

# Libertarian Gun Control

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*Abstract:* Individuals should have the option to waive their Second Amendment rights to keep and bear arms by adding their names to the National Instant Criminal Background Check System. Every year about 20,000 Americans kill themselves with firearms. We present a low-cost and constitutional system that could in just a few years easily save thousands of these lives as people with mental health problems during moments of clarity rationally opt to restrain their future selves. Moreover, our system, which includes the option of providing email notifications of an individual's waiver to third parties, can promote a marketplace of informed association. Just as *Heller* emphasizes the Second Amendment right to keep and bear arms as furthering the "core" individual right to self-defense, a world where individuals can credibly communicate waiver of their Second Amendment rights can facilitate the reasonable choices of others to limit association with those who may possess weapons. Forcing Second Amendment interests to contend with First Amendment associational interests can thus enhance the joint liberty of those seeking to best defend themselves. We provide the results of two surveys showing that close to a third of the general population and more than 40% of those with previously diagnosed mental health concerns indicated that they would be willing to add their name to a "No Guns" list.

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## INTRODUCTION

The individual right to keep and bear arms includes the right not to keep and bear them.<sup>1</sup> Government should give individuals the right to waive their Second Amendment rights to purchase and possess guns and give them the additional right to credibly communicate that waiver to others.<sup>2</sup> While we will discuss giving individuals a variety of waiver choices, we will focus attention on an Internet platform that gives individuals: (1) an all-or-nothing option of registering to cede their right to purchase or possess firearms, (2) the option to automatically rescind any prior registration after a 21-day waiting period, and (3) the option of providing email addresses that will be automatically notified of an individual's waiver or its subsequent rescission.

This article details how modest changes to federal or state law could create these new rights by allowing individuals to add their names to the existing National Instant Criminal Background Check System ("NICS").<sup>3</sup> The NICS "No Guns" list already prevents certain individuals (e.g., convicted felons) who are prohibited from possessing guns from purchasing firearms from gun dealers.<sup>4</sup> Far from creating a huge new federal bureaucracy, our proposal imposes no additional burdens on gun dealers and merely requires a credible mechanism for registration – something that has been accomplished by hundreds of online finance and commerce websites as well as several on-line government portals administered by the IRS and the Social Security Administration.<sup>5</sup>

Facilitating these options to waive and to communicate such waiver is likely to produce three social benefits: (1) self-exclusion, (2) negotiated-exclusion, and (3) political expression. First, the waiver right will reduce gun violence as those who rationally want to limit their future selves from misusing guns will be able to tie their hands against future misuse. Just as state gambling self-exclusion registries allow individuals to commit not to gamble at casinos in

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<sup>1</sup> Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1 (2012).

<sup>2</sup> The idea of giving individuals the option to prevent their own future gun purchases by adding their names to the federal background check system has previously been analyzed. See Fredrick E. Vars, *Self-Defense Against Gun Suicide*, 56 B.C. L. REV. 1465 (2015); Angela Selvaggio & Fredrick E. Vars, "*Bind Me More Tightly Still*": *Voluntary Restraint Against Gun Suicide*, 53 HARV. J. LEGIS. 671 (2016); see also Ian Ayres, *Libertarian Gun Control*, FORBES, at <http://www.forbes.com/sites/whynot/2015/09/01/libertarian-gun-control/#2715e4857a0b40327cf94927> (visited 8/2/2016). But this article goes beyond this literature in five ways: (i) by proposing a system in which participants can waive the right to possess as well as purchase firearms, (ii) by proposing a system in which participants can notify third parties of their waiver status, (iii) by providing a mechanism by which individual states can under existing federal statute implement a state registry that adds citizens' names to the federal list, (iv) by providing evidence from two different new surveys to estimate both the demand for a "No Guns" registry and its associated impact on probable gun violence and (v) by analyzing the possibility of "in rem" as well as "in personam" waiver.

<sup>3</sup> F.B.I., NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) OPERATIONS-2014, at <https://www.fbi.gov/about-us/cjis/nics/reports/2014-operations-report> (visited 6/14/16).

<sup>4</sup> *Id.* at 17.

<sup>5</sup> See *infra* text accompanying notes 13-14 (discussing these government portals).

the future,<sup>6</sup> a “No Guns” registry allows people who know they have mental health problems to self-exclude from the dangers of gun ownership. The story of Ulysses tying his hands to the mast is a frequent metaphor for pre-commitment proposals,<sup>7</sup> but the analogy is especially close because Ulysses’ present-self was worried that his future self would become delusional and do harm to himself or others. There are hundreds of thousands of people in the United States suffering from mental health illnesses who realize during moments of clarity that their future selves are at risk of misusing firearms. In this article, we detail the results of a new survey in which more than 40 percent of people who self-reported that they had been previously “diagnosed with a mental disorder” indicate that they would be willing to waive their rights to bear arms.<sup>8</sup> Approximately 20,000 Americans kill themselves each year with firearms.<sup>9</sup> Based on these surveys and ancillary empiricism, we conservatively estimate that a self-exclusion registry would save annually hundreds of lives.

Second, the right to credibly communicate one’s waiver can facilitate negotiated-exclusion and thereby enhance libertarian autonomy. Our proposal would also give individuals registering for the “No Guns” list the option of including email addresses of individuals or entities that the participants wants to receive notice of waiver and of any subsequent rescission. This option to credibly communicate whether one has waived can facilitate informed association. The article describes why cotenants, landlords and homeowners’ associations, as well as life and property insurers, have legitimate self-defense interests in conditioning their association on other people’s waiver of the right to purchase and possess firearms. Individuals who by themselves would not be willing to self-exclude from gun ownership may voluntarily opt to waive their firearm rights in order to secure particular associational opportunities. Just as citizens routinely waive their First Amendment free speech rights in order to associate with others,<sup>10</sup> a government sponsored “No Guns” registry with optional email notices to third parties can promote social welfare by forcing Second Amendment rights to compete with the First Amendment. This article’s notion of gun control is “libertarian” not only in that it gives the individual enhanced rights to durably commit to not bear arms but also in that it allows others to condition their association on such waiver. Opening up the individual’s arming decision to the associational marketplace might save annually not hundreds, but thousands of lives lost to gun violence.

Third, and finally, the right to credibly communicate one’s waiver can also facilitate political expression. The option to register to waive one’s rights publicly might be used to send a signal to fellow citizens and to representatives the registrants’ support of legislative action to limit gun violence. The registry by disclosing the total number of waivers could, while

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<sup>6</sup> IAN AYRES, *CARROTS AND STICKS: UNLOCK THE POWER OF INCENTIVES TO GET THINGS DONE* (2010).

<sup>7</sup> Gharad Bryan, Dean Karlan, & Scott Nelson, *Commitment Devices*, 2 ANN. REV. ECON. 671 (2010); JON ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS* (2000).

<sup>8</sup> See *infra* Fig.2.

<sup>9</sup> C.D.C., *Suicide and Self-Inflicted Injury*, at <http://www.cdc.gov/nchs/fastats/suicide.htm> (visited 6/14/16).

<sup>10</sup> Such free speech waivers occur for example when individual sign non-disclosure agreements as a condition of employment or coventuring. *National Federation of Federal Employees v. U.S.*, 695 F. Supp. 1196 (D.D.C. 1988).

preserving, individual anonymity, publicly signal aggregate support. Moreover, an individual in registering could also provide the email address of private gun control groups and by registering for the “No Guns” list simultaneously add their name to a private petition. The “No Guns” list could thus become a particularly powerful way to publicly show support by signaling the number of people who were willing to waive their Second Amendment rights. We present below results of an Amazon MTurk survey indicating that close to a third of roughly 1000 respondents would be willing to add their name to their state’s “No Gun” list. The right to register to waive your rights could thus be a way for Americans to make common cause and express solidarity with one another.

While our proposal would allow a waiving party to credibly communicate his or her waiver to any and all recipients, we simultaneously recognize that allowing some third parties to condition their willingness to associate (including economically associate via contracting) raises constitutional concerns. Specifically, unfettered associational waiver discrimination facilitated by the state-action of credible communication might unduly burden an individual’s Second Amendment rights. We therefore propose banning economic associational discrimination based on whether or not a person has waived – except for explicitly pre-defined individuals who in making their own self-defense decisions might reasonably refuse to associate with someone who hasn’t waived.

Although this Article is centrally about giving individuals the ability by waiving to create *in personam* gun-free commitments, we also consider the possibility of creating an analogous *in rem* registry that would give land owners the ability to create gun-free zones. Just as land conservancies allow owners to durably dedicate particular parcels to environmental uses, a “no guns” covenantal registry could make criminal firearm possession within the boundaries of registered land for both current and future owners.

The remainder of this article is divided into five Parts. Part I describes the details of the proposal. This Part will describe how an Internet platform might verify the identity and secure the assent of waiving individuals as well as discuss different ways of structuring choice. Part II presents the theoretical case for why people might willingly volunteer to waive their rights to bear arms and provides the results of two different surveys estimating the potential demand for waiver. Part III then considers constitutional and policy concerns raised by our proposal – including, *inter alia*, whether and when a laissez-faire associational marketplace would unconstitutionally burden Second Amendment rights, and whether private associational choices even trigger Second Amendment analysis. Part IV discusses how a system of waiver could be implemented—especially using states’ existing option of adding prohibitor categories of people who would be added to the NICS list. Finally, Part V considers the case for creating an analogous “No Guns” land registry.

The national “Do Not Call” registry has augmented personal liberty,<sup>11</sup> by enhancing our right to be left alone. A “No Guns” registry is more analogous to the “Do Not Call” registry than first appears because it gives our present selves the option of being left alone from the possible injury that might be caused by our gun-carrying future selves. The success of “Do Not Gamble” registries and of commitment contracting, as well as the survey evidence that we report below, show that a substantial number of people want to be able to restrict their future selves. The registry thus gives new meaning to the term “self-defense” – allowing individuals a new defense from themselves. The registry thus facilitates what *Heller* identified as the “core” and “central component” undergirding an individual’s Second Amendment right by allowing individuals to be better in charge of their self-defense choices.<sup>12</sup>

## I. SCOPE

### A. *Informational Prerequisites*

While the idea of a waiver option as a liberty-enhancing device is readily understandable, important questions remain concerning the scope and specific means of how a waiver option would be implemented. To begin, it would be essential for waiver procedures to attend to three different informational prerequisites. The registry platform should credibly (i) verify the identity of the person waiving, (ii) prevent unauthorized disclosures, and (iii) inform the individual of the legal effects of waiver.

Verifying the identity of the person waiving is essential to preclude a kind of identity theft where imposters maliciously waive another person’s Second Amendment rights. Credible on-line verification systems already exist in a variety of other circumstances. For example, the IRS has a mechanism for verifying an individual’s identity as a prerequisite for receiving an “Identity Protection Personal Identification Number” that is needed to electronically file tax returns. The IRS verification process requires individuals to respond to a confirmation email, and to supply their Social Security number, date of birth, filing status, and the mailing address from their most recently filed tax return. In addition, the platform requires individuals to answer personal, financial, and tax related questions to confirm identity.<sup>13</sup> In contrast, the Social Security Administration’s on-line mechanism for verifying identity as a prerequisite for receiving a full benefits statement only requires providing a valid email address, a Social

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<sup>11</sup> See Dish Network L.L.C. Court Complaint, FTC No. 122 3205, Trade Reg. Rep. P 16816 (C.C.H.), 2012 WL 12378308, ¶ 16,816. (Aug. 23, 2012) (quoting FTC Chairman Jon Leibowitz: “We have vigorously enforced the Do Not Call rules and will continue to do so to protect consumers’ right to be left alone in the privacy of their own homes”).

<sup>12</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 630 (2008) (identifying “self-defense” as the “the core lawful purpose” of gun possession); *id.* at 599 (“central component”).

<sup>13</sup> For example, one of us was asked to answer the multiple choice questions “Which of the following was the property tax amount for [home residence] for the 2000 tax year?” and “When did you SELL the property at [investment property]?”

Security number, and a U.S. mailing address.<sup>14</sup> In both settings, the prospect of ex post criminal punishment does some of the work in deterring “spoofing” ex ante.

Second, it is important that the waiver platform be adequately secured from cyber-attacks and other unauthorized disclosures of information. Without adequate assurance of such security, some individuals will forego registering for fear that their lack of firearm protection will become publicly known – making them targets of crime. While we have become inured to multiple stories of disclosure of private information from both government and non-government databases,<sup>15</sup> security protocols and encryption algorithms have been successfully developed to reduce the risk of mass publication of the registry.<sup>16</sup> The existing NICS already takes “extensive measures” to ensure the security of system information.<sup>17</sup> To ensure that the NICS is not to be used to establish a federal registry of those who have purchased a firearm, all information about inquiries resulting in an allowed transfer are destroyed prior to the start of the next NICS operational day.<sup>18</sup> Moreover, under NICS regulations, gun dealers (“Federal Firearms Licensees”) are only authorized to query the system for the sole purpose of obtaining information on whether the firearm transfer is allowed, and are prohibited from disclosing that information to others.<sup>19</sup>

Third and finally, it is essential that any system securing waiver consent adequately inform the individual of the legal consequences of such waiver. Before signing, individuals should be made aware that:

waiver will bar them from possessing or purchasing firearms,

the definition of “constructive possession,”

the potential criminal penalties for possessing or attempting to purchase,

the ability of police to query the NICS as part of their enforcement efforts,<sup>20</sup>

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<sup>14</sup> U.S. Social Security Administration, *Sign In or Create an Account*, at <https://secure.ssa.gov/RIL/SiView.do?val=AE> (visited 8/2/2016).

<sup>15</sup> See Ian Ayres, *Contracting for Privacy Precaution (and a Laffer Curve for Crime)*, J. LEG. STUD. (forthcoming 2017) (providing examples).

<sup>16</sup> See, e.g., U.S. National Institute of Standards and Technology, *The Security Content Automation Protocol* (2016).

<sup>17</sup> F.B.I., *NICS Fact Sheet*, at <https://ucr.fbi.gov/nics/general-information/fact-sheet> (visited 8/2/2016).

<sup>18</sup> 28 C.F.R. Part 25 [AG Order No. 2186–98] RIN 1105–AA51 National Instant Criminal Background Check System Regulation Federal Register / Vol. 63, No. 210/Friday, October 30, 1998/Rules and Regulations 58304

<sup>19</sup> F.B.I., *NICS FEDERAL FIREARMS LICENSEE MANUAL* (Aug. 2011) (downloaded 7/27/16).

<sup>20</sup> See 28 C.F.R. § 25.6:

(1) Providing information to Federal, state, tribal, or local criminal justice agencies in connection with the issuance of a firearm-related or explosives-related permit or license, including permits or licenses to possess, acquire, or transfer a firearm, or to carry a concealed firearm, or to import, manufacture, deal in, or purchase explosives;

(2) Responding to an inquiry from the Bureau of Alcohol, Tobacco, Firearms, and Explosives in connection with a civil or criminal law enforcement activity relating to the Gun Control Act (18 U.S.C. Chapter 44) or the National Firearms Act (26 U.S.C. Chapter 53); or,

the automatic 21-day waiting period for subsequently rescinding waiver,

the potential legal and non-legal consequences of providing email addresses to the platform – detailing the purposes to which addressees can and cannot legally put information related to your waiver.

To assure that such disclosure is effective, government should undertake ongoing tests of the registry’s users. Just as ad-substantiation helps to assure that advertisements don’t leave potential consumers with false impressions,<sup>21</sup> “consequence substantiation” could help assure that the registry doesn’t leave registrants with a false impression of legal effect of waiver. The platform might provide specialized warnings about unexpected adverse consequences.<sup>22</sup> One might even imagine forcing registrants to pass a test establishing requisite knowledge of the possible consequences of waiver before allowing a registration to become effective.<sup>23</sup>

### *B. Choice Architecture*

In addition to assuring the information integrity of the platform, it is necessary in designing the platform to decide what kinds of options to provide to individuals.<sup>24</sup> Conceptually, a registration system could provide a dizzying array of choices concern the types of firearm rights that are being waived,<sup>25</sup> the durability of such waiver, and even whether such waiver is conditioned on the waiver choices of others.<sup>26</sup> As a general matter, we have opted for reducing the number of choices – for example, by providing an all-or-nothing choice to waive purchase and possession rights instead of giving individuals the additional option to waive just the right to purchase. We favor this “numerus clausus” approach for standard “Paradox of Choice” reasons

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(3) Disposing of firearms in the possession of a Federal, state, tribal, or local criminal justice agency.

