

# A Private Sector Solution to a Public Problem

by CHRIS MOLINA\*

## Introduction

The United States has a gun violence epidemic. In 2010, the Center for Disease Control reported 31,672 deaths involving the use of firearms;<sup>1</sup> roughly one third of those deaths were homicides.<sup>2</sup> In 2011, the FBI reported 122,300 robberies and 136,371 aggravated assaults involving the use of firearms.<sup>3</sup> The numbers are even more startling when compared with other developed countries. The firearm “homicide rate in the U.S. is seven times higher than the combined homicide rate of 22 other high-income countries.”<sup>4</sup> According to the United Nations Office on Drugs and Crime, there were only eleven intentional homicides committed with firearms in

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1. CENTER FOR DISEASE CONTROL, FATAL INJURY REPORTS, NATIONAL AND REGIONAL, 1999–2010, [http://webappa.cdc.gov/sasweb/ncipc/mortrate10\\_us.html](http://webappa.cdc.gov/sasweb/ncipc/mortrate10_us.html) (select “All Intents” in Box 1; select “Firearm” in Box 2; then click “Submit Request”) (last visited Nov. 19, 2013).

2. CENTER FOR DISEASE CONTROL, FATAL INJURY REPORTS, NATIONAL AND REGIONAL, 1999–2010, [http://webappa.cdc.gov/sasweb/ncipc/mortrate10\\_us.html](http://webappa.cdc.gov/sasweb/ncipc/mortrate10_us.html) (select “Homicide” in Box 1; select “Firearm” in Box 2; then click “Submit Request”) (last visited Nov. 19, 2013).

3. FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: TABLE 15 – CRIME TRENDS: ADDITIONAL INFORMATION ABOUT SELECTED OFFENSES, [http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table\\_15\\_crime\\_trends\\_additional\\_information\\_about\\_selected\\_offenses\\_by\\_population\\_group\\_2010-2011.xls](http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table_15_crime_trends_additional_information_about_selected_offenses_by_population_group_2010-2011.xls).

4. Daniel W. Webster et al., *The Case for Gun Policy Reforms in America*, John Hopkins Center for Gun Policy and Research, at 2 (Oct. 2012), available at [http://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/publications/WhitePaper102512\\_CGPR.pdf](http://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/publications/WhitePaper102512_CGPR.pdf).

Japan in 2008; in the United States, the number was 11,030.<sup>5</sup> England and Wales saw only thirty-eight homicides committed with firearms; Australia suffered only thirty-one.<sup>6</sup>

The pervasiveness of gun violence in the U.S. has been attributed to the media, economics, the illicit drug trade, general moral decay, and inadequate mental health resources. Opponents and proponents of gun control are in sharp disagreement over the extent to which the availability of guns plays a role in the violence epidemic. Gun control advocates tend to perceive a positive correlation between the availability of guns and gun-related violence. Supporters of gun ownership are diametrically opposed to that notion, arguing that guns actually make people safer. Both positions probably contain some truth, although the relative strength of those positions is unclear. The research surrounding gun violence is hotly contested. Furthermore, the methods used are somewhat unreliable because of the varied causes for gun violence. Making empirical assertions requires the imposition of countless assumptions. The dearth of reliable information about gun violence makes it difficult for legislators to formulate good policy. Whatever the causes are, it is clear that we, as a country, lack a coherent solution.

There is at least one thing on which both supporters and opponents of gun control can agree: Certain people should not have guns. There is little debate, for example, that violent felons should not have guns. There is at least some consensus that people who suffer from severe mental illnesses or have substance abuse issues should not have guns. But where do we draw the line? Should a person who has been convicted of misdemeanor domestic violence be allowed to own guns? What about a person who merely suffers from treatable anxiety? A person who has a medical marijuana card? Assuming, *arguendo*, that the government could effectively prevent certain classes of individuals from owning guns, any statutes drawing bright-line rules would almost certainly be overbroad or underinclusive. In other words, the government's inability to make individualized assessments about the risk that certain people pose implies that legislative generalizations will be wrong when applied to certain individuals.

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5. UNITED NATIONS OFFICE ON DRUGS AND CRIME, HOMICIDE STATISTICS, <http://www.unodc.org/unodc/en/data-and-analysis/homicide.html> (last visited Nov. 19, 2013).

6. *Id.*

Although the government may be unable to make individualized assessments of gun owners, the insurance industry could make such assessments, much like it does each time that it decides whether to insure a new customer. For example, an auto insurance company must gather certain information before deciding whether to cover a new driver, and at what premium. The cost of insurance is based primarily on two factors: the risk the insured poses and the value of potential liabilities that could result from engaging in activities the insurance policy covers. Thus, the car insurance company first determines how likely it is that a driver will cause an accident using such factors as age, sex, marital status, location, and a driver's history of accidents and tickets. The company then sets rates based on the amount of money that would be required to cover the cost of the damage the insured is likely to cause. This risk-based approach, combined with a government mandate requiring drivers to purchase insurance, gives drivers a financial incentive to drive safely and responsibly.

The government kills two birds with one stone by requiring drivers to purchase auto insurance. First, it provides a mechanism for compensating individuals who suffer losses as a result of the insured's driving. Second, it makes it more expensive for riskier drivers, thereby providing an economic incentive for the driver to be safer. Some commentators have suggested that these two objectives, compensating individuals and incentivizing safer behavior, could be achieved in the realm of gun control if gun owners were required to have liability insurance as a precondition to purchase new guns.<sup>7</sup> The idea is relatively simple: In order to purchase a gun from a weapons dealer, the purchaser must show proof of insurance. In order to purchase a gun from another private individual, the purchaser must also present proof of insurance. The rates for such insurance would be based on several risk factors, such as the number of weapons owned, the type of weapons, and the length of time the purchaser has owned guns without causing any accidents. Insurance companies will be left to identify the traits of responsible gun owners. Undoubtedly, an essential question is whether mandatory insurance for gun owners infringes on the Second Amendment right to bear arms. This Note

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7. See Marsha N. Cohen, *Mandatory Insurance Might Control Guns*, SFGATE.COM (Jan. 10, 2013, 7:43 PM), <http://www.sfgate.com/opinion/openforum/article/Mandatory-insurance-might-control-guns-4184778.php>; John Wasik, *Newtown's New Reality*, FORBES (Dec. 17, 2012, 7:34 PM), <http://www.forbes.com/sites/johnwasik/2012/12/17/newtowns-new-reality-using-liability-insurance-to-reduce-gun-deaths/>.

seeks to address both the advisability of an insurance mandate as a matter of policy and the constitutional issues such a law might pose.

This Note is divided into three parts. Part I examines the current gun control debate and our current laws; the inquiry will focus on what a mandatory insurance law can add to current laws and other reforms. Part II describes the structure of an insurance mandate and how it might be implemented. Part III addresses the constitutionality of an insurance mandate in light the Supreme Court's recent landmark decision in *District of Columbia v. Heller*.<sup>8</sup>

### I. Gun Control Reforms – Past and Present

On December 14, 2012, after killing his own mother, twenty-year-old Adam Lanza went to Sandy Hook Elementary School, and committed one of the most heinous school shootings in American history.<sup>9</sup> Armed with two semiautomatic handguns, a semi-automatic rifle, and a bulletproof vest, Lanza murdered twenty children and six school staff members.<sup>10</sup> For a moment, the political climate was ripe for reform. People across the country, including gun owners, were horrified. Although the tragedy provided the momentum for change, legislators retreated to polarized camps on the proper course of action. For example, as Colorado proposed measures expanding background checks and limiting ammunition magazines to fifteen rounds,<sup>11</sup> Arkansas passed a bill permitting people to carry a concealed weapon in churches.<sup>12</sup> The discrepancy between these contradictory approaches to reducing gun violence is the product of two wholly inconsistent assumptions. The Colorado proposal implicitly relies on the assumption that placing limitations on the availability of guns and ammunition will reduce violence. The Arkansas approach assumes that expanding the availability of guns will reduce violence.

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

9. Richard Esposito, Candice Smith & Christina Ng, *20 Children Died in Newtown, Conn., School Massacre*, ABC NEWS (Dec. 14, 2012), <http://abcnews.go.com/US/twenty-children-died-newtown-connecticut-school-shooting/story?id=17973836>.

10. *Id.*

11. Jack Healy, *After Rancorous Debate, Colorado Senate Advances Strict New Measures on Gun Control*, N.Y. TIMES (Mar. 9, 2013), <http://www.nytimes.com/2013/03/10/us/colorado-senate-advances-strict-gun-control-measures.html>.

12. Suzie Parker, *Law allowing guns in churches signed by Arkansas Governor*, NBCNEWS.COM (Feb. 11, 2013, 10:53 PM), [http://usnews.nbcnews.com/\\_news/2013/02/11/16930912-law-allowing-guns-in-churches-signed-by-arkansas-governor](http://usnews.nbcnews.com/_news/2013/02/11/16930912-law-allowing-guns-in-churches-signed-by-arkansas-governor).

This section examines the contradictory approaches to regulating gun ownership with respect to three types of reform proposals. First is the literature surrounding right-to-carry (“RTC”) proposals—so-called “concealed weapons” laws. These laws allow individuals to possess firearms or other weapons in public in a concealed manner. Second is current federal law regarding background checks—in particular, its ineffectiveness on account of the oft-mentioned “gun show loophole.” Third is the issue of assault weapons. The debates surrounding these reforms will provide useful insight for devising a holistic approach to solving the gun violence problem.

