

Insurance as Gun Control?

A liability insurance mandate for firearm owners may pass constitutional muster, but its effect on violent crime would be modest.

BY STEPHEN G. GILLES AND NELSON LUND

In response to the 2012 massacre at Sandy Hook Elementary School in Newtown, Conn., some legislatures have begun to consider new regulations requiring gun owners to purchase liability insurance. Unlike similar requirements for automobile owners, such laws could easily be written in ways that would render them unconstitutional. This article explores some of the constitutional pitfalls, but concludes that a carefully drafted statute would probably be upheld under current constitutional doctrine. The benefits to public safety would be modest, but such a regulation would be preferable to many politically popular gun control proposals that would be ineffective, unconstitutional, or both.

The Second Amendment protects “the right of the people to keep and bear Arms.” This right is not unqualified, but its core purpose is to protect the individual’s interest in self-defense. Regulatory measures that may decrease the misuse of guns frequently also compromise the ability of individuals to defend their lives. Thus, gun control laws make tradeoffs between the legitimate interests of the individual and the government, and the judiciary’s emerging Second Amendment jurisprudence will largely be concerned with policing those tradeoffs.

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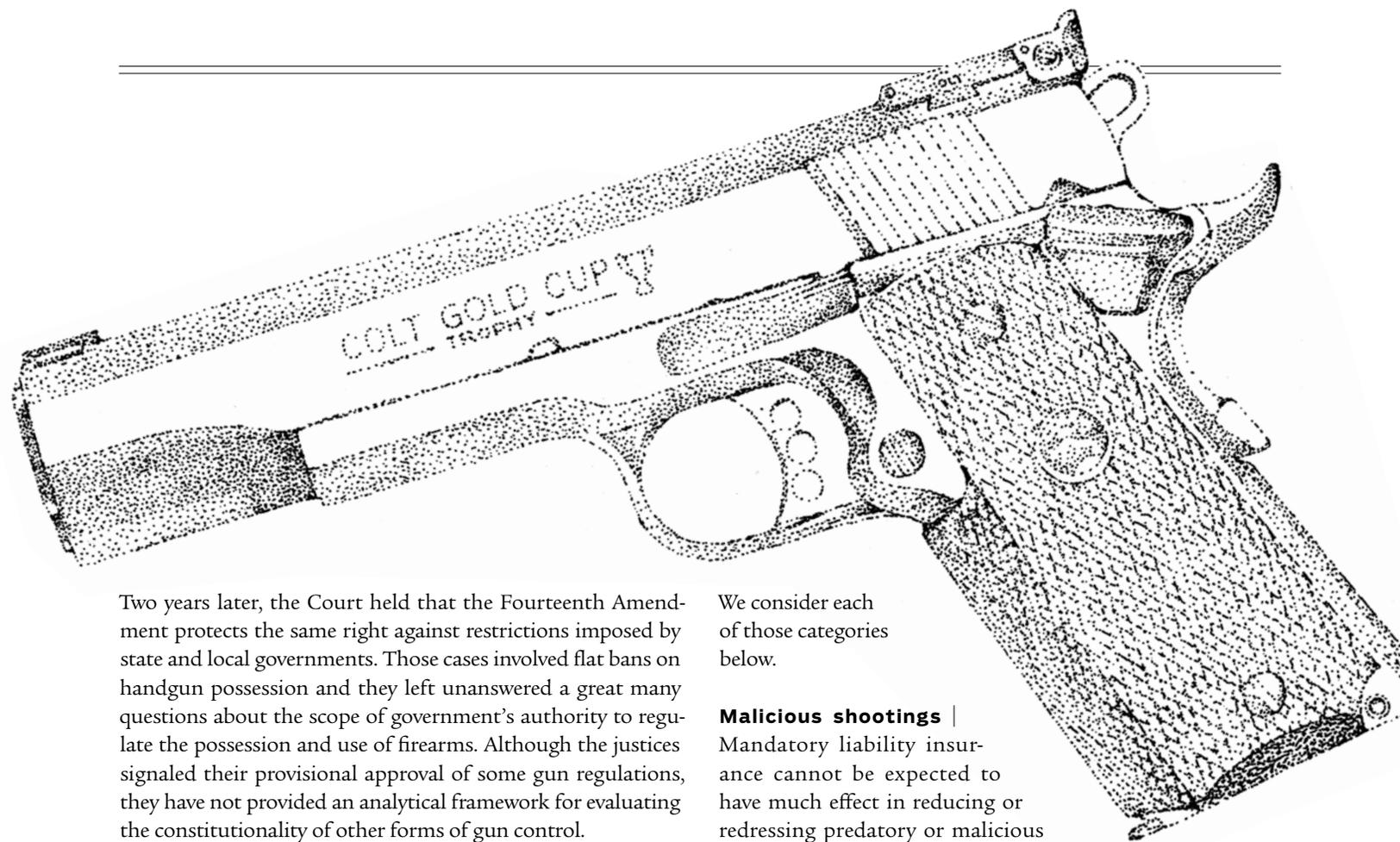
This article summarizes their paper “Mandatory Liability Insurance for Firearm Owners: Design Choices and Second Amendment Limits,” *Engage: The Journal of the Federalist Society Practice Groups*, Vol. 14, No. 1 (March 2013).

