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ADMINISTRATIVE BROWBEATING AND INSURANCE MARKETS

George A. Mocsary, *University of Wyoming*

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ABSTRACT

Some state insurance regulators have been using their regulatory muscle to coerce insurers into furthering their political ends. They have protected favored but harmful commercial activity and have strangled legal but disfavored individual conduct.

In the process, those regulators have disabled the benefits that a properly functioning insurance market can provide. They have hampered individuals' ability to engage in desirable activities, like home ownership, that would otherwise be too risky given their incomes; they have made socially desirable but not risk-free activities, like responsible firearm ownership, less safe; and they have deprived the market of data on safety and risks. Such use of government power to abuse an "outgroup" for the benefit of the "ingroup" can also have devastating effects on social stability.

This paper analyzes the situation through two cases and suggests solutions that preserve near-plenary state control over insurance under the McCarran-Ferguson Act while limiting state regulators' ability to abuse this special federal-state arrangement.

METADATA

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AUTHOR CONTACT INFORMATION

George A. Mocsary, Professor of Law, University of Wyoming College of Law, gmocsary@uwyo.edu

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DISCLAIMER

Administrative Browbeating and Insurance Markets

It has been said that "[p]erhaps no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business. Insurance touches the home, the family, and the occupation or the business of almost every person in the United States."[1] It is a business steeped in the public interest: it enables individuals to engage in desirable activities, like home ownership, that would otherwise be too risky given their incomes; it makes socially desirable, but not risk-free, activities safer; it provides the market with hard data on safety and risks. In short, it makes people freer by allowing them to engage in more activities.

Yet some state politicians and insurance regulators are using the regulatory machinery to bully insurers and, by extension, insureds into serving their political ends.[2] They have deployed "the superior force of an interested and overbearing majority"[3] both to protect favored, but harmful, commercial activity and to strangle legal, but disfavored, individual conduct. In the process, they are damaging insurance markets and causing social harm.

This paper proceeds in five parts. Part I briefly describes how insurance works and why it is important. Part II presents two case studies of state insurance regulators abusing their power. Part III describes the harm to insurance markets, vis-à-vis the social benefits that insurance provides, of that abuse. Part IV briefly explores the deeper social harms of deploying regulatory power against politically disfavored groups. Part V analyzes reform options.

I. INSURANCE AND ITS REGULATION

Insurance transfers the risk of a fortuitous loss from the insured to the insurer in exchange for the payment of a premium by the insured to the insurer.[4] The insured benefits primarily by replacing an uncertain loss with a known payout. Insurers charge each insured a premium that is greater than the expected value of that insured's loss. They use the collected premiums to pay claims, administer claims, and earn a return for bearing the risks. In the process of aggregating risks, insurers spread risk across many insureds. Insurance, then, enables loss diversification.

A. Insurance Is an Enabler

Insurance thus makes desirable activities by insureds possible by replacing a potentially unbearable (for the insured) catastrophic loss with a known and manageable payment stream. Without homeowners' insurance, for example, many families could not bear the risk of owning a

[1] United States v. South-Eastern Underwriters Association, 322 U.S. 533, 540 (1944).

[2] *See infra* part II (describing two case studies); note 53 (citing other instances). Of course, not all insurance regulators abuse their power, and not to the same extent. But, for example, a regulator imposing penalties one or two orders of magnitude higher than those of regulators in other states for fewer instances of allegedly violative conduct should be viewed with suspicion. *See infra* notes 106–109.

[3] THE FEDERALIST NO. 10, at 42 (James Madison) (George W. Carey & James McClellan eds., 2001); *see* JOHN STUART MILL, ON LIBERTY 13 (1859) ("'[T]he tyranny of the majority' is now generally included among the evils against which society requires to be on its guard. Like other tyrannies, the tyranny of the majority was at first, and is still vulgarly, held in dread, chiefly as operating through the acts of the public authorities.").

[4] A fortuitous loss is one that is, from the perspective of the parties to the insurance contract, uncertain, unplanned, and unintentional. ROBERT H. JERRY, II, & DOUGLAS R. RICHMOND, UNDERSTANDING INSURANCE LAW § 63 (6th ed. 2018).

home because one fire or hurricane could wipe out their savings.[5] Insurance allows for the transfer of these risks to an insurer "for a premium that amounts to a fraction of the value of the . . . home."[6] The insurers bearing such losses are unconcerned with any particular loss because their reserves, which are funded by other insureds' premiums, allow them quickly to pay claims.[7]

Insurance also provides both financial and nonfinancial value to the process of dealing with a loss. Insurers are experts in handling claims efficiently and, as important, as painlessly as possible for insureds. They also enjoy economies of scale and scope in managing claims.[8] Accessing these service efficiencies is a key reason—sometimes the main reason—for purchasing insurance.[9] Insurers can provide loss reduction and remediation services to insureds and cash payments to third parties, allowing repairs or other care to commence without potentially prohibitive cash outlays by those who were harmed.[10]

In addition to creating the positive effects discussed so far, however, risk reduction can create negative externalities unless insurers work to counteract them.[11] It is well settled that insureds have less incentive to reduce insured risks than do uninsureds and that insurance coverage should thus not be available for all contingencies.[12] Moral hazard is the tendency for insurance both to reduce an insured's incentive to minimize losses and to increase the insured's incentive to engage in risky behavior.[13] Fortunately, however, insurers have tools—many of which are not available to public regulators—available to them to reduce their insureds' moral hazard. Moreover, use of these tools creates positive externalities experienced by the public at large.

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[5] It need not be homeowners who are risk averse. Mortgage lenders require mortgagors to purchase insurance to protect nonfinancial risks to their collateral that the lenders are not well positioned to assess. Whether the mortgagor or mortgagee is risk averse, the risk transfer provided by insurance enables home ownership. It similarly enables other activities.

[6] George A. Mocsary, *Insuring Against Guns?*, 46 CONN. L. REV. 1209, 1248 (2014).

[7] If the risk borne by an insurer becomes too concentrated—if a given insured's risk is no longer independent enough of other insureds' risks—then insurers will transfer some of it to reinsurers in much the same way that insureds transfer risk to insurers. Neil A. Doherty, *Innovations in Managing Catastrophe Risk*, 64 J. RISK & INS. 713, 714 (1997); *see* JERRY & RICHMOND, *supra* note 4, § 24[c]; *see generally* Doherty, *supra* (describing some ways in which risk is chopped up for reinsurance).

[8] J. David Cummins & Mary A. Weiss, *Analyzing Firm Performance in the Insurance Industry Using Frontier Efficiency and Productivity Methods*, *in* HANDBOOK OF INSURANCE 795, 827–34 (Georges Dionne ed., 2d ed. 2013).

[9] Neil A. Doherty & Clifford W. Smith, Jr., *Corporate Insurance Strategy: The Case of British Petroleum*, 6 J. APPLIED CORP. FIN. 4, 8, 10 (1993) (discussing a case study); David Mayers & Clifford W. Smith, Jr., *On the Corporate Demand for Insurance*, 55 J. BUS. 285–86 (1982); *see also* Mocsary, *supra* note 6, at 1250 (discussing the concept in the firearms context).

[10] See Shauhin A. Talesh, *Data Breach, Privacy, and Cyber Insurance: How Insurance Companies Act as "Compliance Managers" for Businesses*, 43 L. & SOC. INQUIRY 417, 432–35 (2018); Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV. 197, 213–14 (2012).

[11] An externality is an activity's effect on individuals not party to the activity. *See* James M. Buchanan & Wm. Craig Stubblebine, *Externality*, 29 ECONOMICA 371, 372 (1962). A negative externality is a third-party loss, and a positive externality is a third-party gain, from an activity. *Id.* at 374.

[12] *See, e.g.*, KENNETH S. ABRAHAM, DISTRIBUTING RISK (1986); KENNETH J. ARROW, ASPECTS OF THE THEORY OF RISK BEARING (1965); Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237 (1996); Bengt Holmström, *Moral Hazard and Observability*, 10 BELL J. ECON. 74 (1979); Steven Shavell, *On Moral Hazard and Insurance*, 93 Q.J. Econ. 541 (1979); Mark V. Pauly, *The Economics of Moral Hazard: Comment*, 58 AM. ECON. REV. 531 (1968).

[13] Baker, *supra* note 12, at 239. A related concept is adverse selection, which is the "tendency for insurance to be purchased by people who are disproportionately likely subsequently to experience an insured-against event." *Id.* at 271 n.164; *see* Mark V. Pauly, *Overinsurance and Public Provision of Insurance: The Roles of Moral Hazard and Adverse Selection*, 88 Q.J. ECON. 44, 44–45 (1974) (comparing moral hazard and adverse selection). From a public policy standpoint, adverse selection is not necessarily a negative externality if, as discussed, it enables risky but desirable activities. This depends, however, on insurance being priced to cover the risk actually insured, lest the insurer go bankrupt and be unable to pay claims. Because of the risk of creating more losses and increasing harm to third parties, moral hazard should generally not be insured. The exception would be insuring activities that create more positive externalities than negative ones. *See* Pauly, *supra* note 13, at 44–45.

B. Insurance Can Make Activities Safer

Insurers can make activities safer indirectly by incenting safer insured behavior and directly by researching ways to make the covered activities safer. But insurers not facing risk from a particular activity have neither the incentive nor the information needed to do either.

Insurers are data collection and analysis experts. They use their data (and that of other insurers) to determine both the risk associated with insured activities and, as important, the specific behaviors that can reduce that risk. Using this information, insurers employ tools to incentivize and require insureds to reduce the risks attendant to their insured activities.[14] Insurers, who have their own skin in the game, have incentives to so reduce risks because competition, and their bottom lines, demand it.[15]

Such insurance-driven "private regulation" can be "more finely tuned and information sensitive," and thus more effective, than governmental regulation of the insured activities.[16]

Insurance makes activities safer primarily by influencing insureds' behavior. The specific methods for doing so are grounded in insurers' skill in collecting and analyzing data on the frequency of various activities and in measuring the risk associated with those activities.[17]

1. Risk-Based Pricing and Risk Sharing

Insurers employ both forward- and backward-looking risk-based pricing techniques in setting policy premiums. During the underwriting process, insurers collect risk-relevant information about potential insureds. These characteristics are compared with risk-related data collected and shared across the insurance industry[18] to estimate, in a process called "feature rating," the insured's expected loss outcomes.[19] The insured is placed into a pool with similar risks and charged a premium commensurate with the expected loss.[20] The similar process of "experience rating" bases and adjusts an insured's premium on prior claim experience.[21]

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[14] *See* Talesh, *supra* note 10, at 428–32; John Rappaport, *How Private Insurers Regulate Public Choice*, 130 HARV. L. REV. 1539, 1573–91 (2017) (describing the tools); Tom Baker & Rick Swedloff, *Regulation by Liability Insurance: From Auto to Lawyers Professional Liability*, 60 UCLA L. REV. 1412, 1416–23 (2013) (describing the tools); Ben-Shahar & Logue, *supra* note 10, at 198–200 (summarizing and citing sources), 203–16 (describing the tools).

[15] Rappaport, *supra* note 14, at 1595; Ben-Shahar & Logue, *supra* note 10, at 204.

[16] Ben-Shahar & Logue, *supra* note 10, at 201.

[17] Rappaport, *supra* note 14, at 1576; Ben-Shahar & Logue, *supra* note 10, at 210. *But see supra* notes 11–13 and accompanying text.

[18] These data are shared via the multiple insurance rating bureaus set up for this purpose. The chief rating bureaus are the National Council on Compensation Insurance (NCCI), https://www.ncci.com [https://perma.cc/H92M-UUNS]; the Surety & Fidelity Association of America (SAA), https://www.surety.org [https://perma.cc/739Q-LFQR]; the Insurance Services Office, Inc. (ISO), https://www.verisk.com/insurance/brands/iso [https://perma.cc/7KWE-EW7K]; and the American Association of Insurance Services, Inc. (AAIS), https://aaisonline.com [https://perma.cc/FCG9-DBRA].

Sharing risk-related information makes insurance more efficient and effective. Enabling this kind of cooperation among insurers is one of the primary reasons that the McCarran-Ferguson Act exempts insurers from most federal antitrust regulation. *See infra* note 35 and accompanying text.

[19] Rappaport, *supra* note 14, at 1589–90; Ben-Shahar & Logue, *supra* note 10, at 206; *cf.* Talesh, *supra* note 10, at 429.

[20] Rappaport, *supra* note 14, at 1589; *see* JERRY & RICHMOND, *supra* note 4, § 10[c][1].

[21] Rappaport, *supra* note 14, at 1589; Baker & Swedloff, *supra* note 14, at 1419–20.

Risk sharing—the use of limits, copayments, and deductibles to leave insureds with skin in the game—encourages greater vigilance by insureds to avoid the shared losses.[22] Risk-based pricing and risk sharing are complements, each restraining a different aspect of moral hazard.

2. Safety Education and Mandates

Insurers, who bear the costs of paid claims, also have incentive to educate insureds about insureds' behaviors. Insurers collect information about the activities they insure both by aggregating and analyzing the characteristics and claims histories of their and other insurers' customers and by directly studying the activities in question to uncover ways to make them safer.[23] They educate their insureds on best practices for reducing and avoiding risks, and they may mandate that insureds implement the practices as a condition of coverage.[24]

Insurers effectively bond their advice and mandates: "if a loss occurs, they pay, whether their advice was good, bad, or indifferent."[25] Additional proofs, often expensive and elusive, are required for tort liability to attach.[26] Regulators, however, do not automatically bear the financial consequences of their ill-considered mandates or recommendations. Insurers thus have special incentives to minimize insured harms. Where insureds are covered for harm to third parties, positive externalities accrue. Where third-party harms are incommensurable, avoiding an occurrence is all the more important.[27]

3. Public Harm Prevention

Insurers also engage in activities, and provide correlative services, somewhat in the nature of public goods, benefiting the public at large.[28] Much or all of the research studying safety technologies and risk-reduction methods is performed cooperatively through institutes or

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[22] Baker & Swedloff, *supra* note 14, at 1420 ("Limits keep insureds' skin in the game at the high end, deductibles at the low end, and coinsurance throughout."); Rappaport, *supra* note 14, at 1590–91; ARROW, *supra* note 12, at 47, 55 .

[23] Rappaport, *supra* note 14, at 1576; Baker & Swedloff, *supra* note 14, at 1421, 1422–23; Ben-Shahar & Logue, *supra* note 10, at 210, 212.

[24] Talesh, *supra* note 10, at 428–32; Rappaport, *supra* note 14, at 1574–84, 1589; Baker & Swedloff, *supra* note 14, at 1421; Ben-Shahar & Logue, *supra* note 10, 210–11.

[25] Baker & Swedloff, *supra* note 14, at 1422; *accord* Rappaport, *supra* note 14, at 1595.

[26] *See* Rappaport, *supra* note 14, at 1595. Governments may also benefit from protective doctrines like sovereign immunity.

[27] Mark A. Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 773 (1995); Lisa J. Laplante, *Negotiating Reparation Rights: The Participatory and Symbolic Quotients*, 19 BUFF. HUM. RTS. L. REV. 217, 224, 248–51 (2013) (discussing the incommensurability problem in the human rights context).

[28] *See* Elinor Ostrom, *Beyond Markets and States: Polycentric Governance of Complex Economic Systems*, 100 AM. ECON. REV. 641, 642, 645 (2010) (defining a public good as one that is both nonexcludable and nonrivalrous (or of low subtractability)).

Although the loss-prevention methods discussed in the previous section create benefits outside the parties to the insurance contract, these benefits are something in the nature of "club goods," sometimes called "toll goods." *Id.* at 644–45; *see* James M. Buchanan, *An Economic Theory of Clubs*, 32 ECONOMICA 1 (1965) (introducing the concept as an intermediate position between private and public goods). That is, although insurers provide the services to only their paying insureds (the services are highly excludable), the services are provided to all their similarly situated insureds (the services have low subtractability). *See* Ostrom, *supra*, at 642 (defining excludable goods as those from which nonpaying customers can be excluded and rivalrous goods as ones that, if consumed by one party, are unavailable for another), 644–45 (equating "'rivalry of consumption' with 'subtractability of use,'" and stating that the concepts should be viewed along spectra rather than as absolutes).

laboratories created for that purpose.[29] These entities' research is often the basis for safety standards adopted by industry, trade groups, governmental regulators, and courts.[30] Such standards have the advantage of being based on sound research, rather than lawmakers' often hastily made decisions.[31]

C. Insurance Regulation

Insurance is unique among the financial services industries in that it is subject to nearly plenary state regulation.[32] A brief discussion of the impetus for and nature of the federal-state arrangement for regulating insurance, and the potential for the arrangement's abuse, is informative.

1. The Federal-State Arrangement

The McCarran-Ferguson Act of 1945 declares that states' regulation of the "business of insurance" is "in the public interest."[33] To that end, it limits federal preemption in the field to statutes that specifically regulate insurance.[34] The act was lobbied for by the National Association of Insurance Commissioners, backed by insurers, largely to immunize insurers' information-sharing from the reach of federal antitrust laws because "pooling of actuarial data [is] central to the ratemaking process."[35] There was also concern that improper ratemaking led to insurer insolvencies.[36] The act provides exceptions to plenary state control over insurance, the most poignant of which for present purposes is that it does not allow states to condone by insurers "any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."[37]

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[29] Well-known institutes include the Insurance Institute for Highway Safety (IIHS), https://www.iihs.org [https://perma.cc/9NJV-V2YH]; the National Fire Protection Association (NFPA), https://www.nfpa.org [https://perma.cc/X59H-3BFQ]; and the Insurance Institute for Business & Home Safety (IBHS), https://ibhs.org [https://perma.cc/5ATG-7VL3]. Perhaps most ubiquitous is Underwriters Laboratories, a 128-year-old safety testing and research organization started by funding from The Chicago Underwriters Association and the Western Insurance Union. UNDERWRITERS LABORATORIES, *History,* https://ul.org/about#history [https://perma.cc/BY8R-94PU]. Its safety certification is marked on countless products using its familiar symbol. *See also* Rappaport, *supra* note 14, at 1584–85 (discussing accreditation of insureds).

