Tell Me What You Want:
An Affirmative-Choice Answer to the Constitutional Concern About Concealed-Carry on Private Property

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Abstract: In a substantial majority of states, invitees may bring concealed weapons onto private property unless the owner expressly tells them that firearms are not allowed. Five states after the Supreme Court's *Bruen* decision flipped the presumption, enacting statutes that prohibit bringing firearms onto other people's property without the owner's express consent. These statutes have been attacked as violating the Second Amendment. While the Ninth Circuit upheld the constitutionality of the "no guns" default, the Second Circuit and other lower courts have enjoined application of the law with regard to private property open to the public. This Article, after analyzing the reasoning of the courts, proposes a legislative fix. States can enact "affirmative choice" rules which require commercial establishments, as a condition of doing business, to state whether or not they want their customers to be allowed to bring concealed firearms into their stores. An affirmative-choice requirement avoids constitutional concerns that some courts have had with a "no guns" presumption because the ability to bear arms on private property would only be restricted when the landowner so chooses. Without state action restricting gun rights, the statutes would not meet the *Bruen* threshold requirement. The Article explains why affirmative-choice laws are likely to better effectuate the preferences of landowners and why such laws would not pose compelled speech concerns.

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I. Introduction

A comedic YouTube video, titled Californians Move to Texas,[3] depicts a recently transplanted couple who are horrified to learn that a next-door neighbor has brought a handgun into their home without asking permission. The neighbor tries to calm them explaining that this is normal behavior and tells them, "You'll get used to it."[4] The possibility that an invitee or licensee will bring a concealed weapon into someone else's home is a genuine issue and not just in the Lone Star State.[5]

[3] The Babylon Bee, *Californians Move to Texas | Episode 1: Moving Day*, YOUTUBE (Sept. 13, 2022), https://www.youtube.com/watch?v=HlDWzN6TW5Y.

[4] *Id.*

[5] With regards to trespass law, an invitee "is someone whom the landowner or occupier (LOOO) has invited onto the LOOO's property in the expectation that the LOOO will benefit from the invitee's presence" while licensees are social guests who "do not bestow any tangible benefits on the landowner." JOHN FABIAN WITT, TORTS AND REGULATION: CASES, PRINCIPLES, AND INSTITUTIONS 491 (3d ed. 2022).

Until 2022, forty-six states allowed social guests and even service people to bring firearms onto other people's residences unless they were expressly told that guns were not allowed.[6] At that time, a few states had established "no-carry" defaults for alcohol outlets and churches,[7] but no state had adopted generalized no-carry defaults for retail establishments.

The risk that someone would surreptitiously bring a firearm into someone else's home or business was limited in several "may-issue" states by limitations on the number of concealed weapons permits that were issued. Property owners could see and object to firearms that were openly carried and could presume that those few individuals with concealed-weapon permits were well-vetted.[8] All that changed after *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*.[9] The Supreme Court's decision held that any law that restricts conduct covered the Second Amendment's "plain text" is presumptively unconstitutional.[10] The opinion effectively prohibits may-issue laws that allowed states to exercise discretion in denying concealed-weapon permits. Since the decision was handed down, permit applications have been soaring. For instance, in 2021, New York City received just 315 applications for concealed-carry permits; but between 2022 and March 2024, it received more than 11,000 applications.[11] In New Jersey, just 274 people applied for a new concealed-weapon permit in the year before *Bruen*, but more than 40,000 new applications were filed between 2022 and June 30, 2024—with the state approving more than 99% of the applications.[12]

The seismic impact of the *Bruen* decision was not lost on state legislators. Within just four weeks, New York passed new legislation which substantially expanded the set of "sensitive" spaces in which individuals could not carry firearms.[13] The legislation included the first modern provision flipping the default for all private property from "guns welcome unless property owner objects" to

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[6] Ian Ayres & Spurthi Jonnalagadda, *Guests with Guns: Public Support for "No Carry" Defaults on Private Land*, 48 J. L., MED. & ETHICS, Winter 2020, at 183, 184 (noting that Alaska, Arkansas, Louisiana, South Carolina, and the District of Columbia had adopted "no guns" defaults for private dwellings).

[7] *See, e.g.*, MO. ANN. STAT. § 571.107(7) (West 2020) (regarding sellers of alcohol); § 571.107(14) (regarding houses of worship). *See also* Mark Frassetto, *The Historical Regulation of Intoxicated Firearms Possession and Carry: A Response to F. Lee Francis's "Armed and Under the Influence: The Second Amendment and the Intoxicant Rule After Bruen,"* 108 MARQUETTE L. REV. (forthcoming 2024).

[8] Ian Ayres, Pranjal Drall, Spurthi Jonnalagadda & Fredrick Vars, *Guns and Property Preference: Testing the Impact of Gilles and Cynicism Conjectures Using Survey Data*, 39 QUINNIPIAC L. REV. 387, 388 (2021).

[9] 597 U.S. 1 (2022).

[10] *Id.* at 24.

[11] Samantha Max, *Applications to Carry Guns in NYC and NJ Are Surging*, GOTHAMIST (Aug. 13, 2024), https://gothamist.com/news/applications-to-carry-guns-in-nyc-nj-are-surging.

[12] *Id.*; *see also* N.J. Office of Justice Data, *New Jersey Permit to Carry Data*, TABLEAU, https://public.tableau.com/app/profile/nj.office.of.justice.data/viz/PermittoCarryDashboard/Intro (Nov. 15, 2024) (click on "Applications" tab to see a graphic representation of the meteoric rise in applications following *Bruen*).

[13] *Understanding Recent Changes to New York's Gun Laws*, N.Y. STATE ATT'Y GEN., https://ag.ny.gov/new-york-gun-laws (last visited Nov. 10, 2024).

"guns prohibited unless property owner expressly consents."[14] Soon thereafter, four other states (California, Hawaii, Maryland, and New Jersey) followed suit and adopted no-carry defaults on all private property.[15]

Gun rights advocates brought suit in each of these five jurisdictions challenging the constitutionality of the new private-property default provisions.[16] While the Ninth Circuit recently dissolved a preliminary injunction in finding that Hawaii's no-carry default is likely to survive constitutional scrutiny,[17] the Second Circuit and several other lower courts have enjoined the application of the law with regard to private property that is open to the public.[18] The Second Circuit found that New York's no-carry default was unconstitutional because "the State's analogues fail to establish a National tradition motivated by a similar 'how' or 'why' of regulating firearms in property open to the public."[19] The circuit split may soon be resolved by the Supreme Court.

Even if the Second Circuit's reasoning ultimately prevails, state legislators need not remain quiescent. Instead of enacting a default presuming that commercial property owners do not want customers to bring arms into their stores, states can pass "affirmative-choice" laws. An affirmative-choice law would simply require firms, as a condition of being licensed to do business, to affirmatively choose whether or not they want concealed carry on their property. Affirmative-choice laws powerfully respond to the judicial concern with the no-carry default. An affirmative- or active-choice requirement makes no presumption as to whether the property owner wants invitees to come unarmed. The only publicly accessible private properties with gun restrictions would be those in which private owners of such properties affirmatively choose to restrict access. Accordingly, these laws should survive Second Amendment scrutiny because there would be no state action. *Bruen*'s threshold requirement would not be met because the state would not have restricted the right to bear arms.

Affirmative-choice requirements would better protect both the rights of commercial property owners to exclude and the associational interests of their customers. First, the issue with the current laws—where guns are allowed by default—creates a first-mover disadvantage for many store owners. Being the first store on your block to post a sign prohibiting firearms might make

[14] N.Y. PENAL LAW § 265.01-d (McKinney 2023).

[15] CAL. PENAL CODE § 26230(a)(26) (West 2024); HAW. REV. STAT. § 134-9.5(a) (2023); MD. CODE ANN., CRIM. LAW § 6-411(d) (West 2023); N.J. STAT. ANN. § 2C:58-4.6(a)(24) (West 2022).

[16] *See infra* note 44 and accompanying text.

[17] Wolford v. Lopez, 116 F.4th 959, 994-96 (9th Cir. 2024).

[18] *See* cases cited *infra* note 46.

[19] Antonyuk v. Chiumento, 89 F.4th 271, 386 (2d Cir. 2023), *cert. granted, judgment vacated sub nom.* Antonyuk v. James, 144 S. Ct. 2709 (2024), *reinstated in part*, Antonyuk v. James, No. 22-2908, 2023 WL 11963034 (2d Cir. Oct. 24, 2024).

that store a target for violence, harassment, or unlawful protest. With an affirmative-choice law that requires existing stores a roughly simultaneous expression of preference, there is more likely to be safety in numbers given the substantial likelihood that a majority of stores will choose to disallow concealed carry. Second, affirmative-choice requirements will provide better information to customers about whether other invitees can be lawfully armed. As detailed below, there is abundant evidence that a substantial majority of Americans are either uninformed or misinformed about whether concealed weapons can be carried into stores under the current default.[20]

The remainder of this Article is divided into two Parts. Part II discusses the history of the no-carry default and judicial responses to constitutional challenges. It will explain why flipping the default should survive *Bruen*. Part III will then argue that, whether or not the no-carry default survives constitutional scrutiny, state legislatures *should* require store owners to state their preferences affirmatively as a condition of doing business. This Part will describe scholarly theories about affirmative-choice rules and detail how they have been used in other contexts. It will also demonstrate why this type of law would survive judicial scrutiny and serve important policy interests.

II. The No-Carry Default Movement and the Judicial Response

The modern movement to flip the default rule began in 2020 when we proposed this legislative reform in our book *Weapon of Choice*:

> Instead of requiring property owners to proactively prohibit others from carrying weapons onto their property, the rule could be that people cannot carry weapons onto the private property of others without explicit permission. States might enact a statute saying: "No individual may carry a firearm onto the property of another without first receiving the express consent of the owner or person in legal control or possession."[21]

We argued that a no-carry default would better comport with most modern property owners' expectations and preferences. We hypothesized that many people would be taken aback if their plumber or dinner guest brought concealed weapons into their home.[22] An earlier draft of the book went even further and conjectured that a "majority of homeowners do not expect or desire dinner guests or repair people to bring concealed weapons onto their property."[23] One of the book's

[20] *See infra* notes 34-36 and accompanying text.

[21] IAN AYRES & FREDRICK E. VARS, WEAPON OF CHOICE: FIGHTING GUN VIOLENCE WHILE RESPECTING GUN RIGHTS 85 (2020).

[22] *Id.* at 84.

[23] Ayres & Jonnalagadda, *supra* note 6, at 183.

anonymous reviewers responded, "Maybe in New Haven, but not necessarily in Tuscaloosa or Ft. Worth."[24]

This response spurred us to survey a representative sample of 2,000 Americans to learn about both their preferences regarding carrying guns onto other people's property and whether they understood what the existing default was in their jurisdiction.[25] We tested different contexts of potential carrying onto other people's property—including homeowners, retailers, and employers. Less than a third of respondents supported a "carry" default for service providers (27.8%) or friends (32.1%) with regard to residences.[26] And only about one-quarter of respondents (25.1%) expressed support for a default right of employees to bring guns into their places of employment.[27] This figure is statistically different from 50% ($p < .01$).[28] A larger, but still minority, proportion of respondents (44.2%) believed customers, by default, should be allowed to carry into retail establishments, and this percentage was again statistically different from 50%.[29]

Contrary to the speculation of our anonymous reviewer who believed there would be differing preferences across various parts of the country, our survey found a surprising consistency of respondent preferences across jurisdictions. For example, 55.3 of Southern respondents expressed support for a no-carry default at retail stores, which was slightly higher than the support (54.6%) expressed in the Northeast region.[30] In these times of tribalism, blue states and red states may disagree about many cultural hot-button issues, but there is majoritarian support for no-carry defaults for residences and retail establishments. Most respondents—across all regions of the country—did not think that customers, employees, home-repair service providers, or dinner guests should be able to bring guns onto other people's private property without the express permission of the owner (or person in legal control or possession).[31]

Because many defaults are never privately altered, we argued that no-carry defaults would "radically expand[] the areas that are de jure gun free."[32] Flipping the defaults might both directly

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[24] *Id.*

[25] *Id.*

[26] *Id.* at 185 tbl.1.

[27] *Id.*

[28] *Id.*

[29] *Id.* Respondent preferences were sensitive to particular carrying contexts. Two-thirds of respondents (67.1%) supported the default right of tenants to possess weapons on property they had rented, and this proportion was statistically greater than 50% ($p < .01$). *Id.* An even larger proportion (68.3%) supported the default right of employees to keep guns in their cars in their employer's parking lot ($p < .01$). *Id.*

[30] *Id.* The F-tests indicated that there are no statistically significant regional differences in support for default-carry rights in residences or retail establishments.

[31] *Id.* at 185 tbl.1.

[32] *Id.* at 190.

and indirectly reduce gun violence. Restricting the places where guns can be possessed can directly reduce the likelihood of impulsive misuse of firearms. This is a likely explanation for why states like Missouri have already enacted no-carry default in bars.[33] A no-carry default is likely to reduce the likelihood that guns would be transported in cars (because driving onto a private lot or gas station would now be criminal trespass if the owner failed to grant permission), and accordingly, might reduce the number of guns that are stolen.[34] A flipped default might also, on the margin, reduce overall demand for gun ownership. While some people purchase guns solely to defend their homes, others may purchase in part for use in other contexts. As these other contexts for use decrease, so too might the demand for guns.

The survey results buttressed our normative call for a no-carry default by detailing the prevalence of respondents being uninformed or misinformed. More than two-thirds of respondents reported not knowing whether their state, by default, allows firearms to be carried onto other people's residences or businesses.[35] Even worse, the survey found that more than 10% of respondents mistakenly believed that dinner guests (18.1%) or repair people (13.2%) are prohibited from carrying concealed firearms into residences without the owner's permission, and 15.8% of respondents mistakenly believed that the law prohibited retail customers from bringing guns into stores without the owner's express consent.[36] Ignorance of the law can undermine the ability of individuals to exercise their rights as landowners. A homeowner who wrongly believes that repair people are not allowed, by default, to carry concealed weapons onto their property is less likely to explicitly condition entry on not carrying.

An important impetus for our proposal was a belief that flipping the default in this way would not violate the Second Amendment. My right to bear arms ends at your property line—just as my right to free speech does not confer on me a right to erect signs on your yard.[37] Property owners would still be free to invite armed friends, family, customers, and service providers onto their land. They would just have to tell them or post a sign that guns are welcome.

Our proposal received renewed attention after the *Bruen* decision, which not only radically deregulated the process for obtaining concealed weapon permits, but also called into question the constitutionality of all gun-control regulations. *Bruen* itself represents an important default flip.

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[33] MO. ANN. STAT. § 571.107(7) (West 2020).

[34] See *Stolen Guns Pose a Tremendous Risk to Public Safety*, EVERYTOWN (Mar. 6, 2019), https://everytownresearch.org/stolen-guns-pose-tremendous-risk-public-safety.

[35] Ayres & Jonnalagadda, *supra* note 6, app. at 8, tbl.A5.

[36] *Id.*

[37] Ian Ayres & Spurthi Jonnalagadda, *Is Your Dishwasher Repairman Packing Heat? The Case for 'No Carry' Gun Defaults on Private Property*, THE HILL (July 1, 2022), https://thehill.com/opinion/civil-rights/3542765-is-your-dishwasher-repairman-packing-heat-the-case-for-no-carry-gun-defaults-on-private-property.

In *District of Columbia v. Heller,*[38] Justice Scalia went out of his way to emphasize that, notwithstanding a brand new individual right to bear arms, prohibitions of firearm possession by "felons and the mentally ill" are "presumptively lawful."[39] In contrast, the *Bruen* decision seems to reverse this presumption.[40] Justice Thomas, writing for the majority, declared that laws restricting gun rights are presumptively unconstitutional unless the government can "demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."[41]

Within several months following the *Bruen* decision, five jurisdictions—California, Hawaii, Maryland, New Jersey, and New York—flipped the carry default.[42] Under these laws, individuals could only lawfully carry firearms onto private property with the express permission of the owner.[43] Gun-rights activists responded with similar speed in attacking the statutes in each of these jurisdictions, often with multiple suits filed in each state.[44]

A. *The Judicial Response to the No-Carry Default*

District and Circuit courts grappling with the constitutionality of the no-carry default have come to three different substantive outcomes. In *Kipke v. Moore*, a Maryland district court granted a preliminary injunction against the application of the no-carry default applied to any private property.[45] Other courts have Solomonically upheld the application of the law with regard to private property closed to the public, but enjoined its application with regard to property open to the public. The Second Circuit in *Antonyuk v. Chiumento* adopted this approach.[46] And most recently, the Ninth Circuit in *Wolford v. Lopez* reversed a district court's preliminary injunction

[38] 554 U.S. 570 (2008).

[39] *Id.* at 626, 627 n.26.

[40] 597 U.S. 1 (2022).

[41] *Id.* at 17; *see* Ian Ayres & Fredrick Vars, *The Coming Assault on Categorical Gun Laws*, 77 STAN. L. REV. ONLINE (forthcoming 2024), http://dx.doi.org/10.2139/ssrn.4936402.

[42] *See* statutes cited *supra* notes 14-15.

[43] Though, as discussed below, these statutes vary on what constitutes express permission. *See infra* text accompanying notes 102-109.

[44] *See* May v. Bonta, 709 F. Supp. 3d 940 (C.D. Cal. 2023), *aff'd in part, rev'd in part sub nom.* Wolford v. Lopez, 116 F.4th 959 (9th Cir. 2024); Wolford v. Lopez, 686 F. Supp. 3d 1034 (D. Haw. 2023), *aff'd in part, rev'd in part*, 116 F.4th 959 (9th Cir. 2024); Kipke v. Moore, 695 F. Supp. 3d 638 (D. Md. 2023); Koons v. Platkin, 673 F. Supp. 3d 515, 615-25 (D.N.J. 2023); Antonyuk v. Hochul, 639 F. Supp. 3d 232 (N.D.N.Y. 2022), *aff'd in part, vacated in part, remanded sub nom.* Antonyuk v. Chiumento, 89 F.4th 271 (2d Cir. 2023); Hardaway v. Nigrelli, 639 F. Supp. 3d 422 (W.D.N.Y. 2022), *aff'd in part, vacated in part, remanded sub nom.* Antonyuk v. Chiumento, 89 F.4th 271 (2d Cir. 2023); Christian v. Nigrelli, 642 F. Supp. 3d 393 (W.D.N.Y. 2022), *aff'd in part, vacated in part, remanded sub nom.* Antonyuk v. Chiumento, 89 F.4th 271 (2d Cir. 2023); Spencer v. Nigrelli, 648 F. Supp. 3d 451 (W.D.N.Y. 2022), *aff'd in part, vacated in part, remanded sub nom.* Antonyuk v. Chiumento, 89 F.4th 271 (2d Cir. 2023).

