could amount to a prohibition on firearms: gun owners would be required by law to carry insurance policies that might not exist or, at least, might not be affordable—constituting a *de facto* ban on the exercise of the core right of *Heller*. In spite of this, legislators might be interested in requiring gun owners to carry insurance coverage for self-defense shootings. In fact, Connecticut’s proposed bill would require gun owners to carry such insurance.<sup>223</sup> The existence of self-defense shooting

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<sup>220</sup> The Supreme Court has upheld economic regulations on the exercise of other constitutionally protected rights. *See, e.g.*, *Harris v. McRae*, 448 U.S. 297 (1980) (upholding economic regulations on the exercise of the right to abortion). Legislators could argue that gun rights outside the core right of *Heller* could be subject to economic regulations like gun insurance mandates—even if they would price some prospective gun owners out of the market for guns. Legislators would, however, face a higher bar if such mandates affected the core right of *Heller*. Nonetheless, the *McRae* court suggested that states could impose economic regulations on exercises of fundamental rights, *see id.* at 312, 322-23, and lower courts have upheld other economic regulations on handgun ownership that would affect the core right of *Heller*, suggesting that carefully crafted mandates could withstand higher scrutiny in this context. *See, e.g.*, *Kachalsky v. Cacace*, 817 F. Supp. 2d 235 (S.D.N.Y. 2011) (upholding New York’s concealed-carry handgun licensing scheme); *see also* Michael Csere, *State Comparison of Gun Permit Fees*, CONNECTICUT GENERAL ASSEMBLY, Feb. 6, 2013, <http://www.cga.ct.gov/2013/rpt/2013-R-0048.htm>, archived at <http://perma.cc/SWJ9-7SR2> (listing handgun permit policies and fees for each state).

<sup>221</sup> H.R. 3253 § 207(b) (Mass. 2013) (“The commissioner of insurance shall promulgate regulations set forth for the minimum terms of liability insurance policies which shall satisfy the requirements of this section.”); H.R. 6656 §1(b) (Conn. 2013) (“The Insurance Commissioner shall adopt regulations . . . to implement the provisions of this section, including, but not limited to, minimum coverage amounts of such insurance policies . . .”).

<sup>222</sup> *See supra* note 72 and accompanying text (explaining that indemnification of intentional crimes could incentivize such crimes).

<sup>223</sup> H.R. 6656 §1(a) (Conn. 2013) (“Any person who possesses or owns a firearm . . .

insurance policies, in the absence of any mandate, suggests that insurance carriers have succeeded at calibrating these policies and profiting from them.

Nonetheless, legislators should be wary of requiring self-defense insurance for two reasons: First, such a requirement might increase premiums to the point where a significant segment of the population is priced out of owning guns. While the NRA-endorsed self-defense policy suggests that pricing might not be an issue, with a \$254 annual premium netting \$250,000 of coverage,<sup>224</sup> broader coverage in certain markets could change that calculus. Second, the prevalence of self-defense insurance might embolden gun owners to shoot in ostensible self-defense, reducing any mandate's potential to increase responsible gun ownership. As discussed above, similar arguments have been made about car insurance generally.<sup>225</sup> Moreover, critics of "Stand Your Ground" laws have suggested that the expansion of legal protections for self-defense shootings have led to increases in unjustified self-defense shootings.<sup>226</sup> One might worry that the expansion of financial protections for self-defense shootings might have a similar effect. With this in mind, legislators might wish to limit their gun insurance mandates to require insurance carriers to cover the insured's negligent shootings, but not the insured's intentional shootings. Of course, legislators would still want to permit gun owners to purchase liability insurance for self-defense shootings if gun owners wish to supplement their mandatory policies.

Beyond covering unintentional acts and self-defense shootings, some legislators could require gun owners to carry policies that would provide coverage to uninvolved insureds for the intentional acts of coinsureds. Some case law suggests that courts may be willing to extend coverage under these

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shall procure and maintain . . . personal liability insurance that provides coverage for bodily injury or property damage caused by the use of a firearm, and . . . self defense insurance that provides coverage for civil and criminal defense costs and provides for reimbursement of criminal defense costs if such person uses a firearm in self defense.”).

<sup>224</sup> *NRA Self-Defense Insurance*, NAT'L RIFLE ASS'N, <http://www.locktonaffinity.com/nra/defense.htm>, archived at <http://perma.cc/W8UA-6N3E> (last accessed Mar. 20, 2015).

<sup>225</sup> See *supra* notes 61-63 and accompanying text (discussing the link between increased car insurance coverage and increased car accidents).

<sup>226</sup> “*Stand Your Ground*” Laws: *Civil Rights and Public Safety Implications of the Expanded Use of Deadly Force: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Human Rights of the S. Judiciary Comm.*, 113th Cong. 5-6 (2013) (statement of Ronald S. Sullivan, Jr., Director, Criminal Justice Institute, Harvard Law School) (“[T]hese instantiations of Stand Your Ground completely removed the duty to retreat from any space in which a person has a legal right to be. This emboldens individuals to escalate confrontation, even deadly confrontation, whereas an alternative rule would decrease the likelihood of deadly exchanges. . . . The very existence of this law emboldened Mr. Zimmerman to disregard the command of the 911 dispatcher and follow Trayvon Martin, arrogating law enforcement—what should be a public function—to himself.”).

circumstances, despite the existence of intentional act exclusions.<sup>227</sup> If that is the case, then legislators could provide much needed funding for victims and innocent insureds in the wake of mass shootings like those in Columbine and Newtown.