[30] Ben-Shahar & Logue, *supra* note 10, at 212.

[31] See, e.g., Robert Higgs, *Crisis, Bigger Government, and Ideological Change: Two Hypotheses on the Ratchet Phenomenon*, 22 EXPL. ECON. HIS. 1 (1985).

[32] Jonathan R. Macey & Geoffrey P. Miller, *The McCarran-Ferguson Act of 1945: Reconceiving the Federal Role in Insurance Regulation*, 68 N.Y.U. L. REV. 13, 14 (1993).

[33] 15 U.S.C. § 1011 (2018).

[34] *Id.* §§ 1011–12 (2018).

[35] JERRY & RICHMOND, *supra* note 4, § 21[a]; *see supra* note 18 and accompanying text. As the U.S. Supreme Court recognized, "[b]ecause of the widespread view that it is very difficult to underwrite risks in an informed and responsible way without intra-industry cooperation, the primary concern of both representatives of the insurance industry and the Congress was that cooperative ratemaking efforts be exempt from the antitrust laws." Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 221 (1979).

[36] JERRY & RICHMOND, *supra* note 4, § 21[a] and [c]; JUSTIN L. BRADY ET AL., THE REGULATION OF INSURANCE 40–42 (1995).

[37] 15 U.S.C. § 1013(b) (2018). That is, the Sherman Act still applies to such acts by insurers. It also exempts the business of insurance from the reach of the Sherman Act, Clayton Act, and Federal Trade Commission Act, as long as state law regulates the activities covered by those acts, and it specifically makes the National Labor Relations Act, the Fair Labor Standards Act, and the Merchant Marine Act applicable to the business of insurance. *Id.* §§ 1012–14 (2018).

Immediately post-enactment, states focused on consumer and industry protection, including rate regulation[38] and unfair trade practices like unfair competition and deception of consumers.[39] In the years since the initial wave of post–McCarran-Ferguson activity, the basic tenets of insurance regulation have not changed. Insurer health, available and affordable coverage, and equitable treatment of insureds have tied regulatory goals together.[40] State regulatory action has focused on (a) ensuring that insurance is available to would-be insureds, at (b) fair rates while ensuring that insurers remain stable, while (c) enabling reasonable rate competition between insurers, in large part by (d) forcing information into the marketplace for both insurer and insured consumption.[41] This is the same information that allows insured activities to be made safer and, in some cases, to be engaged in at all.[42]

2. Potential for Abuse

State insurance regulators thus operate within a "'regime of privilege'" carved out by the act.[43] This near-plenary immunity to federal regulation was granted to ensure the insurance industry's solvency, to make insurance available on fair terms to as many comers as possible, and to enable its other benefits. But if this special treatment is used for purposes other than those for which it was granted, creating "undesirable and unintended consequences, like abuse of power, the regime may need to be reconsidered."[44]

Investing regulators with such power has its dangers. Regulatory power is exercised proactively and largely in secret, emerging from within an opaque bureaucracy.[45] Regulatory action is subject to the checks and balances of representative government only after it has gone into effect, and then only if a slow-moving and reactive legislature can muster the political will to act.[46] Courts may also react to regulatory overreach,[47] but litigation can be notoriously protracted and expensive. By the time a case reaches resolution, damage may have been done and great resources are likely to have been expended.

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[38] JERRY & RICHMOND, *supra* note 4, § 21[c]; BRADY ET AL., *supra* note 36, at 48.

[39] BRADY ET AL., *supra* note 36, at 48–49. In the former category, state statutes focused on boycott, coercion, and intimidation (even though these were excepted from the McCarran-Ferguson Act's antitrust exemption), defamation, and rebating. *Id.* In the latter, the states focused on misrepresentation in advertising and financial disclosure, discriminatory treatment of insureds, and rebating. *Id.* In the consumer-facing context, rebating tends to be a form of price discrimination inasmuch as the rebate causes insureds who are supposedly paying the same for coverage, and thus similarly situated risks, to pay different premiums. *But see infra* note 211 and accompanying text (noting that antirebating statutes may cause more harm than good).

[40] BRADY ET AL., *supra* note 36, at 49.

[41] *See* JERRY & RICHMOND, *supra* note 4, § 22; BRADY ET AL., *supra* note 36, at 50–53; Macey & Miller, *supra* note 32 (discussing the goals of insurance regulation in light of the McCarran-Ferguson Act's division of authority over the area).

[42] *See supra* section I.B.

[43] Brian Knight & Trace Mitchell, *Private Policies and Public Power: When Banks Act as Regulators within a Regime of Privilege*, 13 N.Y.U. J. L&L 66, 72, 119 (2020). *See generally id.* (discussing the "'regime of privilege'" afforded banks by federal regulation). Unlike in areas where a regime of privilege developed piecemeal, *see id.* at 73–119, the McCarran-Ferguson Act's grant was deliberate and explicit.

[44] Knight & Mitchell, *supra* note 43, at 72.

[45] *See* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 636 (1993).

[46] That much legislative work is done in small compartments within the legislative apparatus, outside of public view, does not help. *Id.* at 610–11. Nevertheless, legislative action is more in the public eye than is administrative behavior.

[47] At least in cases of "serious public moment," decisions are made by the "judiciary as a whole" as they "bubble up through the . . . system." *Id.* at 613.

State insurance regulators thus enjoy substantial insulation from scrutiny, especially if their state's legislators and judges (including federal judges serving the jurisdiction) share the regulators' worldviews.[48] State regulators are further distanced from Congress than are state legislatures. Constitutional and similar federal rights-like requirements and concerns are thus more likely to be far from the minds of those operating in regulatory silos.[49] The resulting danger is that governmental power is used for political and private purposes that are in conflict with the goals for which the power was, explicitly, in this case, granted.

3. Summary

Insurance is "affected with a vast public interest."[50] Insurance regulators have been granted unique authority to maximize consumer access to insurance while ensuring the insurance industry's health and solvency.[51] This, in turn, enables the realization of the benefits and positive externalities generated by insurance. Congress intended to enable a sustainable infrastructure to support insurance consumers engaging in legal activities of their choosing; Congress did not intend to create sublegislative "moral arbiters" who interfere with activities that could not otherwise be regulated directly.[52] Yet some insurance regulators have used their power to advance favored political interests and create de facto barriers to legal (and constitutionally protected), but disfavored, activities, to the detriment of insurance markets and society more broadly. The next two parts set forth two case studies of such behavior and describe the behavior's harms.

II. ADMINISTRATIVE BROWBEATING

This part describes two case studies in which the principles set forth in part I have been violated. In the first, the insurance regulator protected an industry important to its state. In the second, the regulator attacked an activity to which its state is hostile. These are not the only instances of insurance-regulator browbeating,[53] but they are especially poignant. This part describes the

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[48] *Accord infra* text accompanying note 300. Federal judges are traditionally and nearly universally appointed from the jurisdictions they serve. Because they hail from the same state in which state regulators reside, they may be more likely to share those regulators' views.

[49] This is an ages-old concern. As Professor John F. Stinneford shows, even in days before strong legislatures, commands imposed by the sovereign were thought to be suspect, while the common law was thought to reflect "universal, abstract principles of justice." John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1774 (2008); *see id.* at 1772–87.

[50] Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 415–16 (1946).

[51] Regulators acknowledge this role. *See, e.g.*, *About OID*, OKLAHOMA INS. DEPT., https://www.oid.ok.gov/about/ [https://perma.cc/P5Y6-YDUR]; *Mission and Leadership*, NEW YORK STATE DEPT. OF FIN. SVCS., https://www.dfs.ny.gov/our_mission [https://perma.cc/5FQE-XVBE].

[52] Knight & Mitchell, *supra* note 43, at 124.

[53] *See, e.g.*, *Climate Risk Carbon Initiative*, CAL. DEPT. OF INS., http://www.insurance.ca.gov/0250-insurers/0300-insurers/0100-applications/ci/ [https://perma.cc/6XXA-QE52] (suggesting that coal-based investments are too risky for insurers to hold, potentially interpretable as a veiled threat that such investments could be deemed nonadmitted assets and the insurer would have to replace them or risk insolvency review); *Insurance Diversity Initiative (IDI),* CAL. DEPT. OF INS., http://www.insurance.ca.gov/diversity/ [https://perma.cc/GUP5-5364] (discussing the department's efforts to "encourage increased procurement from diverse suppliers and enhanced diversity among insurer governing boards," as verified by surveys that "collect and publicly disseminate information about the diversity efforts of insurers"; potentially interpretable as a veiled threat that insurers whose purchasing and board-hiring decisions are not to the Diversity Task Force's liking will be subject to public shaming by their regulator); John S. Pruitt, et al., *State Insurance Department Responses to Superstorm Sandy*, LEXOLOGY (Nov. 9, 2012), https://www.lexology.com/library/detail.aspx?g=c48322d5-b27a-450d-9c70-ab732c9e3440 [https://perma.cc/ED2X-EK34]

actions taken by the regulators in question. Part III discusses why the actions are especially problematic.

A. Case No. 1: Induced Earthquakes in Oklahoma

Oil and gas production is vital to Oklahoma's economic health, accounting for 10 percent ($15.1 billion), 9 percent ($17.2 billion), and 11 percent ($20.0 billion) of the state's GDP in 2009, 2015, and 2017, respectively.[54] Oil and gas is the highest contributing subcategory to the state's economy.[55] Insurance, by comparison, accounted for 2 percent in each of these years.[56] Data are similar for related measures of economic importance, including full- and part-time employment.[57]

Oklahoma has experienced a large uptick in earthquakes since 2009.[58] Although the number peaked in 2015 with 903 quakes of magnitude 3 or higher, and declined substantially since, current rates continue to be "hundreds of times higher than at any time in the State's history."[59]

(describing how some northeastern insurance commissioners declared that hurricane deductible clauses did not apply because Superstorm Sandy was not a hurricane, even though whether a deductible applied would depend on each policy's language).

There was a push, ultimately unsuccessful, in both several states and Congress, to force insurers retroactively to cover COVID business interruption claims. *See, e.g.*, Steve Evans, *U.S. Treasury Opposed to Forcing of Retroactive COVID-19 BI Claims*, ARTEMIS (May 20, 2020), https://www.artemis.bm/news/u-s-treasury-opposed-to-forcing-of-retroactive-covid-19-bi-claims/ [https://perma.cc/4FHY-5HKK]; Leslie Scism, *Pressure Mounts on Insurance Companies to Pay Out for Coronavirus*, WALL ST. J. (Mar. 30, 2020, 6:15 PM ET), https://www.wsj.com/articles/pressure-mounts-on-insurance-companies-to-pay-out-for-coronavirus-11585573938 [https://perma.cc/T6ZF-TU59]; Heather Morton, *Business Interruption Insurance 2021 Legislation*, NAT'L CONF. OF STATE LEGISLATURES (June 2, 2021), https://www.ncsl.org/research/financial-services-and-commerce/business-interruption-insurance-2021-legislation.aspx [https://perma.cc/GLG5-ELLS].

In yet another example, when hurricane risk drove up Florida homeowners' insurance prices in 2009, Florida enacted price controls that capped rates. Doug Lyons, *Gov. Charlie Crist Is to Blame for State Farm's Departure*, S. FLA. SUN SENTINEL (Feb. 2, 2009, 4:31 AM), https://www.sun-sentinel.com/sfl-mtblog-2009-02-gov_charlie_crist_is_to_blame-story.html [https://perma.cc/5C2B-SJLT]. State Farm left the state, claiming that it could not stay under the mandated pricing and with the governor saying that "Floridians will be much better off without them." *Crist: Florida 'Better Off' without State Farm*, GAINESVILLE SUN (Jan. 29, 2009, 8:26 AM ET), https://www.gainesville.com/story/news/local/2009/01/29/crist-florida-better-off-without-state-farm/31594810007/ [https://perma.cc/MQ93-EN32]. Florida set up its own state-run insurer, Citizens Property Insurance Corporation, to provide the insurance to Floridians at lower rates. Citizens ultimately had to raise its rates to above what private insurers charged to achieve "actuarial soundness." *Florida Gov. Crist to Sign Property Insurance Rate Hike Bill*, INS. J. (May 6, 2009), https://www.insurancejournal.com/news/southeast/2009/05/06/100262.htm [https://perma.cc/QFS6-XU33].

[54] These years were chosen to provide the reader with data from a range of dates. The figures are similar in other years. Dollar amounts are in 2020 dollars. Bureau of Econ. Anal., *Regional Data*, U.S. DEPT. OF COM., https://apps.bea.gov/itable/iTable.cfm?ReqID=70&step=1#reqid=70&step=1&isuri=1 (select "Annual Gross Domestic Product (GDP) by State"; then select "GDP in current dollars (SAGDP2)"; then select "NAICS (1997-forward)," and click the "Next Step" button; then select "Oklahoma" in the Area list and "All statistics in table" in the Statistic list, and click the "Next Step" button; then select "2009," "2015," or "2017" in the Time Period table, and click the "Next Step" button.). The year 2017 is used because later figures have not been finalized. These figures are likely to be higher when activities that support oil and gas extraction are included. *See id.*

[55] *Id*.

[56] *Id*.

[57] *Id.* (select "Annual Personal Income and Employment by State"; then select "Total Full-Time and Part-Time Employment by Industry (SAEMP25)"; then select "NAICS (1998-forward)," and click the "Next Step" button; then select "Oklahoma" in the Area list and "All statistics in table" in the Statistic list, and click the "Next Step" button; then select "2009," "2015," or "2017" in the Time Period table, and click the "Next Step" button.); *see id.* (selecting various queries).

[58] *Oklahoma Has Had a Surge of Earthquakes since 2009. Are They Due to Fracking?*, U.S. GEOLOGICAL SURV., https://www.usgs.gov/faqs/oklahoma-has-had-a-surge-earthquakes-2009-are-they-due-fracking?qt-news_science_products=0#qt-news_science_products [https://perma.cc/B77Z-R6Z9] [hereinafter *USGS Oklahoma Surge*].

[59] AUSTIN HOLLAND, POTENTIAL FOR INDUCED SEISMICITY AND CURRENT MITIGATION EFFORTS WITHIN OKLAHOMA 3 (2015); *Short-Term Induced Seismicity Models*, U.S. GEOLOGICAL SURV., https://www.usgs.gov/programs/earthquake-hazards/science/short-term-induced-seismicity-models [https://perma.cc/M472-ZGET] [hereinafter *USGS Short-Term Induced Seismicity*

One can determine whether an earthquake is "induced"—caused by human activity—and a database of induced seismology has been kept since about 2010.[60] There is broad agreement by the U.S. Geological Survey of the U.S. Department of the Interior, the Oklahoma Geological Survey, and independent researchers that the overwhelming majority of Oklahoma's recent earthquakes have been caused by the subsurface injection of wastewater produced by oil and gas extraction.[61] Oklahoma experiences more induced earthquakes than any other state.[62] As one would predict, a decrease in earthquakes since 2015 is correlated with a decrease in fluid injection during that time.[63]

Earthquake insurance policies typically cover only natural earthquakes; they exclude coverage for human-made ones. Nevertheless, the number of Oklahomans purchasing earthquake insurance rose from 2 percent in 2011 to 15 percent in 2015, and the volume of coverage rose from $5 million in 2009 to $19 million in 2015.[64] By February 2015, 2,500 Oklahoma insurance agents had taken an emergency continuing education class to learn, and be able to inform potential insureds, about the workings of earthquake coverage.[65]

In March 2015, the then–Oklahoma Insurance Commissioner[66] issued a bulletin to insurers in which he threatened insurers who did not pay earthquake claims.[67] The bulletin acknowledged the "announcements" by the U.S. Geological Survey, Oklahoma Geological Survey, and others discussed earlier,[68] and that "'man-made'" earthquakes are excluded. Nonetheless, it said that "there is no agreement at a scientific or governmental level concerning any connection between injection wells or fracking and 'earthquakes.'"[69] It called claims that earthquakes could be

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Models]; *USGS Oklahoma Surge*, *supra* note 58; *see also* Luc Cohen, *Oklahoma Quakes Force Insurers to Limit Their Exposures*, CARRIER MGMT. (May 12, 2016), https://www.carriermanagement.com/news/2016/05/12/154277.htm [https://perma.cc/6WHB-X62H] (stating that the 2015 total is 890); *see also Induced Seismicity*, OKLA. GEOLOGICAL SURV., https://www.ou.edu/ogs/research/earthquakes/inducedseismicity [https://perma.cc/EX8V-7HGL] (citing additional sources).

[60] Vincent Quitoriano & David J. Wald, *USGS "Did You Feel It?"—Science and Lessons from 20 Years of Citizen Science-Based Macroseismology*, FRONTIERS EARTH SCI., May 20, 2020, at 8; see Gail M. Atkinson et al., *The Intensity Signature of Induced Seismicity*, 108 BULL. SEISMOLOGICAL SOC'Y AM. 1080 (2018).