[45] 695 F. Supp. 3d 638 (D. Md. 2023).

[46] 89 F.4th 271, 387 (2d Cir. 2023); *see also* Koons v. Platkin, 673 F. Supp. 3d 515, 615-25 (D.N.J. 2023).

regarding Hawaii's no-carry statute, finding that the no-carry default is constitutional, even for private property open to the public.[47] This Section will focus on the courts' reasoning with regard to (i) the threshold question of whether "the Second Amendment's plain text cover[ing] an individual's conduct" is burdened by the statute, and (ii) the second-step question of whether the challenged law has well-established and representative analogues to "*how* and *why* the regulations burden a law-abiding citizen's right to armed self-defense."[48]

1. The Threshold Inquiry

Step one of *Bruen* requires a plaintiff to show that the challenged law burdens the right to bear arms as covered by the Second Amendment's plain text.[49] If a plaintiff cannot meet this threshold burden, then the government is relieved of having to show sufficient "how" and "why" analogues. Consequently, the plaintiff's constitutional challenge will fail. Courts have found, for example, that the threshold requirement was not met by plaintiffs challenging the federal statute barring certain non-citizens from possessing guns, ruling that the statute is constitutional because non-citizens were not "people" included in the Amendment's text "the right of the people to keep and bear arms."[50]

The threshold inquiry has also been consequential in the no-carry default litigation. Some courts applying the threshold requirement have, somewhat surprisingly, concluded that property closed to the public is not covered by the Second Amendment. For example, the Second Circuit in *Antonyuk* relied on a district court's holding that distinguished between a gunowner's home and private property open to the public on the one hand, and private property closed to the public on the other hand:

> [T]o the extent to which [New York's no-carry default] restricts concealed carry on privately owned property that is *not open to the public* . . . the Second Amendment is not the best place to look for protection from that restriction, because thus far the Second Amendment has been found to protect the right to keep and bear arms for self-defense only in one's own home or in *public*.[51]

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[47] Wolford v. Lopez, 116 F.4th 959, 1002 (9th Cir. 2024). But as discussed *infra* notes 103-108 and accompanying text, the *Wolford* panel upheld the preliminary injunction of California's no-carry default because of that statute's more burdensome altering rules.

[48] *Wolford*, 116 F.4th at 976-77 (emphasis added).

[49] The arguments in this section profited from joint work developed with Josh Feinzig and Alan Schoenfeld in drafting the amicus briefs file in the related litigation. See, e.g., Amicus brief, supra note 2.

[50] United States v. Sitladeen, 64 F.4th 978, 985 (8th Cir. 2023).

[51] *See* cases cited *supra* note 46. The Second Circuit relied on this holding to decide that plaintiffs had failed to make out a facial challenge to the no-carry default. The panel concluded: "Having accepted the State's argument that there was at least one set of circumstances in which the statute could be valid under the Second Amendment [i.e., applied

The idea here is that the Supreme Court's *Heller* opinion protects the right to possess firearms in one's own home and that the Supreme Court's *Bruen* decision protects the right to possess firearms in public, including private property open to the public.[52] But because the Second Amendment does not include a right to carry weapons onto private property closed to the public, a no-carry presumption for such real estate does not implicate the textual rights of the Amendment.

In contrast, every court that has addressed the issue has found that the no-carry default, as applied to private property open to the public, satisfies the threshold requirement. To reach this conclusion, courts have interpreted various mentions of "public" in the Supreme Court's *Bruen* opinion to include private property open to the public. For example, the Ninth Circuit held:

> We are unpersuaded that the Second Amendment is limited strictly to property that is publicly owned. The text of the Second Amendment does not limit the right to bear arms to publicly owned spaces. *Bruen*'s repeated mention of "public carry" or "carry in public" appears to encompass the right to carry firearms on private property that is open to the public. We agree with the Second Circuit and with the district court's thoughtful analysis in the Hawaii case that the Second Amendment encompasses the right to bear arms not only in publicly owned spaces, but also on private property that is generally open to the public.[53]

However, even if these courts are correct in both their reading of these somewhat ambiguous phrases and their prediction that this dictum will ripen into binding precedent, there is still a substantial argument that a mere default presumption against carrying firearms does not constitute a government infringement of Second Amendment rights.

It is equally clear that private property owners have a right "to exclude others, including those bearing arms."[54] Indeed, the Supreme Court in its 2021 decision, *Cedar Point Nursery v. Hassid*, reiterated the foundational idea that "the right to exclude is 'universally held to be a fundamental

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to private property closed to public], it was error for the district court to subsequently enjoin [the no-carry default] in all its applications." *Antonyuk*, 89 F.4th at 387.

[52] A similar conclusion was reached in *Koons*, 673 F. Supp. 3d at 607, in which the New Jersey District Court held that "[a]s to such private property that is not held open to the public, an 'anti-carry presumption' does not come within the scope of the right to carry for self-defense in public, and there the Default Rule does not violate the Second Amendment . . . ."

[53] *Wolford*, 116 F.4th at 993 (citations omitted) (first citing Wolford v. Lopez, 686 F. Supp. 3d 1034, 1057-1059 (D. Haw. 2023); then citing *Antonyuk*, 89 F.4th at 383-84; and then citing Antonyuk v. Hochul, 639 F. Supp. 3d 232, 316-17 (N.D.N.Y. 2022)).

[54] *Id.* at 994.

element of the property right,' and is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"[55]

While courts, in part guided by our own characterization in publications and amicus briefs, have repeatedly referred to the no-carry laws as changing a default, the more foundational property default is that all entry onto other people's property is trespass.[56] Trespass is a strict liability crime (and tort) unless access right is explicitly or implicitly granted.[57] As the King's Bench ruled in 1765, property is so "sacred," that no one "can set his foot upon his neighbour's close without his leave . . . ."[58]

Although often not emphasized in law school classes, a substantial proportion of entries onto other people's land avoids the harsh consequences of this trespassing default by judicial recognition of permissions to enter *implied* through landowner actions (sometimes styled as implied invitations or implied licenses). This point was appropriately emphasized by the New Jersey District Court in *Koons*:

> Indeed, notwithstanding the "strict rule of the English common law as to entry upon a close," "[a] license [to enter] may be implied from the habits of the country." For this reason, "the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds." Absent notice of some kind, one is typically not considered a trespasser when one enters the curtilage or area immediately surrounding and associated with the home of another for a lawful purpose, nor is one a trespasser when one enters a retail establishment for the purpose for which the property is held open to the public.[59]

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[55] Cedar Point Nursery v. Hassid, 594 U.S. 139, 150 (2021).

[56] *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *209 ("The Roman law seem to have made a direct prohibition necessary, in order to constitute [trespass] . . . . But the law of England . . . has carried the point much farther, and has treated every entry upon another's lands, (unless by the owner's leave, or in some very particular cases) as an injury or wrong, for satisfaction of which an action of trespass will lie . . . ."). There are a few exceptions for necessity. *See* Note, *Necessity as an Excuse for a Trespass upon Land*, 22 HARV. L. REV. 296, 297 (1909) ("[A]n entry to save the goods of the landowner, and, in some circumstances, of a third person, from destruction by fire or water is not actionable, and a man may go on land to recover cattle escaped from the highway. The preservation of human life would surely seem to be sufficient necessity . . . ." (footnotes omitted)).

[57] *See* John C.P. Goldberg & Benjamin C. Zipursky, *The Strict Liability in Fault and the Fault in Strict Liability*, 85 FORDHAM L. REV. 743, 748 (2016) ("[T]he old trespassory torts were defined, and their modern descendants are still defined, in a way that allows for the imposition of liability notwithstanding the defendant's diligence or prudence.").

[58] Entick v. Carrington, 95 Eng. Rep. 807, 817 (KB 1765); *see also* GeorgiaCarry.Org, Inc. v. Georgia, 687 F.3d 1244, 1262 (11th Cir. 2012) ("[A] guest is able to enter or stay on private property only with the owner's permission. A guest is removable at the owner's discretion.").

[59] Koons v. Platkin, 673 F. Supp. 3d 515, 611 (D.N.J. 2023) (citations omitted).

The implied permission can also limit the behaviors of the invitee. For example, in 2013, the Supreme Court opined that "[t]his implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave."[60]

The implied nature of these invitations underscores the *interpretative* task of the law. Entering someone else's property is trespass unless there is some affirmative act of the property owner—whether it be a "knocker on the front door" of a residence or a store name on the front of a retail establishment—from which the law can infer an implied license or invitation.[61] The law must determine what acts of ownership implicitly permit what kinds of entry for what kinds of purposes. The no-carry default is, at its core, a rule of interpretation that determines the default scope of implied licenses.

States have also long adopted and reformulated interpretative defaults to better calibrate them to changing ownership preferences. For example, most States over the course of the nineteenth century reversed the default trespass rule as to whether domesticated cattle were permitted to graze on the land of another property owner, thereafter placing the burden on visiting ranchers to obtain an owner's consent.[62] The reformulation of interpretative default rules to adjust the scope of implied licenses and invitations remains a critical means by which States support the integrity of private property. Statutes establishing new interpretative defaults have addressed everything from consumption of alcohol and graffiti to solicitations and drone use.[63]

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[60] Florida v. Jardines, 569 U.S. 1, 8 (2013); *see also* THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 303 (1879) (stating that "[e]very retail dealer impliedly invites the public to enter his shop," but that "the invitation is limited by the purpose"); State ex rel. Qarmout v. Cavallo, 774 A.2d 612, 614-615 (N.J. Sup. Ct. 2001) (finding criminal trespass where defendants were given permission to enter another's land to dump clean fill but instead dumped solid waste).

[61] Not all fraudulently induced invitations to enter private property constitute criminal trespass. Desnick v. Am. Broadcasting Cos., 44 F.3d 1345 (7th Cir. 1995). However, Joseph Blocher and Darrell A. H. Miller persuasively argue: "The basic analysis from cases like Desnick suggests that the [concealed] gun-carrier [who enters notwithstanding a "No Guns Allowed" sign] is a trespasser, because—unlike the secret critic—her fraud interferes with the interests that the right to exclude was meant to protect, especially that of security." Joseph Blocher & Darrell A.H. Miller, What Is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment, 83 U. CHI. L. REV. 295, 315 (2016).

[62] *See* Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 660-61 & n.95 (1986); Eric T. Freyfogle, *The Enclosure of America* (Illinois Public Law Research Paper No. 07-10, 2007), http://dx.doi.org/10.2139/ssrn.1024846.

[63] *See, e.g.*, TOWNSHIP OF MONROE, N.J., MUNICIPAL CODE § 76-1.A(30)(4) (prohibiting consumption of alcohol on private property without owner's consent); BOROUGH OF WESTVILLE, N.J., GENERAL LEGISLATION §§ 187-1 to 187-2 (2007) (prohibiting graffiti on private property without owner's consent); CITY OF JERSEY CITY, N.J., CODE OF ORDINANCES § 245-7 (1978) (prohibiting solicitation on private property without owner's consent); TEX. PARKS & WILDLIFE CODE § 61.022(a) (2020) (prohibiting fishing and hunting on private property without the owner's consent); FLA. STAT. § 934.50(3)(b) (2022) (prohibiting use of drone over private property without owner's consent).

The considerable differences in default rules, throughout American history and across the fifty States, illustrate that default rules are not, and never have been, fixed by federal constitutional law.[64] The flexible and non-constitutional status of interpretative defaults is understandable considering that the regulation of private property is a core police power traditionally left to the States. It has always been a component of the State's legislative prerogative to set and adjust these rules to conform with the evolving expectations and preferences of private owners so as to reduce opt-out costs and produce more efficient arrangements. The Supreme Court recognized this very point in *Breard v. Alexandria*, a decision upholding a municipal ordinance which flipped the interpretive default rule regarding door-to-door solicitation (a constitutionally protected activity).[65] Before the flip, the owner's act of having a knocker or doorbell invited solicitation unless the owner posted a sign to the contrary. After the flip, door-to-door solicitations were not interpreted to be invited by these ownership acts unless a private owner provided express consent.

The Supreme Court, in upholding the ordinance, emphasized that the no-solicitation default would better reflect the preferred invitational terms of owners:

> A householder depends for protection on his city board rather than churlishly guarding his entrances with orders forbidding the entrance of solicitors. A sign would have to be a small billboard to make the differentiations between the welcome and unwelcome that can be written in an ordinance once cheaply for all homes.[66]

The shift of the five jurisdictions from a carry to a no-carry default was partially driven by a similar concern with owner preferences. A majority of respondents in our representative survey expressed a preference for a no-carry default in both retail and residential settings in each of these States. For example, only 21.1% of New Jersey respondents said that a plumber should be allowed to bring a gun onto someone else's home without express permission, only 22.8% said that a visiting friend should be allowed to bring a gun to a dinner party without the owner's express permission, and only 33.3% said that a customer should be allowed to bring a gun onto commercial property without express permission.[67]

Better protecting the preferences of property owners is of constitutional importance not only because of the foundational right of property owners to exclude, but also to effectuate owner's freedom of association with those whom they choose. A substantial majority of Americans are misinformed or uninformed about whether invitees have a presumptive right to carry firearms onto

[64] Amicus Brief, *supra* note 2, at 8.

[65] 341 U.S. 622, 640 (1951).

[66] *Id.*

[67] Ayres & Jonnalagadda, *supra* note 6, app. at 7, tbl.A4.

other people's property.[68] For example, of polled New Jersey residents, 78.9% did not know whether a "[p]lumber is allowed to bring gun without permission," 71.9% did not know whether a "[f]riend is allowed to bring gun without permission," and 70.2% did not know whether "[c]ustomers are allowed to bring gun into business."[69] And the small number of respondents who thought they knew the law were often mistaken—for instance, the New Jersey respondents were nearly evenly split on the question of whether customers are allowed to bring guns into private businesses.[70] Similar results were found in each of the other four jurisdictions that flipped their defaults.[71]

The upshot of this confusion is that owners who preferred not to have guns on their premises were often unknowingly permitting them. Moreover, the no-carry defaults avoid a host of monitoring issues. Under the alternative (carry) default, shop owners have reason to fear that some carrying visitors will unintentionally (or perhaps conveniently) fail to notice "no firearms" signs and surreptitiously carry guns into the store. Landowners may also reasonably fear that posting "no firearms" signs, even if reflective of their underlying preferences, would lead potential criminals to infer that the owner is unarmed and the property vulnerable.

For jurisdictions where the court has ordered different defaults for different types of property, it is not easy to characterize private real property as "open" or "closed" to the public. There are many kinds of establishments that resist being mapped along this binary (e.g., a factory or corporate office).[72] Concluding that a property is open to the public is itself a legal interpretation of affirmative acts of the seller. The confusion only grows because an "implied license to enter" is not a fixed quality but instead varies depending on a multitude of factors, including the purpose and characteristics of a potential entrant.[73] It thus remains highly unlikely that courts—much less property owners and potential entrants—will manage to consistently anticipate which establishments fall on the right side of this binary so as to determine where the rule operates.

When owners "open" their property to members of the public, courts infer that the owner has extended an implied license that is circumscribed by the functions of the property.[74] For instance,

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[68] *See supra* text accompanying notes 35-36.

[69] Ayres & Jonnalagadda, *supra* note 6, app. 9, tbl.A6.

[70] *Id.*

[71] *Id.*

[72] *See, e.g.*, Koons v. Platkin, 673 F. Supp. 3d 515, 610 (D.N.J. 2023) (ambiguously postulating that "closed" property "typically includes . . . some commercial, agricultural, or industrial property and/or facilities").

[73] See COOLEY, supra note 60, at 306.

[74] *See id.* at 303 (observing that the license to enter a commercial establishment "is limited by the purpose" of the establishment); State v. Ingram, 289 A.3d 509, 517 (N.J. Sup. Ct. 2023) (explaining that "[t]he scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose" (quoting Florida v. Jardines, 569 U.S. 1, 9 (2013)).

a grocery store extends an implied license to shop for food but not to sit and play cards. But the courts that have found that the no-carry defaults meet the threshold requirement by burdening the textual amendment rights never explain why an owner's grant of an implied license to enter an establishment justifies the extension of a constitutional right onto that property.[75]

There is no constitutional right to a presumption that a private property owner welcomes firearms until they have publicly stated their opposition.[76] An implied license is shaped by the expectations shared between owners and entrants as to the kinds of behaviors permitted inside a particular kind of property and is thus empirical and highly contextual.[77] Determining the scope of an implied license is an interpretative act of inferring what the property owners intended by their affirmative acts, not what the Constitution demands of the state.[78]

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[75] In the First Amendment context, inviting others to enter a store does not limit the owner's ability to limit their speech while they are invitees. *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) ("[W]hen a shopping center owner opens his private property to the public for purpose of shopping, the First Amendment to the United States Constitution does not thereby create individual rights in expression" (citing Hudgens v. NLRB, 424 U.S. 507, 516-17 (1976)). Entrants thus do not have rights of expression on private property, regardless of whether the property is open or closed to the public. That remains true even though, of course, the text of the First Amendment—like that of the Second Amendment—does not draw an explicit distinction between public and private property.

[76] The district court in *Koons* struggled to articulate why the Constitution mandates a presumption that guns can be carried onto other people's property without their express permission:

> [T]he amici [Professors Ayres and Vars] press that the Court must make one of two findings for Plaintiffs' conduct to be "covered" by the Second Amendment's plain text: *either* (1) the Second Amendment provides a right to carry on private property over the owner's objection; *or* (2) the Second Amendment provides a right to a rebuttable presumption that one may carry onto private property unless the owner objects. Cleverly framed in this dichotomous way, of course, the amici argue that neither survives scrutiny, as there is "no freestanding Second Amendment right to have a private owner's silence regarding the issue of guns construed in a particular direction."

