


2017

## Reforming State Laws on How Businesses Can Ban Guns: "No Guns" Signs, Property Rights, and the First Amendment

Christine M. Quinn

*University of Michigan Law School*

Follow this and additional works at: <http://repository.law.umich.edu/mjlr>

 Part of the [First Amendment Commons](#), and the [State and Local Government Law Commons](#)

---

### Recommended Citation

Christine M. Quinn, *Reforming State Laws on How Businesses Can Ban Guns: "No Guns" Signs, Property Rights, and the First Amendment*, 50 U. MICH. J. L. REFORM 955 (2017).

Available at: <http://repository.law.umich.edu/mjlr/vol50/iss4/5>

This Note is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

## REFORMING STATE LAWS ON HOW BUSINESSES CAN BAN GUNS: “NO GUNS” SIGNS, PROPERTY RIGHTS, AND THE FIRST AMENDMENT

---

Christine M. Quinn\*

### ABSTRACT

*Every state has different regulations regarding how businesses can ban guns. Some states mandate that specific signs be posted in specific places while other states say nothing on the issue. This Note first establishes that even under *Heller* and *McDonald*, private business owners have a right to control their private property, which includes a right to prohibit their customers from carrying firearms into their buildings. It then introduces some states’ requirements for “No Guns” signs and examines their weaknesses, particularly from a First Amendment, compelled speech perspective. The Note concludes that some current state regulations are ineffective, unclear, and outright unconstitutional. It then proposes a uniform model regulation for state adoption which features a standard, simple sign design.*

### INTRODUCTION

Today, many states have “guns everywhere” laws that allow firearms in bars, churches, schools, and government buildings.<sup>1</sup> Additionally, forty-five states permit the open carry of handguns<sup>2</sup> and every state, including the District of Columbia, allows some form of concealed carry.<sup>3</sup> At the same time, the U.S. firearm homicide rate is twenty times higher than the combined rates of twenty-two similarly developed countries.<sup>4</sup> In an average year in America,

---

\* J.D. Candidate, May 2017, University of Michigan Law School. With thanks to the team at the Brady Center to Prevent Gun Violence’s Legal Action Project, who inspired me to write this Note, and to the editors of the *Michigan Journal of Law Reform*. Although I started looking into this subject as an intern at the Brady Center’s Legal Action Project in 2015, the arguments and the proposals expressed in this Note are solely my own and do not represent the position of the organization.

1. Susannah Griffee, *Guns, Everywhere*, THE NEW YORKER (Apr. 20, 2012), <http://www.newyorker.com/news/news-desk/guns-everywhere>.

2. *Open Carrying*, L. CENT. TO PREVENT GUN VIOLENCE, <http://smartgunlaws.org/gun-laws/policy-areas/firearms-in-public-places/open-carrying/> (last visited May 3, 2017).

3. *Concealed Weapons Permitting*, L. CENT. TO PREVENT GUN VIOLENCE, <http://smartgunlaws.org/gun-laws/policy-areas/firearms-in-public-places/concealed-weapons-permitting/> (last visited May 3, 2017).

4. *About Gun Violence*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, <http://www.bradycampaign.org/about-gun-violence> (last visited May 3, 2017).

55,009 people survive shootings; 16,334 people are shot unintentionally and survive; 11,294 people are murdered with guns; and 561 people are accidentally killed with guns.<sup>5</sup>

In *Heller* and *McDonald* the Supreme Court recognized the individual right to bear arms for self-protection,<sup>6</sup> but the grim statistics on gun violence suggest that individuals should also be empowered to protect themselves from guns by enforcing the right of business owners to ban customers from carrying guns into their facilities.<sup>7</sup> This particular right has largely been unexplored by courts. Legislatures occasionally try to fill the gap but often leave business owners uncertain about how best to protect themselves and their customers. From state to state, the laws governing how business owners exercise their right to ban guns are not only diverse, but they are also often unclear, ineffective, and sometimes simply unconstitutional.<sup>8</sup> This makes it difficult, if not impossible, for a business owner to enforce his property rights safely. For example, some state laws, such as Kansas's, require that an authorized representative of the business approach the armed customer and ask him<sup>9</sup> to leave, even after he has seen and ignored the legally compliant "No Guns" sign in the window.<sup>10</sup> Only after the armed customer refuses to leave is he committing a crime.<sup>11</sup> Other states' sign requirements are so burdensome they violate the First Amendment's prohibition of government compelled speech: the State's ability to dictate the size, content, and placement of signs on private property is limited by the First Amendment.<sup>12</sup> For example, Texas's law that requires the posting of giant signs that convey extensive government speech

---

5. See Victims of Gun Violence Fact Sheet, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, [http://www.bradycampaign.org/sites/default/files/Gun%20Deaths%20Fact%20Sheet\\_Mar2016.pdf](http://www.bradycampaign.org/sites/default/files/Gun%20Deaths%20Fact%20Sheet_Mar2016.pdf) (last visited May 3, 2017) (numbers calculated by the author from the information provided in this source).

6. See *District of Columbia v. Heller*, 554 U.S. 570, 579 (2008); see also *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010).

7. See Joseph Blocher, *The Right Not to Keep and Bear Arms*, 64 STAN. L. REV. 1, 44-45 (2012).

8. See *infra* Part II.

9. According to a recent Gallup study, men are three times more likely than women to own guns in America. Therefore, though both men and women carry guns, for ease and clarity of writing, throughout this Note I use male pronouns rather than "he or she." See Jeffrey M. Jones, *Men, Married, Southerners Most Likely to be Gun Owners*, GALLUP, INC. (Feb. 1, 2013), <http://www.gallup.com/poll/160223/men-married-southerners-likely-gun-owners.aspx>.

10. See KAN. STAT. ANN. §§ 75-7c24, -7c10 (Supp. 2016); see also KAN. ADMIN. REGS. § 16-11-7 (Supp. 2016).

11. See §§ 75-7c24, -7c10.

12. See *infra* Part II.B.

in English and Spanish is so unduly burdensome on business owners that it is unconstitutional.<sup>13</sup> Because “No Guns” sign posting laws vary widely by states in their requirements, in their location in the code, and in their penalties for violations, it is also very difficult for a national business to adopt a uniform policy.

This Note explores the contours of state laws regulating the right to ban guns from one’s own business. Part I introduces and summarizes critical federal and state precedent and laws that effect a business’ ability to ban firearms, such as the constitutional right to bear arms, state approaches to the regulation of carrying guns in public, the right to ban firearms on private property, and some state laws outlining how businesses can ban guns. Part II looks at select states’ requirements for “No Guns” signs more closely and highlights several weaknesses. It then focuses on some sign requirements’ violations of the First Amendment prohibition of compelled speech. Part III argues that states should uniformly amend their trespass or firearms codes to automatically impose criminal sanctions for carrying a handgun *or* long gun (open or concealed) onto private property conspicuously marked with the standard symbol many states have already adopted, a pictogram—small enough to be printed from a computer—of a gun with a circle around it and a slash through it. The prohibition sign should be accompanied by the words: “Open and Concealed Carry of Firearms Prohibited Under [statute number cite].”

## I. A BRIEF SURVEY OF GUN LAWS IN AMERICA TODAY

Part I of the Note will first provide a brief overview of the constitutional right to bear arms and state gun laws. It will then outline the right of private property owners to ban guns from their property. Finally, it will provide an introduction to select states’ approaches to regulating how businesses can ban guns.

### A. *The Supreme Court’s Right to Bear Arms*

No discussion of gun laws today can occur without an understanding of the two Supreme Court cases that set the scene for modern gun regulation: the 2008 decision in *Heller* and the 2010 decision in *McDonald*. In *Heller*, the Supreme Court established an individual right to keep and bear arms, striking down two District of

---

13. See *infra* Part II.

Columbia laws—one that banned handguns even in the home and one that required any lawful firearms in the home be disabled.<sup>14</sup> Until that point, it was still up for debate whether the Second Amendment conferred a right to participate in a well-regulated militia or a right to have firearms for personal use.<sup>15</sup> *Heller's* holding was limited; it said there was an individual right to keep and bear ready-to-use arms for the purpose of self-defense. It went as far as to define “bear” as “carry,” but it did not hold that an individual had the right to bear arms outside the home.<sup>16</sup> Further, the Court in *Heller* made clear that reasonable restrictions on who can possess guns, where they can carry them, and the type of guns they can carry, are constitutional.<sup>17</sup> Finally, perhaps most important to our analysis here, the Court based all of its holdings on an exhaustive historical analysis, reading the Second Amendment in the context it was written. The court stated:

A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.<sup>18</sup>

Two years later, the Court in *McDonald* held for the first time, in a five–four decision, that the Second Amendment, as interpreted in *Heller*, applies to the states through the Fourteenth Amendment's due process clause.<sup>19</sup>

*McDonald* and *Heller* left open many questions that lower courts and legislatures are now trying to address in their analysis of state firearms regulations. The Supreme Court in *Heller* and *McDonald* made clear that the Second Amendment could be limited because even the founders did not contemplate an absolute right. To emphasize this point, the Court listed a few approved limits, such as “dangerous or unusual weapons,” possession in schools or government buildings, possession by the felonious or the insane, and regulation of firearms sellers.<sup>20</sup> However, the Court in *Heller* and *McDonald* did not opine on the constitutionality of several other

---

14. See *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

15. *Id.* at 628–29.