[61] *See* Quitoriano & Wald, *supra* note 60; Atkinson et al., *supra* note 60; A. McGarr et al., *Coping with Earthquakes Induced by Fluid Injection*, 347 SCI. 830 (2015); *USGS Short-Term Induced Seismicity Models*, *supra* note 59; *USGS Oklahoma Surge*, *supra* note 58; *Coping with Earthquakes Induced by Fluid Injection*, U.S. GEOLOGICAL SURV. (Feb. 19, 2015), https://www.usgs.gov/news/coping-earthquakes-induced-fluid-injection [https://perma.cc/WB5Q-V6QB]; *see also* Grigoratos et al., *Time-Dependent Seismic Hazard and Risk Due to Wastewater Injection in Oklahoma*, 37 EARTHQUAKE SPECTRA 2084 (2021) (discussing the issue and collecting sources).

[62] *USGS Short-Term Induced Seismicity Models*, *supra* note 59.

[63] McGarr et al., *supra* note 61, at 831 (suggesting that reducing injection activity would reduce earthquake activity); *USGS Short-Term Induced Seismicity Models*, *supra* note 59; *see also* Luc Cohen, *supra* note 59 (noting an increase in injection activity correlating with an increase in earthquakes from 2013 to 2015).

[64] Luc Cohen, *supra* note 59; Adam Wilmoth, *Experts: Steady Rate of Earthquakes in Oklahoma in 2014*, INS. J. (Jan. 21, 2015), https://www.insurancejournal.com/news/southcentral/2015/01/21/354355.htm [https://perma.cc/XM28-ML2B] (noting also that only 10 percent of Californians purchased earthquake insurance).

[65] Adam Wilmoth, *Oklahoma Insurers Receive Earthquake Coverage Education*, OKLAHOMAN (Feb. 22, 2015), https://oklahoman.com/article/5395326/oklahoma-insurers-receive-earthquake-coverage-education [https://perma.cc/S3SZ-P2SM].

[66] He is no longer in office. *See Commissioner Glen Mulready*, OKLAHOMA INS. DEPT., https://www.oid.ok.gov/about-oid/commissioner/ [https://perma.cc/L8MR-B4UV].

[67] Earthquake Insurance Bulletin No. PC 2015-02, from John D. Doak, Oklahoma Insurance Commissioner, to All Property & Casualty Insurers Licensed in the State of Oklahoma (Mar. 3, 2015), https://www.oid.ok.gov/wp-content/uploads/2019/10/030415_Earthquake-Bulletin-3-3-15.pdf [https://perma.cc/GCX8-J9ZJ].

[68] *Id.*; *see supra* note 61 and accompanying text.

[69] Doak, *supra* note 67, at 2.

induced by subsurface fluid injection "unsettled science" and threatened market conduct examinations and enforcement action against insurers that denied claims based on the "unsupported belief that these earthquakes were the result of fracking or injection well activity."[70]

The commissioner cited no evidence that Oklahoma's insurers did not inspect insureds' properties frequently enough (or that insureds would want more frequent intrusions into their daily lives), that earthquake adjusters were undertrained, or that Oklahoma earthquake insurers had ever engaged in improper adjustment or claims payment.[71] Indeed, despite calling the science of induced earthquakes "unsettled," he did not suggest that insurers relied on it improperly.[72]

The bulletin went on, ostensibly in the context of assessing preexisting damage with regard to high denial rates of earthquake claims, to remind insurers of the commissioner's responsibility to monitor claims and determine "whether insurers are employing fair claims practices."[73] It suggested that examinations would be in order for insurers that did not inspect insured properties more frequently than, presumably, they had been or historically felt necessary.[74] It added that, because "[c]omplex fact questions arise when determining whether earth movement has resulted from a covered cause or an excluded cause," the commissioner "expect[ed] the addressees of this bulletin to take steps to ensure that claims adjusters receive training" in earthquake claims.[75]

Not surprisingly, earthquake coverage premiums rose as much as 260 percent in the two years leading up to May 2016, deductibles also increased, and some insurers stopped writing new earthquake coverage.[76] Some insurers were considering the expensive option of suing drillers for reimbursement on paid claims.[77] Several months later, the commissioner issued a follow-on bulletin stating that insurers began offering consumers "enhanced earthquake coverage that treats earthquakes caused by water disposal injection wells or hydraulic fracturing as covered events."[78]

The commissioner who issued the bulletin had a reputation for intimidation and militarization of the Oklahoma Insurance Department.[79] The department spent $180,000 on tactical shotguns, body armor, police-package vehicles, other equipment, and SWAT (special weapons and tactics)–style training for its anti-fraud unit.[80] The commissioner was "personally involved in the details of the purchase, including the design of logos to go on the side of the vehicles."[81] Many, including legislators from both major parties, questioned whether this was a proper posture for either a unit

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[70] *Id*.

[71] *See id.*; *infra* text accompanying notes 73–75.

[72] *See* Doak, *supra* note 67; *supra* text accompanying note 70.

[73] Doak, *supra* note 67, at 2.

[74] *Id.* at 2–3.

[75] *Id.* at 3.

[76] Luc Cohen, *supra* note 59.

[77] *Id*.

[78] Revised Earthquake Insurance Bulletin No. PC 2015-02, from John D. Doak, Oklahoma Insurance Commissioner, to All Property & Casualty Insurers Licensed in the State of Oklahoma, 2 (Aug. 5, 2015), https://www.oid.ok.gov/wp-content/uploads/2019/10/081015_EarthquakeBulletin.pdf.

[79] *See, e.g.*, Wayne Greene, *Body-Armored Okla. Insurance Fraud Agents Armed with Shotguns*, OFFICER.COM (Dec. 9, 2012), https://www.officer.com/investigations/news/10839656/bodyarmored-okla-insurance-fraud-agents-armed-with-shotguns [https://perma.cc/RR6X-MDPA]; Sean Murphy, *Oklahoma Insurance Department Spends $180K on Guns, Police Vehicles*, CLAIMS J. (Dec. 5, 2012), https://www.claimsjournal.com/news/southcentral/2012/12/05/218605.htm [https://perma.cc/4K5B-CMJM].

[80] Greene, *supra* note 79; Murphy, *supra* note 79.

[81] Greene, *supra* note 79; Murphy, *supra* note 79.

that deals in white-collar crime or an elected official.[82] The commissioner justified the purchase on the ground that two Louisiana fraud investigators had been shot and killed the previous year; he cited no other incidents or justifications.[83]

Equally aggressively—and, likely, lawlessly—the same commissioner worked with local law enforcement agencies to create motor vehicle insurance checkpoints, even while Oklahoma law dictates that "[e]stablishing compliance with the [motor vehicle] Compulsory Insurance Law . . . shall not be the primary cause for law enforcement to stop a motor vehicle."[84] Given the commissioner's reputation for disregarding norms and being overly aggressive, insurers had good reason to take his threats about earthquake insurance seriously.

B. Case No. 2: Self-Defense in New York

New York's former governor made no secret of his animosity toward the National Rifle Association (NRA), acknowledging that he has been a "longtime opponent" of the organization and repeatedly calling it "extremist" and accusing it of causing "carnage in this nation."[85] On several occasions, commenting on news articles discussing actions by New York's insurance regulator, the New York State Department of Financial Services (NYDFS), against the NRA and its interests, and an NRA lawsuit prompted by those actions,[86] the governor has promoted his use of the power of the state to attack the NRA financially. He explicitly stated that his goal in doing so is to destroy the organization: "We're forcing the NRA into financial jeopardy. *We won't stop until we shut them down.*"[87] He added that "New York is forcing the NRA into financial crisis. It's time to put the gun lobby out of business. *#BankruptTheNRA*"[88] and that "New York has the NRA on the brink. . . . I'll be sure to remember them in my thoughts and prayers."[89]

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[82] Greene, *supra* note 79; Murphy, *supra* note 79. A state purchasing agent even held up part of the purchase, "puzzled" by what he believed to be an administrative agency's purchase of police vehicles. Upon learning of the delay, the commissioner reacted angrily toward the State Finance Secretary. Greene, *supra* note 79.

[83] *Id.*; Murphy, *supra* note 79.

[84] OKLA. STAT. tit. 47 § 7-600.2(A)(10) (2020); Murphy, *supra* note 79; *Oklahoma Safety Checkpoint Nets 17 Citations for Driving Without Insurance*, INS. J. (Sept. 29, 2013), https://www.insurancejournal.com/news/southcentral/2013/09/29/306576.htm [https://perma.cc/Z4F6-76N].

[85] *E.g.*, Press Release, Governor Andrew M. Cuomo, Transcript: Governor Cuomo Addresses NRA Lawsuit and Condemns the Organization's Illegal Business Practices While Guest on CNN (Aug. 6, 2018), https://www.governor.ny.gov/news/transcript-governor-cuomo-addresses-nra-lawsuit-and-condemns-organizations-illegal-business-0 [https://perma.cc/8BL2-M6VH]; Andrew Cuomo (@NYGovCuomo), TWITTER (Apr. 20, 2018, 9:58 AM), https://twitter.com/NYGovCuomo/status/987359763825614848. Mr. Cuomo has since resigned from office following sexual harassment allegations. WSJ Staff, *Gov. Andrew Cuomo's Resignation: What You Need to Know*, WALL ST. J. (Aug. 10, 2021, 5:00 PM ET), https://www.wsj.com/articles/gov-andrew-cuomos-resignation-what-you-need-to-know-11628629204 [https://perma.cc/EN67-KHNH].

[86] *See infra* notes 90–125 and accompanying text (discussing the NYDFS actions and the lawsuit that they elicited).

[87] Andrew Cuomo (@andrewcuomo), FACEBOOK (Aug. 3, 2018), https://www.facebook.com/andrewcuomo/posts/10155987290088401 [https://perma.cc/E9CE-84N6] (emphasis added).

[88] Andrew Cuomo (@andrewcuomo), FACEBOOK (Aug. 4, 2018), https://www.facebook.com/andrewcuomo/posts/10155989594858401 [https://perma.cc/LU9Q-H7YC] (emphasis added).

[89] Andrew Cuomo, *Stand with Us in the Fight to End the NRA's Stranglehold on American Politics. VOTE SEPT. 13*, YOUTUBE (Aug. 5, 2018), https://web.archive.org/web/20180806034022/https://www.youtube.com/watch?v=59NDp7ATfhg (archived Aug. 6, 2018).

A few days later, perhaps realizing that he should not have so candidly admitted that he instructed the NYDFS to take action against the NRA for the purpose of putting it out of business, he attempted to backpedal about the NRA's financial condition. Press Release, Governor Andrew M. Cuomo, Governor Cuomo Exposes NRA's Hypocrisy (Aug. 9, 2018), https://www.governor.ny.gov/news/governor-cuomo-exposes-nras-hypocrisy [https://perma.cc/4DM5-A4QP]; Press Release, Governor

1. The Guidance Memoranda and Consent Decrees

The events to which these statements and underlying articles refer began in April 2018 when, per the governor's instructions and concurrently with his calling the NRA "an extremist organization,"[90] NYDFS's superintendent sent a guidance memorandum to all insurers doing business in New York.[91] In a "zealous tone," the memorandum ostensibly encouraged insurers to consider reputational risk and, therefore, "'review any relationships they have with the NRA or similar gun promotion organizations, and … take prompt actions to manage these risks and promote public safety.'"[92] The memorandum did not identify law violations or a concrete threat to the addressee insurers' financial integrity.[93] The bulk of the memorandum touted NYDFS's policy views about gun control and corporate social responsibility, while villainizing the NRA and exhorting the moral uprightness of those who oppose its positions.[94] The following paragraph from the memorandum is illustrative of its tone:

> While the social backlash against the National Rifle Association (the "NRA"), and similar organizations that promote guns that lead to senseless violence, has in the past been strong, the nature and the intensity of the voices now speaking out, including the voices of the passionate, courageous, and articulate young people who have experienced this recent horror first hand, is a strong reminder that such voices can no longer be ignored and that society, as a whole, has a responsibility to act and is no longer willing to stand by and wait and witness more tragedies caused by gun violence, but instead is demanding change now.[95]

The memorandum singled out the NRA four times. It thrice referred generally to gun-rights advocacy groups as entities with which insurers should not do business.[96]

One New York banker said of the superintendent's nearly identical memorandum to banks that it is hard to know which legal business is "'going to come in disfavor with either the New York State DFS . . . [which] may say, "Reputationally, you shouldn't be doing business with this

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Andrew M. Cuomo, Governor Cuomo Directs Department of Financial Services to Urge Companies to Weigh Reputational Risk of Business Ties to the NRA and Similar Organizations (Apr. 19, 2018), https://www.governor.ny.gov/news/governor-cuomo-directs-department-financial-services-urge-companies-weigh-reputational-risk [https://perma.cc/DLK3-7S5K] ("Governor Andrew M. Cuomo today directed the Department of Financial Services to urge insurance companies . . . in New York to review any relationships they may have with the National Rifle Association and other similar organizations.") [hereinafter Governor Cuomo Directs].

The apparent hostility to spiritual and religious people is reminiscent of the Oklahoma Insurance Commissioner's anger toward a state purchasing agent. *See supra* note 82.

[90] Andrew Cuomo (@NYGovCuomo), *supra* note 85 (also "urg[ing] companies in New York State to revisit any ties they have to the NRA and consider their reputations, and responsibility to the public"); Governor Cuomo Directs, *supra* note 89.

[91] Memorandum from Maria T. Vullo, Superintendent of Financial Services, to the Chief Executive Officers or Equivalents of All Insurers Doing Business in the State of New York (Apr. 19, 2018), https://dfs.ny.gov/system/files/documents/2020/03/il20180419_rm_nra_gun_manufacturers_insurance.pdf [https://perma.cc/PDP7-JPSN] [hereinafter Vullo Insurance Letter]. A nearly identical memorandum was sent to financial institutions licensed or chartered in New York. Memorandum from Maria T. Vullo, Superintendent of Financial Services, to the Chief Executive Officers or Equivalents of New York State Chartered or Licensed Financial Institutions (Apr. 19, 2018), https://www.dfs.ny.gov/system/files/documents/2020/03/il20180419_rm_nra_gun_manufacturers_banking.pdf [https://perma.cc/D2YT-HVKQ] [hereinafter Vullo Bank Letter].

[92] Julie Andersen Hill, *Regulating Bank Reputation Risk*, 54 GA. L. REV. 523, 555, 556 (2020) (discussing the nearly identical Vullo Bank Letter, *supra* note 91); Vullo Insurance Letter, *supra* note 91.

[93] Vullo Insurance Letter, *supra* note 91; *see* Hill, *supra* note 92, at 532–33.

[94] Vullo Insurance Letter, *supra* note 91.

[95] *Id.* at 1.

[96] *Id.* (also praising "a number of financial institutions that severed their ties with the NRA.").

company,"'" adding that "'it's hard to know what the rules are.'"[97] Others said that "such regulatory guidelines . . . can effectively compel institutions to cease catering to legal businesses."[98] This possibility is not surprising, even given NYDFS's assertion that the memorandum was not a regulatory threat because, with regard to "organization preferences," "frequently . . . regulators treat unenforceable guidance as binding," and NYDFS is "widely viewed as one of the nation's most aggressive State regulators."[99]

Two weeks later, NYDFS announced consent orders related to alleged violations by Lockton and Chubb entities, which sold as an affinity program[100] and underwrote the NRA-endorsed Carry Guard self-defense insurance, of various New York insurance laws.[101] In the orders, Lockton, Chubb, and NYDFS stipulated the following:[102]

1. Lockton compensated the NRA on the basis of premiums collected, and the NRA was acting as an unlicensed insurance broker in the state.
2. Lockton sold, and Chubb wrote, (a) coverage for the costs of criminal defense, (b) liability coverage for injury or property damage expected or intended from the insured's standpoint in a policy limited to firearms use and "that was beyond the use of reasonable force to protect persons or property," and (c) coverage for psychological counseling expenses.
3. Lockton included a one-year NRA membership, which was worth more than $25, with the purchase of Carry Guard insurance without mentioning the membership in the policy.
4. Lockton offered free damage and theft insurance for firearms and firearm accessories to NRA members.

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[97] Neil Haggerty, *Gun Issue Is a Lose-Lose for Banks (Whatever Their Stance)*, AM. BANKER (Apr. 26, 2018, 1:11 PM EDT), https://www.americanbanker.com/news/gun-issue-is-a-lose-lose-for-banks-whatever-their-stance [https://perma.cc/JB5R-H5L9] (discussing Vullo Bank Letter, *supra* note 91).

[98] *Id*.

[99] Memorandum of Law in Support of Defendants' Motion to Dismiss the First Amended Complaint Pursuant to FRCP 12(B)(6) at 13, Nat'l Rifle Ass'n of Am. v. Cuomo [hereinafter *NRA I*], 350 F. Supp. 3d 94 (N.D.N.Y. 2018) [hereinafter Motion to Dismiss I]; Hill, *supra* note 92, at 580 (citing John Heltman, *Next on Banks' Reg Relief Wish List: More Consistent Exams*, AM. BANKER (Nov. 19, 2018, 2:03 PM), https://www.americanbanker.com/news/next-on-banks-reg-relief-wish-list-more-consistent-exams [https://perma.cc/6A6U-788A] ("Greg Baer, CEO of the Bank Policy Institute, said banks routinely complain that supervisors flag things amounting to organization preferences, not safety and soundness threats. Examiners cite guidance as the basis for 'Matters Requiring Attention' or 'Matters Requiring Immediate Attention,' Baer said, even though agency leaders insist disobeying guidance is not grounds for punitive action."); Kristin Broughton, *Bad Actors, Beware: N.Y. Gov. Cites Wells Fargo in Calling for 'Bold Steps,'* AM. BANKER, Feb. 1, 2017, at 8 ("the New York State Department of Financial Services [is] widely viewed as one of the nation's most aggressive state regulators").