673 F. Supp. 3d at 608 (quoting Brief for Professors of Property Law as Amici Curiae in Support of Defendants' Opposition to Plaintiffs' Motions for Preliminary Injunction at 14-15, 29, *Koons*, 673 F. Supp. 3d at 515 (No. 22-CV-7463)). But the court nonetheless found that "Plaintiffs' right to carry for self-defense in public naturally encompasses entry onto the property of another, provided that such property is held open to the public and entry is otherwise lawful." *Id.* at 610. But entry is not "otherwise law" if the owner has expressly or implicitly limited their invitations to those without firearms and the court never explains why the Constitution demands that the law must presume no such limitation.

[77] See COOLEY, *supra* note 60, at 303.

[78] We would reach a different conclusion about whether the threshold requirement was met if an interpretative default was (i) difficult to displace or (ii) set against the likely majoritarian preferences of property owners in ways that burdened the constitutional interests of potential entrants. We will later discuss the Ninth Circuit's conclusion that California's no-carry default was unconstitutionally difficult to displace. *See infra* text accompanying notes 102-109. Impeding altering rules can render a default "quasi-mandatory" and impermissibly burden constitutional interests. *See generally* Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032 (2012) (discussing "impeding altering" and "quasi-mandatory" rules). Examples of the second exception concerning minoritarian defaults that burden the constitutional interests of potential entrants might include statutes presuming that Jehovah's Witnesses or people who had undergone abortions were not invited to enter without express permission of the owner.

In sum, even though no court to date has adopted this position, there are powerful arguments to suggest that no-carry defaults that are easily displaced do not meet the *Bruen* step-one requirement. Namely, this threshold requirement is not met because my Second Amendment rights end at your property line. You may expressly or implicitly prohibit me from entering with a firearm. And within our constitutional tradition, states have the power to interpret certain affirmative acts of landowners to implicitly prohibit concealed carry onto their land.[79]

2. The Analogue Inquiry

Notwithstanding the foregoing arguments, courts have uniformly found that no-carry defaults satisfy the threshold requirement. Accordingly, they have proceeded to consider whether the government can meet its burden of supplying sufficient analogues to the challenged regulations from the Founding Era or from the period preceding or immediately following adoption of the Fourteenth Amendment. As mentioned above, *Bruen* step two requires the government to provide historical examples of gun regulations with regard to "how" and "why" the challenged regulation burdens the right to bear arms.[80] This Section discusses the disagreement between the Second and Ninth Circuit as to whether the government has met this analogic burden. In so doing, we will highlight difficulties in applying *Bruen* step two.

We begin with the Ninth Circuit's analysis of the Hawaii statute. The State offered several historical analogues that the panel divided into two sets, the first of which "prohibited the carry of firearms onto subsets of private land, such as plantations or enclosed lands."[81] This first set included a 1721 Pennsylvania prohibition, a 1722 New Jersey prohibition, a 1763 New York

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[79] Our conclusion that no-carry defaults fail to meet the threshold requirement is supported by Professor Jake Charles. Jacob Charles, *Bruen, Private Property & the Second Amendment*, DUKE CTR. FOR FIREARMS L. (Dec. 2, 2022), https://firearmslaw.duke.edu/2022/12/bruen-private-property-the-second-amendment (suggesting that New York's no-carry default on private property survives Second Amendment scrutiny because carrying on private property is outside the scope of the text). Indeed, only one academic has found the flipped defaults to be unconstitutional. *See* Robert Leider, *Pretextually Eliminating the Right to Bear Arms Through Gerrymandered Property Rules*, DUKE CTR. FOR FIREARMS L. (Dec. 23, 2022), https://firearmslaw.duke.edu/2022/12/pretextually-eliminating-the-right-to-bear-arms-through-gerrymandered-property-rules. Professor Leider's analysis uses hyperbolic language to characterize this legal reform (referring to the new law as "legal chicanery," "pretextual," a "loophole," and "gerrymander[ing]"). But his substantive analysis is unpersuasive. Leider argues that the laws "engineer *de facto* bans" without ever discussing why landowners who want invitees to bring concealed weapons would not displace the presumption (for example with a "Guns Welcome" sign). Even more bizarrely, Leider argues that a provision in the New York law that creates a default presumption that retired police may carry firearms onto private property somehow reveals that the default change applied to others is pretext for an unconstitutional motive. *See* Andrew Willinger, *Private-Property Default Exceptions, Firearms Training, and Multi-Tiered Licensing*, DUKE CTR. FOR FIREARMS L. (Jan. 11, 2023), https://firearmslaw.duke.edu/2023/01/private-property-default-exceptions-firearms-training-and-multi-tiered-licensing (disputing Professor Leider's contention and arguing that "retired police officer exemption is a slender reed upon which to base a claim of 'clear' pretext" in part because retired officers "have completed numerous hours of on-the-job firearms training" during their careers and might pose less risk).

[80] *See* supra text accompanying note 50.

[81] Wolford v. Lopez, 116 F.4th 959, 994 (9th Cir. 2024).

prohibition, and an 1893 Oregon prohibition.[82] For example, the New York law criminalized "carry[ing], shoot[ing], or discharg[ing] any Musket, Fowling-Piece, or other Fire-Arm whatsoever, into, upon, or through any Orchard, Garden, Corn-Field, or other inclosed Land whatsoever . . . without Licence in Writing first had and obtained for that Purpose from such Owner, Proprietor, or Possessor [of the land]."[83]

The second set "contained broader prohibitions, banning the carrying of firearms onto any private property without the owner's consent"[84]:

> In 1771, New Jersey amended its laws to prohibit the carrying of firearms on any lands owned by another: "to carry any Gun on any Lands not his own, and for which the Owner pays Taxes, or is in his lawful Possession, unless he hath License or Permission in Writing from the Owner or Owners or legal Possessor." Similarly, in 1865, Louisiana prohibited "carry[ing] fire-arms on the premises or plantation of any citizen, without the consent of the owner or proprietor."[85]

The Ninth Circuit panel found the first set of laws to be of more limited analogic use for two reasons. First, it acknowledged that the subset of private property to which these were limited likely "did not apply to property that was generally open to the public."[86] Second, the first set seemed to have different purpose—in *Bruen*'s terminology a different "why"—than the challenged no-carry default: "the primary aim of some of those laws was to prevent poaching."[87]

But the panel found that neither of these disanalogies applied to the second set of laws, New Jersey's 1771 prohibition and Louisianna's 1865 prohibition. Both these statutes were found to create no-carry defaults with regard to all private property and the purpose of both was not merely to prevent poaching. The purpose of New Jersey's 1771 law "found in Section 1 of the Act[ ]was 'to prevent trespassing with Guns.'"[88] Similarly, the panel emphasized that "the sole stated purpose of [Louisiana's 1865] law was to 'prohibit the carrying of fire-arms on premises or

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[82] The Supreme Court has suggested that laws close in time to the adoption of the Fourteenth Amendment might also be relevant. N.Y. state Rifle & Pistol Ass'n, Inc. v. Bruen, 596 U.S. 1, 20 (2022) ("'[E]xamination of a variety of legal and other sources to determine the public understanding of a legal text in the period after its enactment or ratification' [is] 'a critical tool of constitutional interpretation.'" (emphasis omitted) (quoting District of Columbia v. Heller, 554 U.S. 570, 605 (2008))).

[83] *Wolford*, 116 F.4th at 994 (alterations in original).

[84] *Id.*

[85] *Id.* (alteration in original).

[86] *Id.*

[87] *Id.* at 994-95.

[88] *Id.* at 995.

plantations of any citizen without the consent of the owner.'"[89] On the basis of this historical record, the panel concluded:

> [T]he Nation has an established tradition of arranging the default rules that apply specifically to the carrying of firearms onto private property. Collectively, the laws establish that colonies and States freely arranged the relevant default rules. And the 1771 New Jersey law and the 1865 Louisiana law are *historical "dead ringers"*: they simply prohibited the carry of firearms on private property without consent. Those laws—enacted shortly before the ratification of the Second Amendment and very shortly before the ratification of the Fourteenth Amendment—were uncontroversial.[90]

The Ninth Circuit in holding that the government was likely to succeed on the merits in meeting its step-two burden acknowledged that in doing so, it was creating a conflict with "the Second Circuit and some district courts."[91]

On what basis did the Second Circuit find the government's proffered analogies wanting? In part, the different finding can be explained by a different appellate record. The two circuits considered historic analogues which only partially overlapped, with each panel considering some Founding statutes that were not considered by the other.[92]

In part, however, the Second Circuit reached a different conclusion because it interpreted the proffered analogues less capaciously than did the Ninth Circuit. With regard to the "why," it concluded that "[a]t least three of the State's proffered analogues [i.e., the 1721 Pennsylvania statute, 1722 New Jersey statute, and 1763 New York statute] were explicitly motivated by a substantially different reason (deterring unlicensed hunting) than the restricted location regulation (preventing gun violence)."[93] The four other proffered statutes were summarily dismissed in a

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[89] *Id.*

[90] *Id*. (emphasis added). The New Jersey and Louisiana laws make clear that while we have been modern proponents of no-carry defaults, we were not originators of the idea. *See* Leo Bernabei, Note, *Taking Aim at New York's Concealed Carry Improvement Act*, 92 FORDHAM L. REV. 103, 130 (2023) ("Variations of a default rule prohibiting firearms on certain types of private property are not a novel creation of the [New York statute]."). *See also* Joseph Blocher & Darrell A.H. Miller, What Is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment, 83 U. CHI. L. REV. 295, 315 (2016) (discussing possibility of flipping trespass presumption).

[91] *Id*. at 996 (citing Antonyuk v. Chiumento, 89 F.4th 271, 384-86 (2d Cir. 2023); Kipke v. Moore, 695 F. Supp. 3d 638, 658-59 (D. Md. 2023); Koons v. Platkin, 673 F. Supp. 3d 515, 615-23 (D.N.J. 2023)).

[92] The Second Circuit considered a total of seven statutes, five of which were also part of the Ninth Circuit's analysis (i.e., a 1721 Pennsylvania law, 1722 New Jersey law, 1763 New York law, 1865 Louisiana law, and 1893 Oregon law), and two of which were not (i.e., a 1715 Maryland law and 1866 Texas law). *Antonyuk*, 89 F.4th at 384. The Ninth Circuit, in addition to the five overlapping statutes, considered one statute not considered by the Second Circuit (i.e., a 1771 New Jersey law). *Wolford*, 116 F.4th at 994-95.

[93] *Antonyuk*, 89 F.4th at 385.

footnote: "Though the remaining statutes are not by their own terms aimed at deterring poaching, the State has placed no evidence in the record regarding whether the motivation behind these statutes was in line with the motivation behind [the New York statute]."[94] The Second Circuit arguably erred in adopting too narrow a conception of the purpose of the modern law. Instead of seeing their purpose as "preventing gun violence," it might have seen them as better protecting property rights by preventing unwanted entry. The Ninth Circuit, in contrast, considered the express goal of the 1771 New Jersey statute ("to prevent trespassing with Guns") to be consonant with the goals of the modern no-carry default provisions. The Second Circuit seems to have ignored "the sole stated purpose" of the 1865 Louisiana statute, which the Ninth Circuit found was to "prohibit the carrying of fire-arms on premises or plantations of any citizen without the consent of the owner."[95]

The Second Circuit also interpreted the "how" of the statutes less capaciously than did the Ninth Circuit. Crucially, the *Antonyuk* panel found:

> As it has been developed thus far, the historical record indicates that "land," "improved or inclosed land" and "premises or plantations" would have been understood to refer to private land not open to the public. The State has produced no evidence that those terms were in fact otherwise understood to apply to private property open to the public or that the statutes were in practice applied to private property open to the public.[96]

Under this reading, the historical statutes did not function to apply the no-carry presumption to property open to the public, meaning there were no analogues that restricted rights in a manner similar to the challenged regulation.

But this reading overlooks New Jersey's 1771 amendment which prohibited carrying "*any Gun on any Lands not his own* . . . unless he hath License or Permission in Writing from the Owner . . . ."[97] Moreover, the *Antonyuk* opinion inadequately explains why laws that applied the no-carry presumption to all "premises or plantations"—such as Louisiana's 1865 statute and Texas's 1866 statute—did not cover all private property.[98] Indeed, both Circuits fail to explain why the historical statutes that create a no-carry presumption on all "improved or inclosed land" do not supply a sufficient analogue for the modern statutes application to commercial establishments, which dominantly conduct business on improved or enclosed property. Princeton historian, Hendrik

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[94] *Id.* at 385 n.112.

[95] *Wolford*, 116 F.4th at 995 (quoting Act of Nov. 23, 1865, no. 10, 1865 La. Laws Extra Sess. 14, 14).

[96] *Antonyuk*, 89 F.4th at 385-86 (footnote omitted).

[97] *Wolford*, 116 F.4th at 994 (quoting Act of Dec. 21, 1771, ch. 540, 1771 N.J. Laws 4th Sess. 343, 344).

[98] *See Antonyuk*, 89 F.4th at 385-86.

Hartog submitted a declaration making a similar point in the litigation challenging the New Jersey statute:

> Private business property in 18th century New Jersey would have encompassed taverns, leathersmiths and blacksmiths, pharmacies, seed stores, and merchants who bought and sold livestock. Thus, under the 1771 law, if one entered a blacksmith's shop, one needed the permission of the blacksmith or his agents if one meant to enter the space armed.[99]

Both circuits seem to equate improved or enclosed land with land that is closed to the public. But Hartog's analysis makes clear what was true in the past (and is still true today)—land which is improved and enclosed can nonetheless be open to do business with the public. It might be reasonable for courts to say that there are not sufficient historic analogues for no-carry defaults with regard to unimproved and unenclosed rural property. But even if a state cannot constitutionally presume non-consent to firearms on unimproved or unenclosed land, it should be able to enact a no-carry default with regard to retail establishments that conduct business on improved or enclosed land. At least with regard "how" inquiry, there are several historic analogues supporting this application.

In addition to asking whether there are sufficient analogues for default presumptions, courts undertaking *Bruen* step two should also consider whether there are sufficient analogues for the "altering" rules of the challenged no-carry defaults. Every default law must have at least implicitly associated altering rules which determine the conditions under which private parties may alter or displace the default.[100] Accordingly, altering rules are "the necessary and sufficient conditions for displacing the legal consequences of a default rule . . . ."[101] State-mandated altering rules that are too onerous and have the effect of impeding the ability of private parties to opt out of a legal default can raise constitutional concerns.[102]

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[99] Declaration of Hendrik Hartog, Koons v. Platkin, 673 F. Supp. 3d 515 (D.N.J. 2023) (No. 22-CV-7463).

[100] Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032, 2036-37 (2012).

[101] *Id.* at 2035.

[102] Onerous altering rules by themselves can cause a default to satisfy *Bruen*'s threshold (step one) requirement. We previously argued that the no-carry presumption did not meet the threshold of state regulation burdening the right to bear arms because the foundational presumption of property law is that all entry onto other people's property without express or implied permission is trespass, and that the State was free to change legal interpretations of the owner's affirmative acts (e.g., having a doorbell or a store sign) to better reflect the preferences of owners. *See supra* notes 56-60 and accompanying text. But altering rules which artificially impede the ability of owners to opt out of a no-carry presumption cannot be squared with an interpretative goal to better reflect owner interests. An altering rule that meets the threshold requirement might, under *Bruen*, only be constitutional if the State could provide examples of historic no-carry statutes with sufficiently analogous opt out procedures.

Such altering-rule concerns in fact led the Ninth Circuit to enjoin California's no-carry statute with regard to private property open to the public even though it upheld Hawaii's no-carry presumption with regard to all private property. For the *Wolford* panel, the crucial difference was the requirements for property owners to opt out of the no-carry presumption. While Hawaii's statute allows a property owner to consent orally, in writing, or by posting appropriate signage on site,[103] California's no-carry default, in contrast, "allows a property owner to consent only by 'clearly and conspicuously post[ing] a sign at the entrance of the building or on the premises indicating that licenseholders are permitted to carry firearms on the property.'"[104] The California statute also required such signs to be "of a uniform design as prescribed by the Department of Justice and shall be at least four inches by six inches in size."[105]

The Ninth Circuit found these more stringent California requirements to be dispositive:

> We find no historical support for that stringent limitation. Although two of the laws mentioned above required a person to obtain consent in writing, all of the other laws allowed a person to obtain consent in any manner. None of the laws forbade a person from obtaining permission only by convincing the owner to post signs of a specific size. Nor do modern circumstances appear to justify California's imposing a much more stringent consent requirement; ordinary signs existed in 1791, in 1868, and today.[106]

The opinion also emphasized the temporal and tailoring limitations of the California statute:

> California's law differs substantially from the historical laws. Under the historical laws, a property owner could give on-the-spot, granular permission to a particular person or persons for a specified time: "Sure, you may carry your musket on my property, but only this week and only one musket." Under California's law, by contrast, permission may not be given on the spot: a property owner must post a public sign of a specific size and with other attributes to be defined by a state agency. Nor may permission be granular: the sign must allow all license holders to carry and must allow them to carry whatever firearms are permissible under state law. Nor may permission be given specific to a particular timeframe, unless the owner laboriously posts and unposts the required sign.[107]

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[103] HAW. REV. STAT. § 134-9.5(b) (2023).

[104] Wolford v. Lopez, 116 F.4th 959, 992 (9th Cir. 2024) (alteration and emphasis in original) (quoting CAL. PENAL CODE § 26230(a)(26) (West 2024)).

[105] *Id.* at 975 (quoting § 26230(a)(22)).

[106] *Id.* at 995.

[107] *Id.* at 995-96.

While we support the intuition that onerous altering rules can render a default unconstitutional, we take no position on whether two historical examples requiring permission in writing is sufficient or not under *Bruen* to support California's signage requirement.[108]

In any case, there is a simple amendment to the California statute that would fix this altering rule infirmity. The State could revise its statute as shown in the following markup to prohibit carrying firearms onto

> [a]ny other privately owned commercial establishment that is open to the public, unless the operator of the establishment ~~clearly and conspicuously posts a sign at the entrance of the building or on the premises indicating that licenseholders are permitted to carry firearms on the property. Signs shall be of a uniform design as prescribed by the Department of Justice and shall be at least four inches by six inches in size.~~ [expressly authorizes carrying or possessing a firearm on the private property by:
>
> > (a) unambiguous written or verbal authorization; or
> >
> > (b) the posting of clear and conspicuous signage at the entrance of the building or on the premises indicating that carrying or possessing a firearm is authorized.][109]

At least in the Ninth Circuit, statutory language to this effect—which is derived from the Hawaii statute—would be sufficient to render a no-carry default constitutional as applied to all private property.