16. See *id.* at 625.

17. *Id.* at 626.

18. *Id.* at 634–35.

19. *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010).

20. *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008).

common types of firearms regulations, such as enforcing a business's private property right to prohibit firearms.

### B. State Approaches to Carry Laws

Following *Heller* and the post-Obama conservative resurgence, states have increasingly passed "guns everywhere" laws.<sup>21</sup> Georgia's 2014 law, for example, now permits the carry of concealed firearms with a permit in bars, nightclubs, school classrooms and churches (with the permission of the school and church), and some government buildings.<sup>22</sup> Missouri, Oklahoma, Tennessee and other states have passed similarly permissive laws.<sup>23</sup>

Each state's laws vary on several aspects, based on the state's differing interpretation of the rights that are and should be granted under *McDonald*: Does the state allow "open carry," or "concealed carry," or both? Are long guns regulated at all? Is a permit required for a handgun? Is it a "may-issue" or "shall-issue" state? May landlords ban their tenants from having guns in their homes? From their hotels? May employers ban employees from having guns in the office or the parking lot? How can business owners ban customers from carrying guns into their businesses?

Handgun laws can permit open carry (visible to the public) or concealed carry (on your person, but not visible) or some variation thereof based on location or possession of a permit. Thirty-one states allow open carrying of handguns without a permit<sup>24</sup> and eleven states allow concealed carrying of handguns without a permit.<sup>25</sup> Every state permits concealed carry with a permit in some form, but the requirements for permits vary widely.<sup>26</sup> Thirty states are "shall issue" states, which means that the state *must* issue permits to everyone that meets a certain minimum criteria that typically mirror the criteria required for firearm purchases.<sup>27</sup> Nine states are "may issue" states that typically impose minimum criteria but leave

---

21. Susannah Griffee, *Guns, Everywhere*, THE NEW YORKER (Apr. 20, 2012), <http://www.newyorker.com/news/news-desk/guns-everywhere>. See, e.g., MONT. CODE ANN. 70-24-110 (2015).

22. Michele Richinick, *Georgia's 'Gun's Everywhere' Bill Takes Effect*, MSNBC (July 1, 2014, 12:01 PM), <http://www.msnbc.com/msnbc/georgia-guns-everywhere-bill-takes-effect>.

23. *Id.*

24. *Open Carrying*, *supra* note 2.

25. *Concealed Weapons Permitting*, *supra* note 3.

26. *Id.*

27. *Id.*; see also, e.g., UTAH CODE ANN. 53-5-704(1)(a) (LexisNexis 2016) ("The bureau shall issue a permit to carry a concealed firearm for lawful self defense to an applicant who is 21 years of age or older within 60 days after receiving an application, unless the bureau finds proof that the applicant does not meet the qualifications set forth in Subsection (2)").

the final decision to the discretion of the sheriff or other issuing authority.<sup>28</sup> Only fourteen states require applicants to justify why they need to carry a concealed handgun and only twenty-seven states require any (even nominal) firearm safety training.<sup>29</sup>

The most common rule is if it is legal for you to carry it in public at all, you can carry it anywhere open to the public that is not on the state's list of prohibited places (e.g., statehouse, schools, churches, sometimes bars). Handguns or pistols generally have more carry restrictions than what are called "long guns," that is, rifles, AR-15s, and shotguns; only six states ban the open carry of long guns and only six other states restrict it in any way.<sup>30</sup> Carrying long guns out in public—wearing your AR-15 to J.C. Penney, walking down Main Street with an assault rifle,<sup>31</sup> or bringing them to Chipotle—is perfectly legal in many states.<sup>32</sup> Carrying a handgun into a private business, either openly or concealed depending on the state, is generally legal.<sup>33</sup> In many states, private business owners can only ban guns from their property by certain methods approved by state law.

### C. *The Right to Exclude Guns from Businesses Open to the Public*

Before we discuss the shortcomings of the laws governing how business owners can exercise their right to exclude guns, it is important to establish that businesses *have* the right to exclude. In the influential 2012 case, *GeorgiaCarry.org*, the Eleventh Circuit cemented this principal by marrying trespass law maxims to the Supreme Court's interpretation of the Second Amendment in *Hel-ler*.<sup>34</sup> In *GeorgiaCarry.org*, the defendants argued that a statute that permitted places of worship to ban weapons and long guns in their

---

28. *Concealed Weapons Permitting*, *supra* note 3.

29. *Id.*

30. There are no concealed carry restrictions on long guns because they are too large to conceal. *Open Carrying*, *supra* note 2.

31. See, e.g., Cavan Sieczkowski, *Joseph Kelley, Utah Man, Takes Rifle to J.C. Penney to Show Guns Can Be Safe*, HUFFINGTON POST (Jan. 18, 2013, 1:26 PM), [http://www.huffingtonpost.com/2013/01/18/joseph-kelley-gun-rifle-jc-penney-guns-safe-law-abiding-citizens\\_n\\_2504142.html](http://www.huffingtonpost.com/2013/01/18/joseph-kelley-gun-rifle-jc-penney-guns-safe-law-abiding-citizens_n_2504142.html).

32. Gail Sullivan, *Chipotle Asks Customers to Leave Assault Rifles at Home*, WASH. POST (May 20, 2014), <https://www.washingtonpost.com/news/morning-mix/wp/2014/05/20/chipotle-asks-customers-to-leave-assault-rifles-at-home/>.

33. It is presumptively legal to carry guns into private businesses, otherwise states would not make laws specifically banning them from certain places, e.g., bars or places with voluntarily posted compliant "No Guns" signs.

34. *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1261 (11th Cir. 2012).

buildings with the force of law was a violation of their First Amendment right to freely exercise their religion as well as a violation of their Second Amendment right to bear arms.<sup>35</sup> The court found that there was no First Amendment protection for the secular personal preference to bear arms and that the Second Amendment right to bear arms did not trump the “fundamental right” to exclude on private property.<sup>36</sup>

According to the Eleventh Circuit, the Second Amendment, as outlined by the Supreme Court in *Heller*, did not forbid “enforcing the Carry Law against a license holder who carries a firearm on private property against the owner’s instructions. . . .”<sup>37</sup> Indeed, the Eleventh Circuit found that *Heller* mandated that Second Amendment claims be read in the context of the historical background of the Amendment because according to *Heller*, the Amendment “codified a pre-existing right.”<sup>38</sup> The court further stated:

Plaintiffs cannot contend that the Second Amendment in any way abrogated the well-established property law, tort law, and criminal law that embodies a private property owner’s exclusive right to be king of his own castle. By codifying a pre-existing right, the Second Amendment did not expand, extend, or enlarge the individual right to bear arms at the expense of other fundamental rights; rather, the Second Amendment merely preserved the status quo of the right that existed at the time.<sup>39</sup>

The court based their holding—that a private property owner has a right to exclude guns—on Blackstone and the writings of the founding fathers. The court noted that “William Blackstone described a private property owner’s right to exclusive control over his or her own property as a sacred and inviolable right[ ].”<sup>40</sup> The court also stated that the founding fathers sought to protect the fundamental rights of property, not limit them, through the Constitution and Bill of Rights, citing John Adams’s *Defence of the Constitutions of Government of the United States*, where he wrote: “The moment the idea is admitted into society that property is not as sacred as the

---

35. *Id.* at 1258.

36. *Id.* at 1258, 1264.

37. *Id.* at 1266.

38. *Id.* at 1264.

39. *Id.*

40. *Id.* at 1261–62 (internal quotations and citations omitted); *see also id.* at 1262–63 (“Implied in this private action, as Blackstone explained it, is an exclusive right of an owner to eject an individual from the owner’s property and initiate a civil trespass action.”).



laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence.”<sup>41</sup>

Other courts have made similar holdings in the context of employment law, finding that an employer can ban its employees from having firearms in its buildings. For example, the Supreme Court of Utah in *Hansen v. America Online, Inc.* held that “despite its muscular claim to be one of our state’s clear and substantial public policies, the right of an employee to keep and bear arms cannot supplant the right of an employer to regulate the possession of firearms by employees within the workplace environment.”<sup>42</sup>

However, courts have also upheld some states’ laws prohibiting businesses from banning guns in their parking lots.<sup>43</sup> For example, in *Ramsey Winch Inc. v. Henry*, the Tenth Circuit stated that business owners required to permit employees to store guns in their locked cars in the business’s parking lots have “not suffered an unconstitutional infringement of their property rights, but rather are required by the [state law] to recognize a state-protected right of their employees.”<sup>44</sup> While these are related issues, they are beyond the scope of this Note, which focuses on the ability of a business to ban customers from carrying firearms into their buildings through the use of signs.

#### D. Current State Law on How Businesses Can Ban Firearms

While the right to ban firearms from one’s own building has largely been recognized, there is a striking lack of uniformity in how, and if, that right is protected under state law. “No Guns” sign posting laws vary widely by state in their requirements, in their location in the code, and in their penalties for violations. Beyond simple trespass law, many states have no laws on the books on the subject at all. The state laws governing a business owner’s right to ban guns are not only all different, but individually, they are often convoluted, unclear, unjust, and sometimes simply unconstitutional, making it difficult if not impossible for a business owner to enforce his or her property rights safely. The state’s ability to dictate the size, content, and placement of signs on private property is

---

41. *Id.* at 1265 (citing JOHN ADAMS, DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES (1787), reprinted in 6 THE WORKS OF JOHN ADAMS 3, 9 (Charles Francis Adams ed., 1851)).