#### **A. The Classic Gun Control Debate: More Guns or Fewer Guns?**

In July 2013, Illinois became the last state in the nation to enact some type of law allowing individuals to carry guns in public.<sup>13</sup> There are different variations on the type of RTC in each state.<sup>14</sup> Some states have “shall issue” RTC laws, which grant concealed carry permits based upon the applicants meeting certain criteria.<sup>15</sup> In “shall issue” states, the government has no discretionary authority to deny permits for applicants who meet the specified criteria.<sup>16</sup> In contrast, in “may issue” states, the decision to grant a permit is left partially in the discretion of the government and applicants are often asked to show “good cause,” such as the need for self-defense.<sup>17</sup> A few states are completely unrestricted, meaning that citizens can carry concealed weapons in public without a permit.<sup>18</sup> The academic literature surrounding RTC laws points in different directions. One of the most influential commentators on the subject, economist John Lott, is largely responsible for the theory that more guns lead to less crime.<sup>19</sup> Lott’s original research relies on county-level crime data from the FBI’s Uniform Crime Reports (“UCR”) between 1977 and 1992.<sup>20</sup>

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13. Greg McCune, *Illinois is last state to allow concealed carry of guns*, REUTERS (July 9, 2013), <http://www.reuters.com/article/2013/07/09/us-usa-guns-illinois-idUSBRE9680ZB20130709>.

14. Law Center to Prevent Gun Violence, *Concealed Weapons Permitting Policy Summary*, (May 21, 2012), <http://smartgunlaws.org/concealed-weapons-permitting-policy-summary/>.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. John R. Lott and David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. LEGAL STUD. 1, 12 (1997).

20. *Id.* at 6.

Between those years, ten states enacted RTC laws while eight other states had prior RTC laws.<sup>21</sup> The study concluded that “[w]hen state concealed handgun law went into effect in a county, murders fell by 7.65 percent, and rapes and aggravated assaults fell by 5 and 7 percent.”<sup>22</sup> Lott’s theory won broad support from special interest groups—notably the NRA<sup>23</sup>—but its reception in the academic community has been mixed.<sup>24</sup>

Only a year after Lott published his original research on RTC laws, however, scholars Dan Black and Daniel Nagin reexamined Lott’s own data; they found serious methodological problems and “no basis for drawing confident conclusions about the impact of RTC laws on violent crimes.”<sup>25</sup> If Lott’s theory were correct, then allowing people to carry guns in public should have the most significant deterrent effect on crimes involving face-to-face confrontations—especially those occurring in public.<sup>26</sup> In other words, RTC laws should scare criminals into avoiding confrontation. But, this is not the case. Critics of Lott’s work have shown that a higher incidence of armed robberies (the crime expected to have the sharpest reduction) is actually *positively* correlated with RTC laws.<sup>27</sup> In addition, one might also expect that if RTC laws are responsible for decreases in crime, there would be a significant number of justifiable homicides, such as the killing of a felon by a private citizen during the commission of the felony. However, the UCR data—the same data upon which Lott relied—shows that between 1998 and 2002, the average number of justifiable homicides by private citizens with firearms was only 167 per year, nationwide.<sup>28</sup>

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21. *Id.* at 12.

22. *Id.* at 19.

23. NRA Institute for Legislative Action, *Right-to-Carry 2012*, [http://www.nraila.org/gun-laws/articles/2012/right-to-carry-2012.aspx?s="Right-To-Carry"&st=&ps="](http://www.nraila.org/gun-laws/articles/2012/right-to-carry-2012.aspx?s=).

24. Compare Don B. Kates, *The Limited Importance of Gun Control from Criminological Perspective*, in *SUING THE GUN INDUSTRY* 70–71 (Timothy D. Litton ed., 2005), with ADAM WINKLER, *GUNFIGHT: THE BATTLE OF THE RIGHT TO BEAR ARMS IN AMERICA*, 76–77 (2013).

25. Dan A. Black & Daniel S. Nagin, *Do Right-to-Carry Laws Deter Violent Crime?*, 27 *J. LEGAL STUD.* 209, 218 (1998).

26. See Ian Ayres & John Donohue, *Shooting Down the “More Guns, Less Crime” Hypothesis*, 55 *STAN. L. REV.* 1193, 1259 (2003).

27. *Id.* at 1266.

28. FED. BUREAU OF INVESTIGATION, *UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES – 2002*, § 2 at 28 (tbl. 2.17), <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2002> (follow “Section II - Crime Index” hyperlink).

Despite the shortcomings in Lott's methodology, opponents of RTC laws are at a slight disadvantage. Over the last several decades, as an increasing number of states enacted RTC laws, crimes involving firearms have decreased.<sup>29</sup> This creates two hurdles for RTC opponents: First, they must disprove any purported link between RTC laws and the general reduction in crime; and, second, they must prove that crime rates would have gone down even further if states had not enacted RTC laws. Some critics of Lott's work posit alternative explanations for the unexpected drop in crime rates during the 1990s. For example, Steven Levitt and John Donohue, authors of *Freakonomics*, advance the theory that legalized abortion is responsible for as much as fifty percent of the drop in crime that occurred during the 1990s.<sup>30</sup>

Any attempt to settle the debate over concealed carry laws is beyond the scope of this Note. However, the lack of scholarly consensus is unsurprising. Measuring the efficacy of RTC laws based on the data provided in the FBI's Uniform Crime Reports may expose a correlation between RTC laws and crime, but drawing a conclusion regarding causation requires unaccounted assumptions. The FBI data does not provide sufficient descriptive information regarding the circumstances involved in each crime. For example, the data fails to show whether the victim had a concealed weapon or whether the crime was committed in public or private.

Although some might disagree, we lack the appropriate information to settle the debate over RTC laws. Some might argue that this is not an accident. Special interest groups, notably the NRA, have convinced Congress to withhold federal money for research about gun violence. Particularly, in 1996, a provision was added to the statute funding the Center for Disease Control ("CDC") that reads, "[n]one of the funds made available in this title may be used, in whole or in part, to advocate or promote gun control."<sup>31</sup> The CDC interpreted this provision broadly and has avoided gun research

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29 D'Vera Cohn et al., *Gun Homicide Rate Down 49% Since 1993 Peak; Public Unaware*, Pew Research Center (May 2013), <http://www.pewsocialtrends.org/2013/05/07/gun-homicide-rate-down-49-since-1993-peak-public-unaware/>.

30. John Donohue & Steven Levitt, *The Impact of Legalized Abortion on Crime*, 66 Q. J. OF ECON. 379, 379 (2001).

31. Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, § 218, 125 Stat. 786, 1085 (2012).

entirely for nearly two decades.<sup>32</sup> However, on January 16, 2013, President Barack Obama signed a presidential memorandum directing the Secretary of Health and Human Services to conduct or sponsor research into the causes of gun violence and the ways to prevent it.<sup>33</sup> The presidential memorandum implicitly distinguishes scientific research from advocacy—the former being permissible and the latter forbidden by law. However, unless President Obama can convince Congress to provide additional funding, it is unclear whether the memorandum will have any effect.<sup>34</sup>

Until there is a comprehensive study specifically providing the data necessary to make meaningful observations regarding concealed carry laws, legislators should wait to make changes to those laws. The academic literature surrounding RTC laws relies on data that was not gathered for the purpose of analyzing RTC laws, such as the FBI's Uniform Crime Reports. As such, the effect of RTC laws remains unclear.

#### **B. Background Checks: Closing the Gun Show Loophole**

Perhaps the least controversial of all the proposals presented to Congress is the effort to expand background checks. In July 2012, an organization called Mayors Against Illegal Guns released a survey by Republican pollster Frank Luntz, which showed that seventy-four percent of NRA members and eighty-seven percent of non-NRA gun owners are in favor of requiring criminal background checks on anyone purchasing a gun.<sup>35</sup> Thus, Congress should be able to pass the expansion of background checks without much opposition.

Generally, current laws require licensed gun dealers to conduct background checks and keep records about the purchaser and the firearms sold.<sup>36</sup> However, federal law exempts those who are “not

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32. JoNel Aleccia, *Obama plan eases freeze on CDC gun violence research*, NBCNEWS.COM (Jan. 16, 2013), <http://www.nbcnews.com/health/obama-plan-eases-freeze-cdc-gun-violence-research-1B7999574?franchiseSlug=healthmain>.

33. THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, PRESIDENTIAL MEMORANDUM – ENGAGING IN PUBLIC HEALTH RESEARCH ON THE CAUSES AND PREVENTION OF GUN VIOLENCE (Jan. 16, 2013), <http://www.whitehouse.gov/the-press-office/2013/01/16/presidential-memorandum-engaging-public-health-research-causes-and-pre-0>.

34. Brad Plumer, *Gun research is allowed again. So what will we find out?*, WASH. POST (Jan. 17, 2013, 12:50 PM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/17/gun-research-is-allowed-again-so-what-will-we-find-out/>.

35. MAYORS AGAINST ILLEGAL GUNS PRESS RELEASE, <http://www.mayorsagainstillegalguns.org/html/media-center/pr006-12.shtml> (July 24, 2012).

36. 18 U.S.C. § 922 (2013).

engaged in the business” of dealing guns.<sup>37</sup> Private individuals and dealers who label themselves as occasional sellers can avoid these requirements.<sup>38</sup> This is the infamous “Gun Show Loophole.” Although the provision exempting occasional sellers may be an easy opportunity to avoid background checks, it is unclear how many gun sales occur without an accompanying background check.<sup>39</sup> A study published in 1997 estimated that almost forty percent of gun sales occur without a background check, but there has been no recent research on this matter.<sup>40</sup>

The primary counterargument to expanding the current laws on background checks is that “criminals do not abide by the law, anyhow.”<sup>41</sup> This argument, although tautological, has some merit. If someone knows that they will not pass a background check, they are unlikely to submit to one at all. A report compiled by the United States Department of Justice states that “[f]rom the inception of the Brady Act on March 1, 1994, through December 31, 2010, over 118 million applications for firearm transfers or permits were subject to background checks” and of those, about 2.1 million applications were denied.<sup>42</sup> In 2010 alone, only 73,000 of 10.4 million applications (1.5%) were denied.<sup>43</sup> Although the denial rate appears to be glaringly ineffective, it demonstrates that at least two million criminals were imprudent enough to attempt to purchase a firearm from a federally licensed dealer in the past two decades.<sup>44</sup> Of course,

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37. *Id.*

38. Mayors Against Illegal Guns, *Closing the Gun Show Loophole*, [http://www.mayorsagainstillegalguns.org/html/federal/gun\\_show.shtml](http://www.mayorsagainstillegalguns.org/html/federal/gun_show.shtml).