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[108] But if the Ninth Circuit conclusion is correct, it raises the possibility that other state altering rule requirements are unconstitutional. For example in Texas, a business is required to post two large signs or hand patrons two cards in order to opt out: one for concealed handguns and one for openly carried handguns. To opt-out of the concealed-carry default rule, the card or sign must state, "Pursuant to Section 30.06, Penal Code (trespass by license holder with a concealed handgun), a person licensed under Subchapter H, Chapter 411, Government Code (handgun licensing law), may not enter this property with a concealed handgun." TEX. PENAL CODE ANN. § 30.06(c)(3)(a). An opt-out sign must display this text in both English and Spanish, consisting of block letters at least one inch in height, contrasted in color against the background. § 30.06(c)(3)(b). The language of the cards or signs prohibiting people from entering a property with an openly carried handgun requires substantially similar language and specifications. *See* § 30.07(c). Since property owners have a constitutional right to exclude armed licensees from their property, *see supra* notes 54-55 and accompanying text, Texas's altering-rule requirements may unconstitutionally burden that right, *see* Joseph Blocher, *The Right Not to Keep or Bear Arms* 45-48 (2012).

[109] CAL. PENAL CODE § 26230(a)(26) (West 2024); HAW. REV. STAT. § 134-9.5(b) (2023); *see also* Email from Ian Ayres, Oscar M. Ruebhausen Professor of L., Yale L. Sch., to Sen. Anthony Portantino, Cal. State Senate (Sept. 28, 2024) (on file with author) (suggesting this amendment to the legislative offices of the principle sponsor of California's no-carry default provision).

Before concluding this Section's discussion of judicial responses to the no-carry defaults, we pause to discuss how the differences among the courts highlight difficulties in applying the *Bruen* step-two requirement. To begin, it is unclear what weight courts should give to historical examples that are sufficiently analogous as to the "how" but not as to the "why." For example, it is not clear what weight the *Wolford* decision gave to the first set of historical statutes that had antipoaching purposes but provided evidence of Founding legislation that flipped the default with respect to improved or enclosed private property.

Relatedly, it is not clear how many analogues are necessary to satisfy *Bruen* step two. Justice Thomas's opinion found that the government must identify analogues that are "well-established and representative."[110] The opinion suggests that to prove representativeness, the State might have to prove a sufficient number of statutory examples covering a certain proportion of the population. For instance, Justice Thomas noted that, "[f]or starters, we doubt that *three* colonial regulations could suffice to show a tradition of public-carry regulation."[111]

He also dismissed western analogues as "outliers":

> The exceptional nature of these western restrictions is all the more apparent when one considers the miniscule territorial populations who would have lived under them. To put that point into perspective, one need not look further than the 1890 census. Roughly 62 million people lived in the United States at that time. Arizona, Idaho, New Mexico, Oklahoma, and Wyoming combined to account for only 420,000 of those inhabitants—about two-thirds of 1% of the population.[112]

There is even the suggestion that to satisfy step two, the government must evidence that all three branches must uphold the constitutionality of analogues and for reasons that would pass muster today:

> [B]ecause these territorial laws were rarely subject to judicial scrutiny, we do not know the basis of their perceived legality. . . . Those state courts that upheld broader prohibitions without qualification generally operated under a fundamental misunderstanding of the right to bear arms, as expressed in *Heller*. For example, the Kansas Supreme Court upheld a complete ban on public carry enacted by the city of Salina in 1901 based on the rationale that the Second Amendment protects

[110] N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 30 (2022).

[111] *Id.* at 46.

[112] *Id.* at 67.

> only "the right to bear arms as a member of the state militia, or some other military organization provided for by law." That was clearly erroneous.[113]

Taken together, the *Bruen* requirements that the government demonstrate a well-established and representative tradition by identifying a sufficient number of analogues, covering a sufficient proportion of the populations, with sufficient judicial review, creates a burden that arguably is not met by two or three dead-ringer analogues for the modern no-carry default provisions (together with a half-dozen antipoaching analogues).

The Ninth Circuit in *Wolford* came to a different conclusion in part because it is the only court that has grappled with the constitutionality of no-carry default provisions after the Supreme Court's decision in *United States v. Rahimi*, which it found to reduce the stringency of government's step-two burden:

> The Court's analysis in *Bruen* misled some courts into imposing too rigid a test when considering historical sources. In *Rahimi*, the Court clarified that *Bruen* did not require stringent adherence to Founding-era laws, emphasizing that its "precedents were not meant to suggest a law trapped in amber."[114]

Instead of focusing on the number of historical statutes or the proportion of the population covered by those statutes or even whether the types of burdens (the "how") from those statutes were analogous to the challenged provision, Chief Justice Roberts's *Rahimi* opinion was more focused the Blackstonian common-law impulse to regulate the possession of gun by people deemed a risk to public safety.[115]

The *Wolford* panel found that its two dead-ringer analogues (possibly also giving some weight to the antipoaching statutes as well) were sufficient to satisfy *Bruen*'s step two in large part because these statutes did not seem to generate controversy after they were enacted:

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[113] *Id*. at 68 (citation omitted); *see also* Koons v. Platkin, 673 F. Supp. 3d 515, 616 (D.N.J. 2023) (rejecting Professor Hartog's declaration that the New Jersey statute's language covered businesses open to public because "the Court is not presented with primary evidence suggesting that the 1769 law (and the 1771 law discussed below) were enforced in [this manner]").

[114] Wolford v. Lopez, 116 F.4th 959, 978 (9th Cir. 2024) (quoting United States v. Rahimi, 144 S. Ct. 1889, 1897 (2024)).

[115] *See* Ian Ayres & Fredrick Vars, *The Coming Assault on Categorical Gun Laws*, 77 STAN. L. REV. ONLINE (forthcoming 2024) (arguing that *Rahimi* may have relaxed the "how" requirement in upholding a possession ban against an individual subject to a domestic-violence restraining order in the face of Justice Thomas's "fairly persuasive argument that the surety analogs proffered by the government imposed substantially less severe burdens than the protective order prohibitions").

> The record—in these cases or in any other case, so far as we can tell—contains no evidence whatsoever that these laws were viewed as controversial or constitutionally questionable. Instead, they were viewed as falling well within the colony's or the State's ordinary police power to regulate the default rules concerning private property.[116]

Under this logic, even a single historic analogue might be sufficient as long as it was not "viewed" as controversial or constitutionally questionable. While Justice Thomas would give less weight to proposed analogues that were "not subject to judicial scrutiny," the *Wolford* Court would arguably give more weight to such examples because the failure of the statutes to be challenged would give rise to an inference that they were not constitutionally problematic. The *Wolford* approach comes close to flipping the burden of persuasion from the government back to the litigant challenging the constitutionality of an existing gun restriction because only the challenger would have the incentive to search the historic record for evidence that a proposed analogue raised constitutional concerns.

Stepping back, we provided in this Part viable arguments for the following propositions:

(i) No-carry defaults do not meet the Bruen step-one (threshold) requirement, because the foundational default of property law is that all entry is trespass. Nonowners can only lawfully enter if they are affirmatively invited by express or implied invitation. And the government's police power includes the power to craft interpretative rules of landowners' affirmative acts of invitation to better reflect landowners' preferences.

(ii) There are sufficient analogues to satisfy the Bruen step-two requirement, both because of the dead ringers identified in *Wolford* and because other historical statutes that created no-carry presumptions for improved and enclosed property would have analogously applied to commercial enterprises (e.g., taverns, blacksmiths).

Nevertheless, there remains substantial uncertainty as to how the Supreme Court might resolve this issue—in part because there is still much we do not know about what *Bruen* requires. There remains a significant possibility that the Second Circuit's (pre-*Rahimi*) analysis in *Antonyuk* will win the day. The next Section grapples with just that possibility.

III. Affirmative-Choice Rules as a Third Way Forward

Some readers might believe that state legislatures have no recourse if courts strike down the no-carry default, on Second Amendment grounds, as applied to private property open to the public.

[116] *Wolford*, 116 F.4th at 994.

It seems that the legal default is necessarily binary—either the public is invited to enter without the right to carry weapons, or the invitation includes the option to bear arms. There is, however, another type of law which requires owners of private property open to the public to affirmatively choose which type of invitation they intend.

Affirmative-choice rules avoid a central constitutional concern with the no-carry default. With an affirmative-choice rule, the government makes no presumption that guns are not invited. Under such rules, the only time a gunowner's rights are impacted is when a private property owner affirmatively imposes some limitation. Hence, affirmative-choice rules lack the critical—and challenged—component of state action.

The remainder of this Part will be divided into four Sections. Section III.A will present a primer on affirmative-choice rules. It will discuss the scholarly theories of when they are optimal, provide examples of where they are used in existing law, and offer an empirical analysis of their impact. Section III.B will flesh out details of our proposal and present the policy rationale for why affirmative-choice rules can better protect property owners and better inform consumers about an important aspect of the commercial setting—whether fellow shoppers are permitted to carry concealed weapons. Section III.C will then evaluate and resolve two constitutional questions about our proposal: (1) whether an affirmative-choice requirement violates the Second Amendment's right to bear arms, and (2) whether our proposal runs afoul of the Supreme Court's "compelled speech" doctrine. Finally, Section III.D will briefly consider the use of affirmative-choice rules in other contexts as well as a new kind of "buy back" proposal.

A. *A Primer on Affirmative-Choice Rules*

The idea of affirmative-choice rules—also known in the literature as "active choice" or "mandated choice" rules—has been analyzed by scholars for more than twenty years.[117] An affirmative-choice rule requires a person or entity to make an active choice as a prerequisite to a transaction. For example, an affirmative-choice rule might require an employee to actively choose whether or not to participate in the employer's defined-contribution retirement plan as a prerequisite to

[117] *See, e.g.*, Ian Ayres, *Valuing Modern Contract Scholarship*, 112 YALE L.J. 881, 899 (2003) (discussing "affirmative choice" rules); Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1173 (2003) ("Employers could avoid choosing a default if they required employees to make an active choice"). *But see* Cass R. Sunstein, *Choosing Not To Choose*, 64 DUKE L.J. 1, 12 (2014) [Sunstein*, Choosing Not To Choose*] ("[S]ome kind of default rule is ultimately necessary. Choice architects have to establish what happens if people decline to choose."); Cass R. Sunstein, *Deciding by Default*, 162 U. PA. L. REV. 1, 40 (2013) [hereinafter Sunstein*, Deciding by* Default] ("For defenders of active choosing [as not being default], the best response is that when active choosing is required, choice architects implement it through a sanction that is so severe that it is the functional equivalent of a mandate.").

employment.[118] Affirmative-choice rules are a subset of a larger category of required disclosures. For instance, federal law requires that, as a condition precedent to employment, new hires disclose their federal tax identification numbers to their employers.[119] These disclosure requirements are also prerequisites for transacting, but they do not involve *choosing* among possible allowable values. In contrast, affirmative-choice rules mandate that the individual (or entity) choose their preferred option from a range of legally acceptable alternatives.

There is semantic disagreement among scholars about whether affirmative-choice rules are a type of default. Some scholars, such as Cass Sunstein, characterize affirmative-choice rules as alternatives to default rules.[120] Other scholars, including us,[121] characterize these rules as a special kind of "penalty" default that uses the consequence of discontinuing a transaction as the incentive for an affirmative choice. Thus, we would characterize the Sophie's Choice dilemma as an affirmative-choice rule because, in the Holocaust novel, the default outcome for Sophie failing to affirmatively choose which of her two children would be spared is that both children would be killed.[122] But we emphasize that nothing substantive turns on whether these rules are characterized as defaults or whether they are referred to as active-, mandated-, or affirmative-choice rules.

Affirmative-choice rules come in a number of different forms. Some rules merely prompt individuals to make an active choice.[123] For example, Virginia mandates every individual seeking a driver's license to choose whether or not they would donate their organs to charity,[124] but allows them to choose "undecided" (and almost one-quarter of the first million people forced to answer the question chose that option).[125] Affirmative-choice rules also differ in *how* they require a

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[118] Gabriel D. Carroll, James J. Choi, David Laibson, Brigitte C. Madrian & Andrew Metrick, *Optimal Defaults and Active Decisions*, 124 Q.J. ECON. 1639, 1639-40, 1643-44 (2009).

[119] 42 U.S.C. § 653a(b)(1)(A) (2018).

[120] Cass R. Sunstein, *Active Choosing or Default Rules? The Policymaker's Dilemma*, 1 BEHAV. SCI. & POL'Y 29, 30 (2015) [Sunstein*, Active Choosing*] ("For those who prize freedom of choice, active choosing might seem far preferable to any kind of default rule.").

[121] *See* Ian Ayres, *Valuing Modern Contract Scholarship*, 112 YALE L.J. 881, 899 n.79 (2003) ("An affirmative choice rule is a type of penalty default that forces contractors to make an affirmative choice in order to create a contract.")

[122] Jennifer Gerarda Brown, *The Sophie's Choice Paradox and the Discontinuous Self: Two Comments on Wertheimer*, 74 DENV. U. L. REV. 1255, 1258 (1997).

[123] Cass R. Sunstein, *Default Rules Are Better than Active Choosing (Often)*, 21 TRENDS COGNITIVE SCIS. 600, 601 (2017).

[124] *Organ Donation*, VA. DEP'T OF MOTOR VEHICLES, https://www.dmv.virginia.gov/licenses-ids/organ-donation (last visited Nov. 20, 2024).

[125] Ann C. Klassen & David K. Klassen, *Who Are the Donors in Organ Donation? The Family's Perspective in Mandated Choice*, 125 ANNALS INTERNAL MED. 70, 72 (1996).

choice—sometimes they impose penalties for failure to choose and sometimes they structure choice as a prerequisite to receiving a benefit.[126]

Examples of requirements implemented with penalties include countries that impose modest fines on people who fail to vote, and the Affordable Care Act, which for a time "require[d] people to make a choice about health insurance, subject to economic penalties if they fail to do so."[127] More often, however, the requirement of an affirmative choice is implemented through conditional carrots. We cannot order from many online platforms without affirmatively making a choice from a menu of product options. The law also sometimes mandates affirmative choice as a condition of achieving some legal status or consequence. For instance, corporate organizers must affirmatively choose the corporation's name and the number of shares it is authorized to issue in the articles of incorporation.[128] In addition, some employers will not pay a worker until the worker has affirmatively chosen whether or not to participate in the firm's retirement plan.[129]

Affirmative-choice regimes can also be designed to guide or influence the choices that individuals make. For example, something as simple as presenting the choice architect's preferred choice first on a menu of options might impact equilibrium choices.[130] Scholars testing the impact of "enhanced active choice" have found, through vignette experiments, that highlighting the disadvantages of dispreferred alternatives results in more people choosing the architect's preferred choice.[131] A powerful illustration of how the presentation of menu options can impact affirmative choice can be seen in the way some banks responded to the Federal Reserve's requirement that overdraft protection services are only allowed if customers actively choose them.[132] Lauren Willis showed that this regulation had only modest impacts because of how banks were able frame the

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[126] Sunstein, *Choosing Not To Choose, supra* note 117, at 12 (categorizing the different requirement methods "as direct penalties, leveraging, and ordinary market arrangements").

[127] *Id.* at 13; *see also* Lisa Hill, *Low Voter Turnout in the United States: Is Compulsory Voting a Viable Solution?*, 18 J. THEORETICAL POL. 207, 208 (2006) (describing compulsory voting systems). Note that the Affordable Care Act penalty in 26 U.S.C. § 5000A was effectively eliminated through legislation enacted by the 115th Congress in December 2017. *See* ALISON MITCHELL & KATE M. COSTIN, CONG. RSCH. SERV., R45244, LEGISLATIVE ACTIONS TO MODIFY THE AFFORDABLE CARE ACT IN THE 111TH-115TH CONGRESSES 7 (2018), https://crsreports.congress.gov/product/pdf/R/R45244.

[128] MODEL BUS. CORP. ACT § 2.02 (AM. BAR ASS'N 2024).

[129] Carroll et al., *supra* note 118, at 1642.

[130] Daniel E. Ho & Kosuke Imai, *Estimating Causal Effects of Ballot Order from a Randomized Natural Experiment: The California Alphabet Lottery, 1978–2002*, 72 PUB. OP. Q. 216, 216-17 (2008) (analyzing a natural experiment involving California's randomized ballot order system and demonstrating that being listed first in primary elections tended to increase the number of people who voted for the candidate); *see also* Sunstein, *Deciding by Default*, *supra* note 117, at 41 (indicating that affirmative choices could be impacted by using "bold or large font" or adopting verbal descriptions that make the architect's preferred choice "especially salient or appealing").

[131] Punam Anand Keller, Bari Harlam, George Loewenstein & Kevin G. Volpp, *Enhanced Active Choice: A New Method to Motivate Behavior Change*, 21 J. CONSUMER PSYCH. 376, 378 (2011).

[132] Requirements for Overdraft Services, 12 C.F.R. § 205.17 (2024).

choice.[133] For example, one bank's marketing materials framed the choice in ways that likely triggered feelings of loss aversion:

> Yes: Keep my account working the same with Shareplus ATM and debit card overdraft coverage.
>
> No: Change my account to remove Shareplus ATM and debit card overdraft coverage.[134]

The takeaway here is that affirmative-choice regimes can be implemented in a variety of ways—using carrots or sticks or various framings that can influence whether and how individuals exercise their choice.

There is a vibrant theoretical literature analyzing when affirmative-choice regimes are more likely to be optimal. Among legal scholars, Sunstein has written several pieces suggesting that policymakers weigh "the costs of decisions and the costs of errors" when deciding whether active-choice requirements are likely to enhance welfare.[135] Put simply, affirmative-choice rules are likely to produce superior welfare than defaults when the costs of active decision-making are low and the individuals are unlikely to make poor decisions. Sunstein argues that these costs are likely to be low when (i) the choice is relatively simple, (ii) people enjoy choosing, (iii) people have heterogenous preferences over what to choose, (iv) the choice architect has inadequate information about what default would be welfare-maximizing, and (v) people find the choice architect untrustworthy.[136] When these factors are present and the process of choosing does not impose substantial decision costs, individuals are better positioned than the government to determine what is best for them.[137] Sunstein also emphasizes that there are many contexts where people have good reasons for preferring not to choose,[138] and he suggests that generally "policymakers should not

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[133] *See* Lauren E. Willis, *When Nudges Fail: Slippery Defaults*, 80 U. CHI. L. REV. 1155, 1174-75 (2013).