42. *Hansen v. America Online, Inc.*, 96 P.3d 950, 953 (Utah 2004).

43. See Blocher, *supra* note 7, at 41.

44. *Ramsey Winch Inc. v. Henry*, 555 F.3d 1199, 1209 (10th Cir. 2009).

limited by the First Amendment. Kansas and Texas are two telling examples of the diversity of state regulation in this field.

### 1. Kansas

According to Kansas's concealed carry law, to ban concealed handguns or unconcealed firearms from the premises, business owners must post a state-created pictogram of a black handgun in a red circle with a slash through it (the universal prohibition sign).<sup>45</sup> The circle must be at least six inches in diameter, unobstructed, posted at all entrances no more than twelve inches from the door and between four and six feet from the ground.<sup>46</sup> However, even if a business follows the sign requirements exactly and an individual sees, understands, and ignores the sign, he is not automatically subject to criminal sanctions under the concealed carry law.<sup>47</sup> Violators are not subject to criminal sanctions unless the owner or other authorized person personally asks them to leave the premises.<sup>48</sup> If they then refuse to leave, they may be prosecuted for criminal trespass, which is a Class B Misdemeanor.<sup>49</sup> A Class B Misdemeanor is punishable under Kansas law by imprisonment not to exceed six months<sup>50</sup> and/or a fine not to exceed \$1,000.<sup>51</sup> A posting of the state-designed "No Gun" sign alone in the correct manner apparently does not meet the requirements of Kansas trespassing law, which requires either a personal request to vacate the premise by the owner or authorized person *or* the posting of "No Trespassing" signs in a "manner reasonably likely to come to the attention of intruders."<sup>52</sup>

### 2. Texas

By contrast, in Texas, open carry and concealed carry of handguns<sup>53</sup> are forbidden on private property without the owner's "effective consent," and certain signs by themselves have the force

---

45. KAN. STAT. ANN. §§ 75-7c24, 75-7c10 (Supp. 2016); KAN. ADMIN. REGS. § 16-11-7 (Supp. 2016).

46. KAN. STAT. ANN. §§ 75-7c24, 75-7c10; KAN. ADMIN. REGS. § 16-11-7.

47. KAN. STAT. ANN. §§ 75-7c24, 75-7c10; KAN. ADMIN. REGS. § 16-11-7.

48. KAN. STAT. ANN. §§ 75-7c24, 75-7c10; KAN. ADMIN. REGS. § 16-11-7.

49. KAN. STAT. ANN. § 21-5808 (Supp. 2016).

50. *Id.* § 21-6602.

51. *Id.* § 21-6611.

52. *Id.* § 21-5808.

53. There is no law regarding the carrying of long guns on private property.

of law.<sup>54</sup> The Texas Penal Code also has specific provisions regarding trespassing with handguns.<sup>55</sup> It is a Class A Misdemeanor to carry a handgun openly or concealed on private property after receiving personal oral notice that handguns are forbidden by the property owner or a person empowered to act with the owner's authority.<sup>56</sup> A Class A Misdemeanor is punishable by a fine not to exceed \$4,000 and/or a jail term not to exceed one year.<sup>57</sup> However, it is also a Class C Misdemeanor just to carry, whether openly or concealed, on private property that has posted signs according to the requirements of §§ 30.06 and/or 30.07.<sup>58</sup> Unlike a property owner in Kansas, a private property owner in Texas with 30.06 and 30.07 complaint signs does not have to ask the trespasser to leave in order for criminal trespass law to come into force.<sup>59</sup> However, a Class C Misdemeanor in this context is punishable only by a fine not to exceed \$200.<sup>60</sup>

Texas's sign requirements are significantly more burdensome than Kansas's. To be effective, a 30.06 sign must be clearly visible to the public and read *exactly* (in English and Spanish with contrasting colored block letters at least an inch high): "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."<sup>61</sup> As of January 1, 2016, business owners seeking to ban open carry of handguns, as well as concealed carry, have to post conspicuously, a second sign (in English and Spanish with contrasting colored block letters at least an inch high) that reads exactly: "Pursuant to Section 30.07, Penal Code (trespass by license holder with an openly carried handgun), a person licensed under Subchapter H, Chapter 411, Government Code (handgun licensing law), may not enter this property with a handgun that is carried openly." The required Spanish language

---

54. TEX. PENAL CODE ANN. §§ 30.06–.07 (West 2011 & Supp. 2016).

55. *Id.*

56. *Id.*

57. PENAL § 12.21 (West 2011).

58. PENAL §§ 30.06(b), 30.07(b) (West 2011 & Supp. 2016). Until the law was first amended in 2003, it was also Class A Misdemeanor just to violate the sign. *See* 1997 Tex. Sess. Law Serv. Ch. 126, § 23 (H.B. 2909) (West) (current version at TEX. PENAL CODE ANN. § 30.06 (West 2011 & Supp. 2016)).

59. PENAL §§ 30.06(b), 30.07(b).

60. PENAL §§ 30.06(d), 30.07(d).

61. PENAL § 30.06(c)(3)(A)–(B)(iii); 2015 Tex. Sess. Law Serv. Ch. 437, § 43 (H.B. 910) (West) (making it a criminal offense for a licensed handgun holder to openly carry a holstered handgun).

translation for either sign is not provided in the statute or in any known official publication by the Texas government.<sup>62</sup>

A single 30.06 sign can cost forty-one dollars and may need to be at least two feet tall by two feet wide to meet the statutory requirement.<sup>63</sup> It also must be “displayed in a conspicuous manner clearly visible to the public.”<sup>64</sup> After the January 2016 legalization of the open carry of handguns in Texas, a second, equally large, sign is also required to bar handguns completely from a business. This means that businesses wanting to ban handguns on their premises must post two signs, whose combined size could be at least four feet tall by two feet wide. Some of the Texas carry community interpret the law to mean if a single word is missing, or if the font is nine-tenths of an inch high instead of one inch high, they are legally and morally authorized to carry inside the business.<sup>65</sup>

Texas and Kansas are choice examples of “No Gun” sign regulations that are so fraught with flaws that they do not sufficiently protect a business owners’ right to ban firearms from their facilities.

## II. CURRENT STATE LAWS ON HOW BUSINESSES CAN BAN FIREARMS

Part II will first highlight the particular features of the patchwork of state laws that make them ineffective and unsafe. It will then argue that requiring large signs, like Texas’s, is unconstitutional under the First Amendment as unduly burdensome government compelled speech.

### A. *How State Laws Have Failed Businesses*

As mentioned previously, the divergence from state to state on how businesses can ban guns makes it very difficult for a national

---

62. PENAL §§ 30.06–.07.

63. As of January 1, 2016, for their signs to have the force of law, businesses must acquire and post new 30.06 signs (in addition to the new 30.07 signs) reflecting a minute change in the wording of law (conceal carry permits have just become carry permits). PENAL §§ 30.06–.07. For examples of complaint signs available online, see *Concealed Carry Texas Sign NHB-28237*, COMPLIANCE SIGNS.COM, [www.compliancesigns.com/NHB-28237.shtml](http://www.compliancesigns.com/NHB-28237.shtml) (last visited May 3, 2017).

64. PENAL § 30.06(c)(3)(B)(iii).

65. Tom Benning, ‘No open carry’ signs are likely to trigger the next Texas gun debate, DALLAS MORNING NEWS (June 2015), <https://www.dallasnews.com/news/local-politics/2015/06/21/no-open-carry-signs-are-likely-to-trigger-next-texas-gun-debate>. See generally *Your 30.06 & 30.07 Information Resource*, TEXAS3006.COM, <https://www.texas3006.com/view.php> (last visited May 3, 2017) (containing a user-created list of 30.06 and 30.07 signs with comments about their various defects).

business to adopt a uniform policy. This often results in businesses that might otherwise ban guns to settle for vaguely requesting that their customers not bring guns into their premises. Starbucks, for example, asked customers not to bring guns into their stores, saying that some customers have been “uncomfortable to see guns in their stores . . . especially when small kids are around.”<sup>66</sup> However, according to Starbucks policy, “store employees will not ask customers who come in with guns in holsters . . . to leave or confront them in any way. . . . No signs explaining the policy will be posted in Starbucks stores, either.”<sup>67</sup> Starbucks has a right to choose to ban guns in order to protect its customers and staff, but because many states do not have specific laws protecting this property right and those that do have such varied requirements, it is impossible to comply uniformly. Therefore, Starbucks is unable to effectively exercise their right—rendering the right a dead letter.

State laws on how to ban guns are also difficult to find and interpret. In some states, the ability to ban firearms from private property is never specifically mentioned and has to be read into the general trespass law.<sup>68</sup> In other states, it is specifically mentioned in trespass law as a particular type of trespass, e.g., trespass with a firearm.<sup>69</sup> In other states, the regulation on how to ban firearms is found in the statute regulating the concealed carry of handguns.<sup>70</sup> This placement makes it unclear whether businesses can similarly ban long guns and open carry. Because the statute’s placement in the code can invoke confusion regarding its application, even law enforcement seeking to enforce the code may be uncertain of the relevant regulations’ effects and scope.