39. Glen Kessler, *The stale claim that 40 percent of gun sales lack background checks*, WASH. POST (Jan. 21, 2013), [http://www.washingtonpost.com/blogs/fact-checker/post/the-stale-claim-that-40-percent-of-gun-sales-lack-background-checks/2013/01/20/e42ec050-629a-11e2-b05a-605528f6b712\\_blog.html](http://www.washingtonpost.com/blogs/fact-checker/post/the-stale-claim-that-40-percent-of-gun-sales-lack-background-checks/2013/01/20/e42ec050-629a-11e2-b05a-605528f6b712_blog.html).

40. Phillip J. Cook & Jens Ludwig, *Guns in America: National Survey on Private Ownership and Use of Firearms*, NAT'L INST. OF JUSTICE (May 1997), <https://www.ncjrs.gov/pdffiles/165476.pdf>.

41. See, e.g., Jonathan Weisman, *Senate Blocks Drive for Gun Control*, N.Y. TIMES (Apr. 17, 2013), <http://www.nytimes.com/2013/04/18/us/politics/senate-obama-gun-control.html?pagewanted=all> (Commenting on failed legislation to expand background checks, Iowa Republican Senator Charles E. Grassley noted that “Criminals do not submit to background checks now. They will not submit to expanded background checks.”).

42. U.S. DEP'T OF JUSTICE, BACKGROUND CHECKS FOR FIREARM TRANSFERS, 2010 – STATISTICAL TABLES (Feb. 2013), available at <http://www.bjs.gov/content/pub/pdf/bcft10st.pdf>.

43. *Id.*

44. See *id.* For a list of categories of persons prohibited from receiving a firearm under the National Instant Criminal Background Check System, see FED. BUREAU OF

there is no real way to measure the number of criminals who were actually deterred from purchasing a firearm because of the background check system. One might presume that criminals smart enough to avoid a background check might purchase firearms in a situation that does not require one—for example, from an “occasional seller” at a gun show.

One limitation of the background check system is the inability to monitor transfers or sales between private individuals. Federal law does not require private individuals to record a firearm transfer to another private individual.<sup>45</sup> One can only imagine how onerous of a task it would be to enforce a law that did require private individuals to record their sales. However, the fact that private individuals can make unrecorded firearm transfers without conducting a background check could undermine the goal of expanding the background check system because criminals can circumvent the system by buying guns privately from a “straw.”<sup>46</sup> In a press release from the United States Attorney’s Office, Bureau of Alcohol, Tobacco, Firearms, and Explosives Special Agent Scott Sweetow conceded that “[n]o one can accurately tally the total number of firearms straw-purchased in the U.S. because these violations often go undetected by law enforcement until the weapons turn up at a crime scene, sometimes months or years after the purchase.”<sup>47</sup> In an ideal world for gun control advocates, there would be some mechanism for recording person-to-person firearm transfers, but not only would such a law face extraordinary political opposition, it would be even more difficult to enforce than existing laws prohibiting straw purchases. The most practical policy, both politically and in terms of implementation, would be to close the Gun Show Loophole.

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INVESTIGATION, NATIONAL INSTANT CRIMINAL BACKGROUND CHECK: FACT SHEET, <http://www.fbi.gov/about-us/cjis/nics/general-information/fact-sheet> (last visited Nov. 19, 2013).

45. U.S. DEP’T OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, *ATF Best Practices: Transfers of Firearms by Private Sellers* (Jan. 2013), <http://www.atf.gov/files/publications/download/p/atf-p-5300-21.pdf>.

46. A “straw purchase” is “the acquisition of a firearm from a federally licensed firearms dealer by an individual (the “straw”) for the purpose of concealing the true identity of the intended receiver of the firearm(s).” U.S. DEP’T OF JUSTICE, *Reducing Illegal Firearms Trafficking* (July 2000), available at <https://www.ncjrs.gov/pdffiles1/bja/180752.pdf>.

47. U.S. DEP’T OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, *New York Man Sentenced To Prison In Connection With “Straw Purchases” of Approximately 16 Firearms in Georgia* (Aug. 29, 2011), <http://www.atf.gov/press/releases/2011/08/082911-atl-new-york-man-sentenced-to-prison-in-connection-with-straw-purchases-of-approximately-16-firearms-in-georgia.html>.

As will be discussed *infra*, a background check will be a necessary component of any insurance mandate, since the administrative task of enforcing the mandate will likely need to piggyback on the FBI's National Instant Criminal Background Check System or the designated state Point of Contact. Although background checks may have little effect on straw purchases, an insurance mandate could provide an incentive for gun owners to report transfers or sales to their insurance providers. After all, if an insurance premium is based, in part, on the number of weapons a person owns, the owner would have a financial incentive to report a change in ownership of his or her firearms in order to reduce the cost of insurance.

### **C. Limiting the Availability of Assault Weapons and High Capacity Magazines**

Although there is some bipartisan consensus about expanding background checks, there is less agreement about banning more powerful assault weapons.<sup>48</sup> The argument in favor of banning assault weapons is premised on the idea that more powerful firearms enable criminals to do more destruction.<sup>49</sup> However, gun control opponents respond that the vast majority of firearm homicides are not committed with assault weapons.<sup>50</sup> For example, of the 12,664 firearm homicides committed in the United States in 2011, only 323 were committed with "rifles"<sup>51</sup>—a classification that encompasses the vast majority of assault weapons. In contrast, 6,220 firearm homicides were committed with handguns.<sup>52</sup> Those who oppose a ban on assault weapons argue that because the percentage of homicides committed with rifles is so low, an assault weapons ban would be ineffective to

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48. Carolyn Lochhead, *Feinstein Assault Weapons Ban Defeated*, SFGATE.COM (Apr. 18, 2013), <http://www.sfgate.com/politics/article/Feinstein-assault-weapons-ban-defeated-4443319.php>.

49. C.S. Koper and J.A. Roth, *The Impact of the 1994 Federal Assault Weapon Ban on Gun Violence Outcomes: An Assessment of Multiple Outcome Measures and Some Lessons for Policy Evaluation*, 17 J. QUANTITATIVE CRIMINOLOGY 33, 38 (2001).

50. Brad Plumer, *Everything you need to know about the assault weapons ban, in one post*, WASH. POST (Dec. 17, 2012), <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/12/17/everything-you-need-to-know-about-banning-assault-weapons-in-one-post>.

51. FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT: TABLE 20 – MURDER BY STATE, TYPES OF WEAPONS (2011), <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-20>.

52. *Id.*

combat gun violence.<sup>53</sup> However, this argument overlooks the fact that the definition of assault weapons includes semiautomatic handguns and excludes rifles without semiautomatic capabilities. In addition, it ignores the fact that the number assault weapons may account for only a small percentage of all guns in circulation. The exact number of assault weapons currently in circulation is unknown, but some studies suggest that of the 192 million firearms in circulation when the 1994 Assault Weapons Ban took effect, only 1.5 million were assault weapons.<sup>54</sup>

Gun rights activists are inconsistent about what the ultimate goal of gun control should be. When talking about expanding universal background checks, they argue that background checks would not have prevented tragedies like the Sandy Hook shooting because the shooter, Adam Lanza, never purchased the firearms.<sup>55</sup> Although true, when gun control advocates point out that an assault weapons ban might have stopped Adam Lanza, opponents respond that such a measure would have an insignificant impact on crime overall.<sup>56</sup> Coming up with measures that gun rights activists will uniformly support is like shooting at a moving target because they reject proposals based on the fact that they don't solve the "real" problem. For example, in response to the Sandy Hook tragedy, the NRA assembled a taskforce of security experts to assess the safety and emergency preparedness of schools around the country.<sup>57</sup> The report's primary recommendation was to provide training for armed personnel at schools.<sup>58</sup> The merits of that recommendation are beyond the scope of this Note, but it is noteworthy that the NRA narrowly confined its report to the issue of school safety. That is, the NRA chose to focus only on school safety, instead of addressing gun control in the context of all forms of gun violence. Improving school safety is undoubtedly a laudable goal. But why stop there?

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53. Jeffrey Bartash, *'Assault' rifles are not involved in many U.S. murders: A look at the data*, MARKETWATCH (Jan. 16, 2013), <http://blogs.marketwatch.com/capitolreport/2013/01/16/assault-rifles-are-not-involved-in-many-u-s-murders-a-look-at-the-data/>.

54. CONG. RESEARCH SERV., GUN CONTROL LEGISLATION 7–8 (Nov. 14, 2012).

55. Joe Johns & Stacey Samuel, *Would background checks have stopped recent mass shootings? Probably not*, CNN (Apr. 10, 2013), <http://www.cnn.com/2013/04/10/politics/background-checks-mass-shootings/>.

56. Plumer, *supra* note 50.

57. The Nat'l Sch. Shield, Report of the National School Task Force (Apr. 2, 2013), available at [http://www.nrschoolshield.com/NSS\\_Final.pdf](http://www.nrschoolshield.com/NSS_Final.pdf).

58. *Id.* at 15.