The most important advantage of using an insurance requirement as an alternative to direct government regulation of firearms ownership arises from the incentives that insurance companies face in a competitive market. Competitive pressures would lead insurance carriers to keep the premiums for low-risk gun owners low, while charging higher premiums to gun owners who are more likely to cause injuries to other people. At the margin, such a system can be expected to reduce the possession and use of firearms by high-risk individuals, and the threat of increased premiums might induce greater care in using and storing firearms by those who were previously uninsured. Mandatory insurance would also increase the likelihood that victims of firearms-related injuries would receive some compensation for their injuries through the tort system.

Insurance companies have better incentives than the government to acquire and use the information needed to distinguish high-risk from low-risk individuals. For that reason, a mandatory insurance system is more likely to make reasonable tradeoffs between public safety and individual rights than a system in which legislatures make politically driven decisions about who may possess what kinds of firearms. If such a system were adopted, however, great care would be required to avoid compromising the Second Amendment rights of individuals.

The Second Amendment Framework

In 2008, the Supreme Court held that the Second Amendment requires the federal government to permit law-abiding citizens to keep a handgun in the home for the purpose of self-defense.



Two years later, the Court held that the Fourteenth Amendment protects the same right against restrictions imposed by state and local governments. Those cases involved flat bans on handgun possession and they left unanswered a great many questions about the scope of government's authority to regulate the possession and use of firearms. Although the justices signaled their provisional approval of some gun regulations, they have not provided an analytical framework for evaluating the constitutionality of other forms of gun control.

The lower federal courts have coalesced, quickly and fairly uniformly, around such a framework. The emerging consensus of these courts can be roughly summarized as follows: Some regulations, primarily those that are "longstanding," are presumed not to infringe the right protected by the Second Amendment. Regulations that severely restrict the core right of self-defense are subject to "strict scrutiny," meaning that they will not be upheld unless they are narrowly tailored to promote public safety without putting unnecessary burdens on individual citizens. Regulations that do not severely restrict the core right of self-defense are subject to "intermediate scrutiny," meaning that the government must demonstrate that the regulation is well suited to advance the public interest in preventing the misuse of guns.

What Should Mandatory Liability Insurance Cover?

For our purposes here, firearms-related injuries fall into the following categories:

- The gun owner intentionally shot the plaintiff with no plausible justification.
- The gun owner intentionally shot the plaintiff with a plausible self-defense justification.
- The gun owner accidentally shot the plaintiff.
- The gun owner did not shoot the plaintiff, but the plaintiff was injured by the owner's firearm under circumstances in which the owner might be liable in tort for the plaintiff's injuries.

We consider each of those categories below.

Malicious shootings |

Mandatory liability insurance cannot be expected to have much effect in reducing or redressing predatory or malicious gun crimes, the vast majority of which are committed by habitual lawbreakers who would be unlikely to comply with such a regulation. The mandate may have some negative effect on "crimes of passion" committed by individuals who had previously been law-abiding citizens, but such incidents are relatively uncommon.

Whatever its benefits, an insurance mandate intended to cover these types of shootings would face serious legal obstacles. Most states prohibit liability insurance for intentional wrongs because such coverage undermines deterrence by enabling wrongdoers to shield their personal assets. Of course, a state legislature could decide to override this public policy, but why do so?