Many state laws, such as Kansas’s, require that an authorized representative of the business approach the person with the gun and ask them to leave even after they have seen the legally compliant “No Guns” sign in the window.<sup>71</sup> This renders the sign and the law ineffective, because under all trespass law, if a person is asked to leave private property and he refuses, he is trespassing. This also puts store employees in the awkward, if not frightening, position of being forced to confront gun carriers in order to enforce their

---

66. Stephanie Strom, *Starbucks Seeks to Keep Guns Out of Its Coffee Shops*, N.Y. TIMES (Sept. 18, 2013), <http://www.nytimes.com/2013/09/19/business/starbucks-seeks-to-keep-guns-out-of-its-coffee-shops.html>.

67. *Id.*

68. *See, e.g.*, Miss. Att’y Gen. Op. No. 2013-00114, 2013 Miss. AG LEXIS 111 (2013).

69. *See, e.g.*, FLA. STAT. ANN. § 810.09(2)(c) (West 2017).

70. *See, e.g.*, N.C. GEN. STAT. ANN. § 14-415.11(c)(8) (West 2015); LA. STAT. ANN. § 40:1379.3(O) (Supp. 2017).

71. KAN. STAT. ANN. §§ 75-7c24, -7c10 (Supp. 2016); KAN. ADMIN. REGS. § 16-11-7 (Supp. 2016).

property rights, where, in contrast, under the simple trespass statute, a clearly posted sign would be sufficient to bar even unarmed people.<sup>72</sup>

People consent to be governed on the understanding that if we give the government a monopoly of the legitimate use of force, the government will maintain rule of law and protect our lives and private property for us.<sup>73</sup> Many states provide unclear and limited protection for a business's right to ban arms, which guts a fundamental property right that the state was created to protect. Just as an individual knows he can rely on the police to enforce and punish violations of his property right if someone trespasses on his clearly posted private land, so too should he know he can rely on the police to protect him and punish people who trespass into his business with guns in violation of clearly posted signs. A right does not effectively exist if no one knows they have it, how to exercise it, or if the government's restrictions on the ability to exercise the right are themselves otherwise unconstitutional.

### *B. Government Signs on Private Property and the First Amendment*

As discussed above, the right to exclude from one's property is a fundamental right; the Second Amendment does not give an individual the right to bring firearms into someone's business against the owner's will.<sup>74</sup> The First Amendment's limitation of compelled speech applies when the government requires a business to relay government speech, like a sign, in order to obtain an essential government benefit, like the protection of property rights.<sup>75</sup> Generally, requiring business owners to post specific signs if they wish to prohibit guns on the premises with the force of law is unlikely to infringe on First Amendment rights.<sup>76</sup> Just like the state can require specific placement and wording of "No Trespassing" signs to establish that an individual was given effective notice that they are not

---

72. KAN. STAT. ANN. § 21-5808 (Supp. 2016) (outlining that an individual is in violation of the basic trespass law just by entering a premises in defiance of appropriate signage).

73. See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §§ 123-26 (Richard Cox, ed., Harlan Davidson, Inc. 1988) (1690) (Social Contract Theory).

74. See *GeorgiaCarry.Org, Inc v. Georgia*, 687 F.3d 1244, 1261 (11th Cir. 2012).

75. See *All. for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 651 F.3d 218, 234 (2d Cir. 2011) ("Compelling speech as a condition of receiving a government benefit cannot be squared with the First Amendment").

76. See *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 131-32 (2d Cir. 2009) (holding that laws compelling restaurants to post calorie counts on menus was commercial speech and was therefore constitutional since commercial speech is less protected than non-commercial speech).

welcome, the state likely can require specific placement and wording of “No Guns” signs. Signs, such as Kansas’ six-inch pictogram, that are purely informative as to store policy and are reasonable in size, so as to give effective notice to potential customers without unduly burdening the business owners, are not likely to be found to be unconstitutional compelled speech.<sup>77</sup>

However, other sign posting laws that are more similar to those of Texas have been found to be unconstitutional compelled speech because their size and content requirements are unduly burdensome and restrictive.<sup>78</sup> If a state’s “No Guns” sign posting requirements force business owners to post non-factual or controversial government speech, or to post a sign in a manner that unduly impedes their own speech, the law violates the business owner’s First Amendment rights.<sup>79</sup> The excessively large signs and detailed requirements are not necessary to achieve the only conceivably legitimate purpose of notice; the only conclusion this Note can draw is that they are the Texas legislature’s way of trying to make it difficult for storeowners to exercise their right to exclude firearms. The sign impedes business owners’ own speech by taking up large amounts of space in their businesses and by forcing the businesses to use the government’s language to convey their position on a controversial issue.<sup>80</sup>

The level of scrutiny courts will apply depends on which circuit the case is brought in and if the “No Guns” signs are found to be commercial speech which conveys an uncontroversial fact. The next Part will review the current state of the law on compelled speech and explain why, if the Texas law and laws like it are reviewed, a court would be hard pressed to find the law sufficiently narrowly tailored or the government interest sufficiently substantial or compelling.

### 1. A Closer Look at Compelled Speech

An individual’s or business’s First Amendment right to speak freely or remain silent is not unlimited. “Core political speech” enjoys the most First Amendment protection; it is defined as “[c]onduct or words that are directly intended to rally public support for a particular issue, position, or candidate; expressions,

---

77. See, e.g., *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 107 (2d Cir. 2001); See also *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 524 (6th Cir. 2012).

78. See, e.g., *Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation*, 512 U.S. 136 (1994).

79. See, e.g., *Evergreen Ass’n v. City of New York*, 740 F.3d 233, 245–50 (2d Cir. 2014).

80. *Id.* at 245.

proposals, or interactive communication concerning political change.”<sup>81</sup> However, not all types of speech are so protected; commercial speech is “[c]ommunication (such as advertising and marketing) that involves only the commercial interests of the speaker and the audience, and is therefore afforded lesser First Amendment protection than social, political, or religious speech.”<sup>82</sup> The Supreme Court has “recognized a ‘commonsense’ distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.”<sup>83</sup> Depending on the type of commercial speech regulation, laws regarding commercial speech are typically subject to either intermediate or rational basis scrutiny.<sup>84</sup>

The extent of an individual’s right to remain silent also varies depending on the circumstances and content of the speech.<sup>85</sup> Compelling political speech is forbidden; the state cannot force an individual “to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.”<sup>86</sup> On the other hand, compelling a business to tell their consumers something, or post certain information relevant to their commercial interests, is more permissible under the First Amendment.<sup>87</sup> How permissible it is depends on the information the government wants relayed. Requiring a business to post a certain political view or opinion runs contrary to the core values of the First Amendment, but requiring a business to inform consumers of relevant facts (e.g., the price, condition, and proven side effects of its products) to prevent consumer deception furthers underlying First Amendment values.<sup>88</sup>

Later sections of this Note will delve into this in more detail, but some Circuits review all factual and uncontroversial commercial disclosure requirements under a rational basis, and not unjustified or

---

81. *Core Political Speech*, BLACK’S LAW DICTIONARY, (10th ed. 2014); *see also* *Meyer v. Grant*, 486 U.S. 414, 421 (1988).

82. *Commercial Speech*, BLACK’S LAW DICTIONARY, (10th ed. 2014); *see also* *N.Y. State Rest. Ass’n*, 556 F.3d at 131–32 (“the protection afforded commercial speech is somewhat less extensive than that afforded noncommercial speech”).

83. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 562 (1980) (internal quotation marks omitted).

84. *See, e.g., Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001). Some Circuits do not refer to the specific standard of scrutiny by name, but rather by definition, for the sake of simplicity, the standards are herein referred to by name. Some also say they are unsure which standard should apply but under any standard, this is constitutional (or unconstitutional, as the case may be).

85. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 629 (1943).

86. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

87. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

88. *Id.*



unduly burdensome, standard; others may require that the disclosure be for the purpose of correcting consumer deception to justify applying the lower standard.<sup>89</sup> The D.C. Circuit has stated that if the disclosure required is not purely factual and uncontroversial, the law should be reviewed by an intermediate or strict scrutiny test.<sup>90</sup> However, the Sixth Circuit has held that the intermediate scrutiny test is reserved for laws *restricting* commercial speech and that laws *compelling* commercial speech are to be reviewed using a rational basis test if the speech is factual and strict scrutiny if the speech is opinion.<sup>91</sup>

Requiring a business to relay government speech, like a sign, in order to obtain a government benefit—especially a fundamental one like protection of property rights—is compelled speech and is limited by the First Amendment.<sup>92</sup> As the Second Circuit said in *Alliance for Open Society International, Inc. v. United States Agency for International Development*, “[c]ompelling speech as a condition of receiving a government benefit cannot be squared with the First Amendment.”<sup>93</sup> For example, if someone opens a restaurant on their property, they are doing that voluntarily; the government is not forcing them to open a restaurant or even use their property at all. But that does not make any signs the government mandates as a condition of being permitted to operate a restaurant any less compelled.<sup>94</sup> Similarly, just because a business owner is choosing to operate a business and choosing to ban firearms, does not make the sign the government requires them to post to operate a business while banning firearms any less compelled.