In 2012, James Holmes killed 12 and wounded 58 people in a movie theater using the same gun—an AR-15—that Adam Lanza used in the Sandy Hook Elementary School shooting.<sup>59</sup> Moreover, Holmes obtained the assault rifle legally.<sup>60</sup> Applying the same logic as that of the NRA’s taskforce report following the Sandy Hook shooting, theaters should also provide armed personnel. In the words of NRA Executive Vice President Wayne LaPierre, “[t]he only thing that stops a bad guy with a gun is a good guy with a gun.”<sup>61</sup> While that statement may contain some emotional appeal, it ignores the fact that a good guy with a gun is at a disadvantage if the bad guy has a more powerful gun. Admittedly, this argument is purely anecdotal, much like LaPierre’s, but it is worth pointing out that although an assault weapons ban might not prevent these types of shootings, it could reduce the number of lives lost.

Unfortunately, the empirical evidence surrounding assault weapons bans, like other gun control issues, is not very helpful. Although assault weapons are particularly suitable for mass shootings, fatalities from mass shootings only average 35 fatalities per year.<sup>62</sup> One might have hoped that the Federal Assault Weapons ban passed during the Clinton administration would have yielded some instructive data, but that is not the case. A provision of the bill required the Attorney General to evaluate the effects of the ban after its passage, but limited the duration of the study to eighteen months.<sup>63</sup>

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59. Erica Goode, *Rifle Used in Killings, America’s Most Popular, Highlights Regulation Debate*, N.Y. TIMES (Dec. 16, 2012), <http://www.nytimes.com/2012/12/17/us/lanza-used-a-popular-ar-15-style-rifle-in-newtown.html>. Holmes entered a Colorado movie theater through an exit door wearing what police described as “ballistics gear.” After the shooting, Holmes was detained outside of the theater standing by his car. *Id.* See also Dan Frosch and Kirk Johnson, *Gunman Kills 12 in Colorado, Reviving Gun Control Debate*, N.Y. TIMES (July 20, 2012), <http://www.nytimes.com/2012/07/21/us/shooting-at-colorado-theater-showing-batman-movie.html>. Authorities recovered an AR-15 assault rifle, a Remington 12-gauge shotgun, and two .40 caliber Glock handguns. *Id.*

60. Nick Carbone, *Colorado Theater Shooter Carried 4 Guns, All Obtained Legally*, TIME NEWSFEED (July 21, 2012), <http://newsfeed.time.com/2012/07/21/colorado-theater-shooter-carried-4-guns-all-obtained-legally>.

61. Sean Sullivan, *NRA’s Wayne LaPierre: Put ‘armed police officers’ in every school*, WASH. POST (Dec. 1, 2012, 11:28 AM), <http://www.washingtonpost.com/blogs/post-politics/wp/2012/12/21/nras-wayne-lapierre-put-armed-police-officers-in-every-school/>.

62. Greg Ridgeway, *Summary of Select Firearm Violence Prevention Strategies*, NAT’L INST. OF JUSTICE (Jan. 4, 2013), <http://www.nraila.org/media/10883516/nij-gun-policy-memo.pdf> (“mass shooting” defined as a shooting consisting of “four or more victims in a particular place and time”).

63. See Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355, 103d Cong. § 110104 (“The study shall be conducted over a period of 18 months, commencing 12 months after the date of enactment of this Act.”).

When the National Institute of Justice (“NIJ”) issued its findings, it explained that the data suggested “a short-term decrease in criminal use of the banned weapons,” but conceded that the limited timeframe of the study restricted “the ability of statistical tests to discern impacts that may be meaningful from a policy perspective.”<sup>64</sup> The NIJ did not release another report until July 2004, which, for unknown reasons, the Department of Justice did not publish.<sup>65</sup> The report summarized that although gun homicides plummeted by about thirty-eight percent between 1994 and 1999, the drop was probably better attributed to other factors, such as “changing drug markets, a strong economy, better policing, and higher incarceration rates.”<sup>66</sup>

A separate, but related, issue that arises in the debate of reinstating an assault weapons ban is limiting high capacity magazines. The Sandy Hook shooter, Adam Lanza, used magazines holding thirty rounds each<sup>67</sup> and the Aurora shooter, James Holmes, used a 100-round drum magazine.<sup>68</sup> Limiting high-capacity magazines may have a more observable effect on crime than a prohibition on assault weapons for two reasons. First, large capacity magazines can be used in both assault rifles and handguns, so limiting magazine size would impact a broader range of firearms. As previously mentioned, the vast majority of firearm homicides are committed with handguns, presumably because they are easy to conceal and handle. Second, a shooter limited to ten rounds per magazine (the 1994 Ban’s limit) is forced to change magazine clips more often. It only takes a few seconds to change clips, but as one Sandy Hook victim’s father told CBS’ *60 Minutes* in an interview, “[i]f you have to change magazines 15 times instead of five times, there are three times as many instances where something could jam, something could be bobbled, you just increase the time for intervention, you increase the timeframe for kids to get out.”<sup>69</sup> However, the argument cuts both ways in the

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64. Jeffrey A. Roth & Christopher S. Koper, *Impacts of the 1994 Assault Weapons Ban: 1994–96*, at 9, NAT’L INST. OF JUSTICE (Mar. 1999), <https://www.ncjrs.gov/pdffiles1/173405.pdf>.

65. Christopher S. Koper, Daniel J. Woods & Jeffrey A. Roth, *Updated Assessment of the Federal Assault Weapons Ban, 1994–2003*, U.S. DEP’T OF JUSTICE (June 2004), <https://www.ncjrs.gov/pdffiles1/nij/grants/204431.pdf>.

66. *Id.* at 91–92.

67. Plumer, *supra* note 50.

68. Goode, *supra* note 59.

69. S.H. Blannelberry, *The Argument Against Banning ‘High’ Capacity Magazines*, GUNS.COM (Apr. 5, 2013), <http://www.guns.com/2013/04/05/the-argument-against-banning-high-capacity-magazines-video/>.

minds of gun rights activists: Someone using a firearm for legitimate defensive purposes will be mutually disadvantaged by a limitation on clip size.

It is difficult to engage in an analysis of these issues without resorting to anecdotal arguments. And, unfortunately, anecdotal arguments are unlikely to shift the political balance in any given direction. Such arguments tend to be circumstantial or fact specific—and not necessarily representative. It is simply too easy to imagine a scenario that will contradict an anecdotal argument. On the other hand, reliable empirical assertions require much more data because trends or patterns can be proven only after controlling for other variables. The assault weapons ban and high-capacity magazine bans only lasted ten years. This might seem like enough time to gather data, but not for a law like the Violent Crime Control and Law Enforcement Act of 1994, which did nothing about the estimated 270 million guns already in circulation in the United States.<sup>70</sup>

Due to the lack of conclusive evidence regarding the actual impact of the 1994 assault weapons ban, the controversy over assault weapons will undoubtedly continue. This Note proposes that an insurance mandate should be considered in the absence of an assault weapons ban. An insurance mandate could have a similar effect as an assault weapons ban: If the price of an insurance policy is tied to the lethality of the insured's weapons, there would be a financial incentive to avoid purchasing assault weapons and high-capacity magazines.

#### **D. A Holistic Approach to Gun Control Reform**

One of the core principles in the field of public health is that “multiple strategies directed toward different risk factors are necessary to solve the problem.”<sup>71</sup> This principle is applicable to the debate on gun violence. The complexity of the issue makes it unlikely that any single reform measure is capable of independently solving the problem. An insurance mandate for gun owners cannot be a panacea for gun violence on its own. As such, the idea of mandatory insurance should be considered alongside other potential reforms for the sake of determining what, if anything, it adds to other proposals.

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70. Aaron Karp, *Completing the Count: Civilian Firearms*, SMALL ARMS SURVEY 2007: GUNS AND THE CITY 39, 47, available at <http://www.smallarmssurvey.org/publications/by-type/yearbook/small-arms-survey-2007.html>.

71. David Hemenway, *The Public Health Approach to Reducing Firearm Injury and Violence*, 17 STAN. L. & POL'Y REV. 635, 649 (2006).

In analyzing the potential efficacy of gun control measures, it is abundantly clear that any measure, standing alone, is insufficient to have a meaningful impact on overall levels of gun violence. Piecemeal legislation that does not include comprehensive reforms will not solve the problem. For example, prohibiting the sale and manufacture of assault weapons can only have a marginal impact because of the existing stockpile of assault weapons already in circulation. If, however, an assault weapons ban was coupled with a gun buyback program, then it could potentially have a greater impact. Universal background checks, standing alone, cannot do much about the straw purchase issue since there is no requirement for individuals to keep records of purchases. However, expanding background checks could be more effective if individuals were required to sell their guns using a federally licensed firearms dealer as an intermediary.

None of these reforms, however, effectively distinguishes between safe gun owners and unsafe gun owners. For example, background checks may stop someone with a history of violence from purchasing a gun, but they will not stop someone who has only a predisposition for violent behavior. James Holmes, having no criminal record, purchased firearms legally before carrying out the Aurora theater shooting.<sup>72</sup> Each of the reforms mentioned *supra* involves drawing bright-line rules that could either keep guns away from lawful owners or allow guns to fall into the hands of unlawful owners. In contrast, an insurance-based approach could provide a mechanism for assessing gun owners on an individualized basis to determine the actual risk posed to others.

## II. Designing an Insurance Mandate

The idea of imposing an insurance mandate on gun owners is at least twenty-five years old. The earliest mention of the idea is found in an *Alabama Law Review* article written in 1987 by one of today's preeminent scholars of Second Amendment jurisprudence, Professor Nelson Lund.<sup>73</sup> Professor Lund's article was devoted to articulating an interpretation of the Second Amendment that is suitable to modern conditions and consistent with the Supreme Court's

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72. Nick Carbone, *Colorado Theater Shooter Carried 4 Guns, All Obtained Legally*, TIME NEWSFEED (July 21, 2012), <http://newsfeed.time.com/2012/07/21/colorado-theater-shooter-carried-4-guns-all-obtained-legally>.

73. Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 128 (1987).

treatment of other individual rights contained in the Bill of Rights.<sup>74</sup> At the outset, Professor Lund rejected the idea that the right to bear arms is a collective right—that is, that the right “is restricted to officially organized military units.”<sup>75</sup> A little over twenty years later, the Supreme Court also rejected the collective right theory, holding that the Second Amendment protects an “individual right to possess and carry weapons in case of confrontation.”<sup>76</sup> Beginning with the proposition that the Second Amendment protects the individual right to bear arms, Professor Lund concluded that mandatory insurance for gun owners would be an effective policy for reducing gun violence and that such a law would pass constitutional muster under an individual rights framework.<sup>77</sup> Before exploring the veracity of Professor Lund’s prediction in the wake of the *Heller* decision, it is necessary to consider more fully how an insurance mandate might work and how it would be implemented.

### A. Overview of Liability Insurance

This section begins with a discussion of certain insurance policies that already cover costs related to firearm injuries. This is followed by a discussion of proposed insurance mandates that have been made at the state level. Before discussing the relative merits of an insurance mandate, this section makes some estimates about the costs of gun insurance.

#### 1. Currently Available Insurance Policies

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>78</sup> These insurance policies cover liability in the event of an accident involving the homeowner’s firearm and typically cost between \$130 and \$300 per year.<sup>79</sup> In general, liability insurance does not cover intentional violations of the law. After the Columbine High School shootings in 1999, however, in which two high school seniors

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74. *Id.* at 103–04.

75. *Id.* at 106.

76. *Dist. of Columbia v. Heller*, 554 U.S. 570, 592 (2008).

77. *See* Lund, *supra* note 73.

78. Insurance Information Network of California, Homeowner Insurance: Gun Liability (Feb. 2013), <http://www.iinc.org/articles/460/1/Homeowner-Insurance-Gun-Liability/Page1.html>.

79. *Id.*

murdered twelve and injured twenty-four students, the two assailants' families were able to settle claims brought by some of the victims' families using money from their homeowner's insurance policies.<sup>80</sup> Yet, generally, in order for the insurance company to indemnify the insured, the injury must be an accident. For example, the NRA provides a number of insurance products that cover personal liability, but coverage applies only if the accident occurs while the firearm is being used for hunting or self-defense.<sup>81</sup> The annual premium for the basic policy is \$47, which buys a \$100,000 coverage limit.<sup>82</sup> The annual premium for its most expensive policy is \$200, which buys a \$1 million coverage limit. Members can purchase an additional rider to cover liabilities related to self-defense for an additional \$118.<sup>83</sup> The NRA-endorsed insurance programs are poor models for the type of insurance that would be needed under an insurance mandate because they are ridden with exemptions from coverage. A meaningful insurance mandate would require gun owners to purchase insurance policies that cover liability resulting from tortious conduct.

## 2. *Legislative Proposals*

To date, no state has enacted an insurance mandate for gun owners, but several states have proposed legislation that would act as insurance mandates. The following language is an excerpt from proposed legislation currently pending in the Illinois General Assembly:

Any person who owns a firearm in this State shall 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. A person shall be deemed the owner of a firearm after the firearm is lost or stolen until such loss or theft is

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80. Michael Janofsky, *\$2.53 Million Deal Ends Some Columbine Lawsuits*, N.Y. TIMES (Apr. 20, 2001), <http://www.nytimes.com/2001/04/20/us/2.53-million-deal-ends-some-columbine-lawsuits.html>.

81. See NRA Member Benefits, <http://membership.nrahq.org/benefits.asp>. See also The NRA Endorsed Property & Casualty Insurance Program, <http://www.locktonrisk.com/nrains/Excess.htm>.

82. The NRA Endorsed Property & Casualty Insurance Program, <https://nrains.locktonaffinity.com/Coverage.aspx?PID=7235>.

83. See The NRA Endorsed Property & Casualty Insurance Program, <https://nrains.locktonaffinity.com/Coverage.aspx?PID=2697>.

reported to the police department or sheriff of the jurisdiction in which the owner resides.<sup>84</sup>

A similar bill has been introduced in State Senate of New York:

Any person in this state who shall own a firearm shall, prior to such ownership, obtain and continuously maintain a policy of liability insurance in an amount not less than one million dollars specifically covering any damages resulting from any negligent or willful acts involving the use of such firearm while it is owned by such person. Failure to maintain such insurance shall result in the immediate revocation of such owner's registration, license and any other privilege to own such firearm.

For purposes of this section, a person shall be deemed to be the owner of a firearm if such firearm is lost or stolen until such loss or theft is reported to the police department or sheriff which has jurisdiction in the county, town, city or village in which such owner resides.

Any person who owns a firearm on the effective date of this section shall obtain the insurance required by this section within thirty days of such effective date.<sup>85</sup>

Each of these proposals contains similar provisions with respect to coverage. Both proposals require the gun owner to purchase a policy worth at least \$1 million. In addition, the proposals require the gun owner to purchase insurance that covers both negligent and willful acts. It is important to note that both statutes are written to require gun owners to purchase insurance that covers the acts of others. It does not matter that someone other than the gun owner causes injury with the owner's gun: The insurance must compensate for losses caused by the gun and not merely by the gun owner. In the same vein, if the gun is lost or stolen, the gun owner's insurance would nevertheless cover injuries caused by it. The gun owner can avoid future liability only by reporting the theft or loss to the proper authorities.

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84. S.B. 1935, 98th Gen. Assemb., 1st Reg. Sess. (Ill. 2013).

85. S.B. 3853, 236th Gen. Assemb., Reg. Sess. (N.Y. 2013).

The only significant difference between the two proposals is that the New York proposal specifically lists the consequences of failing to maintain the insurance policy.<sup>86</sup> Under the New York proposal, failure to maintain the insurance policy would result in a revocation of the owner's "registration, license, or other privilege" to own such a firearm. This provision presupposes that the owner would need to register, obtain a license, or have some other privilege to own the firearm. It is unclear what the bill's proponents intended by including this provision, but it suggests that the legislature might also wish to require gun owners to register their guns.

### 3. *Cost of Insuring Gun Owners*

Each of the legislative proposals mentioned above requires gun owners to purchase insurance policies with at least \$1 million in coverage. This provides one clue as to what such insurance might cost. Another clue is the aggregate societal costs of firearm injuries and deaths. The Pacific Institute for Research and Evaluation estimates that the aggregate total cost of firearm injuries and deaths amounted to more than \$174 billion in 2010.<sup>87</sup> The cost is staggering, which raises the question as to whether \$1 million is actually enough. The answer depends on the nature of the injury. The average societal cost per injury resulting in an emergency room visit is \$116,372; being admitted to the hospital costs \$426,200; and a fatality results in a \$4,699,759 bill.<sup>88</sup> So, while a \$1 million coverage limit would be sufficient to cover the costs associated with a serious firearm injury, it would be wholly insufficient to cover the average cost of a fatality. This may be a consequence that advocates of insurance mandates will have to accept, considering that most victims of firearm violence generally are uncompensated in the first place.

It might be reasonable to base a lower estimate of aggregate societal cost on the average societal cost per gun, which came out to about \$645 in 2010.<sup>89</sup> This is a crude estimate. Insurance costs for gun owners may turn out to be even lower, since the average cost per gun figure includes costs that would not be compensated for by insurance

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86. *Id.*

87. Pacific Institute for Research and Evaluation, *Societal Cost per Firearm Injury, United States, 2010*, available at <http://www.pire.org/documents/GSWcost2010.pdf> ("The costs include medical and mental health care costs, criminal justice costs, wage losses, and the value of pain, suffering and lost quality of life.").

88. *Id.*

89. *Id.*

companies, such as societal costs related to firearm suicides or other governmental costs such as lost tax revenue. However, if insurance costs were tied purely to societal costs per gun, a gun owner with only one firearm would pay only \$645 per year, or \$53.75 per month.

Of course, costs could be greater for people who pose a greater risk to society. Much like auto insurance, the insurance industry could devise certain criteria for assessing risk and use the criteria to make upward or downward departures in price. Such factors might include the type and number of weapons owned, whether the owner can demonstrate the ability to secure weapons safely with adequate gun storage, whether the owner has children in the home, and whether the owner has been trained properly with respect to the use and safety of guns.<sup>90</sup> Other criteria common in the automotive insurance industry may also factor into determining a particular individual's risk, such as age, gender, past history, or place of residence. The cost for an elderly woman living in a remote area possessing only a single pistol capable of holding six rounds may be negligible. On the other hand, a nineteen-year-old living in an apartment in a high crime area of a major metropolitan city would likely have a difficult time affording insurance. However, showing proof of a mental evaluation and completion of safety classes could significantly reduce insurance costs for the nineteen-year old.