The risk that insurance coverage for deliberate shootings would undermine deterrence is a real one. Granted, the criminal sanctions for homicide are severe enough that the deterrent impact of tort liability for wrongful death may be distinctly secondary. Yet that backstop still matters, particularly for potential killers with substantial assets who could afford top-shelf criminal defense counsel. Criminal cases against them may fail in the face of the high burden of proof placed on prosecutors, yet succeed under the lower burden of proof that plaintiffs must meet in tort cases. Insurance coverage would give plaintiffs an incentive to settle within the policy limits rather than pursue the wrongdoers' personal assets.

Even if a state legislature elected to permit or require insurance coverage for deliberate shootings, it is doubtful that liability insurers would agree to sell these policies. Insurers generally exclude intentional wrongs from liability coverage for reasons

closely related to those that underlie the public policy objection. Insurers fear the “moral hazard” that liability insurance for intentional wrongs would create: an insured knowing that he is indemnified for the damages flowing from an intentional tort, and that the insurer will have to defend him if he is sued, would increase the likelihood that the insured would commit the intentional wrong. To avoid that perverse effect, standard homeowners’ policies generally exclude losses “expected or intended from the standpoint of the insured.” In recent years, many insurers have also added a “criminal acts” exclusion.

Legislation demanding that gun owners purchase a kind of liability insurance that the law generally forbids in other contexts, and that insurers might not even be willing to offer, would probably violate the Second Amendment. In the likely event that such insurance proved to be unavailable, the insurance mandate regulation would be unconstitutional because it would constitute a de facto ban on gun ownership. If insurance were available, it would likely be at exorbitant rates that reflected insurers’ aversion to moral hazard and their ability to exploit the compulsory-purchase requirement. Here again, the regulation should be struck down because it would amount in practice to a confiscatory tax on gun ownership rather than a reasonable effort to internalize the expected accident costs of firearms. Speculative claims that such a regulation would have a meaningful effect on the small number of impetuous crimes by generally law-abiding people would fall far short of meeting the judiciary’s strict scrutiny test.

Colorable self-defense | Mandatory insurance coverage makes more sense in cases in which the gun owner intentionally shot the tort plaintiff but the owner has a plausible self-defense justification.

Currently, courts facing coverage disputes in homeowners’ liability insurance cases falling within this category are divided. Some hold that intentional-act exclusions bar coverage while others resist that conclusion, reasoning that the insured acted to prevent injury to himself rather than to injure another. Given the vagaries of self-defense law and the uncertainty over how a jury will evaluate a plausible claim of self-defense, many gun owners would benefit from this liability coverage and the correlative expansion of the insurer’s duty to defend against tort suits. An insured who is found by a jury to have used excessive force in self-defense, or to have made an unreasonable decision about whether it was necessary to act in self-defense at all, has in many cases made a mistake while acting “intentionally” in difficult and unintended circumstances—as has many a negligent driver or physician. Insurers would probably be willing to sell this coverage, which would provide greater assurance of some compensation for the victims of unreasonable but arguably legitimate conduct (along with substantial benefits to many gun owners). If insurers proved willing to offer policies at a price that did not substantially exceed their costs, a regulation requiring such coverage would probably survive intermediate scrutiny by the courts.