[134] *Id.* at 1192 fig.1 (quoting *Stay Protected with SharePlus ATM and Debit Card Overdraft Coverage*, SHAREPLUS FEDERAL BANK, https://secureforms.c3vault1.com/forms/shareplus/pdf/opt-in-details.pdf (last visited Sept. 11, 2013)); Sunstein, *Deciding by Default*, *supra* note 117, at 30 (quoting a banking employee who explained that "[p]eople are scared of change").

[135] Sunstein, *Active Choosing*, *supra* note 120, at 32.

[136] *Id.* at 30, 32.

[137] *Id.* at 32.

[138] Sunstein explains:

> There are several reasons why people might choose not to choose. They might fear that they will err. They might not enjoy choosing. They might be too busy. They might lack sufficient information or bandwidth. They might not want to take responsibility for potentially bad outcomes for themselves (and at least indirectly for others). They might find the underlying questions confusing, difficult, painful, and troublesome—empirically, morally, or otherwise. They might anticipate their own regret and seek to avoid it. They might be keenly aware of their own lack of information or

force people to choose when they prefer not to do so (or would express that preference if asked)."[139]

Economists have also developed formal mathematical models to analyze the welfare impacts of affirmative-choice rules versus traditional defaults. For example, Gabriel Carroll and coauthors have concluded that active decisions will tend to be optimal when choosers have "a strong propensity to procrastinate," possess preferences that are highly heterogeneous, and "are naive about their future tendency to procrastinate."[140]

While most of the literature on optimality has focused on which rule enhances the expected welfare of the individual decisionmaker, Sunstein also emphasizes that the external welfare effects of an individual's choices on third parties can influence an efficiency-minded lawmaker's decision to adopt an affirmative-choice rule.[141] Externality concerns are present in many contexts where affirmative-choice rules have been considered—such as the choice between green and gray energy sources.[142] Sunstein argues that externalities will often militate toward the use of traditional defaults to minimize negative externalities.[143] Thus, we might prefer a "presumed consent" default with regard to organ donation—in favor of either the current presumption or an affirmative-choice rule—if we believed that it would produce an equilibrium with more life-saving transplants. However, as we will soon see, there are times when externality concerns might lead us to favor affirmative-choice rules over traditional default settings.

In addition to theorizing, social scientists have also empirically investigated the equilibrium impact of various defaults, including affirmative-choice defaults. For example, Gabriel Carroll and coauthors analyzed a publicly traded Fortune 500 company that switched from using active decisions to a standard (nonenrollment default) regime for its retirement plan.[144] The authors

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> perhaps even of their own behavioral biases (such as unrealistic optimism or present bias, understood as an undue focus on the near term).

Id. at 30.

[139] *Id.* Sunstein also describes affirmative-choice rules as kind of "choice-requiring paternalism" and states that "an insistence on active choosing is a form of paternalism, not an alternative to it." *Id.*

[140] Carroll et al., *supra* note 118, at 1642, 1658; *see also* Jacob Goldin & Daniel Reck, *Optimal Defaults with Normative Ambiguity*, 104 REV. ECON. STAT. 17, 18 (2022) ("[W]hen as-if costs are mostly nonnormative, the optimal policy induces decision makers to make an active choice.").

[141] Sunstein, *Choosing Not To Choose, supra* note 117, at 42-43.

[142] *Id.* at 43.

[143] *Id.* at 42 ("A focus on the interests of third parties suggests some reasons to favor a default rule over active choosing, at least if the default rule protects third parties, and if active choosers might not attend to their interests.").

[144] Carroll et al., *supra* note 118, at 1641, 1643 ("The firm then switched to a standard enrollment regime as a by-product of the transition from a paper-based administrative system to a phone-based administrative system. The firm did not anticipate that the transition to a phone-based system with a default of nonenrollment would transform the psychology of 401(k) participation.").

found that "compelling new hires to make active decisions about 401(k) enrollment raises the initial fraction that enroll by 28 percentage points relative to a standard opt-in enrollment procedure, producing a savings distribution three months after hire that would take thirty months to achieve under standard enrollment."[145]

The particular setting of the study, however, did not allow the authors to compare the participation rate of an active-choice regime to an opt-out regime (where new employees are enrolled by default in the employer's plan).[146] One might expect that an opt-out default would produce even higher participation rates than affirmative-choice rules because of, inter alia, inertia. Indeed, one of us has asserted:

> *The number of people who fail to contract around a given default is always greater than the number of people who would affirmatively contract for the substantive provision in the shadow of some other rule*. This is the iron law of default inertia.[147]

But this inertial tendency is not so iron-clad when opt-out defaults are compared to affirmative-choice regimes. For example, in one experiment, 107 postgraduate students were randomly assigned to one of three conditions regarding their bank's option to replace traditional paper statements with greener e-statements.[148] As expected, due to inertia, a significantly larger percentage of students in the opt-out (default) condition eschewed paper statements compared to the opt-in (default) condition (70% vs. 56%).[149] More surprisingly, students assigned to the affirmative-choice condition opted for e-statements at an even higher rate (79%).[150] The authors suggested the higher adoption rate in the affirmative-choice condition may be due to "the salience of guilt that stems from consumers' actions and their perceived personal role . . . ."[151]

Simon Hedlin and Sunstein conducted a similar experiment involving the choice between purchasing green energy and standard (less green) energy within a hypothetical green energy program.[152] They randomly assigned 1,245 online (Amazon Mechanical Turk) subjects to a

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[145] *Id.* at 1639.

[146] *See id.*

[147] Ian Ayres & Robert Gertner, *Majoritarian vs. Minoritarian Defaults*, 51 STAN. L. REV. 1591, 1598 (1999) (footnote omitted).

[148] Aristeidis Theotokis & Emmanouela Manganari, *The Impact of Choice Architecture on Sustainable Consumer Behavior: The Role of Guilt*, 131 J. BUS. ETHICS 423, 428-29 (2015).

[149] *Id.* at 429.

[150] *Id.* Although, given the small sample size, the difference between the two percentages (79% versus 70%) were not statistically significant even at a 10% level.

[151] *Id.* at 428.

[152] Simon Hedlin & Cass R. Sunstein, *Does Active Choosing Promote Green Energy Use? Experimental Evidence*, 43 ECOLOGY L.Q. 107, 113 (2016).

number of conditions, including those with opt-in, opt-out, and affirmative-choice rules.[153] Once again, the affirmative-choice rules generated higher uptake of the green option than both the opt-in and opt-out default conditions, even though the opt-out condition had the benefit of inertia.[154] The positive impact of the affirmative-choice requirement was particularly pronounced—and statistically significant—when green energy was described as having a higher cost than the standard energy source.[155] The authors explained this result as an "interaction between people's feelings of guilt and reactance."[156] First, when subjects are defaulted into a green energy source that costs more, they experience greater reactance which leads them to take affirmative action to reject the green option.[157] Second, affirmative-choice requirements caused "participants to feel more guilty about not enrolling in the green energy program than did either green energy defaults or standard energy default policies."[158]

Stepping back, we can see that affirmative- (or active- or mandated-) choice requirements already exist in a broad array of legal settings. These requirements have been analyzed both theoretically and empirically, and have been shown at times to be superior to traditional opt-in or opt-out defaults.

B. *The Affirmative Case for an Affirmative Concealed-Weapon Choice Rule*

1. Details of Implementation

This Section has three goals. First, we provide details on how our proposed affirmative-choice rule might be structured. Second, we lay out the policy case for why an affirmative-choice requirement would give property owners more ability to control the conditions of entry onto their property and better inform customers about the environment they are choosing to enter. Finally, we explain why affirmative choice applied to private commercial property open to the public does not run afoul of the Second Amendment.

The received wisdom discussed in previous section can inform implementation choices. To begin, we suggest that affirmative choice be implemented—like many of the earlier examples—as a

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[153] *Id.* at 124-25.

[154] *Id.* at 127.

[155] *Id.* at 129 ("When only the three groups where green energy cost extra were analyzed, the difference between active choosing and green energy defaults was statistically significant ($p < 0.05$).").

[156] *Id.* at 107.

[157] *Id.*; *see also* SHARON S. BREHM & JACK W. BREHM, PSYCHOLOGICAL REACTANCE: A THEORY OF FREEDOM AND CONTROL 4-7 (1981). More recently, we have likely experienced reactance when counter-service sellers default us into twenty-five percent tips and require us to click multiple icons to choose a different tip amount. Kareem Haggag & Giovanni Paci, *Default Tips*, AM. ECON. J.: APPLIED ECON., July 2024, at 1, 1 (noting that the likelihood of tipping is significantly lower when the taxi-tipping defaults were set higher).

[158] Hedlin & Sunstein, *supra* note 152, at 114.

prerequisite to receiving a government benefit. Accordingly, we suggest limiting the requirement to commercial establishments that currently require licenses to do business. In most states, this restriction will cover the vast majority of private properties open to the public.[159]

With regard to these properties, lawmakers might initially enact a "prompted" choice rule. For instance, the standard license application might ask businesses to state their gun policy, but allow firms to respond "undecided" or not to respond at all.[160] However, we believe a firmer prerequisite should be imposed. As discussed below, there is a substantial first-mover disadvantage in being one of the first firms to prohibit customer concealed carry. Merely prompting this choice may not be sufficient to enable a sizeable number of property owners to opt for their preferred choice.[161]

Lawmakers must also determine which weapons are subject to the affirmative-choice requirement. We suggest businesses only be required to disclose their policy regarding concealed firearms. The open carry of firearms by customers has not been particularly prevalent to date[162] and, more importantly, does not pose as great an informational problem. Both the business and other customers can directly observe if a particular visitor is openly carrying a firearm and can have the opportunity to change their behavior. Businesses can ask that visitor to leave, or customers can choose to remove themselves now and in the future if they prefer to avoid such settings. While the choice requirement would be narrowly limited to concealed weapons, we would include in the menu of possible policies (described below) options to prohibit all firearms (which would cover both concealed and open carry) and broader categories of weapons. Adding these menu options effectively means that affirmative choice would merely be prompted for these other issues.

Finally, and crucially, an affirmative-choice rule must specify what is and is not sufficient to satisfy the requirement. In effect, the law must specify the altering rules that allow commercial entities

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[159] Julianna Lopez, *Starting a Business? A Guide to Business Licenses and Permits*, U.S. CHAMBER OF COM. (Sept. 17, 2024), https://www.uschamber.com/co/start/startup/business-licenses-and-permit-guide. In New York, a substantial proportion of businesses are required to be licenced and to have their licenses renewed once every year or two. See New York Depatment of Consumer and Worker Protection, https://www.nyc.gov/site/dca/businesses/licenses.page (DCWP licenses more than 45,000 businesses in more than 40 industries). New York license applications included several affirmatively-choice requirements and require businesses to publicly display a "Know Your Rights at Work" poster. Id.

[160] A prompted-choice implementation is similar to a "guns allowed" default because businesses that people who entered a store that responded "undecided" would not be guilty of trespass. We worry that prompted choice would not be sufficient to overcome the first-mover disadvantage to banning guns. But prompted-choice that required the stores to communicate to the public (via signs, pamphlets or other means) that they had not yet decided whether guns are allowed or not in their stores might produce a beneficial equilibrium and might present an even stronger argument against compelled speech.

[161] Moreover, failing to publicly choose is likely to keep customers in the dark about whether other invitees are lawfully carrying lethal weapons.

[162] Walmart and seven other retailers asked customers not to openly carry firearms in their stores in 2019, but enforcement of the policy has been less than successful. Claire Duffy, *Asking Customers Not To Bring Guns into Stores Is One Thing. Enforcing the Policy Is Another*, CNN, https://www.cnn.com/2019/09/17/business/guns-retailers-open-carry/index.html (Sept. 18, 2019).

to avoid the default of non-licensure. Altering rules that make it difficult for property owners to permit licensees to bring in concealed weapons would raise serious Second Amendment issues. As discussed above, the Ninth Circuit's *Wolford* opinion emphasized the importance of allowing property owners to "give on-the-spot, granular permission to a particular person or persons for a specified time."[163] Accordingly, it is important that property owners retain the ability to give bespoke permission (or non-permission) to particular invitees notwithstanding any general policy.[164]

Businesses should be required to disclose their policy to both the state and to individuals entering their property. Disclosure to the state is straightforward, occurring when the businesses periodically apply for licenses. Disclosure to individuals can be made through signage, pamphlets, or any other manner that reasonably notifies entrants of the store's policy.[165] Regulations promulgated under the authorizing statute should also create safe harbors for the types of signage (font size, placement, etc.) that would satisfy the disclosure requirement.

To make it easier for businesses to comply with the requirement, an open-ended menu of possible policies that would satisfy the requirement should be presented. Furthermore, each option should also include potential language that would be sufficient to convey the store's policy to invitees who enter the store. For example, a license application form might require applicants to respond to the following text:

> In this state, every commercial enterprise is required to disclose its policy on whether people may carry concealed firearms onto the property. This disclosure must be made through signage or other reasonably accessible methods for persons entering the property. Please indicate below which language you currently disclose

[163] Wolford v. Lopez, 116 F.4th 959, 995 (9th Cir. 2024).

[164] Our prior discussion of menus suggests that the ways that menu options are presented and framed may also raise Second Amendment issues by burdening the property owner's ability to permit invitees to bear arms. *See supra* text accompanying notes 102-107. For example, if the State places the more permissive options last on a long list of options or frames the options by emphasizing the disadvantages of permitting invitees to be armed, it may be unduly interfering with property owners' unfettered exercise of the right to allow or disallow weapons. *See generally* Ian Ayres, *Menus Matter*, 73 U. CHI. L. REV. 3 (2006) (explaining why menu features can impact the choice equilibrium). For online licensure applications, States might randomize the order in which menu options are listed. For offline applications, States may list the most permissive (guns allowed) options first.

[165] Examples of existing on-site disclosure requirements include restaurant grades, *e.g.*, *Letter Grading for Restaurants*, N.Y.C. HEALTH, https://www.nyc.gov/site/doh/business/food-operators/letter-grading-for-restaurants.page (last visited Nov. 21, 2024), and calorie and nutritional information at chain restaurants, *Menu Labeling Requirements*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/food/nutrition-food-labeling-and-critical-foods/menu-labeling-requirements (last visited Nov. 21, 2024). *See also supra* note 108 (describing Texas's requirements for banning weapons). The requirement of on-site disclosure might be enforced with fines for non-compliance. A statute might even authorize private causes of action against stores that fail to properly disclose their gun policy – just as federal truth-in-lending law allows consumers to bring lawsuits against lenders or credit card issuers who fail to properly disclose credit terms. See Regulation Z, 12 C.F.R. pt. 1026 (2023).

(or will begin disclosing as soon as practicable after licensure) at your properties. If there are different policies for different stores, indicate which policies apply to which properties:

- Firearms permitted
- Concealed firearms permitted
- Concealed firearms not permitted
- Firearms not permitted
- Concealed firearms not permitted, except with permission of owner
- Firearms not permitted, except with permission of owner
- Firearms permitted, unless otherwise prohibited by owner
- Concealed firearms permitted, unless otherwise prohibited by owner
- Other (Specify below the language that you use or will use to inform persons entering your store. To satisfy the disclosure requirement, your language must clearly state whether your invitation to the public to enter your property includes or does not include permission to carry a concealed firearm.):



The license application and the authorizing statute should make clear that property owners, notwithstanding their general disclosure, are always allowed to authorize specific people to bring guns onto their property as well as prohibit specific people from doing so. The license application and statute should also explain that stores that use the text box to announce their disclosure policy—rather than choosing one of the pre-specified menu options—must clearly state whether the enterprise's implicit invitation to the general public includes or does not include permission to carry a concealed firearm onto the property. Thus, for example, a proposed disclosure that says "This store will decide on a case-by-case basis whether customers are permitted to possess firearms on these premises" would not satisfy the disclosure requirement because it fails to indicate whether a potential customer, who enters the store before an individualized determination had been made, is trespassing. Under our proposed statute, stores that fail to adequately disclose whether their implied invitation (which makes the property open to the public) includes the right to bring guns onto the property would not be authorized to conduct business.

2. The Policy Case for Affirmative-Choice Requirements

With these implementation details in mind, we can now more fully explain how the affirmative-choice rule furthers legitimate state interests. The affirmative case for the affirmative-choice requirement is that it better protects the interests of store owners and their customers.

The protection of an owner's property rights is paramount. The Supreme Court recently emphasized that a property owner's right to exclude is "universally held to be a fundamental element of the property right . . . ."[166] Affirmative-choice rules can better effectuate landowners' preferences by eliciting express statements regarding who they wish to exclude and not exclude.[167]

Of course, it is possible for any landowner in a "guns allowed" default jurisdiction to exclude those with firearms simply by posting the same kind of "No Guns" sign as they might hang up under our previously proposed menu.[168] At first blush, then, one might think that an affirmative-choice requirement is unnecessary to effectuate property owners' preferences; those who want to exclude armed customers can post signs to that effect, and those who do not will remain silent.

However, property owners who would prefer unarmed customers may be more reluctant to post a "No Guns" sign under a "guns allowed" default rule than in the shadow of an affirmative-choice regime. Some landowners or occupiers may mistakenly think that the current default in their state prohibits customers from bringing guns onto their property without their express permission. Our representative survey of American adults found that 13.9% mistakenly believed that guns were presumptively prohibited in this way at stores.[169] Affirmative-choice rules ensure that landowners do not stick with the default under a mistaken belief that it prohibits armed customers.

Other store owners who prefer unarmed customers may not post "No Guns" signs under the current law because they take the state's choice of the default as an "implicit endorsement" of that

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[166] Cedar Point Nursery v. Hassid, 594 U.S. 139, 150 (2021).

[167] Ian Ayres & Frederick Vars, *Patrons Packing Heat: Businesses Should Be Required to Tell Customers Whether Guns Are Allowed*, The Hill (Dec. 20, 2023), https://thehill.com/opinion/civil-rights/4368020-patrons-packing-heat-businesses-should-be-required-to-tell-customers-whether-guns-are-allowed.