## 2. Compelled Speech Relating to Politics or Opinion

The right of an individual or business not to express a government opinion or political belief is a core First Amendment right; laws impinging on this right are reviewed using a strict scrutiny

---

89. *N.Y. State Rest. Ass’n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 133–34 (2d Cir. 2009); *Pharm. Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294, 310 (1st Cir. 2005).

90. *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 27 (D.C. Cir. 2014); *see also Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 564 (1980).

91. *See Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 532 (6th Cir. 2012).

92. *See All. for Open Soc’y Int’l, Inc. v. U.S. Agency for Int’l Dev.*, 651 F.3d 218, 234 (2d Cir. 2011).

93. *Id.*

94. *See N.Y. State Rest. Ass’n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 132 (2d Cir. 2009) (requiring restaurants to post calorie counts was compelled speech but not unconstitutionally compelled speech).

test.<sup>95</sup> The Seventh Circuit has summarized the Supreme Court's definition of strict scrutiny:

To survive strict scrutiny, the [law] must be narrowly tailored to promote a compelling Government interest. Generally, a statute is narrowly tailored only if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy. Put another way, a statute is not narrowly tailored if a less restrictive alternative would serve the Government's purpose.<sup>96</sup>

The two seminal Supreme Court cases using strict scrutiny to bar laws compelling statements of government opinions and political beliefs are *West Virginia State Board of Education v. Barnette* and *Wooley v. Maynard*.<sup>97</sup> In *Barnette*, the Supreme Court found that a resolution by the West Virginia State Board of Education which mandated that all students participate in the Pledge of Allegiance to the Flag on pain of expulsion and subsequent prosecution for delinquency unconstitutionally violated the First Amendment.<sup>98</sup> The plaintiffs were Jehovah's Witnesses who believed the Pledge broke the Second Commandment forbidding the worship of graven images.<sup>99</sup> The Court held that the flag was a "symbol of adherence to government as presently organized. It requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks."<sup>100</sup> The Court found that the First Amendment may only be infringed upon to protect against grave and immediate danger to state interests and that the failure to salute the flag did not present one of those dangers.<sup>101</sup> In fact, the Court found that forcing individuals to state an opinion they did not themselves hold threatened democracy, stating that "[t]hose who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."<sup>102</sup> Similarly, in *Wooley*, the Supreme Court found

---

95. See *Disc. Tobacco City & Lottery, Inc.*, 674 F.3d at 554.

96. *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 646 (7th Cir. 2006) (internal quotation marks and citations omitted).

97. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 629 (1943); *Wooley v. Maynard*, 430 U.S. 705, 716–17 (1977).

98. *Barnette*, 319 U.S. at 642.

99. *Id.*

100. *Id.* at 633.

101. See *id.* at 639–41; *Wooley*, 430 U.S. at 716–17.

102. *Barnette*, 319 U.S. at 639–41; see also *id.* at 642 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can 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.").

that New Hampshire's mandate that their state motto, "Live Free or Die," appear on license plates was unconstitutional because it required an individual to express adherence to a belief in a way of life contrary to their true beliefs.<sup>103</sup>

After determining that firearms prohibition signs are compelled speech, the next question determining the limits of firearms prohibition signs is whether or not they are pure commercial speech or social/political speech by a business. Since commercial speech is defined as speech only related to the commercial interest of the speaker,<sup>104</sup> a "No Guns" sign, even at a retail location, may not qualify as pure commercial speech, because it relays a voluntary judgment by the business owner on what may be permitted on his private property based on his personal morals and opinions about safety.

Some courts have also framed the issue in the context of commercial speech as turning on whether the speech relays a controversial or noncontroversial fact.<sup>105</sup> From the recent presidential political campaigns it is clear that gun regulation, like abortions, is one of a few issues that motivates a large number of single-issue voters.<sup>106</sup> Like abortion regulations, firearms regulations must be viewed carefully in the greater context of the fierce public debate over the morality and efficacy of firearms bans because the First Amendment is designed to safeguard expression on public issues.<sup>107</sup>

The Second Circuit has found that how, when, and what factual information on controversial political issues is relayed by a business is not pure commercial speech and is further protected by the First Amendment.<sup>108</sup> For example, the court found that two out of three of New York City's posting laws regulating "pregnancy services" centers (religiously affiliated institutions that appear to be medical centers seeking to attract pregnant women and discourage them from seeking an abortion or emergency contraception) violated the First Amendment.<sup>109</sup> The court found that intermediate or strict scrutiny should apply because the compelled speech involved was

---

103. *Wooley*, 430 U.S. at 715 ("New Hampshire's statute in effect requires that appellees use their private property as a "mobile billboard" for the State's ideological message[.]").

104. See *Commercial Speech*, BLACK'S LAW DICTIONARY (10th ed. 2014).

105. *Evergreen Ass'n v. City of New York*, 740 F.3d 233, 249–50 (2d Cir. 2014) ("Because it mandates discussion of controversial political topics, the Services Disclosure differs from the 'brief, bland, and non-perjorative disclosure' required by the Status Disclosure.").

106. Sam Frizell, *Why Hillary Clinton Thinks Gun Control Can Win in 2016*, TIME MAGAZINE (Nov. 25, 2015), <http://time.com/4101947/hillary-clinton-guns-democrats/>.

107. *Evergreen Ass'n*, 740 F.3d at 249.

108. *Id.* at 245.

109. *Id.*

not the disclosure of purely factual and uncontroversial information about a commercial transaction by a commercial entity.<sup>110</sup> The city's interest in preventing delays in access to reproductive health services was compelling and the requirement that centers disclose whether the center has a licensed medical professional on staff was sufficiently narrowly tailored because it was the only way the city could be sure that a person would be informed if a particular facility offered medical services.<sup>111</sup>

However, the court found that “[a] requirement that pregnancy services centers address abortion, emergency contraception, or prenatal care at the beginning of their contact with potential clients alters the centers’ political speech by mandating the manner in which the discussion of these issues begins” and was therefore not sufficiently narrowly tailored because the information could be implied by presence or lack of medical staff.<sup>112</sup> Finally, the court found that the requirement that the center post, in conjunction with the disclosure of the existence of medical services, a message from the New York Department of Health, stating that the New York Department of Health encourages women who might be pregnant to consult with a licensed professional, was also not sufficiently narrowly tailored as it would force the centers to state government speech that could be effectively conveyed through alternate means, such as public advertising.<sup>113</sup>

Similarly, in *Entertainment Software Association v. Blagojevich*, the Seventh Circuit found that a regulation requiring that certain video games be labeled as sexually explicit was subject to strict scrutiny review because the regulation forced businesses to adopt the regulator’s subjective opinion on what was sexually explicit.<sup>114</sup> In *Alliance*

---

110. *Id.* at 245 n.6.

111. *Id.* at 247.

112. *Id.* at 249–50 (2d Cir. 2014). Other courts are less willing to apply higher standards of scrutiny just because the subject matter is controversial. *C.f.* *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 569 (6th Cir. 2012) (“As set forth above, whether a disclosure is scrutinized under *Zauderer* [setting a rational basis standard for compelled disclosure of purely factual information] turns on whether the disclosure conveys factual information or an opinion, not on whether the disclosure emotionally affects its audience or incites controversy.”).

113. *Evergreen Ass’n v. City of New York*, 740 F.3d 233, 250–51 (2d Cir. 2014). *C.f.* *Texas Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576 (5th Cir. 2012) (“First, informed consent laws that do not impose an undue burden on the woman’s right to have an abortion are permissible if they require truthful, nonmisleading, and relevant disclosures. Second, such laws are part of the state’s reasonable regulation of medical practice and do not fall under the rubric of compelling “ideological” speech that triggers First Amendment strict scrutiny. Third, “relevant” informed consent may entail not only the physical and psychological risks to the expectant mother facing this “difficult moral decision,” but also the state’s legitimate interests in “protecting the potential life within her.”).

114. *Entm’t Software Ass’n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006).

for *Open Society International, Inc. v. United States Agency for International Development*, the Second Circuit also found that conditioning the receipt of federal funds for the prevention of HIV/AIDS on an NGO's open condemnation of prostitution warranted heightened scrutiny and was unconstitutional because "the targeted speech . . . is the subject of international debate."<sup>115</sup> The right to communicate freely on such matters of public concern lies at the heart of the First Amendment."<sup>116</sup>

Just as "pregnancy services" centers can be compelled to disclose the vital consumer information about the presence or absence of medical personnel, so can a business be required to disclose if firearms are banned from their facility if they want to enforce the ban, because notice of potential criminal liability is information vital to both a businesses' consumers and law enforcement. However, just as regulations affecting the center's ability to introduce and relay its position on the highly charged issue of abortion must be scrutinized under heightened scrutiny, so too must regulations effecting how a business expresses its highly controversial decision to ban firearms. The decision to post a "No Guns" sign is an inherently political one rooted in the business owner's personal beliefs and the content of a sign expressing that decision will appear to express the owner's beliefs on the matter. Requiring a large sign with specific language and format can amount to the government forcing a business owner to express their nuanced personal political belief through a government form message. This compelled expression of agreement with the government's exact position amounts to compelled political speech and necessitates heightened scrutiny.