E. *Covered Guns*

Lastly, nearly all of these bills share one noteworthy quality: they establish blanket mandates for all guns.<sup>228</sup> Only Massachusetts' bill elaborated—however, ineffectively—on the specific classes of guns that would require coverage, mentioning “firearm[s], rifle[s], [and] shotgun[s].”<sup>229</sup> Blanket mandates would likely provide greater benefits than narrower mandates, in terms of indemnification, compensation, and behavioral incentives. Yet, broader restrictions generally might raise greater constitutional issues. At the very least, *Heller* requires that all mentally-stable, criminal-record-less adults have access to handguns for the purpose of protecting themselves, their families, and their property in their homes.<sup>230</sup> Justice Scalia went so far as to say that handguns are “the quintessential self-defense weapon.”<sup>231</sup> Hence, it might be prudent for legislators to impose lesser burdens on those seeking to own only handguns. While gun insurance mandates are not *de jure* bans on gun ownership, low-income individuals and individuals who have filed numerous claims—thereby increasing their premiums<sup>232</sup>—might be able to challenge gun insurance mandates as *de facto* bans on gun ownership.<sup>233</sup> To protect their

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<sup>227</sup> See *supra* notes 76-77 and accompanying text (reviewing the willingness of courts to enforce intentional act exclusions when insureds seek to cover the intentional acts of other insureds).

<sup>228</sup> H.R. 1369, 113th Cong. (2013) (“It shall be unlawful for a person who owns a firearm . . . not to be covered by a qualified liability insurance policy.”); H.R. 6656, Gen. Assemb., Jan. Sess. (Conn. 2013) (“Any person who possesses or owns a firearm . . . shall procure and maintain . . . excess personal liability insurance . . . .”); DC-B20-170, D.C. Council (2013) (“A person in the District who owns a firearm shall obtain and continuously maintain a policy of liability insurance . . . .”); H.B. 0687, 96th Gen. Assemb. (Ill. 2010) (“[A]ny person who owns a firearm in this State shall maintain a policy of liability insurance . . . .”); S. 577 (Md. 2013) (“A person that possesses a firearm shall maintain liability insurance . . . .”); Assemb. A. 3908 (N.Y. 2013) (“Any person in this state who shall own a firearm shall, prior to such ownership, obtain and continuously maintain a policy of liability insurance . . . .”); H.R. 521 (Pa. 2013) (“No individual shall be issued a license . . . without providing the licensing authority with a certificate of liability insurance . . . .”).

<sup>229</sup> H.R. 3253 § 207 (Mass. 2013) (“Whoever possesses, carries, or owns a firearm, rifle or shotgun without a liability policy . . . shall be punished . . . .”).

<sup>230</sup> See *supra* notes 104-106 and accompanying text.

<sup>231</sup> *District of Columbia v. Heller*, 554 U.S. 570, 628-29 (2008).

<sup>232</sup> See Collins, *supra* note 39 (“[I]nsurance products are priced and developed based on an insurance company’s ability to assess a risk and predict the likelihood of the event.”).

<sup>233</sup> Again, such claims are questionable, but their potential to invalidate gun insurance mandates should direct legislators towards tiered approaches or savings clauses. See *supra*

mandates from such challenges, legislators could demand less from handgun owners, both from the standpoint of coverage minimums and intentional conduct coverage.

Of course, attempts to define classes of guns have failed in the past. Many believe that the 1994 federal assault weapons ban<sup>234</sup> failed in part due to its inability to define what assault weapons are.<sup>235</sup> Connecticut currently has an assault weapons ban that failed to ban the sale and ownership of the Bushmaster AR-15 that Adam Lanza used in the 2012 Newtown mass shooting.<sup>236</sup> However, from a technical standpoint, handguns seem like much simpler weapons than assault rifles, so legislators may have more success defining handguns for the sake of creating tiered mandates.

#### CONCLUSION

Overall, it is clear that any successful gun insurance mandate will be the result of experimentation. Legislators may find where best to draw the lines on classifications of persons, conduct, and guns or where to set criminal sentences and coverage minimums only after a period of experimentation or trial and error. In that vein, Judge Easterbrook's invocation of Justice Brandeis' conception of the states as laboratories seems particularly fitting in the context of gun regulation.<sup>237</sup> What is not clear is whether any legislature in the United States has the political capital and courage to act.

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note 220 and accompanying text.

<sup>234</sup> Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 (expired 2004) (barring creation and new ownership of semi-automatic weapons).

<sup>235</sup> See Michael Luo & Michael Cooper, *Lessons in Politics and Fine Print in Assault Weapons Ban of '90s*, N.Y. TIMES, Dec. 20, 2012, at A1 ("Another challenge for lawmakers was defining precisely what an assault weapon is, which allowed the industry to continue manufacturing guns similar to those that had been banned.").

<sup>236</sup> *Id.* ("Connecticut, in fact, has an assault weapons ban, similar to the old federal law. But law enforcement officials have said that they believe the guns that Adam Lanza used in the Newtown shooting – including a .223 Bushmaster semiautomatic carbine, which is often described as a military-style assault weapon – were legally acquired and registered."). Connecticut has since amended its assault weapons ban. Peter Applebome, *Connecticut's Legislators Agree on Sweeping Gun-Control Laws*, N.Y. TIMES, Apr. 2, 2013, at A1 ("More than three months after the [Newtown] massacre . . . state legislative leaders announced . . . that they had agreed on what they called the most far-reaching gun-legislation package in the country.").

<sup>237</sup> See *supra* note 140 and accompanying text.