[100] An affinity program is an arrangement under which an organization, typically a nonprofit, receives royalties for licensing its intellectual property, like its name, logo, or member list, to a commercial service provider. The nonprofit's members usually receive a discount on the provider's services.

[101] Consent Order under Sections 1102 and 3420 of the Insurance Law, In re Chubb Group Holdings Inc. and Illinois Union Insurance Company (May 7, 2018), https://www.dfs.ny.gov/system/files/documents/2022/08/ea20180507_chubb_illinois.pdf [https://perma.cc/4CFE-RELT] [hereinafter Chubb Consent Order]; Consent Order under Articles 21, 23, and 24 of the Insurance Law, In re Matter of Lockton Affinity, LLC and Lockton Companies, LLC (May 2, 2018), https://www.dfs.ny.gov/system/files/documents/2020/03/ea180502_lockton.pdf [https://perma.cc/A4F2-RVQR] [hereinafter Lockton Consent Order]; Press Release, N.Y. St. Dept. of Fin. Svcs., DFS Fines Chubb Subsidiary Illinois Union Insurance Company $1.3 Million for Underwriting NRA-Branded "Carry Guard" Insurance Program in Violation of New York Insurance Law (May 7, 2018), https://www.dfs.ny.gov/reports_and_publications/press_releases/pr1805071 [https://perma.cc/6QFM-LNKD]; Press Release, N.Y. St. Dept. of Fin. Svcs., DFS Fines Lockton Companies $7 Million for Underwriting NRA-Branded "Carry Guard" Insurance Program in Violation of New York Insurance Law (May 2, 2018), https://www.dfs.ny.gov/reports_and_publications/press_releases/pr1805021 [https://perma.cc/P7YC-66QX].

[102] Chubb Consent Order, *supra* note 101, at 6; Lockton Consent Order, *supra* note 101, at 11–12.

5. In its advertisements for Carry Guard, Lockton called attention to Chubb, an excess line insurer, and mentioned Chubb's AM Best rating.[103]
6. Lockton did not secure declinations from three admitted insurers before placing Carry Guard insureds with Chubb's Illinois subsidiary.
7. Chubb issued liability policies to New York residents that did not include certain statutory notices.

Each of these acts, the orders stipulated, violated New York's insurance law.[104] The orders fined Lockton $7 million and Chubb $1.3 million.[105]

In fining Lockton and Chubb, NYDFS imposed fines far higher than those imposed by other states for identical conduct. Even if a fine was appropriate for technical violations of New York's insurance laws, it was disproportionate to the fines imposed by other jurisdictions. For selling and writing 680 Carry Guard policies in New York, Lockton and Chubb paid fines of $7 million and $1.3 million, respectively.[106] For 322 such policies issued in neighboring New Jersey, the New Jersey Department of Banking and Insurance fined Lockton $1 million.[107] For 811 such policies issued in Washington state, the Washington State Office of the Insurance Commissioner fined Lockton $75,000 and Chubb $102,000.[108] California did not issue a fine to either company or to the NRA, which it ordered to stop soliciting insurance in the state.[109]

Lockton's order prohibits it from selling Carry Guard in New York, "similar programs" endorsed by any organization, or any program endorsed by the NRA, whether or not these programs comply with New York insurance law.[110] Chubb's order prohibits it from participating in Carry Guard or a similar program in New York, even if it complies with New York insurance

[103] An excess line insurer is one that is not licensed to write insurance in the state in question. Brokers may place policies with excess line insurers if the coverage is not available from admitted insurers licensed to do business in the state. AM Best is "the largest credit rating agency in the world specializing in the insurance industry." *About Us*, AM BEST, http://www.ambest.com/about/ [https://perma.cc/6KZ8-ZQ5M].

[104] Most of these acts, even if they happened and are technical law violations, are but superficially significant; prohibiting some of them can be outright harmful. *See infra* section III.C.

[105] Chubb Consent Order, *supra* note 101, at 6; Lockton Consent Order, *supra* note 101, at 12.

[106] *See infra* note 110 and accompanying text.

[107] Consent Order, In re Proceedings by the Commissioner of Banking and Insurance, State of New Jersey, to fine Lockton Affinity, LLC, Reference No. 9026721, at 4 (Sept. 3, 2019), https://www.state.nj.us/dobi/division_insurance/enforcement/e19_86.pdf [https://perma.cc/TXD7-6ML2] [hereinafter NJ Consent Order]. Chubb, which is headquartered in New Jersey, along with Pennsylvania and New York, was not fined. *Locations*, Chubb, https://www.chubb.com/us-en/careers/locations.aspx [https://perma.cc/G523-EDEL].

[108] Consent Order Levying a Fine, In re Lockton Affinity, LLC, at 2, 5 (Mar. 25, 2019), https://fortress.wa.gov/oic/consumertoolkit/Orders/OrderProfile.aspx?OrderNumber=Mk%2fdE1%252BnN5TeW0%2fd625T1A%253D%253D [https://perma.cc/9PCX-JSC8] [hereinafter WA Lockton Consent Order] (click on "Consent Order with Fine" link); Consent Order Levying a Fine, In re Illinois Union Ins. Co., at 3, 5 (Feb. 13, 2019), https://fortress.wa.gov/oic/consumertoolkit/Orders/OrderProfile.aspx?OrderNumber=cSfPDwErqXVwUtKYKJUyVw%253D%253D [https://perma.cc/542W-XGKZ] [hereinafter WA Chubb Consent Order] (same).

[109] The alleged solicitation was via e-mails that described some "specific benefits" of Carry Guard insurance. The NRA agreed to comply after a hearing. Order Adopting Stipulation, In re National Rifle Association of America, File No. OC201700492-AP (May 1, 2019), http://www.insurance.ca.gov/0400-news/0100-press-releases/2019/upload/nr035OrderAdoptingStipulation.pdf [https://perma.cc/W4QZ-V7P7]; Order to Cease and Desist and Notice to Right to Hearing, In re National Rifle Association of America, File No. OC201700492-AP, at 3, 5 (Sept. 11, 2018), http://www.insurance.ca.gov/0400-news/0100-press-releases/2019/upload/nr035NRAC-DOrder.pdf [https://perma.cc/8SJB-GEGC] [hereinafter CA Cease and Desist Order].

[110] Chubb Consent Order, *supra* note 101, at 6–7; Lockton Consent Order, *supra* note 101, at 12–13.

law.[111] Remarkably, both orders restrict the firms' participation in any NRA-endorsed affinity program, whether firearms-related or not, with any New York resident, even if the coverage would apply solely outside the state.[112] Both orders allow the provision in New York of "homeowners, renters, or general liability insurance . . . that includes personal injury liability insurance or property damage liability insurance for loss, damage, or expense that results from the negligent use of a firearm."[113]

Two days after the second consent order was issued, Lloyd's announced that it would stop underwriting programs offered through the NRA.[114] According to a lawsuit filed by the NRA in July 2018, NYDFS privately "exhort[ed] firms to sever ties with the NRA," which resulted in the gun-rights organization's general, umbrella, and media liability carrier to drop its coverage.[115] The suit also asserts that "nearly every [insurance] carrier has indicated that it fears transacting with the NRA specifically in light of DFS's actions against Lockton and Chubb" and that the NRA is having similar difficulties obtaining banking services because the banks fear NYDFS's reprisals.[116]

The NRA alleged that NYDFS selectively charged Lockton with compensating an affinity partner based on premiums collected; offering free basic insurance to its members; and advertising Chubb's financial stability for Lockton-marketed NRA affinity products, but not for similarly or identically situated Lockton-marketed products of other organizations.[117] Rather than deny these claims, NYDFS raised a standing defense, which the court rejected.[118] NYDFS then moved to dismiss the selective-enforcement claims on the grounds that the NRA neither pleaded that NYDFS failed to enforce purported violations by similar enough "comparator" organizations nor knew of the other organizations' purported violations. The court granted the motion on the latter ground.[119]

One has difficulty believing that NYDFS did not know about the non-NRA products given that they were also marketed by Lockton, which NYDFS was already investigating, unless it turned a blind eye to them. And some of the similar or identical products identified in the NRA's

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[111] Chubb Consent Order, *supra* note 101, at 7.

[112] *Id.*; Lockton Consent Order, *supra* note 101, at 13.

[113] Chubb Consent Order, *supra* note 101, at 7; Lockton Consent Order, *supra* note 101, at 13. As explained *infra* notes 141–142 and accompanying text, such provisions in broader general liability policies are all but equivalent to the allegedly improper provisions at issue in the consent orders.

[114] Simon Jessop, *Lloyd's Underwriters Told to Stop Insurance Linked to NRA*, REUTERS (May 9, 2018), https://www.reuters.com/article/us-lloyds-of-london-nra-idUSKBN1IA1T5 [https://perma.cc/Y6MC-4JLY].

[115] First Amended Complaint and Jury Demand at 17, 18, *NRA I*, 350 F. Supp. 3d 94 (N.D.N.Y. 2018) [hereinafter First Amended Complaint].

[116] *Id.* at 26–27. This author's private conversations with insurance professionals likewise revealed that they all view NYDFS's actions as threats.

[117] *See supra* text accompanying note 102, nos. 1, 4, 5. The NRA's complaint cited then-live examples of numbers 4 and 5 for other affinity groups' products. First Amended Complaint, *supra* note 115, at 16, 23–24.

[118] *NRA I*, 350 F. Supp. 3d at 129–30 (denying motion to dismiss damages claim for selective enforcement); Motion to Dismiss I, *supra* note 99, at 37–39. The court did dismiss the NRA's requests to enjoin future enforcement actions against it and the enforcement of the Lockton and Chubb consent orders. *NRA I*, 350 F. Supp. 3d at 126–29.

[119] Nat'l Rifle Ass'n of Am. v. Cuomo (*NRA II*), No. 1:18-CV-00566, 2019 WL 2075879, at *2–5; Memorandum of Law in Support of Defendants' Motion to Dismiss the Amended Complaint in Part under FRCP 12(C) at 10–12, *NRA I*, 350 F. Supp. 3d 94.

brief,[120] as well as others not mentioned there,[121] continue, as of this writing, to be marketed in the allegedly violative forms identified in the consent decree.

As if to retaliate for the NRA's lawsuit, NYDFS fined a group of Lloyd's syndicates $5 million in a December 2018 consent order for related alleged violations.[122] NYDFS then fined Lockton an additional $400,000 in a January 2019 consent order.[123] Finally, NYDFS fined the NRA $2.5 million for violations related to those alleged to have been committed by Lockton and Chubb.[124]

In January 2021, the NRA filed for bankruptcy.[125] In May 2021, the bankruptcy judge dismissed the NRA's suit on the ground that it was filed in bad faith. Bankruptcy, the judge held, cannot be used to avoid a state-forced corporate dissolution.[126]

2. Overstated Accusations

It is unclear whether all of the activities listed in the NYDFS consent decrees were, in fact, illegal. Some of the law violations to which Lockton and Chubb stipulated do not fit neatly, in the context of self-defense insurance, with either the circumstances at issue or the usual justifications for those laws. Others require stretching legal definitions. Although the remaining acts alleged by NYDFS are technical violations if true, they range from being inconsequential[127] to affirmatively counterproductive. One is, perhaps, not surprised that NYDFS subjected to such consent decrees only insurers doing business with the political enemies of the gubernatorial administration of which it was a part.

New York's assertions about intentional-act and criminal-defense coverage[128] fit with neither Carry Guard's provisions nor the fortuity or moral hazard–based justifications underlying the

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[120] VETERANS OF FOREIGN WARS, VFW POST INSURANCE PROGRAM: PROGRAM INFORMATION 2, http://vfwinsurance.com/wp-content/uploads/sites/29/2017/12/VFW_Post_Insurance_Information_Packet.pdf (AM Best rating) [https://perma.cc/PRF9-9JQ4]; *Life Insurance Crafted for Veterans*, THE LOCKTON AFFINITY VFW POST INSURANCE PROGRAM, https://vfwinsurance.com/life-insurance/#no-cost [https://perma.cc/2W82-VK3W] (free insurance); *Insurance for Photographers*, PPA INS. SOLUTIONS PROGRAM, https://insuranceforppa.com/insurance-products [https://perma.cc/3MH9-3W29] (free insurance).

[121] *E.g.*, THE LOCKTON AFFINITY NEW YORK CITY BAR ASSOCIATION INSURANCE PROGRAM, https://nycbarinsurance.com/ [https://perma.cc/U6DT-5A4T] (AM Best rating); THE LOCKTON AFFINITY KNIGHTS OF COLUMBUS LOCAL COUNCIL INSURANCE PROGRAM, https://councilinsuranceprogram.com/ [https://perma.cc/D6X9-6ZRJ] (same).

[122] Consent Order under Sections 1102 and 3420 of the Insurance Law, In re Certain Underwriters at Lloyd's, London Subscribing to Insurance Policies Issued to the National Rifle Association of America (Dec. 20, 2018), https://www.dfs.ny.gov/system/files/documents/2019/01/ea181220_lloyds.pdf [https://perma.cc/6D7H-D9DE].

[123] Supplemental Consent Order under Articles 21, 23, and 34 of the Insurance Law, In the Matter of Lockton Affinity, LLC, and Lockton Companies, LLC (Jan. 31, 2019), https://www.dfs.ny.gov/system/files/documents/2019/02/ea190131_lockton.pdf [https://perma.cc/B4LN-KE53].

[124] Consent Order, In the Matter of The National Rifle Association of America (Nov. 13, 2020), https://www.dfs.ny.gov/system/files/documents/2020/11/ea20201118_co_nra.pdf [https://perma.cc/E3CX-UGAL].

[125] Voluntary Petition for Non-Individuals Filing for Bankruptcy, In re National Rifle Association of America, No. 3:21-bk-30085 (Bankr. N.D. Tex. Jan. 15, 2021).

[126] Order Granting Motion to Dismiss, In re National Rifle Association of America, No. 3:21-bk-30085 (Bankr. N.D. Tex. May 11, 2021).

[127] *See supra* text accompanying note 102, nos. 1, 2(c), 3, 7; *but see infra* text accompanying note 145. For example, although jurisdictions vary on precisely what selling or soliciting insurance means, generally, providing more than cursory coverage details qualifies, and thus requires one to be licensed as a broker. *See id.* no. 1. A cease-and-desist order followed by a hearing and stipulation, without a large fine, would seem to be the appropriate remedy for a small and unwitting violation of the insurance law. *See supra* note 109 and accompanying text.

[128] *See supra* text accompanying note 102, nos. 2(a) and (b).

normal bar on insuring intentional acts.[129] Carry Guard covered only "act[s] of defending one's person, or other persons who may be threatened, or one's property . . . [with] a legally possessed firearm as may be authorized by any applicable local, State, federal, or provincial laws."[130] In New York, an act of self-defense is authorized only if reasonable force is employed.[131]

The policy further excluded coverage for harms "intentionally caused by or at the direction of the insured" and any "criminal act" that was not a colorable attempt at self-defense.[132] The policy covered criminal defense for instances in which, despite the use of a legally owned weapon in a bona fide self-defense situation, "it [was] reasonable to expect that [an insured] will be criminally charged."[133] New York law is well settled that reasonable, but mistaken, use of even deadly force will exculpate a defendant from criminal liability for the harm caused by such use of force.[134]

Despite the consent decrees' statements to the contrary, then, neither Lockton nor Chubb issued or delivered policies covering criminal acts or intentional firearm use "that was beyond the use of reasonable force to protect persons or property."[135] Nor would they want to issue such policies, which would subject them to moral hazard and adverse selection in situations where those problems are at a zenith.[136]

Even if the policy, which covered pre-disposition defense costs up to 20 percent of its limit, is construed to cover mistakenly deployed force that ends up being improper, and thus subject to criminal liability,[137] the Court of Appeals of New York held that

> The mere fact that an act may have penal consequences does not necessarily mean that insurance coverage for civil liability arising from the same act is precluded by public policy. . . . Whether such coverage is permissable [*sic*] depends upon whether the insured, in committing his criminal act, intended to cause injury.[138]

That holding is not surprising considering that, although pulling a trigger in a good-faith defensive situation is volitional, any resulting harm is fortuitous because the defender does not plan or

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[129] JERRY & RICHMOND, *supra* note 4, § 63C ("The insurer bases its premium rates on the probabilities of fortuitous losses; if the insured is in control of the insured risk, which is the case if the policy covers intentional acts, the insurer's ability to calculate fair rates is frustrated."); Mocsary, *supra* note 6, at 1255 ("Covering intentional criminal shootings . . . may encourage them."); *see supra* text accompanying note 13.

[130] CHUBB, NRA CARRY GUARD DECLARATIONS AND POLICY 6 (2017) (internal quotation marks omitted).

[131] N.Y. PENAL LAW §§ 35.10, 35.15 (2020).

[132] *See* CHUBB, *supra* note 130, at 4.

[133] *Id.* at 2.

[134] N.Y. PENAL LAW § 35.15 (2020); People v. Walker, 42 N.E.3d 688, 690–93 (2015); People v. Wesley, 563 N.E.2d 21, 23–25 (N.Y. 1990); People v. Goetz, 497 N.E.2d 41, 52–53 (N.Y. 1986).

[135] *Supra* text accompanying note 102, no. 2(b). New Jersey and California seem to agree. *See* NJ Consent Order, *supra* note 107 (not discussing criminal or intentional acts); CA Cease and Desist Order, *supra* note 109 (same). Washington does not. *See* WA Lockton Consent Order, *supra* note 108, at 3; WA Chubb Consent Order, *supra* note 108, at 2–3.

[136] *See supra* note 13 and accompanying text.