### 3. Constitutional Compelled Commercial Speech

While compelling businesses to relay government political views or opinions on matters of public debate is often prohibited, courts have repeatedly ruled that requiring merchants to disclose certain *facts* to consumers is constitutional compelled commercial speech.<sup>117</sup> Commercial speech is communication regarding "only the commercial interests of the speaker and the audience."<sup>118</sup> The Supreme Court has held that "[t]he government may ban forms of communication more likely to deceive the public than to inform it

---

115. *All. for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 651 F.3d 218, 225 (2d Cir. 2011).

116. *Id.* at 236.

117. *E.g., Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650–51 (1985).

118. *Commercial Speech*, BLACK'S LAW DICTIONARY, (10th ed. 2014).

or commercial speech related to illegal activity.”<sup>119</sup> Compelling the disclosure of information on the hidden costs of a product, where a product is from, and health risks of a product has been found constitutional.<sup>120</sup> For example, in *Discount Tobacco City*, requiring text and image warning labels on cigarette cartons was considered constitutional compelled speech.<sup>121</sup>

In *Central Hudson*, the Supreme Court established a four-part test to determine the constitutionality of government restrictions of commercial speech:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.<sup>122</sup>

In *Zauderer v. Office of Disciplinary Counsel*, the Supreme Court introduced a rational basis standard in reviewing laws compelling commercial factual disclosures for the purpose of preventing consumer deception.<sup>123</sup> The law at issue in *Zauderer* was a requirement that an attorney advertising that he took clients on a contingency fee basis must also disclose that clients will have to pay court costs even if their lawsuits are unsuccessful.<sup>124</sup> The Supreme Court held that while compelling citizens to speak prescribed opinions was subject to strict scrutiny, compelling businesses to disclose factual information is constitutional so long as the “disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers” and are not “unjustified or unduly burdensome” in a way that chills “protected commercial speech.”<sup>125</sup> The Court stated that the biggest reason true and licit commercial speech is constitutionally protected from restriction is the value additional information provides to consumers, and accordingly, that a

---

119. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563–64 (1980) (internal citations omitted).

120. *See Zauderer*, 471 U.S. at 651; *N.Y. State Rest. Ass’n v. N.Y.C. Bd. of Health*, 556 F.3d 114 (2d Cir. 2009); *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18 (D.C. Cir. 2014).

121. *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012).

122. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566.

123. *Id.* at 650.

124. *Id.* at 652.

125. *Id.* at 651.

business's protection from compelled disclosure of "any particular factual information in [its] advertising is minimal," because disclosing more facts can only improve the information available to the consumers.<sup>126</sup> The Court said that it was reasonable to believe that failing to disclose that clients would be liable for a lawsuit's costs even if they hire an attorney on a contingency fee basis might mislead consumers into believing that a lawsuit would cost them nothing if they lost.<sup>127</sup> Accordingly, the Court found that the state "requirement that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available" was constitutional.<sup>128</sup>

Following the Supreme Court's decision in *Zauderer*, the lower courts began using a rational basis standard of review for laws that compelled the disclosure of "purely factual and uncontroversial information" to "[prevent] deception of consumers."<sup>129</sup> When the compelled commercial speech was both not "factual" or "uncontroversial," and was not intended to "[prevent] deception of consumers," courts used the strict scrutiny standard required for compelled non-commercial speech or compelled opinions.<sup>130</sup>

When compelled commercial speech is factual but not intended to prevent deception of consumers, many courts are uncertain as to whether *Zauderer*'s rational basis scrutiny or *Central Hudson*'s intermediate scrutiny should apply.<sup>131</sup> Some argue that *Zauderer* is just an application of *Central Hudson*, because the first step of the *Central Hudson* test is to decide if the speech is First Amendment protected, that is, speech that is not unlawful and not deceptive.<sup>132</sup> *Zauderer* explicitly permits compelled speech for the limited purpose of correcting consumer deception, thus falling within the exception to *Central Hudson*.<sup>133</sup> *Central Hudson* says the First Amendment does not give businesses the right to lie to their consumers; if a business' speech is a lie, then they do not get any First Amendment protection, let alone intermediate scrutiny.<sup>134</sup> *Zauderer* rational basis scrutiny applies when allowing the business to remain silent—that is allowing the business to *hide* a fact—would propagate a deception. Under this analysis, the use of rational basis scrutiny in

---

126. *Id.*

127. *Id.* at 653.

128. *Id.* at 651.

129. *Id.*

130. *Id.*; see *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006).

131. See *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 23 (D.C. Cir. 2014).

132. See *Cent. Hudson*, 447 U.S. at 564.

133. See *id.* at 562–63.

134. See *id.* at 563.

*Zauderer* really turns on whether the compelled speech is meant to prevent consumer deception. Laws compelling speech for purposes other than to prevent consumer deception therefore should be evaluated under the *Central Hudson* intermediate scrutiny test.<sup>135</sup>

However, other courts read *Zauderer* as turning more on the difference between restricting commercial speech (like in *Central Hudson*) and compelling commercial speech than on correcting consumer deception.<sup>136</sup> Recently, at least three circuit courts have started to apply the *Zauderer* rational basis test not just to “factual and uncontroversial” compelled commercial speech intended to “[prevent] consumer deception,” but also to “factual and uncontroversial” compelled commercial speech intended to serve government interests other than correcting deception.<sup>137</sup> For example, the Second Circuit has found that it does not violate a restaurant’s First Amendment rights to require it to post the calorie counts of its dishes.<sup>138</sup> The Second Circuit, following the Supreme Court, applied the rational basis test because the regulations merely compelled disclosure of purely factual and uncontroversial information.<sup>139</sup> They found that disclosure furthered rather than hindered First Amendment values of truth and the free market of ideas.<sup>140</sup> Thus, the city mandate of the disclosure of the caloric information on menus was constitutional because it was reasonably related to the legitimate state interest in combating obesity.<sup>141</sup>

Likewise, in *American Meat Institute*, the D.C. Circuit applied the rational basis test and found that requiring meat producers to include country-of-origin labels on their packaging was reasonably related to the government interests of “enabl[ing] consumers to

---

135. This argument was most notably adopted in *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1214 (D.C. Cir. 2012), but that was overturned by *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 22 (D.C. Cir. 2014) (“To the extent that other cases in this circuit may be read as holding to the contrary and limiting *Zauderer* to cases in which the government points to an interest in correcting deception, we now overrule them.”). While the D.C. Circuit may no longer view this argument as valid, some other Circuits and the Supreme Court have not yet decided the question.

136. *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 552 (6th Cir. 2012) (“Laws that restrict speech are fundamentally different than laws that require disclosures, and so are the legal standards governing each type of law.”).

137. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650 (1985); *see, e.g., Am. Meat Inst.*, 760 F.3d at 21 (“To the extent that other cases in this circuit may be read as holding to the contrary and limiting *Zauderer* to cases in which the government points to an interest in correcting deception, we now overrule them”); *Pharm. Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005); *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 113–15 (2d Cir. 2001).

138. *N.Y. State Rest. Ass’n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 132 (2d Cir. 2009).

139. *Id.* at 132.

140. *Id.*; *see also Nat’l Elec. Mfrs. Ass’n*, 272 F.3d at 114–15.

141. *N.Y. State Rest. Ass’n*, 556 F.3d at 132.



choose American-made products; the demonstrated consumer interest in extending country-of-origin labeling to food products; and the individual health concerns and market impacts that can arise in the event of a food-borne illness outbreak.”<sup>142</sup> Accordingly, some uncertainty remains if government action compelling commercial speech for purposes other than to prevent consumer deception receives intermediate or rational basis scrutiny.

In this case, the “No Guns” signs are not meant to prevent consumer deception, so if the *Zauderer* rational basis test should only be applied when the purpose of the regulation is to prevent consumer deception, *Central Hudson* intermediate scrutiny should apply. However, as previously noted, there has been a trend towards applying *Zauderer* when the government justifies a regulation on grounds other than preventing consumer deception. Accordingly, it is unlikely that a court would subject the sign regulations to heightened scrutiny *just* because they are not intended to prevent consumer deception.

#### 4. Unduly Burdensome Disclosures and Compelled Speech

Often it can be said that deciding the level of scrutiny decides the case; in this instance, however, even under the rational basis test, the Texas law fails because it is unduly burdensome. In 1985, the Supreme Court introduced the idea that even if the state had a rational reason for compelling the disclosure of factual commercial information, there was a line at which disclosure requirements become so excessive as to become unconstitutional: “[w]e recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech.”<sup>143</sup> The Supreme Court looked further at this issue in *Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation*.<sup>144</sup> In *Ibanez*, the state required anyone who used a specialist designation on a business card, advertisement, or letterhead to have in immediate proximity a disclaimer stating that the specialist designation was not government sanctioned and outlining the “recognizing agency’s requirements for recognition, including, but not limited to, education, experience[,] and testing.”<sup>145</sup> The Court, referencing *Zauderer*,

---

142. *Am. Meat Inst.*, 760 F.3d at 23. See also, *Pharm. Care Mgmt. Ass’n*, 429 F.3d at 310 n.8.

143. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

144. *Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation*, 512 U.S. 136 (1994).