[168] An important exception to the ability of landowners to exclude people with guns from their property is found in states with statutes prohibited private property owners from banning people from bringing guns onto certain parts of their property (such as private parking lots). See, e.g., W. Va. Code § 61-7-14(d). Everytown is currently suing West Virginia on behalf of a domestic violence shelter that wishes to keep guns off of their property. Everytown, Challenging West Virginia's "Guns in Parking Lots" Law to Protect Domestic Violence Shelters, https://everytownlaw.org/case/everytown-law-represents-coalition-of-domestic-violence-programs-suing-to-block-west-virginia-law-that-forces-businesses-to-allow-guns-in-parking-lots/ ("Over 20 states have laws that bar, to varying extent, private businesses from prohibiting gun possession in their parking lots, including Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, Tennessee, Texas, Utah, and West Virginia.").

[169] Ayres & Jonnalagadda, *supra* note 6, at 187 tbl.2.

outcome.[170] Several retailers also expressed reluctance to post signs prohibiting firearms for similar reasons. For example, the grocery chain, Kroger, announced in 2017 that "[its] longstanding policy on this issue is to follow state and local laws . . . ."[171] But, of course, as a point of legal semantics, it is unclear what it means to follow the law in a jurisdiction that gives landowners the right to either prohibit or allow patrons to carry firearms. The default nature of the law says that landowners decide—yet these landowners say that the law decides. Affirmative-choice rules help clarify that the government is not implicitly endorsing a particular policy on whether customers are armed.

Possibly the most important reason why an affirmative-choice rule might better effectuate landowners' preferences is that under the current "guns allowed" default, there is a substantial first-mover disadvantage to opting out. There is a rich game-theory literature providing examples of contexts where there is a "pioneer risk" or "first-adopter vulnerability."[172] A store owner may reasonably worry that, by being one of the first businesses in the area to post a "No Guns" sign, they will make their store a target of gun violence. For example, gun-rights advocate John Lott pointed out that "[o]ut of seven theaters showing the Batman movie premiere within 20 minutes of [James Holmes's Colorado apartment], only one theater banned permitted concealed handguns. That's the one [Holmes] attacked."[173] Twelve people were killed.[174] Lott advises against being the first on your block to "post a sign on your home announcing it was a gun-free zone," arguing that publicly stating that your home is gun-free will increase the chance that it will be targeted for crime.[175]

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[170] Sunstein, *Deciding by Default*, *supra* note 117, at 20-21 (discussing implicit endorsement as reason why a default might be "sticky").

[171] *Policy on Customers Carrying Firearms in Stores*, KROGER (Aug. 2017), https://web.archive.org/web/20180329185926/https://www.thekrogerco.com/wp-content/uploads/2017/08/Policy-Firearms-In-Stores.pdf; *see also* Howard Schultz, *Our Respectful Request*, STARBUCKS (Sept. 17, 2013), https://about.starbucks.com/press/2013/open-letter-from-howard ("Our company's longstanding approach to 'open carry' has been to follow local laws . . . .").

[172] Joseph Farrell & Garth Saloner, *Installed Base and Compatibility: Innovation, Product Preannouncements, and Predation*, 76 AM. ECON. REV. 940, 943 n.9 (1986) (using "penguin effect"—derived from the practice of penguins that wait to enter the water while "some other penguin . . . test[s] the waters" for predators—to describe agents who hesitate to take the first step in adopting a new technology, product, or behavior because they are waiting for others to make the move first); *see also* Ian Ayres & Cait Unkovic, *Information Escrows*, 111 MICH. L. REV. 145, 192 (2012) (explaining how escrows can overcome first-mover disadvantages related to disclosure).

[173] John R. Lott Jr., *A Look at the Facts on Gun-Free Zones*, NATIONAL REVIEW (Oct. 20, 2015), https://www.nationalreview.com/2015/10/gun-free-zones-dont-save-lives-right-to-carry-laws-do.

[174] John Lott, Opinion, *Did Colorado Shooter Single Out Cinemark Theater Because It Banned Guns?*, FOX NEWS (May 7, 2015), https://www.foxnews.com/opinion/did-colorado-shooter-single-out-cinemark-theater-because-it-banned-guns.

[175] Lott, *supra* note 173. One of us (Ayres) has a home in Connecticut with a brass plaque next to the front door stating, "Firearms prohibited." A beloved relative, who is a strong supporter of gun rights, upon seeing the plaque, remarked that the plaque was a great way to have our house targeted.

But there can be safety in numbers. Requiring stores to make an affirmative choice almost certainly means that more premises will become gun-free zones—the majoritarian preference.[176] Although a business might not want to be the first on their block to announce that visitors must be unarmed, an affirmative-choice requirement facilitates the ability of property owners as a group to express their true preferences.

Affirmative-choice rules also better protect property owner interests by giving invitees better notice about whether the invitation restricts armed entry. Invitees carrying weapons only are guilty of trespass if they have notice of the owner's gun restriction.[177] In the shadow of a carry default, a "Guns Prohibited" sign would be ineffective if an armed invitee could convince a court that they had not seen the sign. After all, most businesses have no posted sign – so an armed patron might be excused for not thinking to look. But in an affirmative-choice jurisdiction, where all businesses post (or make readily available) their policy, it becomes harder for invitees to claim they were not on notice. For this reason, the very same "No Guns" sign may be more effective in an affirmative-choice jurisdiction than in a carry default jurisdiction.

A third policy rationale for affirmative-choice rules is to promote informed association.[178] Consumers have a legitimate interest in knowing about the safety of their commercial settings. While many store owners, through their attorneys, are likely to be aware of the background legal rules regarding concealed weapons, customers are more likely to be uninformed. The problem of misinformation, as previously discussed,[179] is especially pressing at the present moment in blue states, where *Bruen* has unleashed a substantial increase in concealed weapon permits.[180] Our affirmative-choice proposal directly responds to the problem of poorly informed customers by presenting them with clear and salient information about whether their fellow patrons are permitted to carry firearms.

These twin goals—of better effectuating property owners' preferences and better informing consumers of those preferences—are distinct from any state's goal of reducing gun violence. Plaintiffs challenging the no-carry default often speak in apocalyptic terms about the burdens on gun owners and implicitly assume that virtually all businesses would cleave to the firearm-

[176] *See supra* text accompanying notes 30-31.

[177] Joseph Blocher & Darrell A.H. Miller, What Is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment, 83 U. CHI. L. REV. 295, 315 (2016).

[178] Default reforms have been proposed to foster informed association in other contexts. *See generally* Jennifer Gerarda Brown, *Facilitating Boycotts of Discriminatory Organizations Through an Informed Association Statute*, 87 MINN. L. REV. 481 (2002); Ian Ayres & Jennifer Gerarda Brown, *A Legislative Response to* 303 Creative*,* YALE L.J. ONLINE (forthcoming 2025).

[179] *See supra* text accompanying notes 35-36, 68-71.

[180] *See supra* text accompanying notes 11-12.

restricting default.[181] But there are both theoretical and empirical reasons to expect that an affirmative-choice rule would lead to an equilibrium wherein a substantial minority of enterprises opt to allow armed patrons.

Imagine, for example, a market in which 75% of customers are indifferent to stores' concealed-weapon policies, 20% of customers have a strong preference to patronize stores that prohibit patrons from carrying firearms, and 5% of customers greatly prefer businesses that allow concealed weapons. In such settings, we might easily expect 20% of businesses to post "Guns Permitted" signs.[182]

Beyond the theoretical idea that market competition will cater to the preferences of gun owners, there is real-world evidence that gun-friendly businesses are willing to publicly signal their views—including with "Concealed Carry Is Welcome Here" signs.[183] In reaction to the no-carry default laws, online databases have been emerging to help gun owners locate gun-friendly businesses.[184] These searchable databases represent an analogue to the "Negro Motorist Green Book"[185] but cater to the segment of customers who want to remain armed while shopping. Thus, there are both theoretical and empirical reasons to believe that an affirmative-choice rule will produce an equilibrium that supports a substantial proportion of businesses choosing to restrict armed patronage while simultaneously providing sufficient diversity for gun owners to have opportunities to travel and transact.

C. *Responding to Constitutional Concerns*

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[181] For example, Aaron Dorr, the executive director of the New York State Firearms Association, claims that mandating background checks would inconvenience law-abiding gun owners without improving public safety, and states, "No criminal is going to walk into a retail store to purchase ammunition. This is an absurd attempt to demonize law abiding gun owners one more time." Marina Villeneuve, *New York Governor: State to Limit Where Guns Can Be Carried*, FOX59 (June 29, 2022), https://fox59.com/news/national-world/ap-us-news/new-york-governor-state-to-limit-where-guns-can-be-carried.

[182] To see why, imagine there are ten otherwise identical sellers, who had been splitting the market demand equally. With an affirmative-choice rule, we should expect two of the ten sellers to allow patron firearms solely for profit maximization. If nine other stores prohibit firearms, then the tenth store can raise its market share to 12.5% by allowing guns (as it will receive 7.5% from one-tenth of the indifferent consumers and all 5% of the gun-preferring customers, leaving the remaining sellers with just 9.7% market share each). One of the nine will also have an incentive to allow guns as doing so will raise its market share to 10% from 9.7% (as it will now split the 5% of the gun-preferring customers and retain 7.5% of the gun-indifferent customers). *See also* IAN AYRES & JENNIFER GERARDA BROWN, STRAIGHTFORWARD: HOW TO MOBILIZE HETEROSEXUAL SUPPORT FOR GAY RIGHTS (2005) (discussing a similar example with regard to LGBT consumer preferences).

[183] *See, e.g.*, Thomas C. Zambito, *NY's New Gun Laws Restrict Weapons in Businesses, But Some Owners Welcome Them. Here's Why*, IOHUD (July 28, 2022), https://www.lohud.com/story/news/2022/07/28/as-nys-gun-laws-restrict-guns-in-businesses-some-owners-welcome-them/65382470007.

[184] *See, e.g.*, FRIEND OR FOE, https://friendorfoe.us (last visited Dec. 30, 2023).

[185] THE NEGRO MOTORIST GREEN BOOK: A CLASSIFIED MOTORIST & TOURIST GUIDE COVERING THE UNITED STATES & ALASKA (Victor H. Green ed., 1948 ed., 1948).

1. Why Affirmative-Choice Rules are Consistent with Second Amendment

In addition to these public-policy benefits, a major rationale for an affirmative-choice requirement is to avoid the constitutional concern that led the Second Circuit in *Antonyuk* to enjoin the application of the no-carry default to property open to the public.[186] With an affirmative-choice requirement, there is no state-created presumption that owners prohibit armed patrons from entering their stores. Affirmative-choice requirements do not run afoul of the Second Amendment because there is no state action infringing on the right of individuals "to keep and bear Arms."[187] With affirmative choice, the ability of individuals to carry firearms onto private property would be limited only when the landowner actively chooses to impose such a restriction. And the landowner later asking the police to enforce the restriction does not convert that private choice into state action.[188]

The power of affirmative-choice requirements to eliminate any uncertainty about state action can be seen in the New Jersey District Court's rejection of the no-carry presumption.[189] The court in *Koons* found that "[t]he Default Rule is thus state action insofar as the State is construing the sound of silence. While landowners can ratify or depart from that default, it is the State that is presumptively excluding firearms from private property in the first instance."[190] With an affirmative-choice requirement, the State does not presumptively exclude firearms in the first instance. If the State construes the sound of silence, it does so by concluding that the business applicant has not completed a license application until they have clarified the scope of their implicit invitation to the public to enter their property.

An opponent of affirmative-choice might argue that, even if neutral in theory, it amounts to unconstitutional state action in favor of no-carry because the background default was implied permission to carry. According to this view, by forcing a choice, the state is putting its thumb on the scale against gun-carrying onto private property open to the public. However, the core test for state action is not content neutrality, but whether the action or regulation is "fairly attributable" to the government.[191] Without or without affirmative-choice, the state is not responsible for the

[186] To be clear, we would prefer a no-carry default to affirmative choice. A no-carry default also helps effectuate property-owner preferences as we have argued in various amicus briefs. *See e.g.*, Amicus Brief, *supra* note 2, at 6.

[187] U.S. CONST. amend. II.

[188] Dressler v. Rice, 739 F. App'x 814, 824 (6th Cir. 2018) (upholding criminal trespass enforcement for violation of supermarket's "no guns" sign).

[189] Koons v. Platkin, 673 F. Supp. 3d 515, 613 (D.N.J. 2023).

[190] *Id.*

[191] Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

choices made by private landowners.[192] As argued above, the foundational default of property law is that all (non-necessary) entry is trespass absent express or implied invitation from the landowner. A landowner's ancient and nearly absolute right to exclude has no exception for firearms. Requiring an express rather than an implied exception is too limited a government role to convert this private choice into state action.

The idea that affirmative-choice requirements could be used to avoid state-action concerns has been proposed by other scholars. For example, Robert Gomez has proposed enhancing user control of pornographic online material by recommending that "Congress pass a law which requires all new personal computers to come equipped with blocking and filtering software that requires the activating user to make an affirmative choice, during the computer's initial setup, regarding the computer's filter settings for each account on the computer."[193] A key rationale for requiring users' affirmative choice is to avoid any state presumption restricting freedom of speech:

> Because the final decision to restrict access to certain categories would rest with the activating user, any content-based restriction would occur as a result of the activating user's own actions and, as a result, would not be constitutionally problematic.[194]

In contrast, a statute requiring new computers to ship with even a default content-based filter that consumers could disable would raise the same presumption concerns that have led courts to find state action in the no-carry default litigation.

An even more vivid example of using affirmative choice to avoid state action can be seen in a 2008 article by Andrew Blair-Stanek, which proposed requiring spouses, at the time of marriage, to make a number of affirmative choices regarding the scope of their marital obligations.[195] Among these choices is a proposed gun-surrender clause (term "T"):

> Husband agrees that upon the request of wife, he or his agent will surrender all firearms in his possession to law enforcement for a period of at least fourteen days. The parties explicitly intend specific performance, and the husband knowingly

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[192] *Id.* at 937 ("First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible."); *see also* Dressler v. Rice, 739 F. App'x 814, 824 (6th Cir. 2018) ("[P]olice assistance in the lawful exercise of self-help does not convert private action into state action.").

[193] Robert A. Gomez, *Protecting Minors from Online Pornography Without Violating the First Amendment: Mandating an Affirmative Choice*, 11 SMU SCI. & TECH. L. REV. 1, 1 (2007).

[194] *Id.* at 22.

[195] Andrew Blair-Stanek, *Defaults and Choices in the Marriage Contract: How to Increase Autonomy, Encourage Discussion, and Circumvent Constitutional Constraints*, 24 TOURO L. REV. 31, 43-44 (2008). Blair-Stanek characterizes forcing "the marrying couple to make an affirmative choice is simply a hybrid of opt-in and default with opt-out." *Id.* at 70. But this categorization leaves out the forced nature of the hybrid, that is, the penalty of non-marriage if they fail to fulfill the affirmative-choice requirement.

> WAIVES rights to pre-deprivation hearings and intends that the wife may obtain an ex parte judicial injunction enforcing this promise.[196]

The provision represents a kind of privatized red-flag agreement, where one spouse may, for any reason, unilaterally choose to take possession for a limited time period.[197] Blair-Stanek explicitly justifies the affirmative-choice dimension of the law as a means of avoiding constitutional concerns:

> First, mandating affirmative choices allows legislatures to avoid making any judgments on defaults, leaving the choice completely in the hands of individuals. Second, it equalizes the transaction costs of opting in and opting out and eliminates any influence from the status quo bias. As a result, affirmative choice maximizes individual autonomy. Third, when couples cannot avoid making an affirmative choice, the chances of information disclosure and discussion increase.
>
> Fourth, mandating affirmative choices provides a fallback should default-with-opt-out be found unconstitutional. Consider two states, one of which offers term T as an affirmative choice, the other of which makes T the default with the ability to opt-out. Suppose the Supreme Court then held it unconstitutional to make T the default with an opt-out. In that case, the state that used affirmative choice will still have a basis for continuing to respect the choices of those couples who opted in to T.[198]

Applying this logic to *Bruen*, we can see that an affirmative-choice rule would keep a plaintiff challenge from meeting the threshold inquiry because the statute, on its face or as applied, would not involve the state restricting Second Amendment rights. Each and every court that has addressed the issue has uniformly concluded that property owners have a right to exclude armed invitees.[199] Accordingly, the state would not be forced to present historical analogues—so the government can avoid the difficult issues addressed in Part II of this Article, including whether the Ninth or Second Circuit's analysis is correct.

2. Why Affirmative Choice Does Not Run Afoul of the "Compelled Speech Doctrine"

[196] *Id.* at 46.

[197] *See also* Fredrick E. Vars & Ian Ayres, *Gun Trust as Private Red Flag Law*, 34 PROB. & PROP. 22, 22 (2020) (discussing a civil law option for creating an analogous form of enforcement).

[198] Blair-Stanek, *supra* note 195, at 70-71.

[199] *See, e.g.*, Wolford v. Lopez, 116 F.4th 959, 970-71, 994 (9th Cir. 2024); Antonyuk v. Chiumento, 89 F.4th 271, 387 (2d Cir. 2023).

While an affirmative-choice regime powerfully responds to the concern that a state-created "no-carry" presumption impermissibly burdens the right to bear arms, it may raise a compelled-speech concern.[200] Sellers who want to be licensed to do business are required to publicly declare their policy. However, the public declaration we propose falls squarely within the bounds of commercial-speech regulation. No specific state-endorsed ideology is imposed. Businesses are free to permit or prohibit firearms in the stores. Businesses are merely to clarify a non-trivial detail of consumer experience—that is, whether fellow patrons are permitted to carry arms or not. The Supreme Court, in its landmark decision in *Zauderer v. Office of Disciplinary Counsel*, held that requiring "purely factual and uncontroversial" disclosures is permissible if the disclosures are "reasonably related to the State's interest in preventing deception of consumers."[201] The required disclosure of affirmative choice simply informs consumers of the legal attributes of their entry into the store. Accordingly, it should not be surprising that every court which has reached an analogous compelled-speech issue created by the no-carry default have rejected the compelled-speech concern.[202]

The speech compelled by affirmative choice does not offend the First Amendment for three reasons, one structural and two doctrinal. First, structurally, the government cannot avoid setting a default. And any default rule compels speech of those who wish to opt out of the default. The Second Circuit in *Antonyuk* made just this point in addressing whether New York's no-carry default violated the First Amendment:

> If private property owners are free either to grant or refuse access to visitors, a default rule that consent is presumed would compel speech on the part of proprietors to forbid firearms just as much as the [New York statute] requires speech from those who would welcome them. That someone will need to express his wishes regardless of the chosen default rule is just a fact of life, and not a violation of the First Amendment.[203]

An affirmative-choice rule, as argued above, is another type of default which requires businesses who want to opt-out of the presumed consequence of non-licensure to express their wishes.