[137] CHUBB, *supra* note 130, at 3. Such a provision indirectly supports the presumption of innocence. *See infra* notes 231–234 and accompanying text. Without the provision, innocents who lack the means to pay defense costs, which can be very high in criminal cases, may be forced to accept a plea offer. *See* Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1132 (2008) ("the process costs of proceeding to trial often dwarf plea prices").

[138] Public Service Mut. Ins. Co. v. Goldfarb, 425 N.E.2d 810, 814 (N.Y. 1981).

desire to be attacked.[139] "[O]ne whose intentional act causes an unintended injury may be . . . indemnified" under an insurance policy.[140]

Indeed, many personal liability and homeowners policies, including in New York, cover liability resulting from the reasonable use of force to protect persons or property.[141] Carry Guard was a personal liability policy narrowly focused on firearm self-defense. The coverage to which NYDFS objected was available in policies not "limited to use of firearms."[142]

Finally, Lockton's offering free firearm damage and theft insurance to NRA members is a violation of a statute barring rebating only under a strained interpretation of rebate.[143] For these policies to constitute rebates, NRA members who received the insurance for free had to have been receiving a "rebate" of the entire premium amount, inasmuch as insureds who purchased Carry Guard, which included the damage and theft coverage, were seen as having paid for it. But Carry Guard purchasers are just as easily seen as receiving the damage and theft insurance for free with their self-defense coverage, especially if one considers the ubiquity of such free policies.[144] And free NRA memberships were given to all Carry Guard purchasers. Although this practice was a violation of law because the memberships were not mentioned in the policies, the situation remains that the intention was to put all NRA members, whether or not they purchased Carry Guard, on the same footing vis-à-vis the damage and theft coverage.[145]

III. THE EVILS OF ADMINISTRATIVE BROWBEATING

The behaviors described in part II suggest that the Oklahoma and New York insurance regulators' actions were not driven by concerns about the safety and soundness of their states' insurance markets.[146] The McCarran-Ferguson Act and its post-enactment state-level legislation sought to make insurance available to all consumers on equitable terms, protect the stability of the states' insurance markets, and facilitate insurance's enabling and safety-enhancing potential.[147] Yet Oklahoma and New York regulators' acts achieved the opposite, hampering the efficient functioning of their insurance markets.

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[139] *See* Mocsary, *supra* note 6, at 1255.

[140] *Public Service Mut. Ins. Co.*, 425 N.E.2d at 814; *accord* Messersmith v. Am. Fidelity Co., 133 N.E. 432, 433 (N.Y. 1921) (Cardozo, J.).

[141] *E.g.*, LIBERTY MUTUAL INSURANCE, HOMEOWNER AMENDATORY ENDORSEMENT: SPECIAL PROVISIONS – NEW YORK (FMHO 6100NY 11 17) 8 (2017) (amending LIBERTY MUTUAL INSURANCE, LIBERTYGUARD DELUXE HOMEOWNERS POLICY (HO 00 03 EDITION 04 91) 11 (1991)); HARLEYSVILLE INSURANCE COMPANY OF NEW YORK, PERSONAL UMBRELLA LIABILITY POLICY 4 (2013); *see* CHRISTOPHER J. MONGE, THE GUN OWNER'S GUIDE TO INSURANCE FOR CONCEALED CARRY AND SELF-DEFENSE 41–44 (2013); Peter Kochenburger, *Liability Insurance and Gun Violence*, 46 CONN. L. REV. 1265, 1278–84 (2014).

[142] Chubb Consent Order, *supra* note 101, at 4; Lockton Consent Order, *supra* note 101, at 4.

[143] Lockton Consent Order, *supra* note 101, at 12; N.Y. INS. LAW § 2324(a) (2020); *see supra* text accompanying note 102, no. 4. There is good reason to bar the sale of firearm theft (but not damage) insurance. A great many crime firearms are acquired via theft, *see* Mocsary, *supra* note 6, at 1229, 1263 & n.329, and one should expect theft insurance to incentivize less careful firearm storage, *id.* at 1257.

[144] *See supra* note 120 and accompanying text.

[145] *See id.*; *supra* text accompanying note 102, no. 3.

[146] The Oklahoma commissioner's actions could have resulted only in more claims paid than expected per premium collected, and New York's commissioner, despite her governor having called it "murder insurance," acknowledged that no claims were made under the 680 Carry Guard policies issued in the state. Lockton Consent Order, *supra* note 101, at 8; Cuomo, *supra* note 85.

[147] *See supra* text accompanying notes 40–42.

This part sets forth the broad range of injuries caused by Oklahoma and New York regulators both to insureds and insurers and to a society unable to realize the broader positive externalities that insurance creates. Part IV briefly surveys collateral harms to the social and legal order caused by administrative browbeating.

A. Regulatory Risk

When regulators' decisions seem motivated by politics rather than their regulatory mission, no one with a potentially controversial (or noncontroversial, as in Oklahoma) enterprise is safe. Churches, coal mines, condom companies, and other legal industries possessed of no special financial risks have not been immune.[148] One is, perhaps, unsurprised that the American Civil Liberties Union filed a brief to this effect on behalf of the NRA.[149]

Insurance regulation serves partially to support insurers' reputations by assuring insureds that insurers are able to pay claims.[150] But if the regulators are viewed as incompetent or biased, *their* reputations suffer.[151] The public, in turn, has less reason to trust that those regulators will be able to protect insurer solvency or be willing to place insurer solvency ahead of the regulator's policy preferences.[152]

The result, in other words, of the Oklahoma Insurance Commissioner and NYDFS's threats is increased regulatory risk along multiple dimensions. Such risk is not fortuitous, cannot meaningfully be diversified away or reinsured, and cannot be charged to the regulator.[153] That situation damages the very market that insurance regulators are tasked to protect, by forcing insureds and insurers to bear the cost or forgo the purchase and sale of insurance.[154] When regulators harm markets, they create social cost, as described in sections B and C of part III.

B. Case No. 1: Harm to Oklahoma's Insurance Market

Oklahoma's Insurance Commissioner harmed Oklahoma's insurance market by shifting costs from the parties causing harm to those suffering it, making home ownership more difficult, making the process of providing earthquake insurance more costly, and creating incentives to make extraction less safe.

1. Cost Shifting

Oklahoma's pushing homeowner insurers to cover the costs of induced earthquakes initially placed the costs of the damages caused by the earthquakes onto the insurers who did not expect to have to pay them. Forcing insurers to rely on costly litigation to recover claim payments exacerbates matters by creating costs for, rather than merely shifting them to, the industry.[155] This

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[148] *See* Hill, *supra* note 92, at 573–74.

[149] Brief of Amicus Curiae American Civil Liberties Union in Support of the Plaintiff's Opposition to the Defendants' Motion to Dismiss, *NRA I*, 350 F. Supp. 3d 94 (N.D.N.Y. 2018) [hereinafter ACLU Amicus Brief].

[150] *See supra* part I.C; Hill, *supra* note 92, at 592.

[151] *See* Hill, *supra* note 92, at 592–95.

[152] *See id.*

[153] One would, indeed, be surprised if regulators allowed the risk that they create to be insured.

[154] *See supra* section I.C.2.

[155] *See supra* text accompanying note 77.

willingness to shift costs from the extraction industry to the insurance industry is unsurprising given the extraction industry's greater importance to the state.[156]

But past the short term, one would expect insurers to respond to a coverage area's changing economics, as they did.[157] Increasing insurers' uncertainty by making insurers cover unexpected risk they did not price and did not intend to cover leads to increased premiums and, in extreme cases, the withdrawal of insurance products from the market.[158] Insurance purchasers are risk averse: they are willing to pay a premium that is greater than their expected loss to avoid having to suffer the loss.[159] In the case of home ownership, most insureds cannot engage in the activity unless they obtain insurance.[160] As the difference between the premium and expected loss increases in an insurance pool, low-risk members drop out when the differential becomes greater than the value they attach to avoiding the risk.[161] As low-risk insureds drop out, the insurer is forced to raise premiums further.[162] Each increase further pressures low-risk pool members to drop out, ultimately causing the insurance pool to unravel if the effect is too strong.[163]

Moreover, because these increased premiums operate much like a sales tax with regressive effects, the poor and low-income members in a population of potential insureds will be harmed the most.[164] For starters, this group is the least likely to be able to pay the increased premiums caused by forcing insurers to cover more than they intend. If income and wealth distributions are relatively smooth, there will practically always be someone at the margin who cannot afford a rate increase and therefore cannot buy a home. Those who have acquired a modest home through inheritance or other means, and who have a large proportion of their savings invested in their homes, face potentially devastating losses if they cannot afford the artificially inflated premiums that result from placing liability for induced earthquakes onto homeowners and their insurers rather than onto the extractors who cause them.

Thus, even assuming that the Oklahoma Insurance Commissioner attempted to protect homeowners, in the long run he hurt them. Increased premiums and deductibles placed the costs of the induced earthquakes onto homeowners.[165] Insurers departing the earthquake market took away homeowners' coverage options while reducing competition.[166]

The ultimate effect was to favor extraction over home ownership and, by extension, home ownership–related industries, by shifting the costs created by the former to the latter. This is not to say that induced earthquake damage should not be insurable, but rather that extractors should

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[156] *See supra* text accompanying notes 54–57.

[157] Florida's state-run insurer had to do the same after it interfered with the price mechanism. *See supra* note 53.

[158] Ralph A. Winter, *The Liability Crisis and the Dynamics of Competitive Insurance Markets*, 5 YALE J. REG. 455, 484 (1988); George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1530, 1563–82 (1987).

In Knightian terms, insurers are able to price and cover events with a measurable probability of occurring, but they cannot price those with unquantifiable probabilities of happening. FRANK H. KNIGHT, RISK, UNCERTAINTY AND PROFIT 19–20 (4th ed. 1964). *See generally id.* Unexpected regulatory interference with an insurance contract that had never been interfered with is more like an unquantifiable uncertainty than a quantifiable risk, and thus should be expected to increase premiums more than a calculated risk intentionally added to coverage.

[159] Priest, *supra* note 158, at 1541.

[160] *See supra* note 5 and accompanying text.

[161] Priest, *supra* note 158, at 1541.

[162] *Id.*

[163] *Id.* at 1542; *see id.* at 1563–82 (discussing how the phenomenon combines with adverse selection to exacerbate the problem).

[164] *See id.* at 1560.

[165] *See supra* text accompanying note 76.

[166] *Id.*

bear its cost by buying coverage for it. Currently, however, *homeowners* must pay for "enhanced earthquake coverage" if they want to protect against induced-quake damage caused by others.[167]

2. Hampering Home Ownership

Insurers bullied into bearing the risk of humanmade earthquakes quickly responded, to keep their loss ratios at sustainable levels, by passing the costs onto insureds. The result was both a contraction in the availability of earthquake coverage and a multifold increase in coverage premiums and deductibles.[168] This shifted costs from extractors,[169] who would have borne at least some of them via class-action and other tort lawsuits.[170] But current tort suits against extractors face the impediment that induced earthquakes are excluded from extractors' policies, causing them to deny responsibility for any potential judgment.[171]

But if drillers' liability policies included coverage for induced earthquakes, as the commissioner may mandate,[172] insurers would have incentive to employ all the tools at their disposal to reduce the frequency and magnitude of the claims against their insureds.[173] The presence of insurance, and the mitigating incentives described that come with it, would provide more incentive for drillers to take care than the current situation under which they bear no liability for induced earthquakes.

The presence of insurance is also likely to make the repair process more efficient. Insurers assess losses, process claims, and negotiate payments.[174] Based on past claims experience, insurers can quickly estimate remediation costs. Because insurers have infrastructures in place to facilitate these processes, they can perform them more efficiently than insureds (here, drillers) or third parties (homeowners).[175]

Although a liability claim can take some time to settle, the process is likely to be faster with an insurer involved than if the homeowner had to work directly with a driller. Insurers may have an advantage vis-à-vis the homeowner in the bargaining process, but it is to insurers' benefit to resolve claims swiftly rather than risk litigation. For example, insurers commonly make an initial payment on a liability claim, and then follow it up with an additional payment after the third party shows that the actual cost of repair would be higher.[176]

Providing such coverage would be nonproblematic from an insurance theory standpoint because unintended harm (an induced earthquake) caused by an intentional act (extraction) is

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[167] *See supra* note 78 and accompanying text.

[168] *See supra* text accompanying notes 76–77.

[169] *See supra* text following note 155.

[170] Some such suits are making their ways through the judicial system. *See* Jack Money, *Insurance Company Can't Avoid Having to Defend an Energy Company's Involvement in Class-Action Earthquake Lawsuit, Appeals Court Rules* (Sept. 29, 2020), https://oklahoman.com/article/5672684/insurance-company-cant-avoid-having-to-defend-an-energy-companys-involvement-in-class-action-earthquake-lawsuit-appeals-court-rules [https://perma.cc/3LYV-GKUH].

[171] At least one court has been willing to stretch definitions to allow a claim to proceed. *Id.*

[172] *See* Kochenburger, *supra* note 141, at 1292.

[173] *See supra* section I.B.

[174] Ben-Shahar & Logue, *supra* note 10, at 213–14.

[175] *See* Doherty & Smith, *supra* note 9, at 6–7; Mayers & Smith, *supra* note 9, at 285–86.

[176] The result of the dynamic described in this and the previous paragraph is a related efficiency: the portion of the premium that covers such claims administration is lower than the expected cost that an insured would have to pay for the service.

fortuitous and insurable in Oklahoma.[177] Although an insurer may be inclined to put up an "unsettled science" defense, it would be subject to the evidentiary process in ways that the commissioner's assertion by administrative fiat is not, encouraging the insurer to settle in cases where the science is more reliable than not.[178]

Currently, homeowners bear the costs of harm, either directly, in suing extractors, or indirectly, in buying coverage for induced quakes. Although existing data do not show how many would-be homeowners are at the margin, opting or being forced out of home ownership because its risks are too high, circumstantial evidence suggests that the number is nontrivial.[179]

3. Additional Inefficiency

Similar analyses apply to the heretofore-thought-unnecessary (by either the Oklahoma Insurance Department or insurers) extra inspections of insured properties and the additional training on adjusting earthquake claims pushed onto insurers by the Oklahoma Insurance Commissioner.[180] Both serve to increase the costs of providing, and thus purchasing, homeowners insurance.

4. Incentives to Make Extraction Less Safe

If Oklahoman extractors had to buy induced earthquake coverage, either owing to mandate or because the risk of not doing so would be too high, they would be incentivized to avoid the harmful characteristics and behaviors that are more likely to lead to claims, and thus higher premiums.[181] "This is moral hazard mitigation, plain and simple."[182] If drillers have to share the costs, via deductibles and the like, of the quakes that they cause, they will be inclined to seek ways to cause fewer of them.[183] The drillers who caused the most earthquakes would also be put at a competitive disadvantage, in the form of higher premiums, vis-à-vis their safer competitors. At the extreme, in an environment where drillers bear the costs of the earthquakes they cause, especially unsafe drillers could be forced to choose between making their activities safer or leaving the business if their practices priced them out of the insurance market.[184]

Insurers' services include preoccurrence site assessments to identify risks, training in avoiding risks, management of prevention efforts, and ongoing audits and guidance as insureds' situations change.[185] These services range from the general to the client specific and often make use of subject-matter experts from other professions.[186] "People who are motivated to avoid liability claims might actually take more care if they have access to insurance than if they do not, because

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[177] Cranfill v. Aetna Life. Ins. Co., 49 P.3d 703 (Okla. 2002); *see supra* notes 138–140 and accompanying text (describing fortuity in the self-defense context); *infra* notes 228–230 and accompanying text (same).

[178] *See supra* text accompanying notes 58–63.

[179] *See supra* text accompanying note 64.

[180] *See supra* notes 74–75 and accompanying text.

[181] Rappaport, *supra* note 14, at 1589–90; Baker & Swedloff, *supra* note 14, at 1419.

[182] Baker & Swedloff, *supra* note 14, at 1419.

[183] *See supra* note 22 and accompanying text.

[184] Rappaport, *supra* note 14, at 1588–90.

[185] Talesh, *supra* note 10, at 428–32; Rappaport, *supra* note 14, at 1574–84; George A. Mocsary, *Insuring the Unthinkable*, NEW APPLEMAN ON INS.: CURRENT CRITICAL ISSUES IN INS. L. 1, 8–9 (Spring 2018) (examining and summarizing policies and insurers' informational materials); *see also supra* text accompanying notes 8–10 (discussing how insurers assist in minimizing harm after an occurrence happens).

[186] Talesh, *supra* note 10, at 428–32; Rappaport, *supra* note 14, at 1574–82; Ben-Shahar & Logue, *supra* note 10, at 210–11.

loss prevention–based discounts can educate them about, or make more salient, ways to take care."[187] As insurers' experience across clients and situations expands, they may even be able to provide insureds with "fully-formed model policies and procedures" for avoiding induced earthquakes and place insureds onto "'performance-improvement plans'" if reforms to extraction procedures are indicated.[188]

Indeed, despite moral hazard and adverse selection problems, insurers are often better judges of their insureds' risks than are the insureds.[189] Thus, even where insureds make their best efforts to avoid losses, insurers might improve harm outcomes via their superior ability to determine the relative benefits of various precautions.[190] Insurance is often purchased in large part for its loss prevention features.[191]

But because insurers are currently not involved with induced earthquake claims, they do not collect the data from across insureds that allow them to identify best and worst practices related to such quakes.[192] What they have not learned, they cannot communicate to their customers, industry groups, or regulators.[193] Removing from extractors, and by extension, their insurers, the risk of induced earthquakes disincentivizes the knowledge creation that can ultimately make extraction less prone to causing the quakes.