145. *Id.* at 146.

stated the disclosure requirement was an unduly burdensome restriction on First Amendment rights because there was no evidence that the specialist designation actually deceived people and “[t]he detail required in the disclaimer currently described by the Board effectively rules out notation of the “specialist” designation on a business card or letterhead, or in a yellow pages listing” because the disclaimer required would take up too much space.<sup>146</sup>

Subsequent circuit court cases have helped draw the line between constitutional disclosure requirements and unduly burdensome ones. For example, in *Entm’t Software Ass’n v. Blagojevich*, the Seventh Circuit found that the requirement of a four-inch sticker on a video game was insufficiently narrowly tailored and was therefore unduly burdensome.<sup>147</sup> The court commented that the state failed to explain why a smaller sticker would not suffice and stated that “[c]ertainly we would not condone a health department’s requirement that half of the space on a restaurant menu be consumed by the raw shellfish warning.”<sup>148</sup> The court also stated that the requirement that video game retailers have three eighteen-by-twenty-four inch signs in their stores was unduly burdensome, remarking that “many video game stores are as small as one room in an indoor mall. Little imagination is required to envision the spacing debacle that could accompany a small retailer’s attempt to fit three signs, each roughly the size of a large street sign, into such a space.”<sup>149</sup>

Other circuits’ dicta and decisions have suggested a similar take on unduly burdensome disclosures. In *American Meat*, the D.C. Circuit said, “Finally, though it may be obvious, we note that *Zauderer* cannot justify a disclosure so burdensome that it essentially operates as a restriction on constitutionally protected speech . . . [n]or can it sustain mandates that ‘chill[] protected commercial speech.’”<sup>150</sup> Similarly, the Fifth Circuit held that a regulation of attorney advertising was unconstitutional when it required extensive disclaimers printed in font as large as the largest font printed elsewhere in the ad or spoken slower than the pitch in radio and video ads.<sup>151</sup> The court found there was insufficient evidence that the disclaimer’s font size and speed of speech were reasonably related to the “substantial interests in preventing consumer deception and

---

146. *Id.*

147. *Entm’t Software Ass’n v. Blagojevich*, 469 F.3d 641, 653 (7th Cir. 2006).

148. *Id.*

149. *Id.*

150. *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 27 (D.C. Cir. 2014).

151. *Pub. Citizen, Inc. v. La. Att’y Disciplinary Bd.*, 632 F.3d 212 (5th Cir. 2011).

preserving the ethical standards of the legal profession.”<sup>152</sup> Additionally, the court found that the large font and slow speech requirements for lengthy disclaimers effectively eliminated a lawyer’s ability to use small print ads or short radio or TV commercials, thus unduly limiting the lawyer’s constitutionally protected speech.<sup>153</sup>

An easy parallel can be drawn to the larger and more complex “No Guns” signs required by some states if businesses want to ban guns under pain of criminal sanctions. The Texas sign requirements are a perfect example: business owners wanting to ban both open and concealed carry of handguns have to conspicuously post a sign (or two, presently no single sign covering both 30.06 and 30.07 seems to be commercially available. Regardless, given the font size mandated, even a combined sign would still probably be at least 4 feet tall and two feet wide) in English *and* Spanish (with contrasting colored block letters at least an inch high) where the English reads exactly:

“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.”<sup>154</sup>

“Pursuant to Section 30.07, Penal Code (trespass by license holder with an openly carried handgun), a person licensed under Subchapter H, Chapter 411, Government Code (handgun licensing law), may not enter this property with a handgun that is carried openly.”<sup>155</sup>

The question the Texas government would have to answer on judicial review, regardless of the standard of scrutiny, is the same as the ones the government had to answer in *Ibanez*, *Entertainment Software*, and even *Evergreen Association*: does the disclosure requirement unduly burden the business’s speech?<sup>156</sup> Like in *Ibanez* and *Entertainment Software*,<sup>157</sup> a court confronted with the size, detail, and placement of the sign Texas requires (estimated about two feet

---

152. *Id.* at 229.

153. *Id.*

154. TEX. PENAL CODE ANN. § 30.06 (West 2011 & Supp. 2016) (concealed carry trespassing).

155. PENAL § 30.07 (open carry trespassing).

156. *Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation*, 512 U.S. 136, 146 (1994); *see Entm’t Software Ass’n v. Blagojevich*, 469 F.3d 641, 653 (7th Cir. 2006).

157. *Id.*

by four feet in a prominent location) will almost certainly find it unduly burdensome, particularly when confronted with the alternative of the moderately sized universal prohibition sign accompanied by the statute cite that other states have adopted that achieves the government end of notice just as well as the large sign required by Texas.

Requiring a very large firearms prohibition sign with extensive government language will unduly limit the store owners' ability to speak on the subject themselves, for, once having posted a two-by-four-foot sign, it is unlikely the average small business owner will have room for any other signs to explain the nuances of his position on the subject, or indeed, any other. This restriction on a business owner's speech effectively curtails his First Amendment rights to join the national and local debate on a critical political issue. Just like the large stickers and signs found unduly burdensome by the Seventh Circuit in *Entertainment Software Association* and the long explanation found unduly burdensome by the Supreme Court in *Ibanez*, the signs required by Texas are unnecessarily large and, given the small size of most retailers, seriously and unconstitutionally limit a business's speech.

Accordingly, states must ensure that they adapt reasonable signs requirements such that they do not unduly burden speech or excessively express government messages so as not to run afoul of the First Amendment. The model rule proposed in Part III is composed with these First Amendment limitations in mind.

### III. A MODEL LAW FOR THE PROHIBITION OF GUNS IN BUSINESSES OPEN TO THE PUBLIC

After examining the deficiencies in the existing laws on firearms prohibitions the solution is clear: states should uniformly amend their trespass or firearms codes to automatically impose criminal sanctions for carrying a handgun *or* long gun (open or concealed) on private property conspicuously marked with the standard sign many states have already adopted—a pictogram, small enough to be printed from a computer, of a gun with a circle around it and a slash through it. The prohibition sign should be accompanied by the words: "Open and Concealed Carry of Firearms Prohibited Under [statute number cite]." The standardization of the sign and its simplicity will enable national businesses to enact it universally and make clear to businesses, gun carriers, and law enforcement what the law is. Giving the sign the automatic force of law will both protect businesses from the unenviable position of having to ask

individuals with guns to leave and discourage gun carriers from flaunting the proscriptions they know businesses owners are too intimidated to enforce.

Finally, the reasonable size, cost, and speech of the sign will guarantee it is sufficiently narrowly tailored to meet the government interest of providing notice to gun carriers without being unduly burdensome to businesses, saving the legislation from being struck down as unconstitutional compelled speech. The difference between Supreme Court dicta in *Zauderer* and *Ibanez* illustrates why the Texas sign laws are unconstitutional as unduly burdensome while the ones proposed here are not. In *Zauderer*, the Supreme Court held it was reasonable to require that an attorney advertising that he took clients on a contingency fee basis also include a line in his advertisement saying that clients will have to pay court costs even if their lawsuits are unsuccessful.<sup>158</sup> In *Ibanez* the Court implied it was unduly burdensome to demand that whenever a lawyer used a specialist designation in a business card, letterhead, or ad, that they also make a disclaimer

in the immediate proximity of the statement that implies formal recognition as a specialist; the disclaimer must stat[e] that the recognizing agency is not affiliated with or sanctioned by the state or federal government, and it must set out the recognizing agency's requirements for recognition, including, but not limited to, educatio[n], experience[,], and testing.<sup>159</sup>

In *Ibanez* the required text was so lengthy so as to effectively foreclose the possibility of using the specialist designation on letterhead, business cards, or newspaper ads,<sup>160</sup> in Texas the required signage is so large so as to effectively foreclose the possibility of banning firearms in small businesses. Like the short disclaimer required in *Zauderer*,<sup>161</sup> the modest proposed model regulation sign size, the size of a piece of printer paper, is the minimum size required to effectively communicate the necessary, brief message.

---

158. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 652 (1985).

159. *Ibanez*, 512 U.S. at 146 (1994) (internal quotations omitted).

160. *Id.*

161. *Zauderer*, 471 U.S. at 652.

*A. Location of the Statute*

Where a law is located in the state code can have an effect on the breadth of its use and its meaning. Laws regulating banning firearms from private property are sourced from one of four places: the concealed carry statute, the firearms statute, a specific provision in the trespass code, or mere implication in the trespass code.<sup>162</sup> For example, the Texas statutes, 30.06 and 30.07, are properly located in the Texas Penal Code Chapter on Burglary and Criminal Trespass, and are thus easy to find and outline clear penalties for violations.<sup>163</sup>

Mississippi firearms and trespass statutes, on the other hand, have remained wholly silent on the issue. The Mississippi Attorney General has filled the void by issuing an opinion that reads into the trespass statute the ability of the owner or manager of a store or restaurant to deny entry, verbally or by posting a sign, to people carrying open or concealed weapons on penalty of criminal sanctions.<sup>164</sup> While the breadth of the implied exclusionary power of the Mississippi criminal trespass statute is empowering to business owners who want to exclude any type of weapon from being carried in any way on their premises, there is a critical notice problem. Business owners do not have any way of knowing they have this silent right—it is unlikely they read the Mississippi AG’s advisory opinions to the legislature in their spare time. Likewise, firearm carriers are given little notice that they have a legal obligation to comply with posted signs on pain of criminal penalties. Explicitly writing into the trespass statute or the firearms statute a right of business owners to exclude, with the posting of a sign, handguns and long guns from being carried onto their premises, openly or concealed, under pains of imprisonment or fine, will correct this notice problem, empower business owners, and protect gun carriers from accidental violations.