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[200] The arguments in the section parallel the arguments made in Ian Ayres & Jennifer Gerarda Brown, *A Legislative Response to* 303 Creative, STAN. L. REV. ONLINE (forthcoming 2024). *See generally* Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867 (2015).

[201] 471 U.S. 626, 651 (1985).

[202] *See* Koons v. Platkin, 673 F. Supp. 3d 515, 625 (D.N.J. 2023) ("[T]he Default Rule, as it applies to private property not held open to the public, does not violate the First Amendment . . . ."); Wolford v. Lopez, 686 F. Supp. 3d 1034, 1073 (D. Haw. 2023) ("Plaintiffs are not likely to succeed on the merits . . . on the ground that [the default rule] compels speech in violation of the First Amendment."); *see also Antonyuk*, 89 F.4th at 387 n.115 ("[W]e need not address Plaintiffs' contention that the [default rule] violates the First Amendment . . . . We confess to a certain skepticism about that claim.").

[203] *Antonyuk*, 89 F.4th at 387 n.115.

The second justification for the speech required by our proposal grows out of the decisions rejecting the compelled-speech claims in the no-carry default litigation. These courts determined that those regulations fell outside of First Amendment's scope because they did not require any particular message. For example, the district court in *Wolford* rejected a compelled-speech challenge to the no-carry default by saying:

> Compelled-speech violations result from the fact that the complaining speaker's own message is affected by the speech it is forced to accommodate. Here, Plaintiffs' . . . message is not affected by any speech they are forced to accommodate. Kasprzycki [one of the store owners challenging the default rule] is not forced to speak at all. If he chooses to allow clients to carry firearms on his business's property, then he may do so. He determines whether he wants to give express authorization. He is not required to say anything. There is no coercion. There is no specific message Plaintiffs must speak. Therefore, [the default rule] does not regulate speech within the scope of the First Amendment.[204]

Our affirmative-choice proposal is analogous because "[t]here is no specific message [property owners] must speak."[205]

A New Jersey District Court provided a more detailed discussion reaching a similar result. The court in *Koons* stated:

> [T]here [is no] compelled speech where individuals are not coerced into speaking a *particular* message. . . . Here, the Default Rule does not compel property owners to speak a particular message, so it is not a regulation of speech within the scope of the First Amendment's protection. Unlike in *Barnette*, *Wooley*, and *Becerra* where the state required individuals to, *inter alia*, pledge allegiance, display the state's motto, and inform patients about free abortion services, property owners here are not required to express a specific message at all. Rather, the Default Rule sets a background rule and construes the sound of silence. Property owners can depart from the background rule by manifesting their consent to the entry of firearms on their property, or they can stay silent. Of course, they can withhold consent, too. Placing the burden on firearm carriers to seek consent to enter private property, the State does not mandate that property owners speak certain words to manifest or deny consent or to do so in any particular way. The Default Rule merely gives property owners the choice.[206]

[204] *Wolford*, 686 F. Supp. 3d at 1073 (cleaned up).

[205] *Id.*

[206] *Koons*, 673 F. Supp. 3d at 624-25.

While our affirmative-choice rule requires commercial establishments to announce a gun policy if they wish to do business, it "does not mandate that property owners speak certain words to manifest or deny consent or to do so in any particular way."[207] Property owners and the firearm carriers seeking entry must engage in the same offer-and-acceptance formalities that are "compelled" as a part of all contracting. Here, the property owner's invitation to entry constitutes the offer, subject to various conditions, and the potential entrant's request to enter with a firearm is the counteroffer.[208]

A recent decision from the Southern District of New York preliminarily enjoining on compelled speech grounds a portion of New York's Communications Decency Act is particularly relevant because it seems to also involve an affirmative choice rule.[209] The statute in question required social media networks to post its policy for how it responds to "reports of incidents of hateful conduct on their platform."[210] The law did not require social media networks to respond in any particular way or at all to reports of hate speech on their network, they merely were required to inform users of their policy. The court nonetheless enjoined the statute finding that implicitly "requires social media networks to disseminate a message about the definition of 'hateful conduct' or hate speech" because to comply with the requirement the network's policy had to cover the statute's definition of hate speech which includes user posts that "vilify, humiliate, or incite violence" "on the basis of race, color, religion, ethnicity, national origin, disability, sex, sexual orientation, gender identity or gender expression."[211] Our proposed affirmative-choice rule is distinguishable because it doesn't require businesses to implicitly endorse any state message but

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[207] *Id.* at 625.

[208] Courts have had some difficult discerning whether the compelled speech of no-carry defaults concern the property owner (who must speak in some way to allow armed entry) or to the potential armed entrant (who must ask for permission if he has not already been given such permission. For example, in *Koons*, the court reasoned:

> Nor is it clear how the [property-owner] Plaintiffs are burdened by the Default Rule, or how they are forced to speak the State's preferred policy. . . . The Court fails to see how the . . . Plaintiffs' free speech rights are burdened where others (*i.e.*, firearm carriers) are required to seek permission to carry firearms in the . . . Plaintiffs' homes. And the Default Rule does not require them to manifest their consent. They can deny firearm carriers entry into their homes, too. Thus, the identifiable "expressive content" at issue in First Amendment jurisprudence is not present here. . . . The Default Rule does not mandate speech that a speaker would not otherwise make. Here, unlike in [*Mia. Herald Publ'g Co. v.*] *Tornillo*, the Default Rule does not require property owners to speak a specific message where they would otherwise stay silent; it places a burden on firearm carriers to seek express consent to enter another's property with their firearm, and it gives property owners a choice to manifest their right to exclude. Additionally, for the same reason, neither is the Default Rule a facially neutral restriction on speech. The Default Rule simply does not implicate either level of scrutiny because it does not regulate speech.

Id. at 625 & n.45 (cleaned up).

[209] Volokh v. James, 2023 WL 1991435, (S.D.N.Y 2023).
[210] N.Y. Gen. Bus. Law § 394-ccc(3).
[211] N.Y. Gen. Bus. Law § 394-ccc(1)(a).

merely requires the business to clarify whether it intends for its invitees to be able to carry firearms onto their property.

The final justification for the speech required by our proposal grows out of the Supreme Court's own commercial speech jurisprudence. Commercial speech only began to receive First Amendment protection in 1976.[212] And the Court has repeatedly made clear that commercial speech is subject to "modes of regulation that might be impermissible in the realm of noncommercial expression."[213] Quite simply, "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity."[214] Because the state may lawfully suppress inaccurate commercial speech, even "[c]ontent discrimination is . . . routinely practiced within commercial speech" despite its "impermissib[ility] within public discourse . . . ."[215]

In addition to the prohibition on false and misleading commercial speech, the Court has emphasized the potential reasonableness of business-disclosure mandates:

> [A business's] constitutionally protected interest in *not* providing any particular factual information in [its] advertising is minimal. Thus, in virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, "warning[s] or disclaimer[s] might be appropriately required . . . to dissipate the possibility of consumer confusion or deception."[216]

As Robert Post has recently noted, lawmakers have not been reticent in mandating business disclosures:

> If we just open our eyes, we can see that American society is full of examples of compelled pure speech, ranging from the required product disclosures, to disclosures in real estate transactions, to the required testimony of witnesses in a

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[212] *See* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) ("[T]hough the states and municipalities . . . may not unduly burden or proscribe [free speech] . . . the Constitution imposes no such restraint on government as respects purely commercial advertising."), *overruled by* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762-65, 770 (1976) (holding that speech is not wholly disqualified from First Amendment protection simply because it may be commercial in nature, even though "[s]ome forms of commercial speech regulation are surely permissible").

[213] Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989) (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978)).

[214] Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563 (1980).

[215] Post, *supra* note 200, at 876; *see also id.* ("Although the state may not suppress public discourse because it is misleading or deceptive, it may censor deceptive or misleading commercial speech. Speech is ordinarily deemed to be 'misleading' from the perspective of a reasonable audience.").

[216] Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 651 (1985) (third, fourth, and fifth alterations in original) (quoting *In re* R.M.J., 455 U.S. 191, 201 (1982)).

> trial, to a raft of statutory obligations to report various events and circumstances, to the myriad miscellaneous disclosure requirements imposed on commercial transactions.[217]

Jennifer Keighley has similarly observed:

> Government-compelled commercial speech is ubiquitous. The government requires that cigarette and alcohol packaging display health warnings, corporations file financial disclosure reports, new cars' showroom stickers include vehicles' safety ratings, and food labels display ingredients and nutritional content.[218]

The relatively relaxed scrutiny of commercial-speech regulation makes an affirmative-choice requirement even more likely to pass constitutional muster than, for instance, an analogous rule applied to non-commercial property (e.g., homes).[219]

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[217] Robert Post, *Public Accommodations and the First Amendment: 303 Creative and "Pure Speech*", 2023 SUP. CT. REV. 251, 273 (footnotes omitted); *see also* 20 U.S.C. § 1092(f) (2018) (compelling speech from universities by imposing a duty to "prepare, publish, and distribute . . . an annual security report containing" information regarding "campus security policies and campus crime statistics"); 29 C.F.R. § 1904.2(a) (2024) (compelling speech from "all employers" by imposing a duty to "report to [the Occupational Safety and Health Administration] any workplace incident that results in an employee's fatality, in-patient hospitalization, amputation, or loss of an eye"); N.Y. PUB. HEALTH LAW § 2130(1) (McKinney 2023) (compelling speech from physicians by imposing a duty to report diagnoses of human immunodeficiency virus and acquired immune deficiency syndrome); N.Y. VEH. & TRAF. LAW § 601 (McKinney 2023) (compelling speech from drivers who "strike and injure any horse, dog, cat or animal classified as cattle" by imposing a duty to "report the matter to [the animal's] owner, custodian or [police] officer" and provide their "name and residence"); Simpson v. Gen. Dynamics Ordnance & Tactical Systems-Simunition Operations, Inc., 429 F. Supp. 3d 566, 579 (N.D. Ind. 2019) (compelling speech from sellers by upholding a statutory duty to "(1) properly . . . label the product to give reasonable warnings of danger about the product; [and] (2) give reasonably complete instructions on proper use of the product"); Liriano v. Hobart Corp., 700 N.E.2d 303, 307 (N.Y. 1998) (compelling speech from manufacturers by upholding a duty "to warn of the dangers of foreseeable modifications that pose the risk of injury"); Roe v. Hesperia Unified Sch. Dist., 300 Cal. Rptr. 3d 340, 357 (Cal. Ct. App. 2022) (compelling speech from "teachers and other specified school employees" by upholding a statutory duty "to make a report to a law enforcement agency or a county welfare department" regarding reasonable suspicion of child abuse or neglect); OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 3 (2014) ("'Mandated disclosure' may be the most common . . . regulatory technique in American law."); ANDREW KOPPELMAN, GAY RIGHTS VS. RELIGIOUS LIBERTY? THE UNNECESSARY CONFLICT 139 (2020) ("[I]t is not an impermissible speech compulsion when property owners and product manufacturers are required to warn of hidden dangers.").

[218] Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 J. CONST. L. 539, 541 (2012).

[219] For example, in 2002, as a response to *Dale v. Boy Scouts of America*, 530 U.S. 640 (2000), Jennifer Gerarda Brown proposed that an "informed association" default be enacted with regard to non-commercial expressive associations:

> Public accommodations statutes, like the one in *Dale*, would remain in place to create a default rule of nondiscrimination. To preserve organizations' rights to opt out of that default rule, however, the Informed Association Statute would create a safe harbor—a disclosure process that would effectively exempt organizations from the public accommodations statute.

The clearest articulation of the Supreme Court's approach to scrutinizing compelled commercial speech can be seen in its landmark *Zauderer* decision.[220] In *Zauderer*, the Court upheld the constitutionality of compelled speech in the context of a state requirement that attorney advertisements contain particular factual disclosures:

> In requiring attorneys who advertise their willingness to represent clients on a contingent-fee basis to state that the client may have to bear certain expenses even if he loses, Ohio has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present. . . .
>
> Ohio has not attempted to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." The State has attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a requirement that appellant include in his advertising *purely factual and uncontroversial information about the terms under which his services will be available*.[221]

The Court concluded that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."[222] To be reasonably related to this interest, the mandated disclosure must also "relate to the good or service offered by the regulated party . . . ."[223] If a mandated commercial disclosure fulfills these prerequisites, then it is subject only to rational basis review.[224]

Jennifer Gerarda Brown, *Facilitating Boycotts of Discriminatory Organizations Through an Informed Association Statute,* 87 MINN. L. REV. 481, 483 (2002) (footnote omitted); *see also* AYRES & BROWN, *supra* note 182, at 154 ("In our Informed Association Statute, silence is a covenant not to discriminate. . . . To discriminate, organizations would have to affirmatively 'opt out' of this covenant . . . .").

[220] 471 U.S. 626 (1985).

[221] *Id.* at 650-51 (emphasis added) (citation omitted) (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

[222] *Id.* at 651.

[223] Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 26 (D.C. Cir. 2014) (en banc).

[224] Nat'l Ass'n of Mfrs. v. Sec. & Exch. Comm'n, 800 F.3d 518, 554 (D.C. Cir. 2015) ("The Supreme Court has stated that rational basis review applies to [*Zauderer*] disclosures . . . ."). The D.C. Circuit has analogized the fulfillment of these *Zauderer* prerequisites to the doctrine of *res ipsa loquitur*, reasoning that such a fulfillment satisfies the more searching scrutiny of *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). *See Am. Meat Inst.*, 760 F.3d at 26 ("*Zauderer,* like the doctrine of *res ipsa loquitur,* identifies specific circumstances where a party carries part of its evidentiary burden in a way different from the customary one. . . . [B]y acting only through a reasonably crafted disclosure mandate, the government meets its burden of showing that the mandate advances its interest . . . ."); *see also* Post, *supra* note 200, at 887 ("*AMI* justifies its approach by analogizing *Zauderer* to the doctrine of *res ipsa loquitur*. *AMI* suggests that compelled disclosures necessarily directly advance the goal of disseminating information in a narrowly tailored way . . . ." (footnote omitted)).

Our proposed affirmative-choice proposal falls squarely within the *Zauderer* safe harbor. Businesses are only compelled to disclose "purely factual and uncontroversial information about the terms under which [their] services will be available."[225] The compelled disclosure is "factual" information regarding the terms of service—it clarifies whether or not patrons will or will not be permitted to shop while armed. The disclosure is also "uncontroversial" in that it is not subject to epistemological dispute—it truthfully presents whether the terms of the implied invitation to enter the premises is conditioned on the entrant not bearing a firearm.[226]

In addition, the disclosure is "reasonably related to the State's interest in preventing deception of consumers."[227] The risk of deception is great because, as mentioned above, survey indicates that a substantial proportion of consumers are uninformed or misinformed about whether other shoppers can legally bring concealed weapons onto privately-owned commercial property.[228] The

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[225] *Zauderer*, 471 U.S. at 651.

[226] As Post concluded

> [t]he requirement that information be "uncontroversial" would therefore seem best interpreted as a description of the epistemological status of the information that a speaker may be required to communicate. We should understand *AMI* to hold that if the truth of information is seriously controverted, the state cannot appeal to the relaxed *Zauderer* test to sanction its compelled disclosure.

Post, *supra* note 200, at 910, (citing CTIA—The Wireless Ass'n v. City & County of San Francisco, 827 F. Supp. 2d 1054, 1060 (N.D. Cal. 2011) ("Whether or not cell phones cause cancer is a debatable question and, at this point in history, is a matter of opinion, not fact. San Francisco has its opinion. The industry has the opposite opinion. Can San Francisco force the industry to disseminate the government opinion?"), *aff'd*, 494 F. App'x 752 (9th Cir. 2012) (per curiam)); *see also Nat'l Ass'n of Mfrs.*, 800 F.3d at 538 (Srinivasan, J., dissenting) ("[E]ven if the disclosure qualifies as 'purely factual,' it would still fall outside of *Zauderer* review if the accuracy of the particular information disclosed were subject to dispute. The requirement that disclosures be 'uncontroversial' in addition to 'purely factual' thereby removes from *Zauderer*'s purview disclosures whose accuracy is contestable. *AMI* in fact assumes 'controversial' in this context means exactly that: a 'dispute about . . . factual accuracy.'" (second alteration in original) (quoting *Am. Meat Inst.*, 760 F.3d at 27)).

[227] *Zauderer*, 471 U.S. at 651. In any case, the D.C. Circuit has held that *Zauderer* is not limited "to cases in which the government points to an interest in correcting deception" because its language "sweeps far more broadly than the interest in remedying deception." *Am. Meat Inst.*, 760 F.3d at 22. Therefore, it may not even be necessary to demonstrate that an affirmative-choice rule is aimed at remedying deception.

[228] Some businesses might be subject to the no-carry default if they do not hold themselves out as transacting with the general public. *See* Post, *supra* note 217, at 255 & n.23 (first citing Elizabeth Sepper, *The Role of Religion in State Public Accommodations Laws*, 60 ST. LOUIS U. L.J. 631, 650 (2016) (enumerating "selectivity" as one factor in a "multi-factor analysis"—which also includes "profit status," "commercial nature," "exclusivity," and "intimacy of an entity"—employed to "police" the "public-private divide"); then citing Vejo v. Portland Pub. Schs., 204 F. Supp. 3d 1149, 1168 (D. Or. 2016) (holding that a private university, despite its status as a commercial entity, is not a public accommodation under Oregon law because "its [admissions] processes are not so unselective that it is *de facto* open to the public"), *rev'd on other grounds*, 737 F. App'x 309 (9th Cir. 2018); then citing *Barnett v. E:Space Labs LLC*, No. 6:18-cv-00419-MC, 2018 WL 3364660, at *4 (D. Or. July 10, 2018) (holding that a "membership-based technology incubator" is not a public accommodation under Oregon law because it "grants permission to use its facilities on a selective basis, and has exercised its discretion to revoke permission"); then citing *Emilee Carpenter, LLC v. James*, 575 F. Supp. 3d 353, 378 n.13 (W.D.N.Y. 2021) ("[I]t is worth noting that [a 'distinctly private'] exemption seems particularly well-suited to artists who must be selective in their clientele in order to express their desired message."); and then citing Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1880 (2021) (holding that the

government has a substantial interest in assuring that consumers are adequately informed about an aspect of the shopping environment that is tied to their safety.[229] Accordingly, an affirmative-choice default does not unconstitutionally compel speech.