<sup>21</sup> See Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 590-91 (2014).

<sup>22</sup> See Ayres & Schwartz, *supra* note 21 (proposing “term substantiation” and warnings for unexpectedly adverse contractual terms).

<sup>23</sup> See Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032 (2012) (discussing testing prerequisites to contracting).

<sup>24</sup> Since the no guns waiver is a kind of commitment device (making it harder for a waiving individual’s future to purchase or possess firearms), it should be surprising that the choice architecture decisions discussed in this section are analogous to many of the choices confronted in the commitment contracting platform, stickK.com (cofounded by one of us). Just as with stickK contracts, the platform had to confront questions concerning the scope of the commitment, the consequences of breaking the commitment, as well as identify the person who will decide whether the commitment has been achieved, and who will be notified of the commitments success or failure. See AYRES, *supra* note 6.

<sup>25</sup> For example, one might allow registrants to choose whether they want to waive their rights to long firearms as well as handguns or whether they wish to waive their rights to concealed as well as open carry or whether they wish to retain the right to rent and use firearms at shooting ranges. While it might seem that shooting ranges could be exempted without risking loss of life, ranges have, as an empirical matter, been a site of many suicides. See Mark Feldmann, *Officials Struggle with Spate of Suicides at Shooting Range*, THE JOURNAL-TIMES (Wisconsin) (May 27, 2016), at [http://journaltimes.com/news/local/officials-struggle-with-spate-of-suicides-at-shooting-range/article\\_73b1bce4-a8fc-527a-994e-17a51852fce1.html](http://journaltimes.com/news/local/officials-struggle-with-spate-of-suicides-at-shooting-range/article_73b1bce4-a8fc-527a-994e-17a51852fce1.html) (visited June 6, 2016) (reporting that five people *at one gun range* killed themselves with rented guns between 2009 and 2016).

<sup>26</sup> Ian Ayres, *Voluntary Taxation and Beyond: The Promise of Subgroup Social-Contracting Voting Mechanisms* (working paper, 2016).

and because we speculate that allowing more limited options will increase the salience and social meaning of registry.<sup>27</sup> But reasonable people can disagree not only on how many choices to offer, but on which particular choices should be included in the choice menu. In this section, we explore some of these choices and describe our reasons for crafting the choice architecture of the preferred platform in the model federal and state statutes included in the Appendix.

Purchase and Possession. We propose giving individuals the all-or-nothing choice to waive their rights to both purchase and possess firearms.<sup>28</sup> There is a plausible case for limiting the scope of waiver to just purchases.<sup>29</sup> Waiving the rights of people to possess as well as purchase guns may deter some people from waiving, and it may be difficult for police to effectively enforce waiver of the right to possess.<sup>30</sup> But including possession rights in the waiver might give loved ones additional ability to bargain for reduced access to keeping firearms in the home. Moreover, as discussed below, our MTurk experimental survey of just over 1,000 respondents finds no statistical difference in willingness to waive “purchase and possession” rights versus just “purchase” rights. So at least in this initial small survey, we find no reduction in willingness to waive when no possession is included in the waiver provisions.

Rescission. We also propose that individuals who waive be given the option to rescind their waiver – with the rescission automatically taking effect twenty-one days after giving the registry platform notice of their decision to rescind their waiver.<sup>31</sup> Reasonable arguments might be made for making waiver more durable. For example, one might emulate the existing criteria for “relief from disability” programs found in the NICS Improvement Amendments Act of 2007.<sup>32</sup> That act makes a state eligible for federal grants if the state has created a mechanism whereby people who have been involuntarily placed on the NICS registry for being “formally adjudicated as...mental defective[s], or committed involuntarily to a mental institution” can seek relief from the status and have their names removed from the list.<sup>33</sup> To qualify, the program

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<sup>27</sup> See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 5 (2000) (explaining that the “numerus clausus” principle means “property forms are fixed and limited in number”); BARRY SCHWARTZ, *THE PARADOX OF CHOICE: WHY MORE IS LESS* (2004); RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008).

<sup>28</sup> Our model statutes include within the meaning of purchase even gratuitous transfers of firearms to waiving individuals.

<sup>29</sup> Vars, *supra* note 2, at 1469 n.31.

<sup>30</sup> If state law enforcement found someone in possession of a firearm and suspected they might be barred under our model statute (or other law), they could report that to ATF. ATF could then inquire whether the person was in NICS. 28 C.F.R. § 25.6(j)(2). Possession might not be illegal under federal law, but transfer to that individual by a licensed dealer (or other person, 18 U.S.C. § 922(d)) would violate federal law, thus providing adequate foundation for the ATF inquiry.

<sup>31</sup> Compare Vars, *supra* note 2, at 1469 (proposing 7-day delay period); Selvaggio & Vars, *supra* note 2, at 673 (“A one-week delay, however, would not be enough to prevent all gun suicide attempts.”); see also *id.* (arguing that more stringent judicial hearing option is constitutional).

<sup>32</sup> NICS Improvement Amendments Act of 2007, Pub.L. No. 110–180, 122 Stat. 2559, § 105 (2008).

<sup>33</sup> Department of Justice, Bureau of Alcohol, Tobacco and Firearms, *Certification of Qualifying State Relief from Disability Program*, at <https://www.atf.gov/file/11731/download> (downloaded 8/2/2016). See also 27 C.F.R. §



must have certain indicia of due process and the individual must be found not “likely to act in a manner dangerous to public safety,” and “granting relief will not be contrary to the public interest.”<sup>34</sup>

But as a theoretical matter, more durable waivers that can only be removed after third-party assessment may be inimical to gun safety by dissuading some individuals from waiving their gun rights in the first instance. Our own survey evidence supports this possibility. As reported below, subjects who were given the option of rescinding with an automatic 7-day waiting period were 6.7 percentage points more likely to waive than subjects who were given the option of rescinding only if they could convince a state judge that they were not a risk to themselves or others. Moreover, we find below that subjects who had previously been diagnosed with mental health issues were particularly less likely to waive when only given the option of judicial rescission. Therefore, a subgroup that may be most at risk is more unwilling to initially waive when faced with the potential prospect of later establishing their mental capacity. Many gun suicides are impulsive decisions completed with only a few minutes or hours of thought.<sup>35</sup> Accordingly, we have opted here for a less durable, and more transparently reversible rescission standard of merely waiting 21 days to maximize the chance of securing initial waiver.

Credible Communication. We propose that individuals who waive also be given the option to credibly communicate their waiver to others. While waiving individuals could exercise their free-speech rights by directly telling a third-party that they had waived their right to purchase and possess guns, the third-party would have trouble verifying whether such waiver had actually taken place. With or without the registry option, individuals would be free to contractually promise not to purchase or possess firearms. But the possibility of contract damages would often be an imperfect substitute for more verifiable information that an individual is on the no guns registry. Accordingly, our model statute calls for the registration platform to give waiving individuals the option of providing email addresses that the platform will automatically notify of the individual’s waiver. While any individual may claim to have waived, email notifications from the government platform will more credibly indicate that waiver has occurred.

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478.11 (defining terms “formally adjudicated as a mental defective” and “committed involuntarily to a mental institution”).

<sup>34</sup> B.J.S., *The NICS Improvement Amendments Act of 2007*, at <http://www.bjs.gov/index.cfm?ty=tp&tid=49> (visited 8/2/2016) (“As of September 2015, twenty-nine states have enacted relief programs that have been certified by the state and approved by ATF.”). See also Simpson JR, Sharma KK: Firearms and the mentally ill: demographics and psychiatric characteristics of individuals petitioning for early relief from firearms prohibition. Presented at the 59th Annual Meeting of the American Academy of Forensic Sciences (AAFS), San Antonio, TX, February 23, 2007.

<sup>35</sup> Megan Spokas et al., *Characteristics of Individuals Who Make Impulsive Suicide Attempts*, 136 J. AFFECTIVE DISORDERS 1121, 1123 (2012) (finding that only 36.1% of people contemplated suicide for three or more hours before an attempt); Linda G. Peterson et al., *Self-inflicted Gunshot Wounds: Lethality of Method Versus Intent*, 142 AM. J. PSYCHIATRY 228, 228-31 (1985) (finding that among thirty survivors of firearm suicide attempts more than half had suicidal thoughts for less than a day).

Our email option helps level the credibility playing field in communicating to others whether or not you are exercising your right to possess firearms. An individual who chooses to bear arms can credibly signal that by showing the weapon to another. But it is harder to credibly prove that you do not possess firearms. The email option provides some credible evidence on this front by establishing at least that the waiver is subject to criminal prosecution for gun possession.

This communication option should be updatable diachronically in two ways. First, if a waiving individual later rescinds her waiver, the platform should automatically and immediately send emails to all previously designated addresses indicating that such waiver is being rescinded and will become effective in twenty-one days. Notice of rescission will give recipients notice that the individual will soon regain the right to bear arms and thus give recipients who were relying on the previous waiver the ability to make different associational choices regarding the rescinding individual (and, of course, give recipients a chance to contact the individual and perhaps prevent a suicide attempt or other tragic outcome). Second, the platform should allow waiving individuals to log on subsequent to their initial waiver and provide additional email addresses to the platform. The platform would immediately notify these additional addressees that the individual had waived her right to bear arms (and also notify these addressees if that individual subsequently initiated the process of rescinding her waiver). The platform would not, however, allow an individual to log on and remove the name of an addressee because such removal would undermine giving addressees notice of possible subsequent rescission.

The platform would accept (and provide notice to) any email address provided by a waiving individual. These addresses might include the accounts of not just friends, family and neighbors but also potentially anyone with whom the waiving individual is in privity as well as non-profit organizations that might want create a public or semi-public database of people who had waived their right to bear arms. In addition, the platform might provide waiving individuals with an option to make their identity as a waiver public. By opting into this public disclosure, individuals would be adding their name to a public database maintained by the government credibly indicating the subset of individuals that wish to have their waiver publicly known. Giving individuals the ability to opt into a government-maintained database has some advantages in allowing citizens to signal to each other and to their representatives their preferences with regard to gun control. A government database might, for example, have a salience that privately-supervised databases lack.<sup>36</sup> But structuring the platform to include a public database also raises additional issues of cybersecurity that lead us to prefer relying on private entities to provide any demand that individual waivers have to make their waiver publicly known. Instead we imagine that state registration platforms would merely make available the aggregate number of waiving individuals at any point in time and not identify any individual waivers.

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<sup>36</sup> See Jennifer Gerarda Brown & Ian Ayres, *Mark(et)ing Nondiscrimination: Privatizing ENDA with a Certification Mark*, 104 MICH. L. REV. 1639 (2006) (government-provided option not to discriminate on sexual orientation likely has greater salience than privately-provided option).

While this section has focused on the scope of a waiving individual's right to communicate his or her waiver, our communication option also raises the important related questions of what personal uses email recipients can make of the waiver information and whether they are allowed to pass on the information to others. We will discuss the use question more fully in Part III. But as a preview, we will be proposing that commercial discrimination on the basis of waiver be prohibited unless the commercial entity has a sufficiently strong self-defense interest in choosing whether to associate with non-waiving parties. As to the second question of whether recipients should be allowed to communicate their waiver information to others, we propose a default of confidentiality. We propose that email recipients be prohibited from sharing an individual's waiver status with others unless the addressee receives separate non-platform authorization from the waiving individual to share that information. But unlike the mandatory duty of confidentiality imposed on gun dealers,<sup>37</sup> it is important that the duty of confidentiality be merely a default, because we want to create an option for citizens who so choose to make their waiver public. But to so choose a waiving individual would need to (i) register for the "No Guns" list, (ii) provide the email address of a third-party, and (iii) separately authorize that third-party to publicly disclose that waiver information. While cumbersome, we propose this pathway to publicity out an abundance of concern over waiver privacy.

Third-party Waivers. It might seem obvious that the default meaning of an individual's inaction in any waiver scheme should be that the individual retains her full Second Amendment rights. But here we consider two situations where third-parties might be empowered to waive the Second Amendment rights of certain classes of individuals – effectively, changing the individual's default legal treatment to waiver (with the possibility of rescission 21 days after an affected individual moves to rescind his or her waiver). First, we might imagine a regime in which the parents of a minor would be empowered to waive on their child's behalf. From the child's perspective, such a parent-initiated waiver would effectively change the default. The child upon turning 18 would have to affirmatively ask that the parents' waiver be rescinded and wait an additional 21 days before being able purchase a gun. Parental waiver would thus change the minimum age of purchasing a gun from 18 years to 18 years and 21 days. But the inertia created by the changed default (and the 21-day delay only starting after an affirmative request to rescind) might still be sufficient, given the impulsive nature of many suicides, to prevent some gun fatalities.

Second, we can also imagine a regime that empowered the police or other state officials to change the default status of some individuals who have displayed erratic behavior that falls short of necessitating involuntary commitment, but which creates probable cause for the official to believe that the individual is not well suited to purchase or possess firearms. For example, responding to a harassment call at a hotel, police documented Aaron Alexis's paranoid delusions, but did not arrest him or initiate involuntary commitment proceedings.<sup>38</sup> Less than six weeks

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<sup>37</sup> See *supra* note 19.

<sup>38</sup> Fredrick E. Vars, *Symptom-Based Gun Control*, 46 CONN. L. REV. 1633, 1634 (2014).

later, Alexis legally purchased a shotgun and used it to kill twelve people at the Navy Yard in Washington, D.C.<sup>39</sup> Again this third-party waiver would only act as a changed default, because the affected individual would be free to immediately seek to rescind the waiver and regain full Second Amendment rights after 21 days.<sup>40</sup> We envision a system where the public official could, after an appropriate finding, place the affected individual on the “No Guns” registry *and* have the state notified if the affected individual later moves to rescind the waiver.<sup>41</sup> So the government would learn of the individual’s attempt to acquire weapons and have 21 days to investigate whether there would be an independent basis, such as a conviction, for involuntarily placing the individual on the “No Guns” list or potentially move to have the person involuntarily committed and thereby establish a basis for keeping the person on the list notwithstanding his or her attempted rescission.

While we are attracted to these two classes of third-party waivers – especially because they only amount to imposing a fairly short waiting period on an affected individual’s right to acquire or own firearms – we have resisted the temptation to deviate from libertarian impulse animating of proposal more generally. Since legislators might constitutionally impose a waiting period on all gun purchases (or at least first-gun purchases<sup>42</sup>), it is likely that empowering parents and state officials to impose waiting periods on subsets of individuals is likely to pass constitutional muster. Subsequent legislatures might ultimately embrace third-party waiver, but we have opted for a more conservative, freedom-preserving position.<sup>43</sup>

## II. WHO WOULD WAIVE AND WHY WAIVER WOULD ENHANCE OUR FREEDOM

### A. Theory

Giving citizens the options to waive their Second Amendment rights and to communicate their waiver as a theoretical matter expands personal freedom. Private contracting and promise do not allow individuals to as credibly commit to non-ownership or to communicate that status to others. An individual could contractually promise not to purchase or possess guns, but that promise would not subject gun dealers to liability for selling the individual a gun. While breaching the promise would subject the promising individual to potential contractual damages,

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<sup>39</sup> *Id.*

<sup>40</sup> This proposal has precedent. Under Indiana law, a police officer may seize firearms from an individual if the police officer believes that person is “dangerous.” Ind. Code § 35-47-14-3. Similarly, one of us has argued that people experiencing psychotic symptoms should lose their gun rights. Vars, *supra* note 38.

<sup>41</sup> In contrast, parents of individuals who have gained their age of majority should not by default be given notice of any attempt by their child to rescind parental waiver.