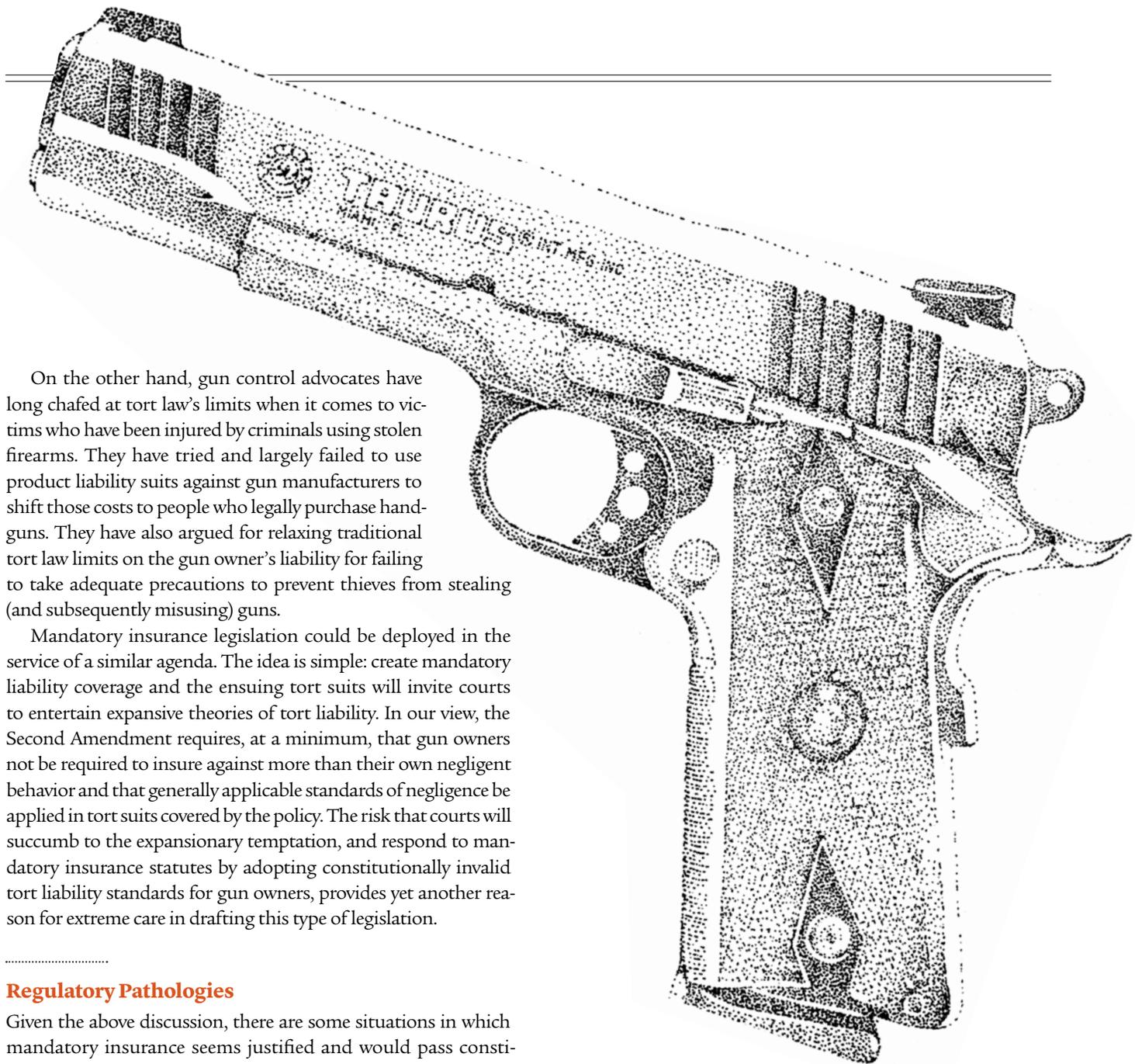
Accidental shootings | In these types of shootings, the man-

dated coverage would essentially duplicate the personal liability coverage already provided by a standard homeowners’ policy—although, depending on the minimum dollar amount mandated, it might increase that coverage. A statute that allowed homeowners’ liability insurance to satisfy its requirements would be legally inconsequential as applied to homeowners. Gun owners who are not homeowners, however, typically do not have personal liability insurance. Renters’ insurance is widely available but (in contrast to homeowners coverage) is purchased by only a minority of potential insureds. Mandatory insurance coverage would thus impose a new liability insurance cost on firearms owners who do not own their own homes. Some might purchase general rental coverage, while others would elect firearm-specific policies. Assuming that the premiums are set in an actuarially fair way, this aspect of the regulation would increase the assets available to compensate plaintiffs in accidental shooting cases while giving insurance companies incentives to police the behavior of gun owners through the price mechanism.