## **B. The Merits of an Insurance Mandate**

### *1. Potential Benefits*

#### **a. Incentivized Responsible Behavior and Victim Compensation**

An insurance mandate may have potential benefits that other gun reforms do not. Two of those potential benefits have already been discussed: incentivizing responsible gun ownership and compensating victims. If the price of insurance is tied to the risk posed by the gun owner, then, in theory at least, the mandate creates an economic incentive for gun owners to be responsible. People might be dissuaded from purchasing stockpiles or obtaining more dangerous weapons like semiautomatic handguns. 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

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90. Ian Simpson, *Lawmakers propose liability insurance for U.S. gun owners*, REUTERS (Feb. 6, 2013, 3:30 PM), <http://www.reuters.com/article/2013/02/06/us-usa-guns-insurance-idUSBRE91516920130206>.

be unable to avoid the increased costs associated with owning more dangerous weapons. At the same time, the mandate would ensure that more victims are compensated for their losses.

b. Reduced Costs for the Healthcare System

Liability insurance for gun owners could also reduce the cost of healthcare in general. The healthcare costs related to acute gun injuries are often paid directly by public financing—if at all. The costs are absorbed by society because uncompensated care results in an increase in payment rates for everyone. It is estimated that uncompensated care for firearm victims leads to an increase of \$9,209 per person.<sup>91</sup> While private sources, victims, and insurance companies cover about half of the lifetime costs of gunshot wounds, taxpayers end up covering the other half, which amounts to about \$1.1 billion.<sup>92</sup> Admittedly, the extent to which an insurance mandate might reduce the cost of healthcare is predicated on two assumptions: first, that a perpetrator can be identified; and second, that such a perpetrator will have insurance coverage. The hope is that in the long run, guns will be less likely to end up in the hands of the wrong people.

c. Increased Gun Data

Another potential benefit of an insurance mandate would be the production of carefully documented information on gun ownership. Out of necessity, insurance companies would generate massive volumes of business records that would be much more detailed than the FBI's crime reports. Insurance records would be a treasure trove for researchers. Presently, most gun research is based on surveys with relatively low samples sizes. Surveys about gun ownership are particularly troublesome because general surveys about controversial topics may elicit unreliable responses.<sup>93</sup> The insurance industry's business records would provide much better information for researchers.

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91. Hugh Waters, et al., *The economic dimensions of interpersonal violence*, DEP'T OF INJURIES AND VIOLENCE PREVENTION, WORLD HEALTH ORG. x, xi (2004), available at <http://whqlibdoc.who.int/publications/2004/9241591609.pdf>.

92. Philip J. Cook & Jens Ludwig, *The costs of gun violence against children*, in 12 THE FUTURE OF CHILDREN 87, 90, (2002), available at [http://futureofchildren.org/futureofchildren/publications/docs/12\\_02\\_FullJournal.pdf](http://futureofchildren.org/futureofchildren/publications/docs/12_02_FullJournal.pdf).

93. See Robert Farley et al., *Gun Rhetoric vs. Gun Facts*, FACTCHECK.ORG (Dec. 20, 2012), <http://factcheck.org/2012/12/gun-rhetoric-vs-gun-facts/> (referring to Economics professor Carlisle Moody's belief that "[p]eople today are simply more likely to tell survey-takers they do not own a gun . . . because it is less socially acceptable").

Furthermore, the additional information the insurance industry would yield may also assist law enforcement in cracking down on straw purchases. Laws that prohibit straw purchases are difficult to enforce mostly because it is difficult to catch people in the act. However, an insurance mandate could prevent unlawful transfers by making it difficult for the transferor to avoid scrutiny. For example, assume that Mrs. Winchester wants to purchase ten guns that she intends to sell unlawfully. Before purchasing the guns, she would need to present proof of insurance to the seller. The seller would then be required to verify her insurance and remit evidence of the sale to the insurance company. If Mrs. Winchester would like to transfer ownership, she would need to inform her insurance company. If she does not inform her insurance company of the transfer, she will be forced to pay insurance at a higher rate since the insurance company will assume she still owns ten guns. Unless she claims that the guns were lost or stolen, Mrs. Winchester will not be able to avoid paying the higher premiums. If Mrs. Winchester claims that she lost ten guns, surely the authorities will be suspicious. Thus, if Mrs. Winchester truly wishes to be a straw purchaser, her alternatives are to continue paying insurance on the resold guns or arouse the suspicions of the authorities.

## 2. *Potential Criticisms*

### a. Disparate Impact on the Poor

Critics of the insurance mandate may attack the law on a number of different grounds. For example, they might claim that such a law will disproportionately affect the poor and hinder their ability to defend themselves.<sup>94</sup> This criticism overlooks the fact that guns are already fairly expensive, at least when purchased directly from a dealer. The suggested retail price for a .40 caliber Smith & Wesson handgun, the cheapest firearm advertised on their website, is \$449.<sup>95</sup> The suggested retail price for the cheapest pistol sold by Colt is \$649,

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94. NRA Institute for Legislative Action, *Outrageous Anti-Gun Bill Proposed in the Land of Lincoln!*, (Feb. 2009), <http://www.nraila.org/legislation/state-legislation/2009/2/outrageous-anti-gun-bill-proposed-in-th.aspx?s=illinois+and+insurance+and+liability&st=&ps=>.

95. Smith & Wesson, <http://www.smith-wesson.com> (follow “Handguns” hyperlink for pricing information) (last visited Oct. 6, 2013).

and the next cheapest pistol is \$928.<sup>96</sup> In addition, ammunition can be fairly expensive as well, sometimes costing more than a dollar per round.<sup>97</sup> Professor Lund anticipated the argument that an insurance mandate might discriminate against the poor, but dismissed it stating “[t]here is some truth in this objection, but it could be applied as easily to any other commodity that is distributed by means of the price mechanism—for example, automobiles, burglar alarms, or watch dogs.”<sup>98</sup> The research for this Note has not revealed any Second Amendment challenges against ammunition and weapons dealers for setting their prices too high. The point is that there will be an added cost to owning a gun; however, that cost is not outrageous when compared with other costs incidental to gun ownership.

b. Compliance

As with any gun control proposal, proponents will have to respond to the usual argument that criminals, by definition, do not follow the law.<sup>99</sup> But the compliance issue is more complicated in the context of an insurance mandate. For example, assume that a criminal complies with an insurance mandate and then willfully commits a robbery. Would insurance pay his court fees? Surely it would not. Would insurance provide any criminal restitution and compensate the victim for his losses? It is not clear. These are some very practical issues that would need to be worked out in the legislature.

c. Incentivizing Reckless Behavior

The policy goals behind an insurance mandate are based, in part, on the idea that requiring gun owners to purchase insurance gives them a “financial incentive to think about and implement safety measures, some of which would surely be developed in response to insurance-cost-driven demand.”<sup>100</sup> Although most people who commit crimes with guns are likely not thinking about insurance costs (and it is unlikely that they will purchase insurance in the first place),

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96. Colt Manufacturing Company, *2013 Retail Price List*, <http://www.coltsmfg.com/Catalog/ColtPistols.aspx> (PDF listed at bottom of page as “2013 Retail Price List”) (last visited Oct. 6, 2013).

97. The Sportsman’s Guide, *Pistol Ammo*, <https://www.sportsmansguide.com/net/browse/pistol-ammo.aspx?c=95&stk=1> (last visited on Oct. 6, 2013).

98. Lund, *supra* note 73, at 130 n.60.

99. See, e.g., Weisman, *supra* note 41.

100. Cohen, *supra* note 7.

for law-abiding gun owners, insurance would at least provide an incentive to take precautions against accidental firearm injuries.

### III. The Constitutionality Of Imposing An Insurance Mandate On Gun Owners

#### A. Background and Case Law

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

– U.S. CONST. amend II

The text of the Second Amendment is one of the most problematic enigmas for both historians and lawyers. Aside from the academic controversy surrounding the meaning of the Second Amendment, only rarely has the Supreme Court interpreted its meaning. Before 2008, the Supreme Court had not addressed the amendment's meaning since 1939 in *United States v. Miller*,<sup>101</sup>—and even then it did so only briefly. In *Miller*, the Court held that the National Firearms Act of 1934,<sup>102</sup> which required certain types of weapons to be registered, did not violate the Constitution because the weapon at issue, a sawed-off shotgun, lacked a “reasonable relationship to the preservation or efficiency of a well-regulated militia.”<sup>103</sup> This holding is essentially meaningless today since short-barreled shotguns are common in military use.<sup>104</sup> However, circuit courts faced with Second Amendment challenges have cited *Miller* for the proposition that the amendment “either applies only to the states’ rights to maintain militias, or requires an individual to demonstrate a reasonable relationship between his possession of a weapon and ‘the preservation or efficiency of a well regulated

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101. *United States v. Miller*, 307 U.S. 174 (1939).

102. National Firearms Act, Pub. L. No. 474, 48 Stat. 1236 (1934) (superseded by the Internal Revenue Code of 1939; codified at ch. 53 of the Internal Revenue Code of 1954; codified as amended at I.R.C. §§ 5801–72 (2013)).

103. *Miller*, 307 U.S. at 178.

104. See *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942) (rejecting *Miller*'s reasoning as “outdated” since almost all small firearms may be useful in modern warfare), *cert. denied*, 319 U.S. 770 (1943).

militia.”<sup>105</sup> The idea that the Second Amendment only protects rights associated with militias is called the “collective rights” theory.

The Supreme Court rejected the collective rights theory in *District of Columbia v. Heller*, holding that the Second Amendment protects an individual’s right to possess a firearm irrespective of one’s affiliation with a militia, as well as the right to use firearms for lawful purposes, such as self-defense within the home.<sup>106</sup> *Heller* involved a police officer who challenged a District of Columbia law that made it a crime to carry an unregistered firearm and prohibited the registration of handguns.<sup>107</sup> Taken together, the two provisions of the law effectively operated as a de facto handgun ban. The Court struck down the law as a violation of the Second Amendment.<sup>108</sup>

Writing for the majority, Justice Antonin Scalia provided an extensive historical analysis of the meaning of the Second Amendment. Justice Scalia’s originalist interpretation relied on a historical inquiry into the meaning of the Constitution as it would have been understood at the time of ratification. The central task before the Court was to determine whether the Second Amendment’s prefatory clause controlled its operative clause.<sup>109</sup> Specifically, the issue was whether the “right to bear arms” was limited by the phrase “a well regulated militia.”<sup>110</sup> If the prefatory clause was controlling, then the Amendment would only protect the right to bear arms related to militia purposes.<sup>111</sup> Justice Scalia explained that the prefatory clause announces a purpose, but that the purpose does not limit or expand the scope of the right.<sup>112</sup> In his view, the Second Amendment codified a pre-existing right, the right to use firearms for defensive purposes.<sup>113</sup>

Interestingly, Justice Scalia relied on post-ratification statements to justify his interpretation of the Second Amendment.<sup>114</sup> However, as Justice John Paul Stevens pointed out in his dissent, the Court’s

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105. Adam Small, *Reviving “Law Office History”: How Academic and Historical Sources Influence Second Amendment Jurisprudence*, 45 AM. CRIM. L. REV. 1213, 1217 (2008).