<sup>42</sup> *Silvester v. Harris*, 41 F. Supp. 3d 927 (E.D. Cal. 2014).

<sup>43</sup> We would however allow government to negotiate for waiver as part of a plea bargain with regard to crimes that by themselves would not qualify the individual to be added to the registry (and government could revoke parole if the individual who accepted the deal later attempted to rescind their waiver).

it would not subject the promisor to criminal liability.<sup>44</sup> Accordingly, learning that an individual had entered into a binding contract not to purchase or possess firearms would not provide as much certainty as an email from a government-sponsored registry that the person in question had opted into potential criminal liability. This is not to say that the waiver registry would be perfectly enforced, it is only to say that the registry option would increase the choice set of Americans and hence expand their liberty.

There are many ways, however, that government might as a formal matter expand our liberty. They might, for example, give us the freedom to subject ourselves to criminal prosecution if we ever uttered the nonsense sentence “An iron exposes her imagined customer.” But this technical expansion of our liberty would have no practical value, because we cannot imagine why a person would ever want to exercise this type of liberty.

The burden of this section, then, is to explain why the “No Guns” registry has practical value; that is, why reasonable people would want to exercise the option to waive their right to bear arms. (And the next section will provide empirical support from surveys that substantial numbers of Americans are in fact willing to waive this right.) As mentioned in the introduction, the demand for waiver can be divided into three different components: (1) self-exclusion, (2) negotiated-exclusion, and (3) political expression.

First and foremost, the waiver right can be seen as a commitment device for those who rationally want to limit their future selves from misusing guns. People who worry about loss of future control seek out a variety of disabling devices – including bariatric surgery (which makes it painful to overeat) and Antabuse (which makes it painful to drink alcohol). Users of the commitment website, stickK.com, have voluntarily put more than \$25,000,000 at risk to increase the chance that their future selves follow through with contractually set goals. States can and have played important roles in providing citizens with commitment options. Several states have well developed “no gambling” registries that block those who register from using state casinos,<sup>45</sup> and state recognition of marriage can be seen as enhancing individual liberty by facilitating the ability of people to make more durable relationship commitments.

Commitment devices are useful to people who have limited amounts of willpower or self-control *and* are sufficiently self-aware to understand that they have a problem.<sup>46</sup> Many overweight people naively believe that they will amend their ways and take those extra pounds off over the next few months. It is not our claim that everyone who rationally should want to waive their right to bear arms would in fact avail themselves of a “No Guns” registry. But of the hundreds of thousands of people in the United States who suffer from mental health illnesses,

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<sup>44</sup> A rare, possible exception would be if a prosecutor could prove beyond reasonable doubt that the promisor at the time of promising intended not to keep the promise. See IAN AYRES & GREG KLASS, *INSINCERE PROMISES: THE LAW OF MISREPRESENTED INTENT* (2005).

<sup>45</sup> AYRES, *supra* note 6, at 143.

<sup>46</sup> Ted O'Donoghue & Matthew Rabin, *Doing It Now or Later*, 89 AM. ECON. REV. 103 (1999) (distinguishing “naifs” and “sophisticates” based on whether they self-aware of their self-control deficits).

tens of thousands may understand during moments of clarity that their future selves are at risk of misusing firearms and be willing to take a government-sponsored opportunity to limit their future, literally psychotic, selves. The next section will present survey evidence that such waiver demand is more pronounced among people who have been previously diagnosed with mental illness, but the sign-up experience at state-sponsored gambling self-exclusion registries and privately-sponsored commitment platforms suggests that offering a “No Guns” registry would provide tens of thousands of Americans more than just a formal expansion of liberty. It would provide a new right that they would in fact exercise.

A second category of waiver demand can come from what we term “negotiated exclusion.” Individuals may rationally commit to waive their Second Amendment firearm rights in order to expand their First Amendment associational rights. In particular, negotiated exclusion is made possible by the ability to credibly communicate one’s waiver. Some friends, neighbors, and even loved ones may more willing to associate with individuals who can credibly signal that they have foregone the right to bear arms. Waiver might accordingly be traded in return for additional associational opportunities. Individuals who by themselves would not be willing to self-exclude from gun ownership may voluntarily opt to waive their firearm rights in order to secure particular associational opportunities.

Our proposed registry creates a marketplace of informed association where one person’s right to bear arms has potentially to contend with other people’s right to not associate. The “No Guns” registry thus creates opportunities for a modern-day *Lysistrata* – where some individuals are motivated to yield their right to firearms because of threatened withholding of various forms of interactions by friends and family.<sup>47</sup> In September 2006, dozens of women organized a sex strike in Pereira, Colombia, called *La Huelga de las Piernas Cruzadas* (“the strike of crossed legs”) in an effort to encourage gang members to turn in their weapons.<sup>48</sup> It is therefore not inconceivable that conditioning personal association on credible gun waiver could substantially expand the use of the registry.

The demand for negotiated self-exclusion might also be prompted by the threat of economic entities to withhold various forms of real property association. Landlords, homeowners’ associations, coop boards and cotenants might condition occupancy upon individuals’ waiver of their gun rights. Indeed, it would be possible for friends, family, or neighbors to use the kinds of commitment contracts provided by stickK.com to make an individual’s waiver more durable. For example, a tenants’ association might make continuing

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<sup>47</sup> Aristophanes, *Lysistrata* (in which Lysistrata persuades the women of Greece to withhold sexual privileges from their husbands and lovers as a means of forcing the men to end the Peloponnesian War).

<sup>48</sup> BBC News, *Colombian Gangsters Face Sex Ban*, (Sept. 13, 2006) at <http://news.bbc.co.uk/2/hi/5341574.stm> (visited 8/2/2016).

waiver registration a prerequisite for occupancy and authorize a financial forfeiture and eviction or ejection if the individual subsequently moved to rescind the waiver.<sup>49</sup>

We might also imagine that life insurers or homeowners or renter insurers might give discounts to individuals who credibly signaled that they had ceded the right to bear arms. While many suicides are impulsive, there is evidence that insureds are more likely to commit suicide once the initial period of payout exclusion ends. Most states mandate that life insurance pay out when the cause of death is suicide if the death occurs after the first year or two of the policy.<sup>50</sup> Samuel Hsin-yu Tseng found that the “suicide rate quadruples after [this] exclusion period.”<sup>51</sup> One might imagine that life-insurance companies, given the opportunity, would offer discounts to insureds who had provided registry verification that they had waived their right to own arms. Similarly, competition might induce renter and homeowner insurance to offer discounts to waiving individuals as there is some evidence that gun ownership increase the probability of burglary.<sup>52</sup> As explained by Philip Cook and Jens Ludwig:

Guns in the home may pose a threat to burglars, but also serve as an inducement, since guns are particularly valuable loot. Other things equal, a gun-rich community provides more lucrative burglary opportunities than one where guns are more sparse. The new empirical results reported here provide no support for a net deterrent effect from widespread gun ownership. Rather, our analysis concludes that residential burglary rates tend to increase with community gun prevalence.<sup>53</sup>

While the incentive of individual insurance companies to provide waiver discounts may be muted because reducing community gun prevalence lowers the payouts of its rivals, a similar “lowering rivals’ cost” effect has not stopped individual insurers from offering LoJack discounts.<sup>54</sup>

This article’s notion of gun control is “libertarian” not only in that it gives the individual the enhanced rights to durably commit to not bear arms but also in that it allows others in privity to condition their association on such waiver. The set of economic entities that might make waiver a prerequisite for contracting is potentially large and might cut across many different consumer and employment arenas. However, as described more in Part III, our proposal would

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<sup>49</sup> Such a private commitment contract could be created at the commitment contract website, co-founded by one of the authors, [www.stickk.com](http://www.stickk.com).

<sup>50</sup> Samuel Hsin-yu Tseng, *The Effect of Life Insurance Policy Provisions on Suicide Rates* (working paper 2016) (33 states “allow for a two-year suicide exclusion, Colorado and North Dakota allow for a one-year exclusion, but Missouri imposes a more stringent regulation, requiring that the insurer cannot use suicide to deny death benefit payments unless it can be shown that the insureds intend to commit suicide when they applied for the policies”).

<sup>51</sup> *Id.* at 1. See also Joe Chen, Yun Jeong Choi & Yasuyuki Sawada, *Suicide and Life Insurance* (working paper 2016) (using OECD cross-country data from 1980 to 2002 finding analogous exemption period effects).

<sup>52</sup> Philip J. Cook, Jens Ludwig, *The Effects of Gun Prevalence on Burglary: Deterrence vs Inducement*, NBER Working Paper No. 8926 (May 2002), at <http://www.nber.org/papers/w8926>

<sup>53</sup> *Id.* at 43.

<sup>54</sup> See Ian Ayres & Steven D. Levitt, *Measuring Positive Externalities from Unobservable Victim Precaution: An Empirical Analysis of LoJack*, 113 *QUARTERLY J. ECON.* 43 (1998).

only allow economic entities with occupancy or insurance self-defense interests to condition willingness to contract on waiver. Employers, for example, have a substantial interest in preventing their employees from bringing guns to the job site and killing themselves or others. There have been numerous instances of employee-instigated workplace violence, including the 2016 San Bernardino shootings, where an employee and his wife killed 14 others at a workplace holiday party.<sup>55</sup> One federal investigator said the leading theory for motive was a “combination of terrorism and workplace” conflict.<sup>56</sup> And while mass shootings in the workplace are unusual,<sup>57</sup> attacks with fewer than four victims are quite common, resulting in 14,770 total workplace homicide victims between 1992 and 2012.<sup>58</sup> But in an abundance of caution, we do not propose authorizing employers to discriminate on the basis of gun waiver.<sup>59</sup>

A third, and final, category of waiver demand might derive from what we term “political expression.” Some people might choose to both waive and credibly communicate their waiver to signal to fellow citizens and to representatives the registrants’ support of legislative action to limit gun violence. After a mass shooting, such as the 2016 Orlando attack at a gay nightclub in which 49 people were killed, many people experience a felt need to do something.<sup>60</sup> While purchases of guns generally and assault rifles in particular tend to spike after mass shootings,<sup>61</sup> other Americans might instead choose to take action to credibly signal that they are not armed. For example, when registering, an individual might simultaneously have the platform send evidence of their waiver to a “Stop Handgun Violence” organization.<sup>62</sup>

Of course, some people will be reluctant to have their identity as waivers publicly known for fear that they may become targets of home invasions and other crime, as criminals will be able to ascertain that they are not armed. However, even people who choose not to provide *any* email addresses might still be motivated to waive in order to signal their commitment to reducing firearm prevalence. This is because the platform would disclose the aggregate number of people who have volunteered to add their names to registry. Indeed, this aggregate registry disclosure

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<sup>55</sup> James Queally, *Motive for Calif. Killings a Mystery; Some Think Mix of Extremism, Work Issues Led to Attack*, CHI. TRIB. 1 (Dec. 4, 2015).

<sup>56</sup> *Id.*

<sup>57</sup> They account for just 4% of mass shootings. Everytown for Gun Safety, *Analysis of Mass Shootings*, at <https://everytownresearch.org/reports/mass-shootings-analysis/> (visited July 20, 2016).

<sup>58</sup> CDC, *Occupational Violence*, at <https://www.cdc.gov/niosh/topics/violence/> (visited July 20, 2016).

<sup>59</sup> We also would prohibit government from purchasing waiver – for example, by requiring waiver as a prerequisite of a gun buyback program – because government purchasing might constitute an unconstitutional condition. Richard Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988). However, as argued above, we would allow conditioning plea bargaining (with its independent requirement of wrong doing) upon waiver. *See supra* note 43.

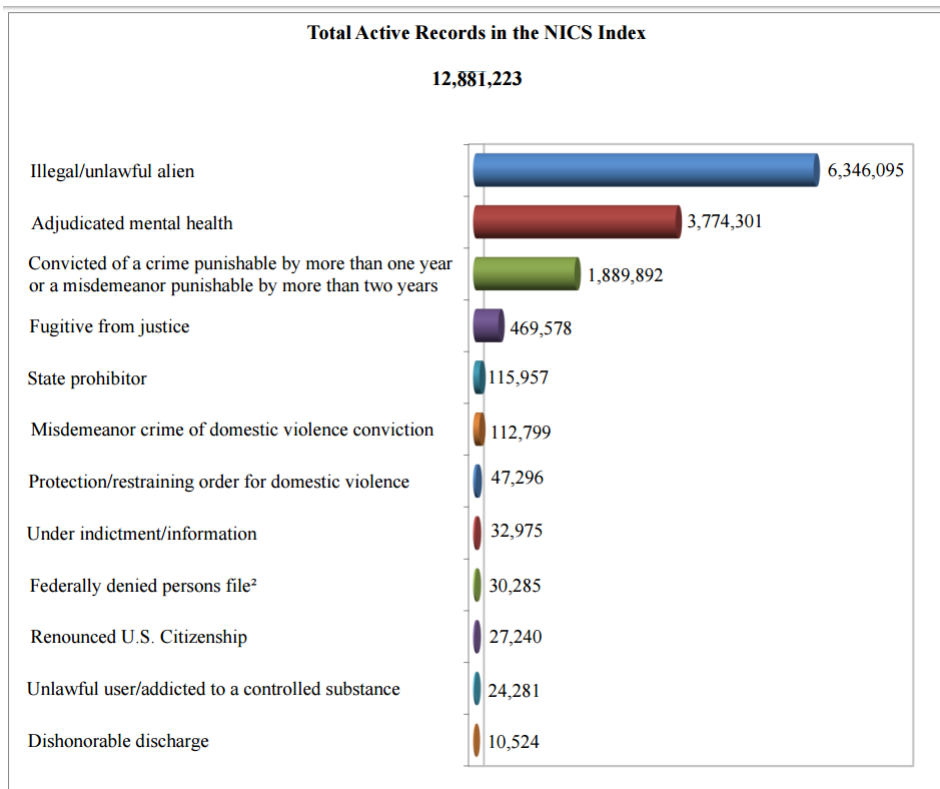
<sup>60</sup> For example, a petition to enact stricter weapon legislation in Orlando garnered 39,638 signatures as of July 20, 2016. [https://www.change.org/p/mayor-buddy-dyer-enact-stricter-weapon-legislation-in-the-city-of-orlando-2?source\\_location=topic\\_page](https://www.change.org/p/mayor-buddy-dyer-enact-stricter-weapon-legislation-in-the-city-of-orlando-2?source_location=topic_page) (visited July 20, 2016).

<sup>61</sup> Lacey N. Wallace, *Responding to Violence with Guns: Mass Shootings and Gun Acquisition*, 52 SOC. SCI. J. 156 (2015); Zachary Crockett, *What Happens after a Mass Shooting? Americans Buy More Guns*, VOX (June 15, 2016), at <http://www.vox.com/2016/6/15/11936494/after-mass-shooting-americans-buy-more-guns> (visited 7/27/16).

<sup>62</sup> *See supra* pages 10-11 (describing mechanism of separately authorizing use of one’s name).



by category is already done – with the FBI reporting as of 2014 not just the total number of registrants (12,881,223) but the number of individuals prohibited from purchasing or possessing guns for particular reasons:



All that would be required under our proposal would be to add an additional category of “Voluntary Registrants.”<sup>63</sup>

The “No Guns” list could thus become a particularly powerful way to publicly show support by signaling the number of people who are willing to waive their Second Amendment rights. The next section shows that close to a third of our survey respondents indicate that they would be willing to add their name to their state’s “No Gun” list. While some of these respondents are waiving as a self-exclusion/commitment strategy, others are likely waiving as a (small) way to take expressive action against gun violence.