A statute that excluded firearms accidents from homeowners’ and renters’ liability coverage and required *separate* firearms liability insurance, on the other hand, should receive skeptical judicial scrutiny. Why tamper with an existing homeowners’ liability market that appears to be functioning well? And why deny renters the option of purchasing umbrella liability coverage that would indemnify them for firearms-related accidents? We cannot think of any satisfactory answer to either question. On the other hand, illegitimate reasons are not hard to imagine: to create an aura of stigma around owning a firearm, or to create a special category of liability insurance for which state regulators might encourage insurers to overcharge. Unless the government could demonstrate that such a new regulation would advance its legitimate goals better than the existing alternative, this requirement would not survive even intermediate scrutiny.

That said, firearms liability insurance mandates *should* require that homeowners’ policies include separate riders for firearms coverage that specify the additional premium the insured is being charged and the reasons for any upward or downward adjustments. In addition to making it more difficult for insurers to overcharge gun owners, transparent firearms premiums will enhance insurers’ ability to convey information about risks and safety to insureds through the price mechanism. Premium reductions for those who take specific precautions known to insurers to be cost-effective—and premium increases for those with poor safety records—are more likely to influence the behavior of insureds if they are itemized and highlighted in this way.

Negligent entrustment and storage | There is nothing novel about tort liability for a gun owner who provides a weapon to someone he should know is likely to misuse it, or who negligently allows such a person to obtain a weapon he owns. Requiring insurance against such behavior is in principle no more problematic than the parallel automobile liability coverage requirement.



On the other hand, gun control advocates have long chafed at tort law's limits when it comes to victims who have been injured by criminals using stolen firearms. They have tried and largely failed to use product liability suits against gun manufacturers to shift those costs to people who legally purchase handguns. They have also argued for relaxing traditional tort law limits on the gun owner's liability for failing to take adequate precautions to prevent thieves from stealing (and subsequently misusing) guns.

Mandatory insurance legislation could be deployed in the service of a similar agenda. The idea is simple: create mandatory liability coverage and the ensuing tort suits will invite courts to entertain expansive theories of tort liability. In our view, the Second Amendment requires, at a minimum, that gun owners not be required to insure against more than their own negligent behavior and that generally applicable standards of negligence be applied in tort suits covered by the policy. The risk that courts will succumb to the expansionary temptation, and respond to mandatory insurance statutes by adopting constitutionally invalid tort liability standards for gun owners, provides yet another reason for extreme care in drafting this type of legislation.

Regulatory Pathologies

Given the above discussion, there are some situations in which mandatory insurance seems justified and would pass constitutional scrutiny. However, many proponents of an insurance mandate seem motivated not by a concern for tort, but a desire to use an insurance mandate to infringe on Second Amendment rights. We consider specific forms of this infringement below.

Disguised taxes | Mandatory liability insurance can be converted into a disguised tax. Instead of using regulation to ensure that individual gun owners bear more of the costs of injuries resulting from their own negligence, one could structure it to force law-abiding gun owners to bear the costs of firearms injuries inflicted by criminals who are outside the mandatory insurance risk pool. In its extreme form, this version of the mandate would give people injured by firearms (or their survivors, in wrongful death cases) a statutory right to recover from a fund created from premiums paid by gun owners who complied with the insurance requirements. To ensure adequate resources for the fund, of course, premiums would

be very high—and would overwhelmingly be attributable to the costs of injuries caused by persons other than those who paid the premiums.

In substance, this would be a tax on lawfully owned firearms earmarked for payment to the victims of illegal firearm violence. As such, it would blatantly violate the Second Amendment. No one would think that a similarly structured "libel tax" could be imposed on every newspaper, magazine, broadcaster, blogger, and soapbox orator, even if the tax were trivial. The same conclusion follows with firearms, though even more obviously because the tax would almost certainly be quite substantial. The use of a government regulation to force law-abiding firearms owners to bear the costs of wrongs committed by those who own and use firearms *illegally* would violate the Second Amendment, whether the coerced transfer occurred on a large scale as in the foregoing hypothetical example or was introduced in camel's-nose fashion.

This reasoning is not limited to attempts to make premium-payers responsible for injuries inflicted by persons who have not purchased the required insurance. It applies to any legislation that attempts to distort the market by charging one class of gun owners premiums that are fairly attributable to risks created by another class of gun owners. For example, imagine a statute that sets a maximum premium rate for urban gun owners that is well below the actuarial costs of their liability coverage. In order to continue offering policies, insurers would have to overcharge rural and suburban gun owners. The premium ceiling violates the Second Amendment because it operates as a discriminatory tax on rural and suburban gun owners. The fact that the premiums are used to cross-subsidize urban gun owners is no defense. A tax on the speech of rural and suburban residents would violate the First Amendment even if the revenues were used to subsidize speech by city dwellers. The same logic applies to the Second Amendment.