Although homeowner insurers could theoretically create some of the knowledge that would make extraction less prone to inducing earthquakes, they are far removed from its source. Extractors are unlikely to willingly share information about their processes, especially if that knowledge would inculpate them. Homeowners cannot make safer an activity in which they are not engaging, and drillers have little incentive to do so.

C. Case No. 2: Harm to New York's Insurance Market

NYDFS harmed New York's insurance market by creating (rather than reducing) risk for insurers via imposing reputational risk requirements upon them, enforcing rules that make the process of providing all insurance[194] more costly, making both lawful self-defense and criminal defense[195] more risky and costly to individuals, and removing the incentives for the provision of firearm-safety education.

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[187] Baker & Swedloff, *supra* note 14, at 1419.

[188] Rappaport, *supra* note 14, at 1575, 1586.

[189] Peter Siegelman, *Adverse Selection in Insurance Markets: An Exaggerated Threat*, 113 YALE L.J. 1223, 1241–53 (2004); *see supra* note 13 and accompanying text.

[190] Ben-Shahar & Logue, *supra* note 10, at 210.

[191] *See supra* notes 8–10 and accompanying text; *see generally* George M. Cohen, *Legal Malpractice Insurance and Loss Prevention: A Comparative Analysis of Economic Institutions*, 4 CONN. INS. L.J. 305 (1997) (discussing loss prevention in the legal-malpractice context).

[192] *See supra* text accompanying note 23.

[193] *See supra* text accompanying note 24; section I.B.3.

[194] As opposed to merely making the provision of self-defense insurance more costly.

[195] Although criminal defense is not ordinarily considered an insurance-related activity, it can become so if defending against criminal charges arising from lawful acts is allowed. *See infra* section III.C.3.

1. Pretend Reputational Risk and Risk Creation

NYDFS's assertions about reputational risk in its guidance memorandum[196] were both meretricious and counterproductive. Insurers are risk experts. Their livelihoods depend on managing risk. It is, therefore, somewhat contrived to suggest that they would be unaware of the potential risks of entering a market space. Indeed, to the extent that reputational risk is meaningful,[197] it can be insured.[198] This suggests both that reputational risk can be quantified and that it can be protected against.

There is also good reason to believe that the superintendent's letter that public attitudes would turn against gun-rights organizations is wrong. The letter was issued about two months after the Parkland, Florida, murders, which it presumably includes among the tragedies that would turn public opinion.[199] But that was a time when firearm sales were spiking.[200] Indeed, the events that NYDFS asserts would alienate people from the insurers' offering self-defense coverage are the ones that lead to the greatest increases in gun purchases.[201] These purchases, generally motivated by self-defense concerns,[202] should be expected to increase demand for self-defense insurance. Increased demand is good for insurer stability, and consumers may view positively an insurer that enables their lawful self-defense.[203] This effect should be magnified if the self-defense worries spurred by these tragic events are coupled with increased membership in gun-rights organizations.[204]

Entering a space where risks are uncorrelated with those of other insurance lines, as is likely the case with self-defense insurance, would serve to increase an insurer's financial stability by diversifying away some of its overall underwriting risk. The more risk an insurer is able to bear—by diversifying it away, insuring against it, or charging for it—the more profitable, and stable, it can expect to be. Greater stability allows for more robust competition, making insurance less costly and available to more consumers; a larger insured base creates more knowledge about the coverage area. Relatedly, lower rates in all coverage areas are more feasible if some of the risks

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[196] *See supra* notes 92–95 and accompanying text.

[197] *Cf. infra* notes 206–210 and accompanying text.

[198] *See, e.g.*, *Reputational Risk and Crisis Management*, MARSH https://www.marsh.com/uk/services/risk-consulting/products/reputational-risk-crisis-management.html [https://perma.cc/RCX8-YW6M]; *Here Comes Bad News*, ALLIANZ, https://www.agcs.allianz.com/news-and-insights/expert-risk-articles/global-risk-dialogue-reputational-risk.html [https://perma.cc/N79X-9YE4]; Ingrid Sapona, *Reputation Risk Insurance: Insuring Your Good Name*, Ins. Institute (May 2017), https://www.insuranceinstitute.ca/en/cipsociety/information-services/advantage-monthly/0517-reputation-risk [https://perma.cc/EBS5-XQCL].

[199] Vullo Insurance Letter, *supra* note 91; Phillip Levine & Robin McKnight, *What Happened When People Feared Gun Control Activism after Parkland? More Gun Sales*, CNN.com (Feb. 13, 2019), https://www.cnn.com/2019/02/13/opinions/gun-sale-spike-after-parkland-levine-mcknight/index.html [https://perma.cc/UJ47-5QLX].

[200] Vullo Insurance Letter, *supra* note 91; Levine & McKnight, *supra* note 199.

[201] Phillip Levine & Robin McKnight, *Three Million More Guns: The Spring 2020 Spike in Firearm Sales*, BROOKINGS (July 13, 2020), https://www.brookings.edu/blog/up-front/2020/07/13/three-million-more-guns-the-spring-2020-spike-in-firearm-sales/ [https://perma.cc/WC32-59BN]; Levine & McKnight, *supra* note 199.

[202] Levine & McKnight, *supra* note 201; Levine & McKnight, *supra* note 199.

[203] *See* Mocsary, *supra* note 185, at 10.

[204] Paul Bedard, *NRA Is Back, 'Highest Ever' Membership*, WASH. EXAM'R (Apr. 1, 2019, 9:32 AM), https://www.washingtonexaminer.com/washington-secrets/nra-is-back-highest-ever-membership [https://perma.cc/3K5N-VD2B]. Ironically, NYDFS's behavior may itself lead to such membership increases. *See* Tom Precious, *New York's NRA Membership Nearly Doubles in Wake of SAFE Act*, BUFFALO NEWS (Feb. 3, 2014), https://buffalonews.com/news/local/new-york-s-nra-membership-nearly-doubles-in-wake-of-safe-act/article_17b8583f-0c1c-511f-b847-f74a0d492c2c.html [https://perma.cc/HG4H-8B7Q].

associated with that coverage are diversified away. In other words, chilling, via threats, insurers' willingness to take on bearable risk works against the core tenets of insurance regulation[205] and should be expected to hurt insurance markets.

Moreover, as delineated by Professor Julie Hill, the concept of reputational risk is amorphous and open to abuse.[206] As a threshold matter, regulators are unlikely to be more competent than insurers at managing reputational risk.[207] Each insurer has a unique collection of constituencies with whom it regularly interacts in myriad ways.[208] Regulators, in contrast, "rarely talk to customers, employees, shareholders, or community members."[209] Insurers are thus in an advantaged position to determine whether dealing—or, as important, not—with a given potential constituency is likely to be beneficial or harmful to its reputation. Regulator interference on reputational risk grounds is thus more likely to be harmful than helpful because it creates significant future uncertainty about whether developing new products or covering specific industries could be deemed by a regulator to constitute this risk.[210]

2. Fostering Inefficiency

As eloquently described by Professors Robert H. Jerry and Reginald L. Robinson, the chief justifications behind rebating statutes—primarily that requiring similar risks to pay different rates is unfair, consumers would receive substandard information from brokers if rebating were allowed, and insurer insolvencies would increase in the presence of rebating—are unpersuasive and likely inefficient.[211]

Significant inefficiency is also introduced into the insurance market by the requirements that advertisements not disclose the financial condition of insurers[212] and that brokers check with three admitted carriers whether they offered Carry Guard insurance before placing it with an excess line carrier.[213] One should not be surprised that these laws are seldom, and then unevenly, enforced.[214]

The requirement that insurers' financial condition not be advertised, which applies equally to the insurers, their brokers, and anyone else involved in the sale of a policy, serves to deprive would-be insureds of information useful to making an insurance purchase decision.[215] From a state regulator's standpoint, this is especially the case with excess line insurers, the financial soundness of which the regulator has not investigated. Even if there were a reason to deprive consumers of such information, it would not apply here. The AM Best ratings disclosed by

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[205] *See supra* notes 38–41 and accompanying text.

[206] *See* Hill, *supra* note 92. Professor Hill's analysis is in the banking context, but it applies with equal strength in the insurance context, especially where NYDFS issued nearly identical letters to banks and insurers. *See id.* at 532 n.44, 556 n.196, 578 n.318, 586 n.370 (citing Vullo Bank Letter, *supra* note 91); *supra* notes 91–92, 97 and accompanying text.

[207] *See* Hill, *supra* note 92 at 585–92; *supra* text accompanying and preceding notes 197–198.

[208] *See* Hill, *supra* note 92 at 590.

[209] *Id.* at 590–91.

[210] *See id.* at 588–92.

[211] Robert H. Jerry & Reginald L. Robinson, *Statutory Prohibitions on the Negotiation of Insurance Agent Commissions: Substantive Due Process Review under State Constitutions*, 51 OHIO ST. L.J. 773, 783–90 (1990).

[212] *See supra* text accompanying note 102, no. 5; N.Y. INS. L. § 1313(a)(1) (2020).

[213] *See supra* text accompanying note 102, no. 6; N.Y. INS. L. § 2118(b)(3)–(4) (2020).

[214] *See supra* notes 117–121 and accompanying text.

[215] Daniel Schwarcz, *Transparently Opaque: Understanding the Lack of Transparency in Insurance Consumer Protection*, 61 UCLA L. Rev. 394, 440, 436–43 (2014) ("it ultimately makes sense to mandate that insurers disclose their financial-strength ratings to consumers.").

Lockton were public knowledge, available to would-be consumers, but with added search costs.[216] Lockton's provision of Chubb's rating once to all interested consumers is more efficient than each consumer searching for it on his or her own.

The diligent-search requirement mandates that brokers attempt to place a policy with three admitted insurers, and receive a declination from each, before placing it with an excess line carrier.[217] Obtaining the declinations is not required if the superintendent places that type of coverage onto the state's "export list."[218] Unsurprisingly, the superintendent, who is a defendant in the NRA's case, did not exempt self-defense coverage from the diligent-search requirement.[219] The goal of requiring a diligent search is to steer in-state policy purchases to insurers subject to the complete oversight of an in-state insurer. But where the coverage sought is specialized and unique to one carrier, as was the case with Carry Guard, requiring brokers to obtain three declinations for coverage known not to exist serves only to impose costs upon the insurance industry and its consumers.

3. Disabling Lawful Self-Defense and Effective Criminal Defense

Although the "social palatability [of self-defense] generally ranges from worried acceptance to affirmative encouragement," it is broadly legal and insurable in New York.[220] Further, there is every reason to believe that the would-be purchasers of Carry Guard, who are especially law abiding and seek only to insure lawful activities, are especially safe with their firearms.[221]

Losses under Carry Guard can be expected to be exceedingly rare.[222] Nevertheless, from the standpoint of an accidental shooting victim, efficient loss assessment and payment[223] is especially important in a context involving payment of medical bills and tort claims.

From the insured's standpoint, where he or she is subject to a lawsuit, which is a practical certainty in the case of an accidental shooting, insurers are obliged to defend their insureds.[224] The insurers are almost certain to have better access to subject-matter experts for defending claims than their insureds, and the defense costs are often prohibitive for individual (as opposed to organizational) insureds.[225] "During a very stressful and emotional time, it is a great benefit to

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[216] *Search for a Rating*, AM BEST, http://ratings.ambest.com/search.aspx [https://perma.cc/3WBX-5UW4]; *see* Schwarcz, *supra* note 215, at 440; *cf. supra* note 28 and accompanying text (defining public goods).

[217] N.Y. INS. LAW § 2118(b)(4) (2020).

[218] *Id.* § 2118 (b)(3)(A); N.Y. COMP. CODES R. & REGS. tit. 11, § 27.3(g) (2020).

[219] N.Y. COMP. CODES R. & REGS. tit. 11, § 27.3(g) (2020).

[220] Mocsary, *supra* note 6, at 1255; *see supra* notes 131–142 and accompanying text.

[221] NICHOLAS J. JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 50–51 (2d ed. 2017) (citing data indicating that holders of concealed carry licenses are as law-abiding as law enforcement personnel); Mocsary, *supra* note 6, at 1245–47, 1256 (citing data indicating that "citizens are both effective and precise in their defensive gun uses"); *supra* note 146 (citing the Lockton Consent Order, *supra* note 101 at 8, to show that no claims were made under the 680 Carry Guard policies issued in New York).

[222] *See supra* note 146.

[223] *See supra* text accompanying notes 174–176.

[224] JERRY & RICHMOND, *supra* note 4, § 111.

[225] Ira P. Robbins, *The Price is Wrong: Reimbursement of Expenses for Acquitted Criminal Defendants*, 2014 MICH. ST. L. REV. 1251; Mocsary, *supra* note 6, at 1248–49, 1250–51; Baker & Swedloff, *supra* note 14, at 1421, 1429; Ben-Shahar & Logue, *supra* note 10, at 213–14; *see* Bowers, *supra* note 137.

. . . insureds, to have the ability to call an insurer whose staff is trained to deal with unfortunate situations."[226]

Furthermore, defending a criminal lawsuit to acquittal (or otherwise) can be a bankrupting experience.[227] Criminal acts, including not only intentional ones but also criminally negligent or reckless acts, are typically not insurable on fortuity and moral hazard grounds.[228] Criminals have incentive to commit crimes if the costs of those crimes do not fall upon them.[229] Carry Guard, accordingly, covered only good-faith attempts at self-defense, with all responsibilities to the insured "terminat[ing] upon the earliest of" the insured's "plead[ing] guilty; or . . . conviction of any criminal charge."[230]

Requiring the innocent to bear potentially crippling defense costs, however, especially in a nation in which the "presumption of innocence is one of the cornerstones of the criminal justice system," is another matter.[231] The policy reasons for making the guilty bear their defense costs, in other words, do not apply to the acquitted. But in New York, which bars *any* criminal defense coverage, regardless of guilt or innocence,[232] the "vile rain" of crushing defense costs "falls on the righteous and the wicked alike."[233] This situation occurs where private insurers and insureds are willing to allocate the costs among themselves.[234]

4. Making Firearm Ownership Less Safe

In the Carry Guard context, the insurer was on the hook for accidental firearm misuse by its insureds. One is not surprised, therefore, that Carry Guard came with complementary safety training for its members.[235] A textbook example of a positive externality, the Carry Guard website made the training and associated materials in varying media forms available to the public, often for free, even after Carry Guard insurance was made unavailable because of the actions against Lockton and Chubb.[236] This material, which was available as of the start of this writing, has since been removed.[237] One Carry Guard course appears to remain available to potential students willing to pay for it.[238]

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[226] Mocsary, *supra* note 185, at 12; *accord* Talesh, *supra* note 10, at 432–33.

[227] *See* Robbins, *supra* note 225; Mocsary, *supra* note 6, at 1248–49.

[228] *See supra* note 129 and accompanying text; *but see supra* text accompanying notes 138–140 (explaining that some unintentional and fortuitous criminal acts may be insurable).

[229] *See* Mocsary, *supra* note 6, at 1254–55 (analyzing the likely effect of firearm-owner liability insurance mandates).

[230] CHUBB, *supra* note 130, at 2; *see supra* text accompanying notes 129–141.

[231] Andrew Cuomo, *Andrew Cuomo: Why I Will Not Sign a Budget without Criminal Justice Reform*, N.Y. DAILY NEWS (Mar. 12, 2019, 12:55 PM), https://www.nydailynews.com/opinion/ny-oped-no-criminal-justice-reform-no-budget-20190312-story.html [https://perma.cc/6J5R-H97R]; *see supra* note 137.

[232] N.Y. COMP CODES R. & REGS. tit 11, § 262.5; *see supra* text accompanying note 102, no. 2(a).

[233] Robert Higgs, *The Ongoing Growth of Government in the Economically Advanced Countries,* INDEP. INST. (Oct. 3, 2003), https://www.independent.org/publications/article.asp?id=1303 [https://perma.cc/X2CT-PG8X].

[234] Some parties argue the state should bear the costs it imposes on innocents via failed criminal prosecutions. Robbins, *supra* note 225, at 1281–85.

[235] *Training*, NRA Carry Guard, https://www.nracarryguard.com/training/ [https://web.archive.org/web/20171020192509/https://www.nracarryguard.com/training/] (archived Oct. 20, 2017).

[236] NRA Carry Guard, https://web.archive.org/web/20201023045149/https://www.nracarryguard.com/ (archived Oct. 23, 2020).

[237] *Compare* NRA Carry Guard, *supra* note 236, *with* https://www.nracarryguard.com/ (page no longer exists).

[238] *Training Catalog*, NRA Training, https://www.nrainstructors.org/CourseCatalog.aspx [https://perma.cc/V36B-88N7].

5. New York Summary

Individuals, relying on their analyses of their "particular circumstances of time and place," should determine when they need to insure their lawful activities.[239] This amalgamation of individual market choices allows the "wisdom of the crowds" to make its way into the underwriting process.[240] Disabling this feedback mechanism prevents insurance from enabling desirable activities and making them safer.[241]

If insurance is made unavailable, its benefits—to insureds, third parties, and society—will not be realized. Likewise, if the insurance industry is made less stable by reducing its profitability via creating difficulty for insurers to write legitimate business, thereby preventing insurers from diversifying their risk, and by directly imposing regulatory risk upon the industry, it will be less able to create positive externalities. Administrative browbeating thus undermines all that McCarran-Ferguson sought to accomplish.