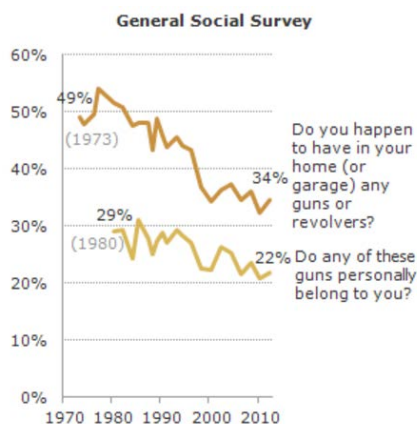
## B. Empiricism

This section goes beyond mere theorizing about potential demand and instead provides initial “proof of concept” evidence that a substantial minority of Americans are in fact willing to

<sup>63</sup> The table is taken from <https://www.fbi.gov/about-us/cjis/nics/reports/2014-operations-report> at p. 25. As described below, if implemented through our model state statute, “voluntary registrants” would be a subcategory of “state prohibitor,” the category created by disqualifying attributes defined by individual states. Our model statute would make people who had voluntarily registered an additional disqualifying category.

waive their Second Amendment rights. As an initial matter, most Americans do not currently own weapons. The exact percentage owning guns is difficult to ascertain, but surveys suggest that the proportion may be as low as just one third and has been declining in recent decades.<sup>64</sup> For example, Figure 1 shows that the proportion of people saying they had guns or revolvers in their home dropped from 49% in 1973 to just 34% in 2010.<sup>65</sup>

Figure 1: U.S. Gun Ownership Percentage Over Time



Moreover, the proportion of Americans who personally own guns is, in this University of Chicago survey, just 22%. Accordingly, the registry is asking to citizens to waive a right that most are not exercising.

This section will be reporting survey results that more than 30 percent of respondents are willing to waive their gun rights. But this survey evidence is likely conservative for two reasons.<sup>66</sup> First, the survey focuses primarily on the potential “self-exclusion” demand for waiver. Because the survey’s description of registration excluded the possibility of credible communication to third parties, we have not measured the derived demand of “negotiated exclusion” – where third-parties (friends, family, neighbors, co-tenants and insurers) may incentivize waiver by limiting their willingness to associate with non-waivers. Something as simple as a \$50 annual discount for homeowners or life insurance might be sufficient to dramatically increase the demand for waiver. Second, the willingness-to-waive estimates are conservative because they were elicited without any prior government messaging. Public service announcements and other forms of advertisements might increase the salience of the question and the palatability of waiver itself. Of course, advertisements can also be utilized by those trying to discourage waiver. But our finding below that people are more willing to waive when

<sup>64</sup> Drew DeSilver, *A Minority of Americans Own Guns, But Just How Many Is Unclear*, PEW RESEARCH CENTER (June 4, 2013) at <http://www.pewresearch.org/fact-tank/2013/06/04/a-minority-of-americans-own-guns-but-just-how-many-is-unclear/> (visited 8/2/16).

<sup>65</sup> *Id.*

<sup>66</sup> Our empiricism, however, does not directly test how people would respond to our proposed 21-day waiting period, which as described above was chosen as a compromise between the less durable 7-day waiting period and the more durable state judge options that we test below.

informed that their peers are waiving is at least suggestive that more publicity and deliberation might produce on net even higher waiver rates than reported here.

#### A. Internet Survey

1,050 Amazon Mechanical Turk respondents filled out the following survey on a Thursday in February 2016.<sup>67</sup> The major caveat in using the MTurk worker population as survey respondents is its limited representativeness, raising questions about external validity. While restricted to the U.S., the MTurk worker population is not representative of Americans at large.<sup>68</sup> Our sample is 63% male and is younger than average. 65% of the sample is between 18-34 years old, compared to 29% in the U.S. as a whole. The sample is more highly educated and more likely to be single. The sample is also much more liberal than the U.S. as a whole. Nearly 60% voted for Obama in 2012, while less than 20% voted for Romney, while in reality the voter split was 51% to 47%. 45% were registered Democrats and only 18% were registered Republicans. Nearly 80% were white, compared to 65% nationwide.<sup>69</sup>

Method. Respondents were randomized into eight groups defined by three pairs of treatments ( $2 \times 2 \times 2 = 8$ ). The first treatment pair is “purchase” v. “possess or purchase,” referring to the banned activities for individuals whose names are on the list. Respondents assigned to the “possess or purchase” group were shown following vignette:

The National Instant Criminal Background Check System maintains a “No Guns” list which prevents certain individuals (for example, convicted felons) from possessing firearms and from purchasing firearms from gun dealers. Imagine that your state legislature has just enacted a new program that gives state residents the right to confidentially add their names to this “No Guns” list.” Proponents of the legislation have argued that restricting access to firearms reduces suicides, homicides, and accidental deaths.

Respondents assigned to the “purchase” group were shown a vignette that omits the “from possessing firearms” language, but is otherwise the same.

The second arm of the experiment randomly assigned respondents into “wait seven days” or “state judge” groups, referring to the manner in which an individual can remove their name from the list. The second pair of treatments states either:

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<sup>67</sup> See Online Appendix for details on the Mechanical Turk platform.

<sup>68</sup> Berinsky et. al. argue that MTurk workers are more representative than “convenience samples,” but less so than expensive representative samples like the Current Population Survey. Adam J. Berinsky, Gregory A. Huber, Gabriel S. Lenz *Evaluating Online Labor Markets for Experimental Research: Amazon.com's Mechanical Turk*, 20 *Political Analysis* 20 (2012). Huff and Tingley extend this analysis. Connor Huff & Dustin Tingley, “Who Are These People?” *Evaluating the Demographic Characteristics and Political Preferences of MTurk Survey Respondents*, 2015 RESEARCH & POLITICS 1.

<sup>69</sup> See Online Appendix Table 1.

“If you add your name, you can later remove it for any reason by requesting removal and waiting seven days” or

“If you add your name, you can later remove it if a state judge certifies that you are not a danger to yourself or others.”

The third arm of the experiment randomly assigned respondents into “simple ask” v. “more than half” groups, referring to the way respondents were asked about their willingness to register. The third pair of treatments states either:

“Would you be willing to add your name to your state’s ‘No Guns’ list?” or

“Would you be willing to add your name to your state’s ‘No Guns’ list if more than half of other adults in your state also add their names?”

A respondent was randomly assigned to each of the three arms, for a total of 8 (2 x 2 x 2) group combinations. A combination might be, for example, “purchase and possess,” “state judge” and “simple ask”.<sup>70</sup>

Results. The eight treatment groups were properly balanced on pre-treatment demographic characteristics – suggesting that the randomization successfully assigned similar respondents to the different groups.<sup>71</sup> For our central outcome variable, we find across all vignette types that 30.8% (95% confidence interval: 28.0% to 33.6%) of our 1,050 MTurk subjects responded that they would be willing to add their names to their state’s “No Guns” list.<sup>72</sup> Nearly a third of respondent expressed a willingness to waive some form of their Second Amendment rights.

The treatment effects for our three experimental arms can be seen in Figure 2:

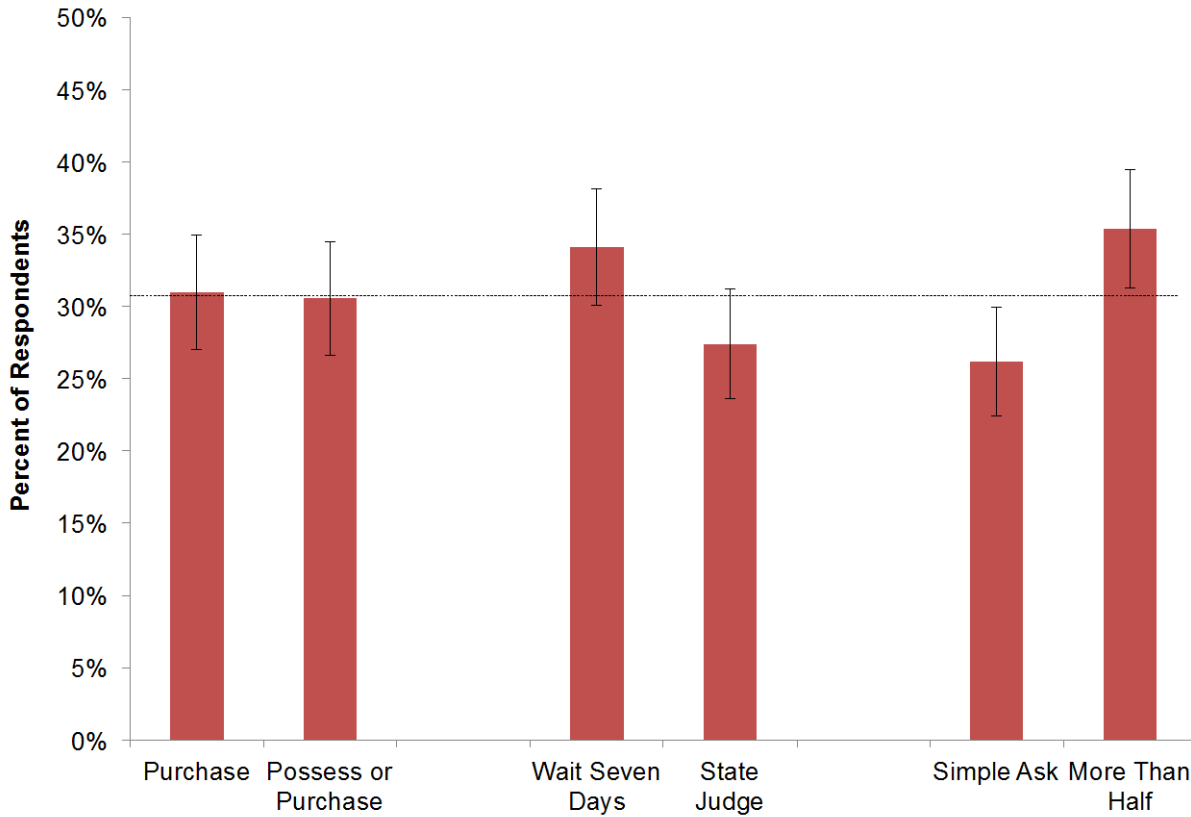
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<sup>70</sup> See Online Appendix Exhibits 1-8 for screenshots of all 8 groups. The underlying data and statistical analysis (including STATA .do and output files) can be found at [www.ianayres.com/nogunsdata.zip](http://www.ianayres.com/nogunsdata.zip)

<sup>71</sup> See Online Appendix Table 2.

<sup>72</sup> Using the Current Population Survey data, we apply post-stratification weights to the sample based on gender, age group, and region. After re-weighting the data to match the CPS data, the percent responding positively dropped slightly to 29.6% (95% confidence interval: 24.0% to 35.1%). There are several drawbacks to this methodology. First, we are forced to place very high weight on people aged over 35 because their underrepresentation in the data. This introduces volatility (as shown by a large increase in the size of the confidence interval), and places a large emphasis on a relatively small number of respondents. The post-stratification weight, for example, averages 15 for those over 65 and 18 for women over 65. Second, we make the assumption that internet-using citizens (who are able to respond to the survey) would have the same view, on average, as non-internet-using citizens.

Figure 2: Percent of Respondents Adding Name to "No Guns" List, by Treatment Group



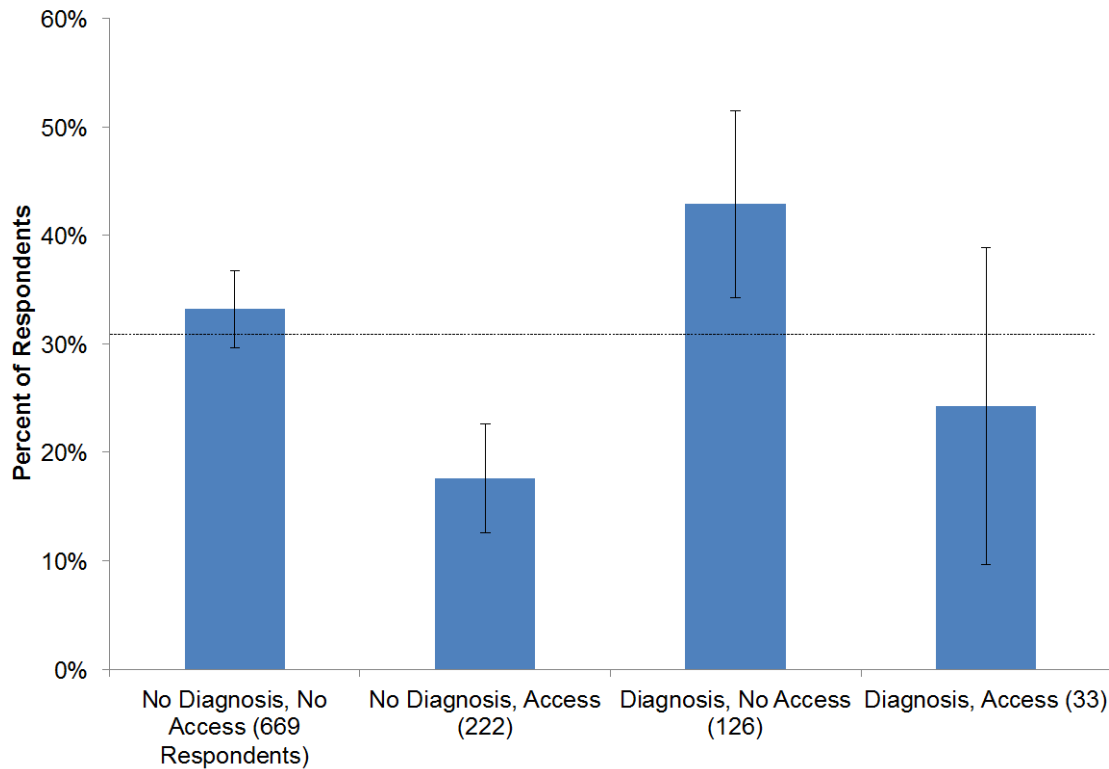
Notes: The dashed line represents the average response waiver rate (30.8%) across all subjects. N = 1,050.

The left-hand columns of Figure 2 show that subjects' willingness to waive was not reduced by increasing the scope of the waiver to include purchase and possession. 31.0% of subjects were willing to add their name to a "No Guns" list which would prohibit them from purchasing weapons, while 30.6% of subjects were willing to add their names to a "No Guns" list which would prohibit both the purchase and the possession of guns. As discussed above, the equal willingness to waive across this dimension suggests that structuring choice to include purchase and possession might not dissuade registration. This broader waiver scope would also be consistent with current condition of individuals included on the NICS list who are prohibited from both purchasing and possessing firearms.

In contrast, both the rescission and peer arms of the test displayed statistically significant treatment effects. Subjects who were told they could automatically rescind their waiver after seven days were 6.7 percentage points more likely to waive than those who were told that they could only rescind their waiver if a state judge found that they were not a risk to themselves or others (34.1% vs. 27.4%). As shown in the right-hand columns of Figure 2, subjects were 9.2 percentage points more likely to waive if a more than half of other adults in their state also added their names than if the choices of others were not mentioned (35.4% vs. 26.2%).

We also found substantially different willingness to participate for different types of respondents. Subjects who reported having been previously “diagnosed with a mental disorder” (15.1% of the sample) or having “regular access to firearms at home” (24.3% of the sample) displayed highly variable willingness to participate.

Figure 3: Percent of Respondents Adding Name to "No Guns" List, by Mental Disorder Diagnosis and Access to Firearms



Notes: The dashed line represents the average response across all subjects. N = 1,050.

As shown in Figure 3, those with no mental health diagnosis and no access to a firearm are close to the sample mean at 33.2%. Subjects with regular access to firearms are (unsurprisingly) less likely to waive their Second Amendment rights: those with “regular access to firearm at home” are 15.6 percentage points less likely to waive. However, respondents with a diagnosed mental disorder are 9.7% more likely to waive their rights. Those who have a diagnosed mental disorder and access to a gun are 8.9% less likely to waive their rights, but the small number of respondents in this category causes the estimate to be imprecise.