D. *Extensions*

This Section briefly considers extensions of our proposal in two different dimensions. First, we explore other contexts in which affirmative-choice rules might be deployed to address issues of gun violence. Second, we consider whether affirmative choice with regard to unarmed entry in commercial settings could be incentivized or made more durable.

1. Deploying Affirmative Choice in Other Contexts

The idea that affirmative-choice requirements can avoid state action and thereby avoid constitutional limitations raises the possibility that there might be other contexts in which the strategy might be deployed. Indeed, as previously discussed, Blair-Stanek has independently proposed that marrying couples be required to choose whether or not they would like to create a kind of private red-flag option—where one spouse would have the option of temporarily disarming the other spouse.[230]

Affirmative-choice requirements might also be deployed to increase the salience of Donna's Law. Several states have enacted versions of a reform that we have proposed which give individuals the right to temporarily suspend their right to purchase or possess firearms.[231] People who register

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Catholic Social Services is not a public accommodation in part because "[c]ertification as a foster parent . . . is not readily accessible to the public" and "involves a customized and selective assessment that bears little resemblance to staying in a hotel, eating at a restaurant, or riding a bus")).

[229] Some consumers may feel safer knowing that other patrons are armed; other may reasonably feel less safe. An affirmative-choice requirement gives each type of consumer better information about the circumstances of their shopping.

[230] *See supra* notes 195-198 and accompanying text.

[231] *See, e.g.*, DEL. CODE ANN. tit. 11, § 9802(a) (2024) ("The Superintendent of the Delaware State Police shall create a Voluntary Firearms Do-Not-Sell Registry in which an applicant may voluntarily enroll for the purpose of being prohibited from purchasing a firearm. No person may knowingly sell or transfer a firearm to an individual enrolled on the Registry."); UTAH CODE ANN. § 53-5c-301(1) (LexisNexis 2024) ("An individual . . . may voluntarily request to be restricted from the purchase or possession of firearms."); VA. CODE ANN. § 52-50(A) (2020) ("The Department of State Police shall establish the Virginia Voluntary Do Not Sell Firearms List (the List) in the Commonwealth to prohibit the possession, transportation, and sale of firearms to any person who voluntarily registers himself to be enrolled into the List."); WASH. REV. CODE § 9.41.352(1) (2024) ("A person may file a voluntary waiver of firearm rights, either in writing or electronically, with the clerk of the court in any county in Washington state."); *see generally* AYRES & VARS, *supra* note 21 (discussing Donna's Law and our efforts to promote its enactment). Donna's Law is so named in memory of Donna Nathan. Ms. Nathan struggled for over two decades with the effects of bipolar disorder. Katrina Brees, *The Story Behind Donna's Law*, 39 QUINNIPIAC L. REV. 359, 360 (2021). In her efforts to prevent the impulses of her condition, she would voluntarily hospitalize herself more than a dozen times. *Id.* In the words of her daughter, "[s]he gave up every freedom to try and protect herself." *Id.* But in Louisiana, she could only give up her right to purchase a firearm if "a judge determined [she was] suicidal, homicidal or gravely disabled, and ordered [her]

have their names added to the FBI's background-check list so that they would be blocked from purchasing a gun from any licensed firearm dealer. A central impetus for the initiative is to make progress on the problem of gun suicide. People who know they are at risk of self-harm can take action, during moments of clarity, to reduce their capacity to injure themselves. Surveys that we have conducted show that there is substantial interest in registration.[232] But real-world take-up has likely been hampered by requirements of in-person registration and other procedural hurdles.[233] An affirmative-choice requirement might radically increase take-up of the registration option.

For example, just as some states have mandated affirmative choice on organ donation as a pre-condition of receiving a driver's license, states might also require license applicants to choose whether or not they wish to join the Donna's Law registry. Alternatively (or in addition), the state might mandate citizens to make a registration choice when they contract with mental-health professionals or as part of family-court custody decisions. These reforms might, like some of the organ-donation choice requirements, actively prompt individuals to make a choice but allow one of the choices to be "decline to answer."

An affirmative-choice requirement might also be used to better effectuate peaceful assembly. We have previously proposed that organizers seeking government permits for gatherings on public land should be given the ability to decide whether they want their events to be temporary gun-free zones.[234] However, we framed the proposal as an opt-out default, presuming that organizers would want participants to be unarmed:

> Under this approach, all public assemblies—demonstrations, protests, marches and yes, Independence Day parades—by default could be temporarily gun free. But the

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to be involuntarily committed for treatment." *Id.* at 362. On June 26, 2018, Ms. Nathan purchased a firearm from a local store and took her own life. *Id.* at 361. Two days later, her daughter, Katrina Brees posted on her Facebook page: "I wish my mom could have registered herself as being unfit to buy a gun." *Id.* at 362. The campaign for Donna's Law is the effort at codification of that idea. *Id.*

[232] *See* Ian Ayres & Fredrick E. Vars, *Libertarian Gun Control*, 167 U. PA. L. REV. 921 (2019) (reporting that 31% of a broad internet sample wanted to sign up); FREDRICK E. VARS, Karen Cropsey, Cheryl McCullumsmith, and Richard Shelton, *Willingness of Mentally Ill Individuals To Sign Up for a Novel Proposal To Prevent Firearm Suicide*, SUICIDE & LIFE-THREAT. BEHAV. (2016) (finding that 46% of a sample of relatively high suicide risk individuals wanted to sign up).

[233] Agya K. Aning, *To Prevent Suicide, States Want to Let People Ban Themselves From Buying Guns*, The Trace (Nov. 12, 2024), https://www.thetrace.org/2024/11/donnas-law-suicide-prevention-gun-buying/ (reporting that 132 had used Donna's Law).

[234] *See* Ian Ayres & Fredrick Vars, Opinion, *How Can States Limit Guns? By Protecting the Right to Peaceably Assemble*, L.A. TIMES (July 5, 2022), https://www.latimes.com/opinion/story/2022-07-05/concealed-weapons-laws-demonstrations-first-amendment. An affirmative-choice rule for rallies/demonstrations may not be constitutionally required because there is a robust historical tradition of states prohibiting arms at such gatherings. Mark Anthony Frassetto, *Mass Violence and The Second Amendment: Analogizing Historical Prohibitions On Armed Groups To Modern Prohibitions On Assault Weapons And Large-Capacity Magazines,* 76 ALABAMA L. REV. 43 (2024).

> person seeking a permit for an event would be given the option of checking a box to indicate that firearms would be allowed.[235]

This gun-free gathering presumption raises the same state-action concerns as the no-carry default laws. We can imagine that some courts would find that that presumption meets *Bruen*'s threshold inquiry and would require the state to provide sufficient analogues for the provision. But slightly amending the application form to include a "Select One" instruction—an instruction that requires an applicant to actively choose whether or not they want their gathering space to exclude armed individuals—would likely be sufficient to allow organizers to eschew weaponry without triggering the exacting requirements of *Bruen* and its progeny.

2. Armed Invitation Buybacks

Another extension of our central proposal facilitates the government's ability to incentivize landowners toward durable prohibition of armed entry onto their property. While government interventions that burden gun rights are strictly scrutinized for historical analogues, the state remains able to use carrots instead of sticks to impact gun possession. To our knowledge, no cases have successfully challenged gun-buyback programs where the government offers cash incentives for individuals to voluntarily dispossess themselves of particular firearms. Indeed, it simply cannot be unconstitutional "for government to allow individual commitment not to bear arms."[236]

Here, we explore whether the government could offer financial incentives to commercial property owners who prohibit visitors from bringing firearms onto their property. We characterize this as an "armed invitation buyback" because, in essence, the government would be "buying" the property owner's right to make a particular kind of invitation (i.e., an invitation to members of the public to enter their private property while armed). The armed invitation buyback regime would be doubly insulated from constitutional concern because, in addition to being implemented with a carrot, it does not seek to purchase the *gun owner*'s right to carry but, rather, the *property owner*'s right to exclude.

The buyback program might be made on a non-durable basis. For example, the government might offer a small tax credit to any property owner who, for a particular tax year, opts to prohibit patrons from carrying weapons in their stores. But there is also an opportunity for the government to use existing property mechanisms to induce *durable* commitments to keep their property gun-free

[235] *Id.*; *see also* Ian Ayres & Fredrick Vars, Opinion, *Peaceful Assembly Can't Happen Without the Option of Gun-Free Events*, WASH. POST (Oct. 28, 2020), https://www.washingtonpost.com/opinions/2020/10/28/peaceful-assembly-cant-happen-without-option-gun-free-events (proposing an analogous opt-in default).

[236] Ian Ayres & Frederick E. Vars, *Libertarian Gun Control*, 167 U. PA. L. REV. 921, 923 (2019); *see also* Joseph Blocher, *The Right Not to Keep or Bear Arms* (2012).

stores, commitments which not only renew year after year, but also "run with the land."[237] These mechanisms could still allow the owner to remain armed and designate specific agents to enter the property with firearms.

One way to make a durable commitment would be for the government to compensate property owners for agreeing to restrictive covenants that would bind them *and* future owners to exclude the public from bringing firearms onto their land. For example, a California court ruled that a deed providing for the sale of the land on the condition "that the use of firearms upon [the] premises is and shall be forever prohibited" meant that the restriction on firearms is to be attached to the land in perpetuity, no matter the owner.[238]

Alternatively, the government might incentivize landowners to create conservation easements that again prohibit the public from bring guns on their land.[239] The Uniform Conservation Easement Act defines a conservation easement to be

> a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations, the purposes of which include retaining or protecting natural, scenic, or open-space values of real property; assuring its availability for agricultural, forest, recreational, or open-space use; protecting natural resources; maintaining or enhancing air or water quality; or preserving the historical, architectural, archeological, or cultural aspects of real property.[240]

In *Wooster v. Department of Fish & Game*, a California appellate court found that "the grant of hunting rights" to a state agency (so that the agency "could prohibit all hunting on the property") was entirely consistent with statutory requirements governing conservation easements[241]:

> The "natural" and "historical," not to mention "scenic," condition of land can easily be understood as land teeming with wildlife—as it was before the advent of men, women, and

[237] A covenant that "runs with the land" is essentially an encumbrance on the use of a particular piece of real estate that "bind[s] all current and future owners to [the covenant's] conditions, while also providing beneficiaries of the covenants with a remedy if the parcel falls out of compliance with those conditions." Danielle D'Onfro, *Contract-Wrapped Property*, 137 HARV. L. REV.1059, 1082 (2024).

[238] Guar. Realty Co. v. Recreation Gun Club, 107 P. 625, 626 (Cal. Dist. Ct. App. 1910) ("To have and to hold: All and singular the said premises, together with the appurtenances, unto the parties of the second part, and to their heirs and assigns forever; provided, that one of the conditions of this conveyance is that the use of firearms upon said premises is and shall be forever prohibited, and that the said grantees agree, for and on behalf of themselves, their heirs and assigns, and all persons claiming through or under them, to observe and enforce this provision.").

[239] *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 8.5 cmt. a (AM. L. INST. (2000) (reporting that all but three states had enacted statutes to eliminate questions about the enforceability of conservation servitudes or easements).

[240] UNIF. CONSERVATION EASEMENT ACT § 1(1) (UNIF. L. COMM'N 2007).

[241] 151 Cal. Rptr. 3d 340, 343 (Cal. Ct. App. 2012).

> firearms. Using a conservation easement to ban hunting most certainly does help retain land in this sort of unspoiled condition.[242]

A "conservation easement" that granted to the government (what would have previously been the owner's) right to control armed entry onto a particular commercial property (such that now the police, instead of the owner, might have the right to prohibit firearms on the property) may analogously qualify as having a "natural," "historical" or "scenic" purpose. Or a state might create an analogous statute providing for the creation of "gun safety easements." Just as governments provide various financial incentives to stimulate the use of conservation easements,[243] one could imagine states incentivizing the use of gun-safety easements to expand the number of gun-free acres in a jurisdiction.[244]

Modern title records provide ample notice to potential buyers of these restrictions. Covenants, conservation easements, and defeasibility of fees would all be recorded and discovered in title searches. The existing methods provide ample opportunity to make these restrictions run with the land to bind not just the owners but also their successors in interest. But to provide adequate notice to the public, it is also necessary to include in the servitudes' provisions certain duties on current and successive owners to post signs on the land notifying third parties that firearms are not allowed on the property. Just such a provision was included in the conservation easement upheld in *Wooster*. That provision required the posting "at all points of entry to inform the public that . . . no . . . hunting is allowed."[245]

An important question is whether the permanence of gun-free zones violates public policy because of standard "dead hand" concerns. One commentator argues that when covenants are stale and restrict behavior that does not produce negative externalities, they should be enforceable only by compensatory damages, not specific performance.[246] But guns can readily be turned against neighbors, which may explain why so many more people fear more guns in their community than

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[242] *Id.* at 351.

[243] Christen Linke Young, *Conservation Easement Tax Credits in Environmental Federalism*, 117 YALE L.J. POCKET PART 218 (2008).

[244] Alternatively, a landowner who wants the prohibition on guns to bind subsequent owners could, when selling the property, only convey a "defeasible fee." An owner could create a defeasible fee, for example, by including what is known as a fee simple determinable condition in the deed: "to A so long as A does not knowingly possess or allow others to possess firearms on the premises." The original owner (and their heirs) would forever retain a vested interest in the land known as a "possibility of reverter" that would automatically revert to fee simple absolute (i.e., actual and possessory) ownership of the land itself upon violation of the condition. THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 510, 516, 574 (2012).

[245] *Wooster*, 151 Cal. Rptr. 3d at 343.

[246] *See* Andrea J. Boyack, *Common Interest Community Covenants and the Freedom of Contract Myth*, 22 J.L. & POL'Y 767, 842-43 (2014).

welcome them.[247] There is certainly no reason why gun-safety servitudes should be any less durable than other restrictions on land.

IV. Conclusion

This Article has argued that there are good reasons why the no-carry default could be upheld, as the Ninth Circuit so held in *Wolford*.[248] But even if the Supreme Court affirms the result of the Second Circuit in *Antonyuk* and enjoins the application of no-carry defaults to private land open to the public, states need not stand mute. They can enact affirmative-choice laws that merely require commercial enterprises to clarify the scope of their implied invitations. Because affirmative-choice requirements only restrict gun rights via the operation of freely made private choices, they lack the state action crucial to Second Amendment concerns.

One of our goals in proposing an affirmative-choice rule is to reduce gun violence by substantially reducing the spaces where concealed and open-carry firearms are allowed. Nearly sixty percent of all land in America is privately owned.[249] When required to choose by an affirmative-choice rule, we have good reason to believe that only a minority of stores would hang "Guns Permitted" signs. So, affirmative-choice laws are likely to radically expand the spaces that are gun free. Restricting the places where guns can be possessed can reduce both the likelihood of impulsive misuse of firearms—a likely explanation why some states have no-carry default laws in bars—as well as the settings (especially automobiles) from which guns can be stolen.[250] Such restrictions might also, on the margin, reduce overall demand for gun ownership. While some people purchase guns solely to defend their homes, others may purchase in part for use in other spaces. As these spaces for use decrease, so too might the demand for guns.

But reduction of gun violence is not our only goal. Affirmative-choice requirements are also motivated by increasing the autonomy of property owners. A central goal is to better effectuate the preferences of landowners. These requirements give property owners more control over the

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[247] *See* Matthew Miller, Deborah Azrael & David Hemenway, *Community Firearms, Community Fear*, 11 EPIDEMIOLOGY 709, 709 (2000).

[248] *See supra* text accompanying notes 114-116.

[249] Christopher Ingraham, *American Land Barons: 100 Wealthy Families Now Own Nearly as Much Land as that of New England*, WASH. POST (Dec. 21, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/12/21/american-land-barons-100-wealthy-families-now-own-nearly-as-much-land-as-that-of-new-england.

[250] Ayres & Jonnalagadda, *supra* note 6, at 190; *see also, e.g.*, Mo. Rev. Stat. § 571.107(7) (2014) ("No concealed carry permit . . . shall authorize any person to carry concealed firearms into . . . [a]ny establishment licensed to dispense intoxicating liquor for consumption on the premises . . . without the consent of the owner or manager."); *Stolen Guns Pose a Tremendous Risk to Public Safety*, *supra* note 34 (explaining that somewhere between 200,000 and 500,000 guns are stolen each year, one-quarter of them from vehicles, and that a majority of stolen firearms recovered by law enforcement were connected to crime).

central exclusion decision by better tailoring the scope of their implied invitation to their preferences. Disclosing their choice to patrons has the added benefit of informed association.[251]

Our purpose is not to contest the constitutional right of individuals to keep and bear arms. Rather, through this piece, we merely aim to make those rights accommodate the competing constitutional interests of property ownership and informed association. Legislators have been willing to impose outright bans on gun possession at "sensitive spaces," including courthouses, schools, and polling places, among other places.[252] But the affirmative choice proposal outlined here can go much further in tightening the geographic tourniquet while preserving (and even enhancing) the associational rights of patrons and property owners. Empowering property owners to create these gun free zones can reduce gun violence by letting landowners better defend themselves and their property.

[251] *See supra* text accompanying notes 178-180.

[252] *See, e.g.*, FLA. STAT. § 790.06(12)(a) (2024) (prohibiting both open and concealed carry in fifteen different categories of sensitive places, including, inter alia, schools, polling places, bars, and "career center[s]); GA. CODE ANN. § 16-11-127(b) (2024) (prohibiting "carrying a weapon or long gun" in seven different categories of sensitive places, including, inter alia, courthouses, jails, places of worship, and state mental health facilities); WASH. REV. CODE § 9.41.300 (2024) (prohibiting knowing possession of a weapon in various sensitive places, including, inter alia, zoos and public transit facilities).