IV. OTHERING

The injuries go deeper than directly damaging insurance markets and the benefits they create. Oklahoma and New York's insurance regulators have used their power to "other" political enemies. Othering is a strategy employed by a ruling "ingroup" to "reinforce[] the mainstream by differentiating individuals and groups and relegating them to the margins according to a range of socially constructed categories."[242] It aims to "denigrate, oppress and ultimately reject the stigmatized," devalued, and subordinated "outgroup."[243] Its goals are "discrimination and exclusion" based on "others' essential inferiority."[244]

When "translated into systemic practices, [othering] become[s] dangerous."[245] Unequal treatment under law, political discrimination, and deployment of governmental power to abuse one group for another's benefit can have devastating effects on social stability.[246]

This part highlights the most worrisome othering methods deployed by Oklahoma and New York's insurance regulators and shows how they facilitated interfering with insurance markets.

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[239] F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 521–22, 524 (1945); *see* Knight & Mitchell, *supra* note 43, at 122–23.

[240] *See* JAMES SUROWIECKI, THE WISDOM OF CROWDS (2005) (arguing that collective decision-making is more effective than that of individual "experts").

[241] *See supra* sections I.A–B.

[242] Angharad N. Valdivia, *Othering*, *in* KEYWORDS FOR MEDIA STUDIES 133, 133 (Laurie Ouellette & Jonathan Gray eds., 2017).

[243] Katerina Strani & Anna Szczepaniak-Kozak, *Strategies of Othering through Discursive Practices: Examples from the UK and Poland*, 14 LODZ PAPERS IN PRAGMATICS 163, 164–65 (2018).

[244] Yael Cohen, Michal Krumer-Nevo & Nir Avieli, *Bread of Shame: Mechanisms of Othering in Soup Kitchens*, 64 SOC. PROBS. 398, 398 (2017); *accord id.* at 399 ("The oppressive force of otherness comes . . . from its exclusionary effect."). Othering is typically deployed against minorities and the poor, but "can equally be applied in many instances to other dimensions of difference." *See id.* at 398; Derek M.D. Silva, *The Othering of Muslims: Discourses of Radicalization in the* New York Times*, 1969–2014*, 32 SOCIO. F. 138 (2017); Strani & Szczepaniak-Kozak, *supra* note 243; Valdivia, *supra* note 242; Stuart Hall, *The Spectacle of the 'Other'*, *in* REPRESENTATION: CULTURAL REPRESENTATIONS AND SIGNIFYING PRACTICES 223, 225, 276 (Stuart Hall ed., 1997).

[245] Strani & Szczepaniak-Kozak, *supra* note 243, at 166.

[246] John P. Anderson, *Law beyond God and Kant: A Pragmatist Path*, 32 J.L. & RELIGION 98, 101–103 (2017).

A. Stereotyping and Backgrounding

Stereotyping is perhaps the most common othering tool. It is typically employed to subordinate and exclude an outgroup from social participation.[247] It "reduces a marked group into one single category in a way that members of that group cannot be considered in any other role or context."[248]

Differentiation is implemented "'on the basis of irrational emotional criteria.'"[249] The criteria are "'vivid, memorable, easily grasped and widely recognized," and then exaggerated and simplified to concretize difference.[250] "It then *excludes* or *expels* everything which does not fit," as "'deviant,'" "'pathological,'" or "'beyond the pale.'"[251] Common stereotyping terms are "radical" and "dangerous."[252]

Stereotyping is intertwined with backgrounding, a process that relegates individual agents to a narrative's background so that perpetrators of a given action are difficult to identify.[253] An individual actor's behavior can then be attributed to a group to which the actor belongs, rather than the actor's discrete agency.[254]

The Oklahoma Insurance Commissioner leveraged an existing stereotype, born of some genuine incidents, to portray insurers as unfairly withholding payments on legitimate claims.[255] Yet the evidence shows that Oklahoma insurers were not arbitrarily denying claims, but denying only those that they had no contractual obligation to pay.[256] The commissioner nevertheless implicitly grouped together all insurers—honest or not—and portrayed them as villains.

The New York ruling establishment's referring to the NRA as "extremist" and grouping it with murderers is quintessential stereotyping.[257] More recently, in what feels like a coordinated attack with NYDFS to ensure that the NRA bleeds legal fees on multiple fronts, New York's Attorney General referred to the NRA's "poisonous agenda" and described it as "an organ of deadly propaganda masquerading as a charity for public good."[258] She added that it was a "criminal enterprise" and "terrorist organization" before her November 2018 election.[259] After being elected, she brought suit, since dismissed, to dissolve the NRA on the ground that some of

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[247] Hall, *supra* note 244, at 258–59.

[248] Strani & Szczepaniak-Kozak, *supra* note 243, at 169.

[249] *Id.* at 169 (quoting Sophie Body-Gendrot, *Migration and the Racialization of the Postmodern City in France*, *in* RACISM, THE CITY AND THE STATE 77, 81 (Malcolm Cross & Michael Keith eds., 1993)).

[250] Hall, *supra* note 244, at 257; *accord id.* at 249.

[251] *Id.* at 258.

[252] Strani & Szczepaniak-Kozak, *supra* note 243, at 170; *cf. infra* text accompanying note 272. *See generally* Silva, *supra* note 244 (examining the use of the word "radicalization" by the *New York Times* in a process of othering Muslims).

[253] THEO VAN LEEUWEN, DISCOURSE AND PRACTICE: NEW TOOLS FOR CRITICAL DISCOURSE ANALYSIS 29 (2008).

[254] *See* Silva, *supra* note 244, at 144, 152–53, 156; VAN LEEUWEN, *supra* note 253, at 47, 54.

[255] *See supra* text accompanying notes 67–75; *see, e.g.*, DAVID J. BERARDINELLI, FROM GOOD HANDS TO BOXING GLOVES: THE DARK SIDE OF INSURANCE (2008) (describing Allstate's program, as suggested to it by management consultants McKinsey & Co., of systematically denying and underpaying claims).

[256] *See supra* text accompanying notes 58–65, 74.

[257] *See supra* text accompanying notes 85, 92, 252, 254; note 90 and accompanying text; *infra* text accompanying notes 269, 275 (describing the attribution of murders by individuals with free agency to the NRA and others with an interest in firearms).

[258] Jon Campbell, *NY AG Letitia James Called the NRA a "Terrorist Organization." Will It Hurt Her Case?*, USA TODAY (Aug. 19, 2020, 12:44 PM ET), https://www.usatoday.com/story/news/politics/2020/08/19/nra-lawsuit-ny-ag-letitia-james-past-comments/5606437002/ [https://perma.cc/Z54R-CBB6].

[259] *Id.*

its leadership engaged in fraud.[260] When the NRA filed for bankruptcy five months later, she tweeted: "The @NRA's claimed financial status has finally met its moral status: bankrupt."[261]

B. Symbolic Boundaries

Symbolic boundaries are "conceptual distinctions made by social actors to categorize objects, people, [and] practices."[262] They "define who is at the center of the community and who is at its margins"[263]—"who is us and them."[264] They create and reinforce biases (often fostered by stereotyping) against outgroups.[265]

The Oklahoma bulletin attempted to alienate insurers from their insureds, with whom they need to work closely when valid claims arise. Some insurers have especially good reputations for swift and fair adjustment and payment.[266] The bulletin risked unnecessarily inserting a wedge into those insurer-insured interactions. It also insulated the energy industry (the ingroup) from existing and would-be property owners (the outgroup).

The result was a tripartite split. The energy industry was the ingroup with respect to the other two. Property owners were the ingroup with respect to insurers, but the outgroup with respect to extractors. Insurers were the outgroup with respect to the other two. This toxic dynamic made it acceptable to place the costs of induced earthquakes onto anyone but extractors. Homeowners were left holding the bag.[267]

In New York, the superintendent's reference, in her official memorandum, to "gun promotion organizations"[268] unrelated to any alleged law violation serves to create a divide between the gun-owning, gun-using outgroup and the state's majority ingroup that does not have a particular interest in firearms. The othering effect is especially effective when combined with extremism rhetoric—extremists are, by definition, beyond the boundary of the mainstream.[269]

C. Fear Rhetoric

Representing differences in a way that "mobilizes fears and anxieties" is another effective othering strategy.[270] It employs "narratives of fear and anger" to portray an outgroup as a

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[260] People v. Nat'l Rifle Ass'n of Am., 74 Misc. 3d 998 (N.Y. Sup. Ct. 2022); Campbell, *supra* note 258; *A Brief History of the NRA*, NRA, https://home.nra.org/about-the-nra/ (noting that the NRA had been incorporated in New York since 1871) [https://perma.cc/3ZZF-BGUW].

[261] Letitia James (@NewYorkStateAG), TWITTER, (Jan. 15, 2021, 4:52 PM), https://twitter.com/NewYorkStateAG/status/1350199191440674816.

[262] Michèle Lamont & Virág Molnár, *The Study of Boundaries in the Social Sciences*, 28 ANN. REV. SOCIO. 167, 168 (2002).

[263] Peter A. Hall & Michèle Lamont, *Introduction*, *in* SUCCESSFUL SOCIETIES: HOW INSTITUTIONS AND CULTURE AFFECT HEALTH 1, 11 (Peter A. Hall & Michèle Lamont eds. 2009).

[264] Michèle Lamont, *Responses to Racism, Health, and Social Inclusion as a Dimension of Successful Societies*, *in* SUCCESSFUL SOCIETIES, *supra* note 263, at 151, 157.

[265] Yael Cohen et al., *supra* note 244, at 402; Silva, *supra* note 244, at 156.

[266] Jason Bisnoff, *America's Best Insurance Companies*, FORBES (Sept. 29, 2021), https://www.forbes.com/best-insurance-firms/#647618e23659 [https://perma.cc/24XL-Z82S].

[267] *See supra* text accompanying notes 78, 167.

[268] *See supra* text accompanying note 92.

[269] *See supra* text accompanying notes 257–260.

[270] Hall, *supra* note 244, at 226.

threat.[271] Common fear-connoting rhetoric includes adjectives such as "*threat*, *intense danger*, or *risk*."[272]

The Oklahoma Insurance Commissioner's bulletin played on property owners' fears of losing their homes. Insurers were portrayed as the obvious target for homeowners' ire, rather than the extractors causing the harms in question, who were left appearing blameless.[273] One could thus send insurers the message, in the form of added market-conduct examinations and the like, that they would be punished if they failed to fall in line.[274]

New York officials, in addition to the fear-inducing rhetoric just described, directly deployed, in both official and unofficial communications, anxiety-inducing language meant to instill fear of physical harm. Phrases such as "carnage," "senseless violence," "horror," and "tragedies" were tied to political foes rather than to the human agents who committed the referenced acts.[275]

D. Self-Aggrandizing at the Stigmatized Group's Expense

Once the outgroup has been turned into a "flat and blurry figure," its members may be depicted as inferior without prompting skepticism.[276] They are "portrayed in ways that problematise and marginalise them: as criminal, deviant . . . and culturally alien," to the point where one is unreasonable not to mistrust them.[277] Leaders of the dominant group, meanwhile, "present themselves as tolerant, hospitable, and rational," self-evidently espousing truth.[278]

Oklahoma insurers were stigmatized as one-dimensional dishonest villains. Similarly, New York officials reduced "gun promotion organizations," and, by extension, gun owners broadly, to reprobate purveyors of violence.

Moreover, in twice referring to the "unsettled science" of induced earthquakes, in his bulletin,[279] Oklahoma's Insurance Commissioner attempted to ground in reality his denial of the scientific consensus about induced earthquakes while denying the division he fostered.[280] In the process, he portrayed himself as a man of the people.

In addition to bullying the outgroup, New York's leaders used heroic terms such as "passionate," "courageous," and "articulate" to describe the ingroup to which they belonged.[281] This "social backlash" by the superior (according to itself) ingroup presumably justified (in its mind) state-sanctioned threats against insurers willing to work with the stigmatized group.[282] The governor's connecting his actions to "public safety" was an attempt to say, in effect, "We're not doing this to destroy a political enemy. We're doing this for you." Suggesting, via a call to

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[271] Silva, *supra* note 244, at 142.

[272] *Id.* at 153.

[273] *See supra* text accompanying notes 67–75.

[274] *See supra* text accompanying note 70.

[275] *See supra* text accompanying notes 85, 95, 252, 257.

[276] Cohen et al., *supra* note 244, at 408.

[277] Martha Augoustinos & Danielle Every, *The Language of "Race" and Prejudice: A Discourse of Denial, Reason, and Liberal-Practical Politics*, 26 J. LANGUAGE & SOC. PSYCH. 123, 127, 129 (2007); *see also id.* at 131–32.

[278] *Id.* at 126–27, 129.

[279] *See supra* text accompanying notes 68–70.

[280] *See supra* text accompanying notes 58–63, 70.

[281] *See supra* text accompanying note 95.

[282] *Id.*

#BankruptTheNRA and declaring that "*[w]e won't stop until we shut them down*,"[283] that it is natural for everyone (except gun owners, who are of diminished social value) to go along with him in such an unprecedented action implies the social deficiency of anyone who disagrees.

E. Harm to Markets and Social Stability

The McCarren-Ferguson Act did not intend to empower regulators to engage in "coercion, or intimidation."[284] Yet the insurance regulators studied herein have lost the ability to distinguish between what is politically expedient and what best serves their states' insurance needs. Doing so as far from public scrutiny as possible,[285] and attempting to immunize the actions from judicial review,[286] is an extreme abuse of power and unaccountability.

When a state regulator rewrites a settled insurance contract to protect his or her state's most powerful interest group, or equates doing business with his or her political opponents to confessing to one's role in blood in the streets,[287] McCarren-Ferguson's unique grant of power appears to serve only insurance regulators' political preferences.

The harm caused by interfering with insurance markets is troubling. Such harm is orders of magnitude worse when accompanied by the harm to social stability caused by effectuating it using othering practices. The social fracturing described in this part needs little to evolve into mob behavior and retaliation. After Oklahoma foisted the costs of induced earthquakes onto property owners, Pennsylvania followed suit.[288] After New York strong armed the NRA's insurers, so did the gun-unfriendly states of California, New Jersey, and Washington, albeit in more measured ways.[289]

Finally, one state's outgroup may be another state's ingroup. One has no difficulty envisioning energy-unfriendly and gun-friendly states browbeating extractors and those seen as hostile to gun rights. In Georgia, for example, after Delta Airlines cut marketing ties with the NRA, the state rescinded a sales tax exemption for jet fuel that primarily benefited Delta.[290]

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[283] *See supra* text accompanying notes 87–88.

[284] 15 U.S.C. § 1013(b) (2018); *see supra* text accompanying note 37.

[285] *See supra* text accompanying notes 45–49, 115.

[286] Chubb Consent Order, *supra* note 101, at 10 ("The parties understand and agree that no provision of this Consent Order is subject to review in any court or tribunal outside [NYDFS]."); Lockton Consent Order, *supra* note 101, at 17 (same).

[287] These regulator actions are reminiscent of China's Social Credit System, under which businesses and individuals are scored depending on how well they cooperate with the Chinese Communist Party's agenda. *See* Bernard Marr, *Chinese Social Credit Score: Utopian Big Data Bliss or Black Mirror on Steroids?*, FORBES (Jan. 21, 2019, 12:37 AM EST), https://www.forbes.com/sites/bernardmarr/2019/01/21/chinese-social-credit-score-utopian-big-data-bliss-or-black-mirror-on-steroids/?sh=1cc279948b83 [https://perma.cc/829U-SMA6]; Alexandra Stevenson & Paul Mozur, *In China, Big Brother Targets Business*, N.Y. TIMES, Sept. 23, 2019, at B1.

[288] Insurance Department Notice No. 2015-04 from Teresa Miller, Acting Commissioner, to All Insurers Writing Homeowners Insurance Policies in Pennsylvania and Rating Organizations Authorized to File on Their Behalf (Apr. 11, 2015), https://www.propertyinsurancelawobserver.com/wp-content/uploads/sites/11/2015/05/Department-Notice-2015-04.pdf.

[289] *See supra* text accompanying notes 106–109.

[290] Brooke Singman, *Georgia Governor Signs Bill Nixing Delta Tax Break after NRA Split*, FOX NEWS (Mar. 2, 2018), https://www.foxnews.com/politics/georgia-governor-signs-bill-nixing-delta-tax-break-after-nra-split [https://perma.cc/3MSY-HP7Y]; *see Sales Tax Rates—Jet Fuel*, GA. DEP'T REVENUE, https://dor.georgia.gov/sales-tax-rates-jet-fuel [https://perma.cc/D2W3-KUTW] (showing current sales tax rates on jet fuel).

V. REFORM

Regulatory discrimination and its fallout is antithetical to the equitable principles inherent in McCarran-Ferguson. It both harms insurance markets and does violence to the United States' social and constitutional order. To favor or target preferred or disliked groups—with their differing aspirations and views—is to disadvantage them in the marketplaces of safety, commerce, and ideas.[291] Regulators, courts, legislatures, and standard-setting organizations are candidates for restraining administrative browbeating in insurance markets.

A. State Regulators, Courts, and State Legislatures Are Suboptimal Avenues for Reform

Professor Hill ably shows that in cases where the browbeating is driven by state agency heads (or their governor bosses), rather than misbehaving examiners, there is no reason to believe that officials will curb their own abuses.[292] Federal regulators currently lack the power to intervene.[293] In at least one situation where a federal agency—the Consumer Financial Protection Bureau—was empowered to protect consumers when a state regulator allegedly failed to do so, its enabling legislation, the Dodd-Frank Wall Street Reform and Consumer Protection Act, explicitly barred the agency from involvement with insurance-related issues.[294]

Courts are suboptimal because insurers are repeat players with their regulators. They "have strong incentives to keep their regulators happy and may be especially unwilling to fight regulators over . . . third-parties . . . with whom [they] do little business."[295] And even in cases where a regulated entity's incentives might be stronger, because it does more business with the disfavored and targeted entity, the regulator may simply increase a fine to a level where the regulated entity gets the message. This was the case with Lockton, which paid a disproportionately large fine compared to any other entity, including the NRA, for its alleged wrongdoing.[296]

A third party, like the NRA, might file suit. But such parties' resources are no match for a state's taxing power to fund expensive lawsuits. In a contest between a state and a nonprofit—even a relatively powerful one—going bankrupt first, one should bet on the state. Further, just as regulators can bully insurers serving a disliked third party, they can bully the third party directly, as happened in New York.[297] Individual homeowners have fewer options than large nonprofits; they can pay higher premiums, risk induced earthquake damage, or forgo home ownership.