Table 1 shows the results of OLS regressions where a dummy for willingness to register is regressed on indicator variables for each of the 3 experimental arms, as well as several respondent (self-reported) characteristics. Model 1 parallels the histogram above (Figure 2) with controls testing whether the “possess or purchase”, the “stage judge” or the “more than half” groups are statistically different than their paired counterparts. Model 2 adds a dummy for whether or not the respondents scored at or above a 7 on the Suicide Behaviors Questionnaire-

Revised (SBQ-R), a cutoff that has been shown to indicate being at risk of suicide.<sup>73</sup> Model 3 adds a dummy for whether the respondent self-reports as having been diagnosed with a mental disorder. Model 4 adds interactions with the random treatments. Model 5 adds a dummy indicating whether the respondent has regular access to a firearm, as well as an interaction with the mental disorder dummy. This parallels Figure 3. Model 6 adds dummies indicating if there are children in the home. Model 7 adds more than a dozen demographic controls for respondents' race, gender, sexual orientation, age, region, income, education, and political identification.<sup>74</sup>

Table 1: Regression Results

	1	2	3	4	5	6	7
Possess or Purchase	-0.005 (0.028)	-0.004 (0.028)	-0.003 (0.028)	-0.016 (0.030)	-0.006 (0.028)	-0.005 (0.028)	0.001 (0.028)
State Judge	-0.066** (0.028)	-0.065** (0.028)	-0.066** (0.028)	-0.041 (0.030)	-0.065** (0.028)	-0.064** (0.028)	-0.057** (0.028)
More Than Half of Other Adults	0.092*** (0.028)	0.091*** (0.028)	0.087*** (0.028)	0.098*** (0.031)	0.086*** (0.028)	0.088*** (0.028)	0.085*** (0.028)
SBQ-R Score Greater Than or Equal to 7		0.054 (0.035)					
Diagnosed with a Mental Disorder			0.087** (0.042)	0.142* (0.079)	0.089* (0.047)	0.084** (0.041)	0.077* (0.041)
Diagnosed with a Mental Disorder X Possess or Purchase				0.103 (0.082)			
Diagnosed with a Mental Disorder X State Judge				-0.166** (0.083)			
Diagnosed with a Mental Disorder X More Than Half				-0.037 (0.084)			
Have Regular Access to Firearm					-0.154*** (0.031)	-0.165*** (0.030)	-0.109*** (0.032)
Diagnosed with a Mental Disorder X Regular Access to Firearm					-0.038 (0.093)		
Live with Children Under 18						0.058 (0.041)	0.057 (0.045)
Live with Children Under 5						-0.025 (0.050)	-0.027 (0.052)
Full Demographic Controls	NO	NO	NO	NO	NO	NO	YES
Constant	0.298*** (0.028)	0.285*** (0.029)	0.285*** (0.029)	0.274*** (0.031)	0.326*** (0.031)	0.312*** (0.032)	0.336*** (0.069)
Observations	1,050	1,050	1,050	1,050	1,050	1,050	1,050
R-squared	0.015	0.017	0.020	0.025	0.042	0.044	0.105

Model 1 shows the magnitude and statistical significance of the differences shown in Figure 2. Requiring a state judge to certify that you are not a danger to yourself or to others, rather than requesting removal and waiting seven days, lowers support by 6.6 percentage points and is statistically significant ( $p < .05$ ). Conditioning signup on more than half of other adults in the state signing up statistically increases support by 9.2 percentage points, as compared simply asking if the respondent would like to sign up. But as suggested by Figure 1, there is no statistical difference in support whether the scope of waiver is framed as “purchase or possess” or merely “purchase.”

<sup>73</sup> Augustine Osman et al., , *The Suicide Behaviors Questionnaire-Revised (SBQ-R) – Overview*, 8 ASSESSMENT 443 (1999).

<sup>74</sup> The full regression and list of demographic controls is reported in Online Appendix Table 2.

Model 2 tests whether having a SBQ-R score above 7 affects signup, and finds that it does by 5.4 percentage points, but this result is not statistically significant. However, Model 3 suggests that having been diagnosed with a mental disorder in the past is associated with increased support by 8.7 percentage points and is statistically significant ( $p < .05$ ). Model 4 interacts the mental disorder dummy with the three treatment dummy variables. Most notably, the coefficient on “Diagnosed with a Mental Disorder X State Judge” is large, negative, and statistically significant ( $p < .05$ ). This indicates that those who have been diagnosed with a mental disorder are 16.6 percentage points less likely to sign up if required to convince state judge that they are not a danger to themselves or others (as opposed to simply requesting to take their name off and waiting seven days). Concomitant with this effect is the lack of statistical significance on the uninteracted “State Judge” variable, indicating that those who have not been diagnosed with mental disorders are, statistically, equally willing to add their names even if they must go before a state judge to have it later removed.

Model 5 indicates that those with regular access to a firearm are less willing to voluntarily give up their Second Amendment rights by 15.4 percentage points. This effect is stable for those who have been diagnosed with a mental disorder. Model 6 shows that support does not seem to be affected by the presence of children in the household.

Model 7 adds full demographic controls to Model 6 (see Online Appendix Table 3 for full results). Women are 8.4 percentage points more likely to sign up than men. Asian, Black, and Hispanic respondents were all more than 10 percentage points more likely to sign up than White respondents (11.9, 15.9, and 19.7 percentage points, respectively). Registered Democrats were also statistically much more likely to be willing to waive their Second Amendment rights than Republicans, independents, and those who are not registered to vote.

## B. The Alabama Survey

The high sign-up rates reported above for those diagnosed with a mental disorder (42.9%) are consistent with the first study to assess the willingness of individuals to self-restrict firearm access in this manner.<sup>75</sup> In an anonymous written survey, 46% of 200 psychiatric patients in Alabama said they would volunteer for either the 7-day or judicial-hearing versions of the proposal.<sup>76</sup> This suggests that nearly half of individuals at highest risk of suicide would sign up.<sup>77</sup> While this sign-up rate is higher than those observed in the current study, differences in methodology must be acknowledged.

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<sup>75</sup> Fredrick E. Vars et al., *Willingness of Mentally Ill Individuals To Sign Up for a Novel Proposal To Prevent Firearm Suicide*, *SUICIDE & LIFE-THREATENING BEHAV.* (forthcoming 2016). We expect this study to be available for citation before the current article goes to press, but there is a very small chance it may not be.

<sup>76</sup> *Id.*

<sup>77</sup> See Jason B. Luoma, Catherine E. Martin, & Jane L. Pearson, *Contact with Mental Health and Primary Care Providers Before Suicide: A Review of the Evidence*, 159 *AM. J. PSYCHIATRY* 909 (2002) (as many as half of people who committed suicide had seen a mental health care professional).



The Alabama study asked each respondent about both versions of the program. The pooled number is reported because it appeared that some subjects mistakenly interpreted the task as picking between the two versions rather than as independent options. The Alabama study offered a much more extensive rationale for the proposals than did the current study. The respondents were people seeking mental health care and could therefore be counseled as to the advantages of the program.

All of that said, there are reasons to think even higher levels of participation are realistically achievable. In the Alabama study (as in the current one), having access to a gun was significantly associated with a lower sign-up rate. Alabama has the seventh highest gun ownership rate in the United States<sup>78</sup> and a strong consensus against gun regulation,<sup>79</sup> so the sign-up rate would likely be higher in other states with lower rates of gun ownership and less resistance to gun regulation.

The MTurk survey also confirmed several other secondary findings from the Alabama study. Those with current access to a gun were significantly less likely to volunteer (though 18.7% still did). Whites were less likely to sign up for the judicial hearing option in the earlier study, which was also consistent with the MTurk results. The SBQ-R score was not significantly associated with sign-up rates in either study. And the presence of children in the home appeared to have no effect.

### C. The Bottom-Line: Estimated Lives Saved

The substantial sign-up rates found in both the Alabama and MTurk surveys suggest that the proposal could save hundreds of lives each year. In 2013, there were 23,845 suicides in states without waiting periods.<sup>80</sup> In the MTurk survey, 31% indicated they would sign up for the proposal with the seven-day delay removal option.<sup>81</sup> It is unreasonable to think that a 31% waiver rate would translate into a 31% reduction in suicides. Some individuals who waive would access guns by waiting or from other sources. Others would kill themselves by other means. However, a large and sophisticated study finds a 6% reduction in suicide for handgun purchase waiting periods seven days or longer.<sup>82</sup> If we assume a 6% reduction in suicide of those who sign up, our proposal could be expected to save approximately 440 lives.<sup>83</sup> At the

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<sup>78</sup> Bindu Kalesan, Marcos D Villarreal, Katherine M. Keyes, & Sandro Galea. *Gun Ownership and Social Gun Culture*. INJURY PREVENTION (2015), doi:10.1136/injuryprev-2015-041586.

<sup>79</sup> Fredrick E. Vars, *Shooting Blanks: Alabama's New Gun Rights Amendment*, JURIST (2014), at <http://jurist.org/academic/2014/11/fredrick-vars-alabama-gun.php> (accessed 30.10.15).

<sup>80</sup> Christopher W. Drapeau & John L. McIntosh, *U.S.A. Suicide: 2013 Official Final Data*, at <http://www.suicidology.org/Portals/14/docs/Resources/FactSheets/2013datapgs3.pdf> (visited 8/2/2016) (reporting C.D.C. data).

<sup>81</sup> See *supra* Fig.1.

<sup>82</sup> Griffin Edwards et al. *Looking Down the Barrel of a Loaded Gun: The Effect of Mandatory Handgun Purchase Delays on Homicide and Suicide*, at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2629397](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2629397) (2016).

<sup>83</sup> 23,845 x .308 x .06 = 440.7

government's statistical value of human life, this amounts in economic terms to an annual benefit of more than \$4 billion – far outstripping the modest and largely one-time costs of creating the registry platform as a modest add-on to the FBI's existing program.<sup>84</sup>

Moreover, as mentioned above, there are good reasons to expect this estimate of lives saved to be a lower bound. It assumes that the 31% who signed up in states without waiting periods would experience a 6% decline in suicide. But negotiated exclusion could substantially increase the proportion that signs up, and those waivers that provide third-party emails may experience more substantial declines as these third-parties will learn if the individual attempts to rescind their waiver and may intercede to reduce the risk of suicide. In addition, some of the people who are most at risk may on their own or with the encouragement of others voluntarily cede their right to bear arms.<sup>85</sup> All things considered, one could easily imagine the system saving one or two thousand lives a year.

### III. LIBERTARIAN CONTRACTING AND ITS LIMITS

While giving individuals the unfettered, unilateral discretion to waive their right to bear arms is consonant with the libertarian embrace of self-authorship,<sup>86</sup> the negotiated-exclusion aspect of our proposal created by the email option raises separate concerns about government's burdening of individuals' Second Amendment rights. From one perspective, negotiated exclusion where waiver is induced by the threat of private third-parties to withhold commercial or non-commercial association does not raise constitutional concerns because it does not involve any state action. But the email option does involve the government as a facilitator. The government facilitates the associational marketplace by creating a registry and by credibly communicating waiver (if so directed) to third-parties.

If a state created a similar registry that gave women the option to credibly communicate to third parties whether they had previously had an abortion, merely facilitating an associational marketplace would raise grave concerns about whether the government's facilitating role would constitute an "undue burden" on the exercise of this fundamental right.<sup>87</sup> On the other hand, a government registry that gave registered voters the option of credibly communicating whether or not they exercised their right to vote would almost certainly be constitutional. Indeed many state

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<sup>84</sup>  $440.7 * \$9,100,000 = \$4,009,954,960$ . See Binyamin Appelbaum, *As U.S. Agencies Put More Value on a Life*, *Businesses Fret*, N.Y. TIMES A1 (Feb. 17, 2011) (reporting that the EPA set the value of a human life at \$9.1 million).

<sup>85</sup> In our survey, people with a mental health diagnosis were significantly more likely to sign up. This group of people is at relatively high risk of suicide. E. Clare Harris & Brian Barraclough, *Suicide as an Outcome for Mental Disorders. A Meta-Analysis*, 170 BRIT. J. PSYCHIATRY 205(1997). Taking these two facts into account would increase estimated lives saved by around 40%.

<sup>86</sup> The constitutionality of self-exclusion with regard to Second Amendment rights has separately been analyzed. Vars, *supra* note 2; Selvaggio & Vars, *supra* note 2.

<sup>87</sup> See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (state restriction is an undue burden if it has "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus").

governments, without constitutional challenge, already do more than merely give citizens the option of communicating this to others; many states publicize whether specific citizens voted or not in specific elections.<sup>88</sup> The Constitutional jurisprudence of whether government can mandate disclosure of whether individuals exercise constitutional rights is complicated – with mandated disclosure of voting allowed but with mandated disclosure of associational membership, in cases like *NAACP v. Buttons*,<sup>89</sup> prohibited. The Constitutional jurisprudence of whether government can merely facilitate an associational marketplace where private citizens burden the exercise of constitutional rights is less developed. One way of assessing the constitutionality of our email option is to ask whether it is more analogous to the presumptively prohibited status of an abortion registry or to the presumptively permissible status of a voting registry.

Without offering a definitive normative analysis of the Constitutional limits to the government as facilitator, we propose instead two limitations that argue strongly in favor in the constitutionality of our proposal, which we call the self-defense and the *Shelley* limitations. First, our self-defense limitation prevents many commercial actors from discriminating on the basis of whether a customer (or other contracting party) has waived her Second Amendment rights.<sup>90</sup> More specifically, we would only allow commercial actors to engage in negotiated exclusion if they have a sufficient self-defense interest in discouraging firearm possession by particular individuals. In *Heller*, the Supreme Court held that individual self-defense was “the *central component*” of the Second Amendment right.<sup>91</sup> The right to disassociate with people who possess arms is constitutionally at its strongest when the person disassociating is also making a decision about how best to defend their home – where, as *Heller* explained, “the need for defense of self, family, and property is most acute.”<sup>92</sup> Thus, our email option does not just make Second Amendment firearm rights contend with First Amendment associational rights, our associational market place makes one person’s self-defense preferences contend with another person’s constitutionally-equal self-defense preferences.

In June 2016, Anne Verrill, the owner of two restaurants in Portland, Maine posted a photo of an AR-15 assault rifle along with the message: “If you own this gun, or you condone the ownership of this gun for private use, you may no longer enter either of my restaurants . . . .”<sup>93</sup> If our email proposal was adopted, one might imagine that this owner would demand credible evidence that patrons had waived their right to possess firearms as a precondition of service. But our self-defense limitation would not allow such discrimination. While a restaurant

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<sup>88</sup> Alan S. Gerber, Donald P. Green, & Christopher W. Larimer, *Social Pressure and Voter Turnout: Evidence from a Largescale Field Experiment*, 102 AM. POL. SCI. REV. 33 (2008).

<sup>89</sup> *NAACP v. Button*, 371 U.S. 415 (1963) (striking down Virginia statute requiring membership list disclosure). See also *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

<sup>90</sup> These limitations are included in our model state and federal statutes. See Appendices A and B.

<sup>91</sup> *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008) (stating that the “inherent right of self-defense has been central to the Second Amendment right”). See also *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

<sup>92</sup> *Id.*

<sup>93</sup> Katharine Q. Seelye, *Think AR-15s Are O.K.? You’re Not Welcome Here*, N.Y. TIMES A10 (Aug. 2, 2016).

owner has a legitimate basis for prohibiting customers (or others) from carrying firearms onto her property,<sup>94</sup> she does not have a sufficient self-defense basis for refusing to serve customers who possess firearms remotely. Just as the baker is prohibited in some jurisdictions from refusing to make a cake for a same-sex wedding,<sup>95</sup> our proposal would prohibit most retail sellers from refusing to sell to gun possessors.

With an abundance of caution, our proposal would only allow those who live on or near the potential waiver's residence or those who have a property or insurance interest in the potential waiver's residence or life to condition their willingness to contract on waiver. Thus, our model statutes would allow covenants, landlords, homeowners' and condominium associations to condition an individual's residency upon registering to waive his or her Second Amendment rights.<sup>96</sup> And as argued above, life and property insurers as well as landlords have sufficient property interests in the potential waiver's residence and/or continued life to justify conditioning insurance and leaseholds on an individual's waiver status.<sup>97</sup>

A powerful case could be made for also allowing employers to condition employment on workers' non-possession of firearms. As mentioned above, there were 14,770 workplace homicide victims between 1992 and 2012.<sup>98</sup> The very term, "going postal," derives from "a series of incidents from 1986 onward in which United States Postal Service (USPS) workers shot and killed managers, fellow workers, and members of the police or general public."<sup>99</sup> A reasonable employer might decide that employee gun possession made the work place less safe. Nonetheless, our proposal would prohibit employment discrimination on the basis of waiver status.