106. *Dist. of Columbia v. Heller*, 554 U.S. 570, 573–626 (2008).

107. D.C. CODE §§ 7–2501.01(12), 7–2502.01(a), 7–2502.02(a)(4) (2001).

108. *Heller*, 554 U.S. at 635.

109. *Id.* at 577–78.

110. *Id.*

111. *Id.*

112. *Id.* at 575.

113. *Id.* at 598–602.

114. *Id.* at 605–19.

reliance on post-ratification statements is “particularly puzzling” since they are “generally viewed as the least reliable source of authority for the intent of any provision’s drafters.”<sup>115</sup> As an originalist, one would expect Justice Scalia to have confined his analysis to pre-ratification sources of authority. Yet, Justice Scalia relied on several historical authorities, both pre- and post-ratification, and made no attempt to address the veracity of scholars who have reached the opposite conclusion about the meaning of the Second Amendment—i.e., a collective right interpretation. For example, in 2002, the Ninth Circuit reached the opposite conclusion after an extensive and thoroughly researched examination of the historical record surrounding the adoption of the Second Amendment.<sup>116</sup> In criticizing Justice Stevens’ dissent, Justice Scalia balked at “the proposition, unsupported by any evidence, that different people of the founding period had vastly different conceptions of rights to keep and bear arms.”<sup>117</sup> As a general matter, this cannot possibly be true.

### 1. *The Absence of a Clear Analytical Framework*

In addition to the interpretational issues, *Heller* provides little guidance for future courts considering Second Amendment challenges. The decision clarified that the Second Amendment protects an individual’s right to bear arms for the purpose of self-defense, but it failed to articulate *why* it protects that right. Instead of attempting to provide an analytical framework to determine the scope of the Amendment, the Court merely articulated a list of laws that are presumptively valid, such as laws prohibiting felons or the mentally ill from owning guns.<sup>118</sup> The list creates even more confusion because the presumptively valid laws mentioned cannot be supported by the logic used to invalidate the handgun ban. If the core right that the Second Amendment protects is the right to use a gun for self-defense, then how can the Court justify disallowing the mentally ill from defending themselves? While prohibiting felons from owning a

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115. *Id.* at 662 (Stevens, J., dissenting).

116. *Silveira v. Lockyer*, 312 F.3d 1052, 1092 (9th Cir. 2002) (“the Second Amendment affords only a collective right to own or possess guns or other firearms”).

117. *Heller*, 554 U.S. at 604–05.

118. *Id.* at 626–27 (“Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”).

gun may seem like good policy, the justification for such a prohibition loses its appeal when applied to nonviolent felons convicted of crimes of tax evasion or insider trading.<sup>119</sup> The Court makes no attempt to explain why the laundry list of presumptively valid laws are constitutional despite the fact that during the nation's founding era, there were no laws prohibiting the mentally ill or convicted felons from owning guns.<sup>120</sup>

Although it is unclear what type of analysis to apply in future cases, the Court provided some guidance on what type of analysis *not* to apply. The Court opted against a rational basis test.<sup>121</sup> Under a rational basis test, a handgun ban would be upheld if the government could demonstrate that the ban was rationally related to a legitimate government purpose. The Court further rejected an interest-balancing test,<sup>122</sup> although Justice Scalia implicitly applied an interest-balancing test when he analyzed why Americans prefer handguns to rifles for self-defense.<sup>123</sup> Regardless, since *Heller*, Second Amendment challenges have flooded lower courts,<sup>124</sup> and there has been a lack of uniformity in the way those cases have been decided.

a. Divergent Circuit Court Interpretations of *Heller*

Most courts, relying in part on the presumptively lawful dicta, have analogized various challenged statutes to those enumerated on the laundry list.<sup>125</sup> Some courts have rejected this analogy approach, requiring gun laws to have an independent justification under some form of intermediate scrutiny.<sup>126</sup> Under the analogy approach, courts generally look to one of the prohibitions on the list, such as the prohibition against felons, and uphold statutes that are more narrowly defined than those. For example, in *United States v. White*, the Eleventh Circuit upheld 18 U.S.C. § 922(g)(9), which prohibits violent

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119. See generally 7 U.S.C. § 221 (2013).

120. Adam Winkler, *Heller's Catch-22*, 56 UCLA L. REV. 1551, 1563 (2009).

121. *Heller*, 554 U.S. at 628.

122. *Id.* at 634–35.

123. *Id.* at 628.

124. Law Ctr. to Prevent Gun Violence, *The Second Amendment Battleground: Victories in the Courts and Why they Matter* (June 2012) <http://smartgunlaws.org/wp-content/uploads/2012/07/web-victories-in-the-courts.pdf> (“Since *Heller*, federal and state courts have issued over 600 decisions on Second Amendment challenges nationwide”).

125. Winkler, *supra* note 120, at 1566–67.

126. See *United States v. Skoien (Skoien I)*, 587 F.3d 803, 808, 815 (7th Cir. 2009), *vacated*, No. 08-3770, 2010 WL 1267262 (7th Cir. Feb. 22, 2010); see also *United States v. Chester*, 628 F.3d 673, 679 (4th Cir. 2010).

felons from transporting firearms in interstate commerce, because the law was narrower than the presumptively valid Section 922(g)(1), which prohibits both violent and nonviolent felons from owning guns.<sup>127</sup>

The Seventh Circuit, ruling on 18 U.S.C. § 922(g)(9), reached the same result, but for a different reason in *United States v. Skoien* (“*Skoien I*”).<sup>128</sup> In *Skoien I*, the court devised a two-part test.<sup>129</sup> First, the court called for a determination of whether the regulated conduct was protected by the Second Amendment, as it was understood at the time of ratification.<sup>130</sup> Second, if the regulated conduct was in fact protected by the Constitution, then courts should apply a means-end scrutiny at a level that is appropriate based on the content of the law itself.<sup>131</sup> The court explained that “the degree of fit required between the means and the end will depend on how closely the law comes to the core of the right and the severity of the law’s burden on the right.”<sup>132</sup> The court remanded the case because the government had no way of knowing that it would be required to carry its burden of proof under an intermediate scrutiny standard. When the Seventh Circuit, sitting en banc, reheard *United States v. Skoien* in 2010 (“*Skoien II*”), it upheld section 922(g)(9), arguing both that the meaning of the Second Amendment was historically understood as not protecting the rights of criminals to own weapons, and that the law was substantially related to an important governmental objective.<sup>133</sup>

In 2011, the Fourth Circuit merged the original analogy approach with the *Skoien* approach in *United States v. Masciandaro*.<sup>134</sup> The case involved a challenge to a federal law that prohibited carrying a loaded weapon inside a vehicle in a national park.<sup>135</sup> The defendant claimed that he frequently slept in his car for business trips and needed the gun for self-defense.<sup>136</sup> Thus, *Masciandaro* placed the core right of

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127. *United States v. White*, 593 F.3d 1199, 1205–06 (11th Cir. 2010).

128. *Skoien I*, 587 F.3d at 808.

129. In 2010, the Fourth Circuit adopted this approach in *United States v. Chester*, 628 F.3d 673, 677 (4th Cir. 2010).

130. *Skoien I*, 587 F.3d at 808–09.

131. *Id.* at 809.

132. *Id.*

133. *United States v. Skoien (Skoien II)*, 614 F.3d 638, 640–45 (7th Cir. 2010).

134. *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011).

135. *Id.* at 459.

136. *Id.* at 465.

self-defense, established in *Heller*, directly at issue. Applying an intermediate level of scrutiny, the court upheld the law as “reasonably adapted to a substantial governmental interest,” but also held that the law was “analogous to the litany of state concealed carry prohibitions specifically identified as valid in *Heller*.”<sup>137</sup> In applying intermediate scrutiny, the court explained that the government has a substantial interest in “providing for the safety of individuals who visit and make use of national parks.”<sup>138</sup> Because the government will always have such an interest, the only question to be resolved under this framework is the limit of such an interest. This is probably what Justice Scalia hoped to avoid when he explicitly rejected interest-balancing in *Heller*.<sup>139</sup>

It is difficult to understand how Justice Scalia hopes to avoid all forms of interest-balancing. In the total absence of any interest-balancing, every single law implicating the Second Amendment would need to be justified independently using a historical analysis. While a historical analysis reveals that the Second Amendment, as understood at the time of ratification, protects an individual’s right to possess firearms for self-defense, it cannot speak to the laws that the founders did not foresee. During the Founding Era, laws banning handguns in school zones did not exist.<sup>140</sup> Laws prohibiting ex-felons from owning firearms emerged in the 1920s and 1930s.<sup>141</sup> It cannot be said that these presumptively valid laws enumerated in *Heller* were part of a tradition that existed in the founding era. It is clear that the Court will need to revisit the doctrinal issues raised by *Heller*, but until they do, lower courts will have to perform some form of ad hoc analogy or interest-balancing test.

In the five months following the *Heller* decision, federal courts handed down over fifty rulings on the constitutionality of gun control laws.<sup>142</sup> In each of those decisions, the courts upheld the challenged law.<sup>143</sup> Such laws have included those that prohibit ex-felons from

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137. *Id.* at 473–74.

138. *Id.*

139. *Dist. of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008).