*B. Breadth of the Statute*

Part III.B will examine how the breadth of the underlying state statute affects a business owner’s ability to effectively ban firearms: Does it specifically allow for the ban of long guns and handguns?

---

162. See, e.g., TEX. PENAL CODE ANN. §§ 30.06–.07 (West 2011 & Supp. 2016); Miss. Att’y Gen. Op. No. 2013-00114, 2013 Miss. AG LEXIS 111 (2013).

163. PENAL §§ 30.06–.07.

164. Miss. Att’y Gen. Op. No. 2013-00114, 2013 Miss. AG LEXIS 111 (2013).

Does it allow for the ban of open and concealed carry? Does violation of the sign carry the threat of criminal sanctions?

### 1. Handguns and Long Guns

The specific language of the statute has the most significant impact on how much it protects a business owner's rights. For example, Texas statutes 30.06 and 30.07 explicitly permit the exclusion of open and concealed handguns by posting a sign.<sup>165</sup> The statutes do not, however, address a business owner's ability to exclude long guns.<sup>166</sup> So, while a Texas business owner with properly posted 30.06 and 30.07 signs can exclude under pain of criminal penalty the .38 a customer has on his belt, the business owner is nowhere explicitly given the power to exclude the AR-15 semi-automatic rifle a customer has strapped across his chest. Indeed, applying the commonly used rule of statutory construction, *expressio unius est exclusio alterius*,<sup>167</sup> the existence of a criminal trespass statute stating that handguns can be prohibited with properly posted signs, implies that other weapons cannot be prohibited with signs, because if the legislature had intended them to be prohibited, they would have been included in the statute or the statute would have been written more broadly. The specificity of Texas's sign legislation thus endangers a business owner's right to exclude long guns, which otherwise might have been read into the criminal trespass statute.

Model legislation should either use the term "firearms," which includes handguns and long guns, or list both specifically. An ideal sign would state "Open and Concealed Carry of Firearms Prohibited Under [statute number cite]," with the universal prohibition symbol.

### 2. Open and Concealed

Similarly, it is imperative that business owners are explicitly empowered by the statute to ban both the open and concealed carry of firearms. In general, training should be required for a concealed carry permit and it should not just cover how to safely use and store a firearm, but also the laws governing when a firearm can be used

---

165. PENAL §§ 30.06-.07.

166. PENAL §§ 30.06-.07.

167. The expression of one thing means the exclusion of others.

and where it can be carried. An explanation of a concealed permit holder's legal obligation to obey "No Guns" signs on pain of criminal penalty should be included in the permit training and in the permit paperwork. Furthermore, conviction of trespass with a firearm should automatically result in the revocation of a conceal-carry permit. While a permit revocation would probably be temporary, depending on the state, a violator may have to petition to get it reinstated. In "may-issue" states, however, the sheriff could take a past concealed carry permit violation and revocation as a reason not to reissue a permit. Criminal trespass is typically a misdemeanor offense and the penalty is usually a fine. While the proper penalty for trespass with a firearm is beyond the scope of this Note, to ensure compliance, the law must have teeth beyond a nominal fine, especially when few concealed carriers can reasonably expect to get caught because by nature, their weapon is hidden from view. Concealed carriers might be willing to risk a nominal fine if they can afford to pay, but the threat of revocation of a concealed carry permit might have more of a significant deterrence effect because getting a permit that has been revoked reinstated might be difficult in some states. Our country also has a tradition of prohibiting felons of any sort from buying guns.<sup>168</sup> Prohibiting people who have a misdemeanor conviction specifically for violating the concealed carry law from carrying a concealed gun seems consistent with that tradition. Carrying a gun onto properly posted premises banning guns *is* a criminal act with a firearm and should at least result in the revocation of a concealed carry permit.

### 3. Force of Law

The effectiveness of the firearms prohibition signs in protecting business owners' rights hinges largely on whether the signs themselves are given the force of law. For example, in Kansas, the legislature has adopted a reasonably sized standard pictogram for their sign, however, they have declined to give the sign the force of law, as evidenced in the relevant statute:

---

168. See 18 U.S.C. § 922(d)(1) (2012); *see also* District of Columbia v. Heller, 554 U.S. 570, 626 (2008) ("From Blackstone through the 19th century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.").



It shall be a violation of this section to carry a concealed handgun in violation of any restriction or prohibition allowed by subsection (a) or (b) if the building is posted in accordance with rules and regulations adopted by the attorney general pursuant to subsection (i). Any person who violates this section shall not be subject to a criminal penalty but may be subject to denial to such premises or removal from such premises.<sup>169</sup>

This means that, even if a business has a properly posted sign giving clear notice to all comers that firearms are prohibited, before business owners are given the protection of trespass law, they must walk up to the person with the gun, personally ask them to leave, *and* the person with the gun must refuse.<sup>170</sup> Once an armed person has been asked to leave a store and has refused, the situation has likely escalated beyond simple trespassing. Every time a person with a gun walks into a posted store the owner has to make a potentially life threatening decision: will he risk antagonizing a person with a gun in a room full of vulnerable people he is responsible for—his employees, his customers, and maybe even his family—just to assert his fundamental right to control what comes onto his private property? The answer is almost certainly no and the people with guns *know* that.

Without the force of law, firearms prohibition signs like Kansas's are not worth the paper they are printed on; indeed, it is truly mystifying why Kansas took the time to write the signs into their code at all because a business owner can always ask someone to leave for nearly any reason.<sup>171</sup> In glaring contrast, Kansas's standard trespass law only requires a personal request to vacate the premise by the owner or authorized person *or* posting "No Trespassing" signs in a "manner reasonably likely to come to the attention of intruders," not both.<sup>172</sup> To truly protect a business owner's fundamental property rights and ensure their safety we must similarly give firearms prohibition signs the force of law.

---

169. KAN. STAT. ANN. § 75-7c10(e)(1) (Supp. 2016).

170. Even this power is uncertain, and this author presumes it here under a theory that Kansas did not intend to wholly abrogate a private property owner's fundamental right to control who is on their property, which has, to the author's knowledge, only notably been limited by the civil rights movement and exceptional First Amendment cases.

171. It is also worth noting that Kansas has taken another questionable step to disincentivize attempts at firearms prohibitions. If the business owner fails to provide "adequate security measures" and permits conceal carry, he will not be liable for any wrongful act on his premises with a concealed handgun. KAN. STAT. ANN. § 75-7c10(c)(1) (Supp. 2016).

172. § 21-5808.

The relevant state statutes should be amended to automatically impose criminal sanctions for the violation of a properly posted sign, without the additional requirements of a personal request to leave. This Note suggests adapting language common to criminal trespass statutes e.g.: “Criminal trespass with a firearm is entering or remaining in a privately owned premises while carrying a handgun or a long gun, openly or concealed, in violation of an order by the owner or another authorized person, OR when such premises are posted in a location reasonably likely to come to the attention of entrants with the [the sign described above] prohibiting firearms.”

#### IV. CONCLUSION

The First Amendment has long been recognized as a dual right: with few exceptions, individuals have the right to speak *and* the right to remain silent.<sup>173</sup> The Second Amendment has heretofore been recognized as the right to bear arms for the purposes of self-defense.<sup>174</sup> It is long past time for states to begin to protect the necessary inverse just as vigorously—the right to exclude firearms for the purposes of self-defense.<sup>175</sup> 108,000 people are shot each year in the United States.<sup>176</sup> The Supreme Court has made much of ensuring people have the right to carry firearms to protect themselves, but has done little to ensure people have the far more effective right of self-defense through the ability to protect themselves and their property *from* firearms.<sup>177</sup> Giving business owners real options in making the decision of how they want to protect themselves by permitting sensible, standardized firearms prohibition signs to have the force of law is an essential step towards protecting Americans’ gun rights, property rights, and lives.

---

173. See *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

174. See *D.C. v. Heller*, 554 U.S. 570, 584 (2008).

175. See Joseph Blocher, *The Right Not to Keep And Bear Arms*, 64 STAN. L. REV. 1 53-4 (2012).

176. *Key Gun Violence Statistics*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE (Jan 22, 2015), <http://www.bradycampaign.org/key-gun-violence-statistics>.

177. Press Release, Brady Campaign To Prevent Gun Violence, New Campaign Ad Features Classic NRA Fearmongering, Myth That A Gun In The Home Makes You Safer (Sept. 22, 2016) <http://www.bradycampaign.org/press-room/new-campaign-ad-features-classic-nra-fearmongering-myth-that-a-gun-in-the-home-makes-you> (“Owning a gun is linked to a higher risk of being shot in homicides, suicides, and unintentional shootings. In fact, research has shown that a gun in the home makes a homicide two to three times as likely and suicide three to five times more likely . . . For every time a gun is used in self-defense, it is used: 11 times for completed and attempted suicides, 7 times in criminal assaults and homicides, and 4 times in unintentional shooting deaths or injuries.”).