Our proposal also limits government's entanglement in enforcing this limited set of allowable contracts. What we refer to as the *Shelley* limitation takes its name from *Shelley v. Kraemer*, a case in which the Supreme Court found that judicial enforcement of a privately-created racial covenant would constitute state action (violating the Equal Protection clause).<sup>100</sup> Our proposal mitigates the *Shelley* concern with state involvement through judicial enforcement in two ways. First, our federal and state statutes operate primarily as a shield with regard to self-defense contractors who choose not to contract -- immunizing these contractors for liability from

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<sup>94</sup> See *infra* Part V.

<sup>95</sup> Jacob Gershman & Tamara Audi, *Court Rules Baker Can't Refuse to Make Wedding Cake for Gay Couple*, WALL STREET J. (Aug. 13, 2015).

<sup>96</sup> See *infra* Appendices A & B.

<sup>97</sup> Allowing discrimination even in these narrow circumstances raises concerns, though not of a constitutional dimension. Suppose a homeowner's association insists upon proof of waiver because a particular homeowner is acting strangely. This might be a good faith effort to protect the community, or reflect bias against the mentally ill, or be some combination of the two. It would be permissible under our model statute, but we provide alternative language that would prevent the association from singling anyone out. In this example, it could require proof of waiver from all members or from none. See *infra* note 186.

<sup>98</sup> CDC, *Occupational Violence*, at <https://www.cdc.gov/niosh/topics/violence/> (visited July 20, 2016).

<sup>99</sup> [https://en.wikipedia.org/wiki/Going\\_postal](https://en.wikipedia.org/wiki/Going_postal)

<sup>100</sup> *Shelley v. Kraemer*, 334 U.S. 1 (1948).

such refusal. A court dismissing a non-waiving individual's claim would not be entangled in enforcing a contract provision; it would be refusing to enforce a claim. Thus, a landlord would be free in the first instance not to rent to an individual without registry confirmation of that person's prior waiver; by extension, an insurer, who was notified by the registry that a particular individual was rescinding her waiver, would be free to cancel that individual's insurance. Second, a court that was called on to rescind a prior real estate transaction because a tenant subsequently rescinded her registry waiver would, unlike *Shelley*, be enforcing against an individual who had knowingly agreed to such enforcement.<sup>101</sup> Accordingly, our proposal would allow the unwinding of real estate transactions or the imposition of differential residential fees or insurance premia for ex post registry rescission if the court finds sufficiently knowing waiver by the effected individual ex ante.<sup>102</sup>

While we limit the ability of some commercial contractors to discriminate on the basis of registry status, we place no such limitation on the non-commercial associational choices. Private citizens under our proposal would be free to withhold love, affection and friendship to people who failed to register (as signaled by the email option). Neighbors could refuse to fraternize or allow their kids to have play dates or sleep overs on this basis. While the associational First Amendment rights of commercial actors, like their free-speech First Amendment rights, are subject to constitutional restriction,<sup>103</sup> we are chary to restrict the associational rights of non-commercial individuals and organizations.<sup>104</sup> Individuals' choice not to renounce their Second Amendment rights might limit their ability to interact with others in non-economic spheres, but they remain free to find their own communities of kindred spirits.

Stepping back, we have proposed a system in which commercial contractors without sufficient self-defense interests – including employers and virtually all retailers of goods and services – would be prohibited from discriminating against someone for failing to waive the rights to purchase or possess firearms. With regard to all of these contractors, an individual's right to possess to bear arms would be market-inalienable.<sup>105</sup> Government's role in facilitating associational discrimination by non-commercial entities or commercial entities is itself one-sided. A landlord under our proposal could refuse to lease to someone who had not registered, but the government would not facilitate discrimination by a landlord who insisted on gun possession as a precondition of leasing.<sup>106</sup> A tenant could more directly satisfy such a landlord

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<sup>101</sup> Vars, *supra* note 2; Selvaggio & Vars, *supra* note 2.

<sup>102</sup> A more restrained version of our proposal that excluded any affirmative claims by email addresses would leave insurance markets largely unaffected (where affirmative claims against insureds are rare), but would limit the ability of landlords and nearby tenants to evict individuals that breached promises to remain on the registry. *See infra* Part VI (discussing *In Rem* registry).

<sup>103</sup> *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984); *see also* Gershman & Audi, *supra* note 95.

<sup>104</sup> *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

<sup>105</sup> Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) (“Something that is market-inalienable is not to be sold, which in our economic system means it is not to be traded in the market.”).

<sup>106</sup> Although in “shall issue” states, the issuance of a concealed weapons permit might be a way in which government facilitates an associational marketplace for those who prefer associating with gun owners.

preference by showing the gun itself. While the exact contours of any possible constitutional duty on government to refrain from facilitating associational preferences are debatable, we are confident that our limitations – especially prohibiting associational discrimination by commercial contractors without sufficient self-defense interests in the firearm choices of others – allow our email option to pass constitutional muster.

#### IV. IMPLEMENTATION

##### A. Federal Legislation

Our proposal could easily be implemented by Congress making a few minor modifications to 18 U.S.C. § 922, along with enacting a new subsection.<sup>107</sup> Model legislation sufficient to accomplish this (and comprising fewer than 500 words) is set forth in Appendix A. A federal statute of this kind would be the ideal approach to implementation, providing national access built seamlessly on NICS. However, federal firearms legislation has historically been difficult to pass.<sup>108</sup>

##### B. State Legislation

If federal legislation is unachievable, individual states could implement the proposal by exploiting an existing state-option to expand NICS coverage. Significantly, the federal background check system already allows states to add categories of covered individuals into the NICS system – because under the federal law, the NICS system prohibits transfer where barred by federal *or state* law.<sup>109</sup> Individual states have already taken advantage of this option to

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See Ian Ayres & John J. Donohue III, *Shooting Down the “More Guns, Less Crime” Hypothesis*, 55 STAN. L. REV. 1193 (2003) (discussing “shall issue” concealed carry statutes and their effects on crime).

<sup>107</sup> One might imagine that a version of the proposal might be implemented through an aggressive interpretation of the President’s executive order power. Cf. William P Marshall, *Actually We Should Wait: Evaluating the Obama Administration’s Commitment to Unilateral Executive-Branch Action*, 2014 UTAH L. REV. 773 (describing and criticizing the expansion of executive authority). For example, the President might issue an order or cause the FBI to issue a revised regulation interpreting one of the nine prohibited purchase or possession categories to include people who sign-up under this proposal. The most plausible disqualifier is for a person who has “been committed to a mental institution.” *Id.* § 922(g)(4). The proposal could be recast such that signing up constitutes a kind of virtual commitment. The current regulations defining the phrase, 27 C.F.R. § 555.11, might be modified to say: “The term ‘committed to a mental institution’ does include a person whose name appears in the NICS as a result of their own voluntary request.” Such an interpretation, however, was obviously not intended by Congress when it enacted the gun law. Clare Priest, *When a Stopgap Measure Triggers a Permanent Proscription: The Interpretation of “Committed to a Mental Institution” in the Gun Control Act of 1968*, 80 WASH. U. L.Q. 359, 387 (January 2002) (“[T]o follow Congress’s intention, courts should only prohibit gun possession by persons who have been formally committed.”).

<sup>108</sup> Jonathan Weisman, *Gun Control Drive Blocked In Senate; Obama, In Defeat, Sees ‘Shameful Day,’* N.Y. TIMES A1 (Apr. 18, 2013). Even lifting the ban on federal funding of gun research is highly contested. David Smith, *Obama Looks To Expand Background Checks for Guns with Executive Action White House Says It Is Also Exploring So-Called Gun Show Loophole As House Democrats Push To Have Federal Ban on Gun Violence Research Funding Lifted*, THE GUARDIAN (U.K.), 2016 WLNR 14430252 (May 11, 2016).

<sup>109</sup> 18 U.S.C. § 922(t)(4), (5). F.B.I., NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) OPERATIONS 2013, at <https://www.fbi.gov/about-us/cjis/nics/reports/2013-operations-report> (visited 5/18/2016).

expand the coverage of prohibited individuals. For example, Illinois prohibits people who have voluntarily admitted themselves within the past five years to “a mental health institution for mental health treatment.”<sup>110</sup> In effect, Illinois already has a version of our proposed libertarian gun control, because by volunteering to be admitted, an individual waives the right to possess or purchase firearms for the next five years. As of 2013, more than 100,000 individuals were included in NICS solely because they were prohibited from possessing firearms under state law (and hence under NICS are categorized as “state prohibitors”).<sup>111</sup>

By creating a new category of individuals who cannot lawfully possess firearms, a state can not only prevent non-residents from purchasing guns in that state, but it can also prevent residents of that prohibiting state from purchasing guns in any other state in the country. As explained in the FBI’s Federal Firearm Licensee Manual, “The National Instant Criminal Background Check System (NICS) is required to deny the transfer of a firearm to any individual who is found to be prohibited under state law, i.e., under the law of the purchaser’s state of residence and/or the law of the state where the transfer occurs.”<sup>112</sup> Under this interpretation, a resident of Alabama who was voluntarily committed would not be able to purchase a gun for five years in Illinois. Moreover, a resident of Illinois who was voluntarily committed would not (for five years) be able to purchase a weapon in any state in the nation.<sup>113</sup> As shown in Table 2, a state’s prohibitor category would only not apply if the person with the prohibitor characteristic was not a resident of the prohibitor state *and* was not attempting to purchase in the prohibitor state. Thus, the Illinois provision would not apply to an Alabama resident who was voluntarily committed and attempting to purchase in Alabama or any other state without this prohibitor category.

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<sup>110</sup> 720 ILCS 5/24-3.1. Illinois is not alone. Del. Code Ann. tit. 11, § 1448(a)(2); D.C. Code § 7-2502.03(a)(6); Ga. Code Ann. § 16-11-129(b)(2)(J); Mass. Ann. Laws ch. 140, § 131(d)(ii); *State v. Dunham*, No. 9812012054, 1999 WL 1223767, at \*3 (Del. Super. Ct. Oct. 6, 1999) (“[T]he person’s voluntariness is irrelevant....”).

<sup>111</sup> See *supra* note 63 and accompanying text.

<sup>112</sup> F.B.I., NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) FEDERAL FIREARMS LICENSEE MANUAL 2, at <https://www.fbi.gov/about-us/cjis/nics/federal-firearms-licensees/ffl-manual> (downloaded May 23, 2016). *But cf.* 27 C.F.R. § 478.99 (barring interstate handgun transfers and stating that sellers may not sell to buyers who are too young under state law “applicable at the place of sale”); *Mance v. Holder*, 74 F. Supp. 3d 795 (N.D. Tex. 2015) (holding interstate handgun transfer ban unconstitutional). The broadest reading of “State law,” 18 U.S.C. § 922(t)(4), (5), under the federal background check statute would prevent purchase in *every* state by anyone barred by *any* state’s law. Longstanding principles of extraterritoriality and choice-of-law militate against such an interpretation, *Huntington v. Attrill*, 146 U.S. 657, 669 (1892) (“Crimes and offenses against the laws of any state can only be defined, prosecuted, and pardoned by the sovereign authority of that state.”), but do not preclude it: “[C]oncerns regarding extraterritorial effects of state law are misplaced. We are dealing with a federal statute which has incorporated state law into its application. Upon incorporation, that state law became a part of the federal statutory scheme; so, it is federal law being given effect, not state law.” *In re Stockburger*, 192 B.R. 908, 910 (E.D. Tenn. 1996).

<sup>113</sup> If the Illinois resident in this example changes her residency some time during this five-period to a state without the prohibitor category, we imagine that she would be able to buy in any state without the prohibitor category (but she would continue to be unable to purchase in Illinois and any other state with the prohibitor category because possession would be unlawful in “the state where the transfer occurs.” *Id.*

Table 2: Extraterritorial Effect of State Prohibitor (including “No Guns” Waiver) Categories

		Place of Purchase or Possession	
		Prohibiting State	Non-Prohibiting State
Place of Residence	Prohibiting State	Applies	Applies
	Non-Prohibiting State	Applies	Does Not Apply

An individual state could accordingly implement our proposal for “libertarian gun control” by simply creating a state waiver registry and passing legislation making it illegal for individuals who register to possess firearms. This state statute would thereby create a new prohibitor category, and the individuals who registered with the state would then automatically qualify for inclusion in the NICS system. The state on an ongoing basis would forward registrant information to the FBI,<sup>114</sup> and the registrants would then be barred from purchasing in the applicable jurisdictions described in Table 2. Thus, if California passed such a statute, then a California registrant would be barred from purchasing a firearm in any state in the country. But California in passing the statute could also give a small commitment gift to non-California residents as well, because non-Californian residents who registered in the California system would at least be barred from purchasing guns in California. (However, a state statute in this example would not prohibit non-Californians from possessing or purchasing guns outside of California.)

Except for achieving a national effect for non-state registrants, a state statute on its own could fully implement all aspects of our proposal – including the information prerequisites, the waiver rescission option, and the option of credibly communicating one’s waiver to others. A model state statute (weighing in with fewer than 600 words) that accomplishes all this and integrates with the NICS system is included in Appendix B.

Moreover, our proposed statute provides for reciprocity that would allow a subset of states to increase the footprint the registrations effect. Crucially, the statute provides that “registering in any other state that adopts an analogous “No Guns” registry renders possession of a firearm illegal” in other passing jurisdictions.<sup>115</sup> Thus, if California and Illinois both passed the model statute, then anyone who registered in one state could not then legally possess in either state. We do not anticipate that our model statute would be enacted in many states at once, but we can

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<sup>114</sup> The NICS system allows states to choose whether to maintain their own databases for at least some background checks. See 28 C.F.R. § 25.2 (providing that state point of contact can “check state and local record systems,” as well as NICS). As of 2013, in 29 states, dealers contacted the FBI directly for all background checks. F.B.I., *supra* note 109. But all states have the option of passing on names of persons who fall into a prohibited possession category to the FBI, so our proposal would merely be adding a new prohibitor category that could be transmitted. See 28 C.F.R. § 25.4 (stating that reporting by states to NICS is voluntary).

<sup>115</sup> See *infra* Appendix B, Section 3.



easily imagine passage by those states (such as California and Illinois) that have shown an appetite for various other firearms restrictions.<sup>116</sup>

### C. Competitive Federalism

A final, more creative, implementation alternative is the next best thing to federal legislation: allow individuals from other states to opt-in to the law of a state that has adopted the proposal. It would be like corporations choosing to charter in Delaware.<sup>117</sup> All that would be required would be for the Justice Department to provide through express rulemaking that “State law” includes not just the law of the place of the transfer and the state of residence, but also the state law selected under the proposal.<sup>118</sup> This would in fact be the best reading of the statute, which is designed to set a coherent federal floor on gun regulation, not a crazy quilt with state-specific loopholes.<sup>119</sup> The effect of such an interpretation would be that, by registering in an enacting state, a resident of a non-enacting state could thereby be barred from purchasing in any state in the union.<sup>120</sup>

Conflict-of-laws principles militate strongly in favor of interpreting “state law” in the federal background check statute to include the “state prohibitor” restrictions of an enacting state as chosen by an out-of-state participant. This is a question of federal law, so federal question cases present the closest analogy. When sitting in a federal question case, the circuits are split on whether to apply federal common law choice of law principles or to apply the choice of law

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<sup>116</sup> States that are already voluntarily reporting to NICS large numbers of people disqualified by federal mental health restrictions might be the most likely to enact. The top ten reporting states are Pennsylvania, New Jersey, Virginia, Delaware, California, Washington, Michigan, New York, Texas, and Colorado. EVERYTOWN, CLOSING THE GAPS: STRENGTHENING THE BACKGROUND CHECK SYSTEM TO KEEP GUNS AWAY FROM THE DANGEROUSLY MENTALLY ILL 12 (2014).