140. Winkler, *supra* note 120, at 1564.

141. *See, e.g.*, Federal Firearms Act, 15 U.S.C. §§ 901–09 (1938) (repealed 1968).

142. Nelson R. Lund et al., *Civil Rights: The Heller Case*, 4 N.Y.U. J.L. & LIBERTY 293, 309 (2009).

143. *Id.* at 309–10.

having guns,<sup>144</sup> and carrying guns in places such as post offices and schools.<sup>145</sup> These cases are simple for the courts since they fall into the safe harbor articulated in *Heller*.<sup>146</sup> Courts have also upheld laws that tend to stray away from the list of “presumptively valid” laws, such as bans based on misdemeanor convictions for domestic violence or laws restricting the ability of substance abusers and illegal aliens to obtain firearms.<sup>147</sup> An insurance mandate does not bear any of the characteristics of the laws enumerated in *Heller*’s safe harbor list. However, *Heller* is the only Supreme Court case that clearly adopts the individual right theory. Thus, any court faced with a Second Amendment challenge must consider the individual right theory.

## 2. *The Constitutionality of an Insurance Mandate*

As a threshold matter, it must be determined whether an insurance mandate affects a right protected by the Second Amendment.<sup>148</sup> The answer depends on how the issue is framed. For instance, the question could be whether the Second Amendment protects the right to possess a gun without purchasing insurance. If *Heller* stands for the proposition that the Second Amendment protects the right to possess guns for the purpose of self-defense, then an insurance mandate would not necessarily interfere directly with that right since individuals could still possess guns while complying with the law. There is a constitutional right to travel between states,<sup>149</sup>

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144. See, e.g., *Kilgore v. Drew*, Civ. A. No. 9:08-02299-HFFBM, 2008 WL 4279565 (D.S.C. Sept. 18, 2008).

145. See, e.g., *United States v. Dorosan*, Crim. A. No. 08-042, 2008 WL 2622996 (E.D. La. July 7, 2008) (upholding a ban on guns on postal property); *United States v. Lewis*, Crim. No. 2008-45, 2008 U.S. Dist. LEXIS 103631 (D.V.I. Dec. 24, 2008) (upholding a ban on guns in school zones).

146. *Heller*, 554 U.S. at 626–27 (“Nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”)

147. See generally *United States v. Booker*, 570 F. Supp. 2d 161 (D. Me. 2008) (misdemeanor domestic violence convictions); *United States v. Guerrero-Leco*, No. 3:08cr118, 2008 WL 4534226 (W.D.N.C. Oct. 3, 2008) (illegal aliens); *United States v. Yancey*, No. 08-cr-103-bbc, 2008 WL 4534201 (W.D. Wis. Oct. 3, 2008) (substance abusers).

148. See *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (“The first question is whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee.”) (internal citations omitted).

149. *Shapiro v. Thompson*, 394 U.S. 618, 629–31 (1969).

yet requiring a car owner to have insurance does not violate that right.

The question becomes more difficult, however, if an insurance mandate could effectively prohibit someone from owning a gun altogether. Would the insurance mandate be unconstitutional if, because of the cost, it operated as a complete deprivation of the right to bear arms for the poor? Phrasing the issue in this manner may result in a court applying strict scrutiny. In general, courts will apply strict scrutiny when a law discriminates against a suspect class<sup>150</sup> or burdens a fundamental right.<sup>151</sup> Since wealth classifications do not trigger strict scrutiny,<sup>152</sup> the question becomes whether an insurance mandate interferes with a fundamental right. In *McDonald v. Chicago*, the Supreme Court held that the right to bear arms is a fundamental right and applies to states as a right incorporated by the Due Process Clause of the Fourteenth Amendment.<sup>153</sup> The Court's precedents involving wealth discrimination and fundamental rights are instructive on this point. In *Griffin v. Illinois*, the Court invalidated a state law that prevented an indigent criminal defendant from obtaining a transcript of his trial for use on appeal.<sup>154</sup> Requiring indigents to pay for their transcripts operated as a de facto discrimination against the poor because they were completely unable to afford them.<sup>155</sup> In *Bullock v. Carter*, the Court similarly invalidated a filing-fee requirement for getting on a primary election ballot in Texas.<sup>156</sup> Because the fee was several thousand dollars and there were "no reasonable alternative means of access to the ballot," inability to pay resulted in an absolute denial of the right to run for office.<sup>157</sup> In sum, if an insurance mandate were to foreclose the possibility of gun ownership for certain individuals, then there might be a legitimate concern about the law's constitutionality.

On the other hand, the insurance mandate might pass constitutional muster if it provides alternatives to purchasing

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150. The use of strict scrutiny for certain classes of individuals was first conceived in *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

151. See, e.g., *Roe v. Wade*, 410 U.S. 113, 155 (1973).

152. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973) ("this Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny").

153. *McDonald v. City of Chi.*, 130 S. Ct. 3020, 3036–42 (2010).

154. See generally *Griffin v. Illinois*, 351 U.S. 12 (1956).

155. *Id.* at 18.

156. See generally *Bullock v. Carter*, 405 U.S. 134 (1972).

157. *Id.* at 149.

insurance.<sup>158</sup> For example, in lieu of purchasing insurance, a gun owner could submit to an annual mental evaluation and drug test, or show proof that the gun is still in his or her possession. As a matter of policy, these other reforms are generally desirable, but are often fiscally untenable. The government would only need to provide an opportunity for alternative compliance to gun owners who can demonstrate an inability to afford the insurance, not to everyone.<sup>159</sup> There likely would not be a constitutional issue posed under the Equal Protection or Due Process Clauses so long as the insurance mandate does not result in a total disarmament of the poor. This, of course, assumes that the insurance mandate violates the Second Amendment only as applied to certain individuals.

The Court might find that the insurance mandate directly interferes with the core right protected by the Second Amendment because insurance companies declined to insure certain risks. Applying *Heller*, the first question to ask is whether the conduct at issue was understood to be within the scope of the right at the time of ratification.<sup>160</sup> The proposed insurance mandate would make it a crime to possess a gun without insurance. Obviously, the Founders would have never anticipated the issue of purchasing liability insurance before owning a gun. Hence, a person alive at the time of the Second Amendment's ratification would not have understood the amendment as protecting a right to possess a gun without insurance. A historical inquiry really provides very little insight, which leaves courts at a stopping point. In the future, the Court will undoubtedly need to do one of two things. The Court should either clarify why the "presumptively valid" restrictions are valid in the first place, or the Court should sanction at least some form of a balancing test. The analogy approach, although useful in some cases, is superficial and falls short of sound constitutional jurisprudence.<sup>161</sup>

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158. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 21 (1973) (noting that in cases invalidating fee requirements that "no constitutional violation would have been shown if the State had provided some 'adequate substitute'").

159. *Id.* at 23 (noting that the wealth discrimination cases invalidated laws as applied to individuals whose lack of personal resources resulted in an absolute deprivation of a right).

160. *Dist. of Columbia v. Heller*, 554 U.S. 570, 627 (2008).

161. See Jeff Golimowski, Note, *Pulling the Trigger: Evaluating Criminal Gun Laws in A Post-Heller World*, 49 AM. CRIM. L. REV. 1599 (2012) (advocating the use of time, manner, and place criteria like those used in First Amendment cases in evaluating Second Amendment challenges).

### Conclusion

Notwithstanding the doctrinal issues in *Heller*, the Court did not foreclose the possibility that an insurance mandate would survive a constitutional challenge, provided it does not result in an absolute deprivation of the rights of lawful gun owners.<sup>162</sup> Ultimately, the justification for the mandate rests in part on the idea that some people should not be deprived of the right to own a gun. Although gun control advocates might prefer an outright ban, such an idea overlooks the reality that firearms can provide a legitimate means of protection. The right of self-preservation is at the very heart of social contract theory: We give up certain basic freedoms in order to receive greater protections in the interest of self-preservation and personal prosperity. Thus, if the government chooses to burden the right of self-preservation, it should prove that the proposed laws will nevertheless secure the safety of its constituency to a greater extent than the constituency could itself. This logic is appealing but also evident in our current laws that prohibit citizens from owning extremely dangerous weapons. If average citizens could individually own rocket launchers, they undoubtedly would have a very powerful means of self-preservation; however, such a right would clearly make society less safe as a whole. An insurance mandate, although imposing a cost on the ownership of guns, would leave the right to possess firearms for self-defense largely undisturbed.

States that are considering whether to enact an insurance mandate for gun owners should be mindful of the fact that the *Heller* decision rests on unstable grounds and that divergent approaches to applying *Heller* have already emerged among the circuit courts. States should seek ways to minimize the burden caused by the mandate, since any form of means-end scrutiny will require balancing the states' interest in reducing gun violence against the burden placed on gun owners. Although Scalia eschewed the use of balancing tests in *Heller*,<sup>163</sup> such tests are difficult to avoid, and indeed, several of the circuit courts have embraced them.<sup>164</sup> Thus, policymakers should

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162. See *Heller*, 554 U.S. at 636 (“The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns. But the enshrinement of constitutional rights necessarily takes certain policy choices off the table.”).

163. *Id.* at 634–35.

164. *United States v. Marzarella*, 614 F.3d 85 (3d Cir. 2010); *United States v. Chester*, 628 F.3d 673, 677 (4th Cir. 2010); *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 801 (10th Cir. 2010).

minimize the burden that an insurance mandate could cause in order to save the law from being held unconstitutional. Since the burden is largely financial, states should look for ways to limit the cost of insurance by placing ceilings on the amount of administrative expenses and shareholder dividends that insurance companies make, or through tort reforms. Of course, one would expect that since insurance costs are correlated with the remunerative costs of covering the insured's liabilities, costs should decrease as firearm injuries decrease. This means that the success of an insurance mandate may depend on how successful gun safety reforms are in general.

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