Moreover, government defendants enjoy various immunities that destroy claims against them before the claims can be adjudicated on the merits. In the NRA's case against New York's governor, NYDFS, and its superintendent arising out of the conduct described herein, most of the NRA's remaining claims were dismissed under the doctrines of absolute immunity and sovereign

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[291] *Cf.* George A. Mocsary, *Freedom of Corporate Purpose*, 2016 BYU L. REV. 1319, 1382 (2017).

[292] Hill, *supra* note 92, at 598–99.

[293] *See supra* part I.C.

[294] 12 U.S.C. § 5481(15)(c) (2018).

[295] Hill, *supra* note 92, at 599 (speaking in the context of the nearly identical treatment of banks, discussed *supra* note 91 and *supra* note 97 and accompanying text).

[296] *See supra* text accompanying notes 105–109, 122–125.

[297] *See supra* text accompanying note 124.

immunity.[298] The superintendent appealed the district court's allowing the NRA's First Amendment claims to proceed despite her assertion of qualified immunity.[299]

More still, courts and state legislatures, whose members come from their home states, can be trusted no more than their states' regulators.[300] As if to illustrate this point, the Second Circuit dismissed on interlocutory appeal the NRA's remaining claims.[301] Despite reciting the standard rule that on a motion to dismiss, it was bound to "draw all reasonable inferences in favor of the plaintiff," the Second Circuit, in practice, drew every inference in favor of the superintendent.[302] It acknowledged that the superintendent, to insurers, "'presented [her] views on gun control and [her] desire to leverage [her] powers to combat the availability of firearms.'"[303] Nevertheless, the court held that the superintendent's actions and statements, including many of those discussed herein, "[d]id not cross the line between an attempt to convince and an attempy to coerce."[304]

Perhaps this should not be surprising. The court saw the superintendent as a "policymaker" rather than simply a "regulator [and] enforcement official."[305] The court several times spoke approvingly of the superintendent "advancing *her* policy goals."[306] When a single individual or department is invested with legislative, executive, and judicial power, nearly any act—no matter how abusive of an unpopular group—can be explained away. Indeed, as scholars and U.S. Supreme Court Justices have observed, judges routinely defy settled law and manipulate obvious inferences for controversial topics.[307] State legislatures are no better. For example, after the U.S. Supreme Court recently held that public defensive firearm carry—much of the conduct covered by self-defense insurance—was protected by the Second Amendment and could not be conditioned on a showing of good cause,[308] New York's legislature responded by passing a statute

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[298] Nat'l Rifle Ass'n of Am. v. Cuomo, 525 F. Supp. 3d 382, 393–400 (dismissing selective enforcement claims under absolute immunity), 404–11 (dismissing all claims against NYDFS under sovereign immunity) (N.D.N.Y. 2021) [hereinafter *NRA III*].

[299] *Id.* at 400–403; Notice of Appeal, *NRA III*, *supra* note 298.

[300] *Accord supra* note 48 and accompanying text.

[301] Nat'l Rifle Ass'n of Am. v. Vullo, 49 F.4th 700 (2d Cir. 2022) [hereinafter *NRA IV*].

[302] *Id.* at 706; *see generally id.* (interpreting the superintendent's acts as innocent or done in "good faith").

[303] *Id*. at 708.

[304] *Id.* at 717.

[305] *Id.* at 706 (referring to the superintendent's "various capacities as regulator, enforcement official, policymaker, and representative of New York State").

[306] *Id.* at 713 (emphasis added); *accord id.* at 720–21. The Second Circuit also opined that "[t]he [insurance] policies insured New York residents for litigation defense costs resulting from intentional, reckless, and criminally negligent acts with a firearm that resulted in another person's injury or death." *Id.* at 718. As discussed earlier, this assertion is problematic. *See supra* notes 128–142.

[307] *E.g.*, Rogers v. Grewal, 140 S. Ct. 1865, 1866 (2020) (Thomas, J., joined by Kavanaugh, J., dissenting from denial of certiorari) ("many courts have resisted our decisions in [District of Columbia v. Heller, 554 U.S. 570 (2008)] and [McDonald v. Chicago, 561 U.S. 742 (2010)]"); Peruta v. California, 137 S. Ct. 1995, 1997 (2017) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari) (referring to the opinion below as "indefensible"); Jackson v. City & Cty. of San Francisco, 576 U.S. 1013, 1013 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari) ("Despite the clarity with which we described the Second Amendment's core protection for the right of self-defense, lower courts, including the ones here, have failed to protect it."); Joyce Lee Malcolm, *Defying the Supreme Court: Federal Courts and the Nullification of the Second Amendment*, 13 CHARLESTON L. REV. 295, 304 (2018) (stating that judges are "increasingly dismissive" of gun-rights claims); George A. Mocsary, *A Close Reading* of an Excellent Distant Reading of Heller *in the Courts*, 68 Duke L.J. Online 41 (2018) (describing evidence of judicial defiance); Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 960 (2016) (describing courts' narrowing binding precedent, sometimes as a form of "resistance"); *but see* Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms after* Heller, 67 Duke L.J. 1433 (2018) (suggesting that the defiance claim may be exaggerated).

[308] New York State Rifle and Pistol Ass'n v. Bruen, 142 S. Ct. 333 (2022).

that did not include a good-cause requirement but was so restrictive and vague as to amount to a de facto ban and trap for the unwary.[309]

Until the incentives of state regulators, courts, and state legislatures are corrected, other options must be considered to rein in errant state regulators. Care should be taken, however, not to upset McCarran-Ferguson's otherwise well-functioning balance. Section V.B discusses how the National Association of Insurance Commissioners (NAIC) might ensure that its members both refrain from damaging their insurance markets out of animus and respect their insurers' and insureds' rights. Section V.C offers options for rights-focused, enabling, and relatively hands-off federal relief.

B. The National Association of Insurance Commissioners

The NAIC's mission is to "set standards and ensure fair, competitive, and healthy insurance markets to protect consumers."[310] Its members are the insurance commissioners of the U.S. states and territories.[311] Among the NAIC's tools are its ability to propagate Model Laws and Regulations and its Accreditation Program. "The model laws, when coupled with the NAIC Accreditation process, address areas where uniformity and consistency across state borders is beneficial to all."[312]

The NAIC's Procedures for Model Law Development provide that a Model Law or Regulation is appropriate as follows:

1. The issue that is the subject of the Model Law necessitates a minimum national standard and/or requires uniformity amongst all states; and
2. Where NAIC Members are committed to devoting significant regulator and association resources to educate, communicate, and support a model that has been adopted by the membership.[313]

Given the destructiveness of administrative browbeating, this standard should be met for the activities described herein. Model Laws and Regulations can create intrastate oversight systems or directly prescribe insurance practices.[314]

The approval process for a Model Law is thorough, involving many steps and requiring, for example, supermajority votes at both a committee and the NAIC membership levels. This ensures that adopted Model Laws or Regulations have broad buy-in by those responsible for the insurance industry's national health. But a state need not adopt a Model Law or Regulation, and legislatures or regulators of states like Oklahoma and New York should not be expected to do so.

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[309] *See* S.B. S51001, 2022 Leg., Extraordinary Sess. (N.Y. July 1, 2022), https://www.nysenate.gov/legislation/bills/2021/s51001 [https://perma.cc/EHP2-XVG2]. For example, the law makes it a felony to possess a firearm on private property, including businesses, where the owner or lessee does not expressly post or verbally give consent to possession; on mass transit, possibly including streets with bus routes; on any "grounds . . . owned or leased" by any kind of school, presumably including those grounds open to the public and serving as public streets; at most or all places of indoor or outdoor public gathering; at "any gathering of individuals to collectively express their constitutional rights to protest or assemble," which can cover as few as two people; in Times Square; and in public parks. The burden is on the possessor to know that he or she is in such a place.

[310] *Our Story*, NAIC, https://content.naic.org/about [https://perma.cc/V5DM-2QSD].

[311] *Id.*

[312] *NAIC Model Laws,* NAIC, Apr. 19, 2022, https://content.naic.org/cipr-topics/naic-model-laws [https://perma.cc/E387-WRY4].

[313] NAIC, PROCEDURES FOR MODEL LAW DEVELOPMENT 1 (2007, amended 2008, revised 2013) (emphases omitted).

[314] *See infra* sections V.C.1–2.

When made into an accreditation standard, however, a Model Law or Regulation can motivate abusive regulators to change. To be accredited, a state regulator must "meet an assortment of legal, financial, organizational, and licensing and change of control standards as determined by a committee of its peers."[315] Accreditation is an important imprimatur that a state has a healthy regulatory environment. The program was developed in response to a congressional inquiry into the large insurer insolvencies of the 1980s.[316] Its focus is solvency regulation, into which regulatory risk, which is fed by the abuses described herein, and reputational risk readily fall.[317]

More broadly, NAIC member commissioners rely on the NAIC to ensure that other states' regulations are appropriate and effective. The commissioners have an interest in ensuring the NAIC and the McCarran-Ferguson Act's goals are achieved. Perhaps more important, remediation of their fellow members' abuses before Congress does so is to their benefit.

C. Congress

Congress must authorize any federal reforms addressing administrative browbeating by state insurance regulators, but it should take a minimalist approach. The McCarran-Ferguson Act has functioned well for over three-quarters of a century. Neither the insurance industry nor state regulators would want thorough federal oversight of the type that exists in the banking sector. Their concerns are understandable. For example, one bad federal regulator would hurt the entire nation's insurance market, and many insurance products are state specific to include underwriting for local laws. Even so, regulatory browbeating should not be tolerated. This section offers suggestions on how Congress might remedy abuses while enabling free transacting around legal and legitimate activities.

1. Existing Federal Agencies

Instead of acting directly, a more prudent Congress might enable existing federal agencies to serve as intermediaries between it and the states. Such a tiered system would moderate the legislative urge to act impulsively, while focusing Congress's attention on specifically identified cases rather than on the business of insurance as a whole. Although both agencies discussed in this section can be granted additional rulemaking authority, giving them such power over alleged administrative browbeating would risk centralizing that problem in a national regulator.

Federal Insurance Office (FIO). The FIO was established "to monitor all aspects of the insurance industry."[318] It is also authorized to consult with states on insurance matters[319] and to advise the Secretary of the Treasury and the Financial Stability Oversight Council (FSOC) on insurance matters.[320] The FIO must submit an annual report to the Senate's Banking, Housing, and Urban Affairs Committee and Finance Committee and the House's Financial Services Committee and Ways and Means Committee.[321]

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[315] NAIC, FINANCIAL REGULATION STANDARDS AND ACCREDITATION PROGRAM 1 (2022).

[316] *Id*.

[317] *See supra* sections III.A, III.C.1.

[318] 31 U.S.C. § 313(c)(1)(A) (2012).

[319] *Id.* § 313(c)(1)(G).

[320] *Id.* § 313(c)(2)–(3).

[321] *Id.* § 313(n).

The FIO could monitor states—by explicit Congressional command, if necessary—for abuses, including via the equivalent of a complaint line available to insurers and consumers. If it spots potential discrimination or favoritism, it can (a) consult with the state; (b) inform Congress, which can then act; or (c) inform the Secretary of the Treasury or the FSOC, both of which can make further recommendations on potential remedies.

Consumer Financial Protection Bureau (CFPB). Because state browbeating affects consumers, especially in situations like Oklahoma's where homeowners are more clearly forced to bear the costs of political discrimination, the CFPB would also be a natural candidate for monitoring state regulators. The CFPB has the advantage of having experience working with consumers. Although the CFPB has rulemaking authority, insurance is explicitly outside its domain.[322] As with the FIO, and for the reasons stated, any authority to combat administrative browbeating in insurance should be of the monitoring and informing variety.

Some fear, however, that the CFPB is partisan and unaccountable.[323] Although there is little or no such criticism about the FIO, that may be a function of its having less substantive power. As this paper shows, partisanship and unaccountability resulting in under- or overenforcement is a legitimate concern about any administrative agency. As said by a former aide to Senator Barney Frank, a sponsor of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which created both the FIO and the CFPB, "Congress must be disciplined in keeping regulatory agencies within its sights and holding them accountable."[324] That is why Congress is advised to limit FIO and CFPB authority to reporting, especially in the context of the McCarran-Ferguson arrangement.

2. Enabling Legislation

Whether or not Congress's consideration of enabling legislation is prompted by a third party, it can take two forms. The first is an opt-in system, under which Congress can create a federal regime that allows insurers to join, but that leaves state regulation untouched. The second is one that directly targets abuses.

Federally Chartered Insurers. Congress could provide a parallel route to insurance regulation by allowing insurers the option to form at either the federal or the state level. A would-be insurer could then opt into its state's system or the federal one. Rather than risking the centralized-bad-regulator problem, a parallel system would add another "laboratory" working to create the best regulatory regime.[325] This system exists in the banking sector, albeit with more federal control over state-chartered banks than the absence of control proposed here. Creating a federal insurance infrastructure can be expensive, however.

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[322] 12 U.S.C. §§ 5512, 5517(m) (2018).

[323] *See, e.g.*, Dennis Shaul, *What Went Wrong With the CFPB: I Was an Aide to Barney Frank. I've Learned It's a Mistake to Create an Unaccountable Agency*, WALL ST. J., Nov. 19, 2017, at A17; Adam C. Smith & Todd Zywicki, *Behavior, Paternalism, and Policy: Evaluating Consumer Financial Protection* (Mercatus Working Paper No. 14-06, Mercatus Center at George Mason University, Arlington, VA, March 2014); *but see* Brief for Financial Regulation Scholars as Amici Curiae Supporting Respondent, Seila Law LLC v. Consumer Financial Protection Bureau, 140 S. Ct. 2183 (2019) (No. 19-7).

[324] *See* Shaul, *supra* note 323.

[325] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Enabling of National Markets. Reform, whether it takes the form of features of a federal chartering system or targeted statutes, should be enabling. It should focus on facilitating the efficient and unmolested operation of insurance markets.

The best place to start is broadly to permit insurers to engage in economically efficient activities that do not run contrary to (and, indeed, support) McCarran-Ferguson goals of enabling a strong insurance industry. This approach would have the added benefit of disabling malicious regulators from selectively enforcing inefficient rules to the detriment of their political enemies.[326]

Insurers should, for example, be able to advertise their financial conditions.[327] Congress can either allow federally chartered insurers to do so or enact a statute withholding from states the power to bar insurers from doing so. The same can be done for diligent-search mandates in cases where domestic coverage is known not to exist.[328]

Relatedly, either through the rules governing federally chartered insurers or via enabling legislation, state control over consumers' going to excess line carriers can be limited. An export list over which regulators have plenary discretion, for example, facilitates the abuses described herein.[329] If the limit is tied to legal activity, a state's legislature would have to criminalize the activity for its regulators to be able to discriminate against those who engage in the activity. That criminalization, in turn, would have to withstand constitutional challenge.[330]

These are but two examples. Other avenues of abuse, such as assertions of reputational risk, are ripe for similar treatment.[331] Removing inefficiency while curbing abuse of the inefficiency would be a boon for markets.

Fee Shifting for Rights Violations. Although courts are a suboptimal avenue for insurer vindication, making them more accessible at least to third parties and insureds is nonetheless worthy of consideration. In an environment where a state declares its intention to bankrupt a firearm advocacy group and then works to follow through on it, where that state's governor previously participated in a group of lawsuits "designed to be resistant to consolidation, and to stretch the ability of . . . handgun manufacturers to pay for legal defense in dozens of jurisdictions at once,"[332] a fee-shifting statute would make accessing the courts less risky for both large and small plaintiffs. Although fee shifting is not always appropriate, it is apt in cases where the regulatory machinery is used to bankrupt political enemies, deny equal protection of law, or stymie the exercise of fundamental rights—all the more so when the vandals publicly brag about their misdeeds.

Regulated parties may also be somewhat more willing to seek judicial vindication for regulator mistreatment if they receive some protection from the equivalent of a whistleblower or anti-retaliation statute.[333] Although retaliation can be difficult to prove, the evidence presented herein shows that at least some regulators lack the self-control to moderate their behavior.

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[326] *See supra* text accompanying notes 117–121.

[327] *See supra* text accompanying note 212; text following note 214; text surrounding note 216.

[328] *See supra* text accompanying notes 213, 217–219; text following note 219. Although this approach likely would not be an issue for federally chartered insurers, a federal regime conceivably would require its insurers to follow some regulations in their home states.

[329] *See supra* text accompanying note 218; text surrounding note 219.

[330] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).

[331] Hill, *supra* note 92, at 601–602.

[332] JOHNSON ET AL., *supra* note 221, at 679.

[333] *But see supra* notes 298–307.

CONCLUSION

Insurance can enable desirable activities and make them safer. Properly functioning insurance markets are important to the smooth functioning of a modern economy. Congress gave the states near-plenary power over insurance regulation because it believed that the states were better positioned to ensure the stability of such markets.

But some states' insurance regulators use their power for political ends, and, in the process, violate basic rights. This administrative browbeating works against the financial purposes underlying the granting to States of regulatory control over insurance, undoes the enabling and safety-enhancing benefits created by insurance, and does violence to the nation's social and legal order. It should be stopped in short order.