Under the FBI’s current interpretation that “state law” includes either the transaction state or the buyer’s state of residence, *see supra* text accompanying note 112, residents of any state that passes the model statute would be barred from purchasing nationwide. But the reciprocity would broaden the scope of resident registrants in the circumstance that the federal government limited NICS to the place of transaction. Under that interpretation, a registrant in California would be barred from purchasing in either California or Illinois. To implement reciprocity, enacting states would need to share registrant information with other each other (as is provided in Section 2 of the model statute). See Appendix B.

<sup>117</sup> See Timothy P. Glynn, *Delaware’s Vantagepoint: The Empire Strikes Back in the Post-Post-Enron Era*, 102 NW. U. L. REV. 91, 97-98 (2008) (“About sixty percent of all publicly traded American corporations are chartered in Delaware, and an overwhelming percentage—over eighty percent—of all out-of-state incorporations of such firms are in Delaware.”).

<sup>118</sup> An interpretation might not even require formal rule-making procedures. See *Guadamuz v. Bowen*, 859 F.2d 762, 771 (9<sup>th</sup> Cir. 1988) (explaining that interpretive rules, like those expressing an agency’s “tentative view of the meaning of a particular statutory term,” are not subject to the Administrative Procedure Act’s strict requirements).

<sup>119</sup> See *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 222 (2008) (construction of statutory phrase “must, to the extent possible, ensure that the statutory scheme is coherent and consistent”); *In re Stockburger*, 192 B.R. 908, 910 (E.D. Tenn. 1996) (“it is federal law being given effect, not state law”)

<sup>120</sup> However, such an interpretation would still not create a nation-wide footprint regarding possession prohibition – meaning that a resident of a non-enacting state who registered in an enacting state would still be able to possess firearms in any non-enacting state.

principles of the forum state.<sup>121</sup> Federal common law and nearly half of the states follow the approach of the *Second Restatement*.<sup>122</sup> Under the *Second Restatement*, choice of law is enforced where there is a “reasonable basis for the parties’ choice” and the choice is not “contrary to a fundamental policy” of the more interested state.<sup>123</sup> Wanting to protect oneself nationwide against impulsive gun purchase is a reasonable basis for the choice of law, and no state has a fundamental policy against exercising that option.

Some *Second Restatement* states will not enforce a choice of law clause in a contract if that contract has no “significant relationship” to the state of the law selected.<sup>124</sup> In *Contour Design, Inc. v. Chance Mold Steel Co.*, the only connection between the contract and the state’s law selected in the choice of law clause was that the lawyer who drafted the contract worked in that state at the time, and the court held that this was not enough of a significant relationship to enforce the choice of law clause.<sup>125</sup> Here, there is a much more significant relationship. The “contract” would be between an individual and the enacting state, and possible only by virtue of that state’s enactment of the proposal. The choice of law is essential to the very existence of the contract. In addition, the individual will have purposefully sought out the enacting state and delivered a form to it, and that state will have processed the form and added the individual’s name to a registry within the state. These contacts are likely enough that they would pass the “any significant relationship” test in the states that use it.

The states that do not expressly apply the *Second Restatement* apply a variety of other modern approaches, or the Traditional Approach, which follows the *First Restatement*.<sup>126</sup> Of these, the Traditional Approach is the least likely to enforce the parties’ choice of law.<sup>127</sup> The Traditional Approach does not provide one generic test for determining when a court will enforce a choice of law clause.<sup>128</sup> Some Traditional courts required that the choice of law be bona fide and that the law of the jurisdiction chosen must have some relation to the agreement.<sup>129</sup> An individual’s choice to bind himself to the enacting state’s law for the gun control list would likely pass this test. Wanting to protect oneself nationwide against impulsive gun purchases is a bona fide reason for choosing the enacting state’s law, and the combination of delivering an

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<sup>121</sup> See *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997 (9th Cir. 2006) (Because jurisdiction is not based on diversity, federal common law applies.). *But see* *Barkanic v. General Admin. of Civil Aviation of the People’s Republic of China*, 923 F.2d 957, 961 (2d Cir. 1991) (stating that forum choice of law principles could apply).

<sup>122</sup> *Huynh v. Chase Manhattan Bank*, 923 F.2d at 997 (“Federal common law follows the approach outlined in the RESTATEMENT (SECOND) OF CONFLICTS OF LAWS.”); Symeon C. Symeonides, *Choice of Law in the American Courts in 2009*, 58 AM. J. COMP. L. 227, 231 (23 states follow the Second Restatement for contracts).

<sup>123</sup> RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 187(2)(1971).

<sup>124</sup> *Contour Design, Inc. v. Chance Mold Steel Co.*, 693 F.3d 102, 107 (1st Cir. 2012)

<sup>125</sup> *Id.*

<sup>126</sup> Symeon C. Symeonides, *Choice of Law in the American Courts in 2009*, 58 Am. J. Comp. L. 227, 231

<sup>127</sup> Aristotle G. Mirzaian, *Y2K Who Cares? We Have Bigger Problems: Choice of Law in Electronic Contracts*, 6 Rich. J.L. & Tech. 20, 123 (2000) (“under the First Restatement, the traditional view of choice of law clauses in contracts was that they were presumptively unenforceable.”)

<sup>128</sup> *Barnes Grp., Inc. v. C & C Products, Inc.*, 716 F.2d 1023, 1029 (4th Cir. 1983) (For choice of law provisions, “the rule-oriented approach of the first Restatement of Conflicts provides no ready analytical framework”).

<sup>129</sup> *Siegelman v. Cunard White Star Ltd.*, 221 F.2d 189 (2d Cir. 1955)

application form to that state and the state's processing of that form give the "contract" some relation to the enacting state. Additionally, today, even courts that follow the Traditional Approach value party autonomy and enforce choice of law clauses.<sup>130</sup> These courts have either explicitly adopted section 187 of the *Second Restatement*, or use a similar test without citing section 187.<sup>131</sup> Because respecting a participant's choice of an enacting state's law passes the *Second Restatement's* test, it would likely be enforceable in all fifty states.<sup>132</sup>

#### D. No Conflict with Existing State "Gag Laws"

Enactment of the proposal at the federal level would preempt any contrary state law. But our model state statute runs the risk of conflicting with the laws of other states. As argued in the previous subsection, voluntary self-restriction of gun rights does not violate the "fundamental public policy" of any state. Some states, however, have laws restricting certain conversations about guns between health care providers and patients. Properly read, those laws do not impose a barrier to the proposal. First, these gag laws would have no limiting effect on the communications between health care providers and patients in enacting states (which presumably would not have the gag provisions). Second, people in non-enacting states might learn about and use the No Guns Registry without it ever being mentioned by health care providers.

Moreover, speaking about the registry need not violate existing state gag laws. In Florida, for example, a health care practitioner may not generally inquire as to "the ownership of a firearm or . . . the presence of a firearm" in a patient's home.<sup>133</sup> Presenting "No Guns Registry" as an option does not run afoul of this prohibition for several reasons. First,<sup>134</sup> a health care provider could quite naturally present the registry as an option without any firearm-related inquiry at all. A health care provider need not solicit or record any firearm information in order to suggest that a patient consider self-restricting gun purchase.

Explaining this option could in theory give rise to a claim that the health care provider was "unnecessarily harassing a patient about firearm ownership during an examination," which is forbidden by a different section of the gag law.<sup>135</sup> But the Eleventh Circuit has read the harassment provision to prohibit only disparagement and persistent unwanted communications.<sup>136</sup> A one-time brief explanation of the registry option during a patient visit would be neither disparaging nor persistent.

A second argument comes into play if a health care provider wants to outline the potential benefits of waiving one's rights to bear arms in greater depth based on a patient's risk of suicide rather than just in general. Florida law specifically allows firearms-related questioning

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<sup>130</sup> William M. Richman, *The First Restatement of Conflict of Laws on the Twenty-Fifth Anniversary of its Successor: Contemporary Practice in Traditional Courts*, 56 MD. L. REV. 1196, 1213 (1997) ("contemporary First Restatement courts routinely enforce choice-of-law clauses and routinely endorse the principle of party autonomy.")

<sup>131</sup> *Id.*

<sup>132</sup> Steven M. Richman, *International Contracts What Practitioners Need to Know*, N.J. Law., December 2012, at 17, 19 ("Choice of law clauses in this country will generally be enforced unless there is a public policy issue or there is absolutely no reasonable relationship of the chosen law to the transaction or the parties.")

<sup>133</sup> Fla. Stat. Ann. § 790.338(2).

<sup>134</sup> Or perhaps second. One could also argue that DNS concerns the potential *purchase* of a firearm, not ownership or present access in the home. The obvious counter-argument, however, is that purchase is closely enough connected to ownership to fall within the prohibition.

<sup>135</sup> Fla. Stat. Ann. § 790.338(6).

<sup>136</sup> *Wollschlaeger v. Governor of Florida*, 797 F.3d 859, 882-83 (11<sup>th</sup> Cir. 2015).

when the provider “in good faith believes that this information is relevant to the patient's medical care or safety, or the safety of others.”<sup>137</sup> Because firearm access is strongly associated with higher risks of suicide and accidents, many health care providers believe in good faith that firearm ownership and access are *always* relevant to patient and household safety.<sup>138</sup> To read the exception this broadly, however, would swallow the general rule, or so the Eleventh Circuit has concluded.<sup>139</sup> A health care provider may therefore inquire about firearm ownership and access only when he or she has a good faith belief in relevance “based on the specifics of the patient's case.”<sup>140</sup>

If a doctor learns as part of her general intake procedure that a patient has recurring thoughts of suicide, firearm counseling surely must be permissible.<sup>141</sup> So too if a physician who learns from an initial interview that a patient has indicia of depression,<sup>142</sup> then inquiries about firearm access and the registry would fall within the exception because depression has been shown to be a strong risk factor for suicide.<sup>143</sup>

## V. “IN REM” WAIVER

This article is focused primarily on “in personam” self-restriction, but there are analogous “in rem” restrictions on real property.<sup>144</sup> For example, a landowner can transform her property into a gun-free zone by posting “no firearms allowed” on her land – even with regard to citizens who are otherwise permitted by statute concealed or open carry of firearms.<sup>145</sup> Many common-

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<sup>137</sup> Fla. Stat. Ann. § 790.338(2). The harassment ban incorporates essentially the same principle by extending only to “unnecessar[y]” harassment. Fla. Stat. Ann. § 790.338(6). *Wollschlaeger*, 797 F.3d at 883.

<sup>138</sup> E.g., American Academy of Pediatrics, *Policy Statement: Firearm-Related Injuries Affecting the Pediatric Population*, 130 PEDIATRICS 1416, 1421 (2012).

<sup>139</sup> *Wollschlaeger v. Governor of Florida*, 797 F.3d 859 (11<sup>th</sup> Cir. 2015).

<sup>140</sup> *Id.* at 881.

<sup>141</sup> *Wollschlaeger*, 797 F.3d at 883 (“For example, if a patient is suicidal, a physician may wish to attempt to persuade the patient to remove firearms from the patient's home, even if the patient initially objects.”).

<sup>142</sup> American College of Physicians, Patient Care & Office Forms, Summary Form, at [https://www.acponline.org/running\\_practice/practice\\_management/forms/matrix.htm](https://www.acponline.org/running_practice/practice_management/forms/matrix.htm) (downloaded 11/24/2015).

<sup>143</sup> John Michael Bostwick & V. Shane Pankratz, *Affective Disorders and Suicide Risk: A Reexamination*, 157 AM. J. PSYCHIATRY 1925 (2000).

A final fallback position is that the gag law violates patients’ Second Amendment right *not* to bear arms. A government prohibition on hearing from health care providers about option to waive your right to bear arms via the registry burdens one’s right to control one’s own access to firearms. Whether a burden on Second Amendment rights triggers intermediate or strict scrutiny depends on “the nature of the conduct being regulated and the degree to which the challenged law burdens the right.” *United States v. Chovan*, 735 F.3d 1127, 1136 (9<sup>th</sup> Cir. 2013) (quoting *Chester*, 628 F.3d at 682). While the right *not* to bear arms is protected by the constitution, *see* Blocher, *supra* note 1, at 50 (arguing for this right with some exceptions, e.g., for drafted soldiers who cannot establish conscientious objector status), the right to durably waive the right to bear arms is unlikely to be a constitutional right. The government does not have an obligation to provide a waiver option – either by creating a registry or by enforcing waiver agreements. Accordingly, we find it unlikely that courts would strike down as unconstitutional a law prohibiting health-care provider discussion of the waiver option.

<sup>144</sup> The two types of restrictions can obviously overlap. In such instances, “in rem” restriction has the advantage of avoiding invidious discrimination. *See supra* note 97.

<sup>145</sup> 13 AAC 30.110(b) (Alaska) (“Nothing in this chapter or in AS 18.65.700 - 18.65.790 precludes a person from posting, to the extent allowed by law, a notice regarding the carrying of a concealed handgun.”); Utah Code Ann. § 76-10-530; Ga. Code Ann., § 16-11-127(c) (“private property owners or persons in legal control of private property through a lease, rental agreement, licensing agreement, contract, or any other agreement to control access to such

interest communities are already gun-free by covenant.<sup>146</sup> Landlords can similarly restrict gun possession in leases except where this conflicts with state statute.<sup>147</sup>

This should not be surprising. In one nationally representative survey, 50% of respondents reported that they would feel less safe if more people in their community owned guns, while only 14% said they would feel safer.<sup>148</sup> As discussed above,<sup>149</sup> a substantial majority of Americans live in gun-free homes, and it is natural for these citizens to prefer that their neighbors also to be unarmed. A large percentage of Democrats in particular want gun-free communities: in a recent poll, 41% said it would be harder to get along with a new neighbor who owned a gun.<sup>150</sup> One might reasonably believe that disputes between neighbors would less often be fatal if the neighborhood was gun free. Gun accidents could be virtually eliminated. In Alabama and the other 14 states with the most guns, 82 children aged 5 to 14 died from accidental gunshot wounds between 2003 and 2007, as compared with just 8 in the six states with the fewest guns (though there were virtually the same number of kids in that age range).<sup>151</sup>

This section focuses on how government could facilitate owners' ability to (i) durably waive their right and the right of their successors to allow firearms on particular property parcels and (ii) create sufficient notice to third-parties so that they would be liable of criminal trespass

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private property shall have the right to exclude or eject a person who is in possession of a weapon or long gun on their private property"); 430 ILCS 66/65(a-10) ("The owner of private real property of any type may prohibit the carrying of concealed firearms on the property under his or her control."); Mo. Stat. Ann. § 571.107; N.M. Admin. Code § 10.8.2.16(F); N.C.G.S.A. § 14-415.11(c)(8). In Louisiana and South Carolina, the default is that invitees may not carry concealed weapons onto a private residence – so no posting is necessary. LSA-R.S. 40:1379.3(O) ("No individual to whom a concealed handgun permit is issued may carry such concealed handgun into the private residence of another without first receiving the consent of that person."); S.C. Code 1976 § 23-31-225. There is even an argument that the owner of a private residence retains the common law right to exclude firearms even in states that have adopted statutes allowing concealed carry except in specified locations not expressly including private residences. *See* State v. Taylor, 425 P.2d 1014, 1018 (Haw. 1967) ("Statutes in derogation of the common law are strictly construed, and a court should not, merely by application of the maxim *expressio unius exclusion alterius*, find that the common law has been superseded in the area not mentioned by a statute, where it does not appear that it was the legislative purpose to supersede the common law."). *But cf.* 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) (suggesting that "no guns allowed" signs in store "might not automatically transform all concealed-gun-carrying shoppers into trespassers").

<sup>146</sup> Christopher J. Wahl, *Keeping Heller Out of the Home: Homeowners Associations and the Right To Keep and Bear Arms*, 15 U. PA. J. CONST. L. 1003, 1003 & n.5 (2013); Blocher & Miller, *supra* note 145, at 319.