Disguised gun registration requirements | Another dif-

difficulty with an insurance mandate is the potential for abuse of its recordkeeping requirements. Gun registration laws are controversial because of their potential to facilitate illegal confiscations by the government, and it is easy to imagine how recordkeeping requirements in the insurance area could be designed or used in a way that violates the Second Amendment. But it is not obvious that such laws are necessarily or inherently unconstitutional. Recordkeeping requirements in a mandatory insurance regulation should be analyzed in the same way that general registration laws should be analyzed. That analysis is likely to be highly fact-intensive and we do not undertake to explore the issue here.

Enforcement of the mandate | Enforcing compliance with mandatory liability insurance laws has proven difficult in the automobile setting and is likely to pose even greater problems for firearms liability insurance regulations.

The least intrusive technique would be to impose a fine on an uninsured gun owner after an insurable event—such as an accidental shooting—occurs. Provided the fines do not exceed those imposed on uninsured drivers, this strategy is unlikely to threaten Second Amendment rights.

A second strategy, employed by many states for automobile liability insurance, is to require proof of insurance as a condition of registration and licensing. Imposing a universal licensing requirement on owning a firearm would raise serious constitutional questions, just as a licensing requirement on speech would raise such questions under the First Amendment. A less troubling alternative would be a requirement that anyone purchasing a

firearm provide proof of liability insurance at the time of sale. As applied to ordinary commercial transactions, this requirement would be minimally burdensome and is unlikely to pose serious constitutional problems. Just as with universal gun registration requirements, however, imposing a proof-of-insurance requirement on every private sale or transfer of a firearm would present substantial Second Amendment issues.

Excessive minimum coverage requirements | How high may a state set the minimum coverage under the mandated policies without running afoul of the Second Amendment? For guidance, we propose looking to the most analogous type of regulation: mandatory automobile liability insurance. The cost of injuries from automobile accidents exceeds that from firearms accidents by orders of magnitude. The state's burden of justification should be a heavy one when it places greater burdens on the exercise of a constitutional right than on the exercise of a non-constitutional right that involves very similar tradeoffs

A properly drafted mandatory liability insurance regulation would do more good than some of the other measures that have recently been proposed, such as bans on so-called assault weapons and limits on the capacity of magazines for semi-automatic firearms.

between individual and social interests. Singling out firearms for disfavored treatment is constitutionally suspect even if the higher mandatory minimum for firearms does not exceed the expected cost of the externalities associated with their non-malicious misuse. Consequently, we think the Second Amendment presumptively requires states to tailor minimum coverage limits so they do not exceed the analogous auto liability limits.

In the overwhelming majority of states, the statutory minimums for auto liability insurance are relatively low: 44 states require coverage of \$25,000 per person and \$50,000 per occurrence or less, and only two states (Alaska and Maine) require as much as \$50,000 per person and \$100,000 per occurrence. The risk that the average driver will accidentally cause serious injuries to a third party in amounts exceeding those limits is significant, yet no state mandates minimum coverage of even \$100,000 per injured person.

With such minimums in place, premiums for firearms liability insurance would presumably be quite reasonable, probably in the neighborhood of \$20 per year. It is true that states might raise the minimums for both automobile and firearms insurance, but a presumption that the latter not exceed the former would prevent discriminatory treatment of the constitutional right and would pretty effectively discourage political grandstanding. To overcome the presumption, a state would need to make a convincing showing that its higher minimum for firearms insurance would

not make gun ownership unaffordable for law-abiding citizens of modest means, either because insurers charged steep premiums or because they refused to issue large liability policies to insureds without significant assets of their own.

Premium-setting practices and regulations | Automobile liability insurers price their policies in part on the basis of indirect indicators of risk, such as accident rates in the insured's neighborhood, the insured's creditworthiness, and so on. As a policy matter, this could be a serious problem in the firearms context because insurance companies might be inclined to charge higher rates in high-crime neighborhoods, where law-abiding people are likely to have the most need for a gun but also to have trouble affording insurance.

It is nevertheless difficult to argue that the Second Amendment flatly forbids such practices. It is true, as we have stressed, that driving an automobile is not a constitutional right, whereas owning a firearm for self-defense is. There is, however, no general constitutional rule that citizens must be exempted from the obligation to internalize the costs of exercising their constitutional rights. High-quality firearms are expensive, but that does not mean that government must subsidize their purchase by poor individuals. Access to shooting ranges is protected by the Second Amendment, but this does not imply that range owners have a constitutional right to operate without liability insurance. To the extent that a liability policy prevents gun owners from externalizing the risk of their own negligence onto innocent victims or society at large, it is analogous to a government regulation that requires newspaper companies (which are protected by the First Amendment just as gun owners are protected by the Second Amendment) to carry workers' compensation insurance. That said, any mandatory insurance statute should be closely scrutinized for features that would encourage insurers to overcharge the very people to whom Second Amendment rights are most valuable.

Burdensome insurance regulations | One of the benefits of mandatory liability insurance is that it facilitates the flow of information to insureds about how to reduce the risks associated with their activities. If insurers learn that firearms owners who keep their guns in safes or use safety locks typically have lower accident rates, the insurers can offer discounts to policyholders who take these precautions. But while this "private regulation" could yield safety benefits, insurers might also impose onerous conditions on the issuance of liability insurance. Imagine, for example, that insurers (perhaps in response to pressure from state insurance regulators) all decide that they will not issue liability insurance coverage if the insured owns so-called "assault weapons." If liability coverage is mandatory, this requirement is tantamount to a ban on that category of firearms, and the state's enforcement of the mandate should be analyzed as such. Because "assault weapon" bans invariably affect a subcategory of semi-automatic weapons that are defined almost entirely in cosmetic terms, this form of state action should fail intermediate scrutiny.

Selective regulation of firearms but not other means of self-defense | The regulatory pathologies we have surveyed provide ample reason to be skeptical when politicians propose mandatory liability insurance for gun owners. Nevertheless, we disagree with those who might regard such compulsory insurance as inherently unconstitutional because it singles out firearms for discriminatory treatment. Granted, even with the restrictions and safeguards we have proposed, such regulations would require liability insurance only for the risks associated with owning guns, thereby excluding the parallel risks of owning other instruments that can be used in self-defense (e.g., knives and pepper sprays). But these substitutes for firearms are both less lethal and less likely to result in serious accidental injuries to other people. Consequently, a state's decision to regulate only the former is not unreasonable on its face. Given the good fit between mandatory liability insurance for firearms and the state's legitimate interests in deterrence and victim compensation, a well-designed statute should survive intermediate scrutiny.

Conclusion

Statutes requiring gun owners to carry liability insurance could be written in a way that would not violate the Second Amendment, but there are many constitutional pitfalls in such an undertaking. Such regulations could easily be used to impose disguised taxes, penalties, and prohibitions on gun ownership, to discriminate in favor of some law-abiding gun owners at the expense of others, or to promote overcharging by insurers supervised by state regulators eager to score political points with gun control advocates.

Nevertheless, a properly drafted regulation would do more good than some of the other measures that have recently been proposed, such as bans on so-called assault weapons and limits on the capacity of magazines for semi-automatic firearms. Such efforts to ban limited categories of politically unpopular devices are unlikely to have any significant effect on criminal violence or negligent behavior. A mandatory insurance regulation might at least have some effect in deterring negligence, though it would probably not be very great. Although such regulations hardly deserve to be among the highest of legislative priorities, they would increase the chances that those who suffer accidental injuries at the hands of negligent gun-owners would receive some compensation. If legislators who feel driven to "do something" about guns could be persuaded to adopt properly drafted mandatory liability insurance laws instead of other measures that are ineffective or unconstitutional (or both), that would be a better outcome for both public safety and individual liberty. **R**

READINGS

■ "Implementing the Right to Keep and Bear Arms: An Analytical Framework and a Research Agenda," by Eugene Volokh. *UCLA Law Review*, Vol. 56 (2009).

■ "Second Amendment Standards of Review in a *Heller* World," by Nelson Lund. *Fordham Urban Law Journal*, Vol. 39 (2012).