<sup>147</sup> *Compare* Tenn. Op. Atty. Gen. No. 09-170, 2009 WL 3666436 (Oct. 26, 2009) ("A landlord can prohibit tenants, including those who hold handgun carry permits, from possessing firearms within leased premises. Such a prohibition may be imposed through a clause in the lease."), *with* Ohio Rev. Code R.C. § 2923.126(b) ("A landlord may not prohibit or restrict a tenant who is a licensee and who on or after September 9, 2008, enters into a rental agreement with the landlord for the use of residential premises, and the tenant's guest while the tenant is present, from lawfully carrying or possessing a handgun on those residential premises.").

<sup>148</sup> Matthew Miller, Deborah Azrael, & David Hemenway, *Community Firearms, Community Fear*, 11 EPIDEMIOLOGY 709 (2000).

<sup>149</sup> *See supra* text accompanying note 64.

<sup>150</sup> Hannah Fingerhut, *Partisanship in the U.S. Isn't Just About Politics, But How People See Their Neighbors* (6/27/2016), at <http://www.pewresearch.org/fact-tank/2016/06/27/partisanship-in-u-s-isnt-just-about-politics-but-how-people-see-their-neighbors/> (visited 7/4/2016). In contrast, the figure for Republicans is only 6%. *Id.*

<sup>151</sup> David Hemenway, *Risks and Benefits of a Gun in the Home*, 5 AM. J. LIFESTYLE MED. 502, 503 (2011).

for entering property while knowingly in the possession of a firearm. As an initial matter, owners could agree to restrictive covenants that would bind them and future owners to exclude firearms from their land. For example, a 1910 California appeals court interpreted a deed with a habendum clause which expressly provided that “one of the conditions of this conveyance is that the use of firearms upon said premises is and shall be forever prohibited” to be an enforceable restrictive covenant in gross which runs with the servient tenement.<sup>152</sup> Covenants appurtenant reciprocally agreed to by neighboring tracts and recorded in public land records are especially likely to be enforceable at common law.<sup>153</sup>

Landowners wishing to make their land “gun free” might also be able to take advantage of conservation easement statutes that have been enacted in most jurisdictions.<sup>154</sup> 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.” In *Wooster v. Dept. of Fish and Game*,<sup>155</sup> a state appellate court interpreted a conservation easement, finding that the grant of hunting rights to a state department (so the department could prohibit hunting on the property) was consistent with the statute’s easement purpose requirements:

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 firearms. Using a conservation easement to ban hunting most certainly does help retain land in this sort of unspoiled condition.<sup>156</sup>

A “conservation easement” that granted to state police the sole right to bear arms on a particular property (so the police might prohibit firearms on the property) might analogously qualify as having a “natural,” “historical” or “scenic” purpose. Just as governments provide various financial incentives to stimulate the use of conservation easements,<sup>157</sup> one could imagine states

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<sup>152</sup> *Guaranty Realty Co. v. Recreation Gun Club*, 12 Cal. App. 383, 390 (Cal. 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.”).

<sup>153</sup> THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* 1051 (2d ed. 2012) (“A negative covenant in gross probably would not run with the land at common law. It could not be enforced as a real covenant, since the privity requirements would not be met. And courts generally refused to enforce covenants in gross as equitable servitudes, only appurtenant covenants were eligible for enforcement against successors with notice.”).

<sup>154</sup> See RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 8.5 TD No.7 (1998) (reporting that all but three states had enacted statutes to eliminate questions about the enforceability of conservation servitudes or easements).

<sup>155</sup> 211 Cal. App. 4th 1020 (Cal. Ct. App. 2012).

<sup>156</sup> *Id.* at 1034.

<sup>157</sup> Christen Linke Young, *Conservation Easement Tax Credits in Environmental Federalism*, 117 YALE L.J. POCKET PART 218 (2008).

incentivizing the use of conservation easements to expand the number of gun-free acres in a jurisdiction.<sup>158</sup>

Alternatively, a landowner who wants the prohibition on guns to bind subsequent owners could, when selling the property, only convey a defeasible fee. This, for example, might be accomplished by including 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.”<sup>159</sup> The original owner would retain a possibility of reverter (not limited by the rule against perpetuities) that would automatically revert to fee simple absolute ownership if the firearm condition occurs.<sup>160</sup> Modern title records provide ample notice to potential buyers of these restrictions – as covenants, conservation easements and defeasibility of fees would all be recorded and discovered in title searches.

The existing methods provide ample opportunity for existing owners to bind themselves and successors in interest, but to make the land truly “gun free” it is also necessary to constrain third parties from carrying firearms onto the land and to do so in a way that durably extends to periods of successor owners. Durably constraining third parties might be accomplished by including in the covenants, conservation easements or defeasible fee grants provisions that impose duties on current and successive owners to post the land with signs notifying third parties that firearms are not allowed on the property.<sup>161</sup> Sufficiently conspicuous signs have been found to provide adequate constructive notice to third parties such that their violation constitutes criminal trespass.<sup>162</sup> Alternatively, the state could facilitate third-party notice by changing the default terms of real property invitations. A “no guns” default would mean that third-party invitees could not lawfully enter with a gun unless the invitation explicitly said so. In Louisiana and South Carolina, the default rule is already that third-parties may not carry concealed handguns in another’s private residence.<sup>163</sup> With a no guns default, property owners and their

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<sup>158</sup> Conservation easements prohibiting firearms would not, however, qualify for favorable federal tax treatment as having one of the existing “conservation purposes” under the Internal Revenue Code § 170(h)(4)(A) except if the land dedicated was open to the public or was historically important or hosted ecologically significant flora or fauna.

<sup>159</sup> A fee simple subject to condition subsequent would also suffice. *See generally* Mountain Brow Lodge No. 82, Independent Order of Odd Fellows v. Toscano, 257 Cal. App.2d 22 (Cal. App. 1967).

<sup>160</sup> The possibility of reverter interest is carved out of the original grantor’s estate and hence remains vested, thus avoiding the Rule Against Perpetuities concern with remote vesting. MERRILL & SMITH, *supra* note 153, at 510, 516, 574.

<sup>161</sup> An analogous no-hunting provision was included in the conservation easement at issue in *Wooster v. Dept. of Fish and Game*, 211 Cal. App. 4th 1020 (Cal. Ct. App. 2012), which required state department to “post the property at all points of entry to inform the public that said property is a State wildlife area and that no trespassing or hunting is allowed.”

<sup>162</sup> CHARLES T. WILLIAMS, BALDWIN'S OH. PRAC. REAL EST. § 32A:21 (2016 update). As Judge Posner has emphasized, not all fraudulently induced invitations to enter private property constitute criminal trespass. *Desnick v. Am. Broadcasting Cos.*, 44 F.3d 1345 (7th 1995). However, Joseph Blocher and Darrell A. H. Miller persuasively argue: “The basic analysis from cases like *Desnick* suggests that the gun-carrier *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.” Blocher & Miller, *supra* note 145, at 315.

<sup>163</sup> *See supra* note 145. Georgia’s recent “Safe Carry Protection Act” deploys different defaults for different places: an “opt out” default for bars and a “opt in” defaults for houses of worship and schools. Safe Carry Protection Act,

successors would merely need to be bound not to “contract around” the default by inviting people carrying firearms onto their property.

These “in rem” gun restrictions on owners, successors in interest, and third-parties are likely constitutional. The Second Amendment generally restricts state action, not private arrangements like the ones described above.<sup>164</sup> The only two relevant exceptions to the state action doctrine are the *Shelley* limitation on racially restrictive covenants and the company towns limitation.<sup>165</sup> If private gun-free zones became so prevalent that gun-owners had difficulty finding places to lawfully possess and store their guns and the zones were deemed to be “quasi-governmental,” the geographic restrictions might conceivably qualify under the second exception.<sup>166</sup> The company town exception is thus well-suited to capture the concern that gun-free zones could burden individuals’ right to bear arms in their home by so restricting the set of available residences that there would be no market opportunity to buy or rent a home where guns could be lawfully possessed. But this company-town exception is limited to places where a single or small group of private owners constrain contracting options and effectively becomes the local government.<sup>167</sup> The company town doctrine implicitly facilitates an “in rem” associational marketplace, because aggregate contracting constraints created by the similar preferences of dispersed private owners do not trigger constitutional scrutiny. Another possible way to meet the state action requirement is criminal prosecution. The police simply removing a trespasser from a premises pursuant to a criminal trespass statute, without independent investigation, does not amount to state action.<sup>168</sup> Removal, and more so criminal prosecution, could presumably constitute state action if the trespass statute were not generally applicable but rather singled-out gun possession.<sup>169</sup>

State constitutions, unlike the federal constitution, may regulate purely private conduct.<sup>170</sup> Case law on private gun regulation is sparse, but one Connecticut court concluded that the state’s broadly worded<sup>171</sup> constitutional right to bear arms “does not prevent a private

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2014 Ga. Laws 601, §§ 1-5, 1-6, codified at Ga. Code. Ann. §§ 16-11-127 (b)(4), (c); 16-11-127.1(c) (Supp. 2014). See also Blocher & Miller, *supra* note 145, at 316-17.

<sup>164</sup> Wahl, *supra* note 146, at 1024-25.

<sup>165</sup> *Id.* Cf. Blocher & Miller, *supra* note 145, at 343 (outlining a third potential expansion of the state action doctrine derived from First Amendment case law). But see John-Patrick Fritz, *Check Your Rights and Your Guns at the Door: Questioning the Validity of Restrictive Covenants against the Right To Bear Arms*, 35 SW. U. L. REV. 551 (2007) (arguing for expansion of *Shelley* because the right to bear arms is also fundamental).

<sup>166</sup> But see Yan Sui v. 2176 Pacific Homeowners Ass’n, No. SACV 11–1340 JAK (AJW), 2012 WL 6632758 (C.D. Cal. Aug. 30, 2012).

<sup>167</sup> See *United Auto Workers, Local No. 5285 v. Gaston Festivals, Inc.*, 43 F.3d 902, 909 (4th Cir. 1995) (“A private actor must assume plenary control and complete governmental power over the property in question.”).

<sup>168</sup> *Rundus v. City of Dallas, Tex.*, 634 F.3d 309, 314-15 & n.6 (5th Cir. 2011).

<sup>169</sup> *Parks v. Ford*, 68 F.R.D. 305 (E.D. Pa. 1975).

<sup>170</sup> Helen Hershkoff, *State Constitutions: A National Perspective*, 3 WIDENER J. PUB. L. 7, 20 (1993) (“some state constitutional provisions, by their express terms, provide protection against private actors”).

<sup>171</sup> CONN. CONST. Art. 1, § 15 (“Every citizen has a right to bear arms in defense of himself and the state.”).



landowner from prohibiting the otherwise lawful possession of firearms on his land.”<sup>172</sup> But even if the federal state action requirement were satisfied or if state constitutional law swept more broadly, place restrictions like these routinely survive constitutional challenge. For example, the Tenth Circuit upheld the United States Postal Service’s blanket ban on firearms on postal property.<sup>173</sup> Of particular relevance here is that the court, in rejecting the Second Amendment claim, relied on the fact that the postal service was acting in its proprietary rather than governmental capacity, and its regulation applied “only to discrete parcels of land” and was “directly relevant” to “providing a safe environment for its patrons and employees.”<sup>174</sup> The Supreme Court of Virginia similarly upheld against both state and federal constitutional challenge a firearm ban covering campus facilities and events.<sup>175</sup>

Public policy, like constitutional law, is a trump card in property law.<sup>176</sup> The right to self-defense overlaps substantially with state and federal constitutional provisions on bearing arms. One court in a state without a constitutional right to bear arms rejected a policy-based challenge to a no-firearms covenant: “We think there is no merit in the contention that the restriction and covenant is void as being either unreasonable or as in violation of the inherent right of the citizen to bear arms.”<sup>177</sup> When weighed against the right to property – and specifically the right to exclude – as well as the right to *not* bear arms,<sup>178</sup> it is difficult to see a public policy argument against gun-free zones prevailing,<sup>179</sup> except perhaps if the restrictions leave no genuine options for housing without firearm restrictions.

Possibilities of reverter, rights of entry, conservation easements, and covenants can last more or less indefinitely.<sup>180</sup> 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, they should be enforceable only by compensatory damages, not specific performance.<sup>181</sup> Limiting parties to compensatory damages, however, would effectively convert gun-free zones to gun-tax zones, and the increased risks and psychological harm would

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<sup>172</sup> *Winters v. Concentra Health Services, Inc.*, No. CV075012082S, 2008 WL 803134, at \*4 (Conn. Super. Mar. 5, 2008).

<sup>173</sup> *Bonidy v. U.S. Postal Service*, 790 F.3d 1121 (10th Cir. 2015).

<sup>174</sup> *Id.* at 1126-27. See Stephen Kiehl, *In Search of a Standard: Gun Regulations after Heller and McDonald*, 70 MD. L. REV. 1131, 1132-33 (2011) (stating that after *Heller* and *McDonald* “[l]ower courts have easily upheld . . . laws prohibiting the carrying of guns in sensitive places such as airplanes and parks.”).

<sup>175</sup> *DiGiacinto v. Rector and Visitors of George Mason University*, 704 S.E.2d 365 (Va. 2011). See also 79 AM. JUR. 2d *Weapons and Firearms* § 30. See generally *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1264 (11<sup>th</sup> Cir. 2012) (“An individual’s right to bear arms as enshrined in the Second Amendment, whatever its full scope, certainly must be limited by the equally fundamental right of a private property owner to exercise exclusive dominion and control over its land.”)

<sup>176</sup> *Nahrstedt v. Lakeside Village Condominium Assn.*, 878 P.2d 1275 (Cal. 1994); see also *State v. Shack*.

<sup>177</sup> *Guaranty Realty Co. v. Recreation Gun Club*, 12 Cal. App. 383, 390 (Cal. App. 1910).

<sup>178</sup> Blocher, *supra* note 1.

<sup>179</sup> “The right to keep and bear arms is . . . subject to the right of a property owner . . . .” 94 C.J.S. WEAPONS § 18.

<sup>180</sup> Andrea J. Boyack, *Common Interest Community Covenants and the Freedom of Contract Myth*, 22 J.L. & Pol’y 767 (2014).

<sup>181</sup> *Id.*

be very difficult to quantify. The same critic of common-interest communities further contends that covenants restricting behavior without externalities are illegitimate.<sup>182</sup> But guns can readily be turned against neighbors, which may explain why so many more people fear more guns in their community than welcome them.<sup>183</sup> It is not obvious to us why gun-free zones should be any less durable than other restrictions on land.

## CONCLUSION

In this Article, we have laid out a plan for a new kind of gun control that is inexpensive, politically feasible, and likely, within just a few years, to save thousands of lives. Our proposal to allow individuals to waive their Second Amendment rights is inexpensive because it merely calls for an on-line registry to supplement the existing NICS system. Our proposal does not add any additional burdens on gun dealers who already have to query the NICS system before selling.

The “No Guns Registry” is politically feasible not only because of its libertarian and freedom-enhancing quality, but also because it can be implemented by individual states without requiring Congressional action. Indeed, Delaware, Illinois, Massachusetts and the District of Columbia have already enacted a version of our proposal by allowing individuals to opt into the NICS system by volunteering to be committed for mental health purposes. There are good reasons why we might be concerned about such waivers via voluntary commitment, as the individuals at the moment of voluntary commitment may have reduced decisional capacity and we worry that the Second Amendment consequences of waiver are not sufficiently disclosed. People should not be made by the state to give up their constitutional right as a pre-condition for receiving mental health care. But our proposal avoids these concerns. The registry does not systematically target people in extremis and fully discloses the consequences of waiver, including the process for subsequently rescinding the waiver. Moreover, the option of waiver is not a government set quid pro quo for mental health or any other services. While our email option allows individual neighbors, cotenants, and insurers to require waiver as an associational prerequisite, non-waiving individuals are free to seek out other associational communities making different self-defense decisions.

The “No Guns Registry” sees government not simply as a source of mandates and prohibitions but as a platform that can facilitate citizens coming together to make common cause.<sup>184</sup> Instead of traditional state action, the government as platform merely facilitates citizen action. Our registry platform not only facilitates the associational marketplace of those most

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<sup>182</sup> *Id.*

<sup>183</sup> Matthew Miller, Deborah Azrael, & David Hemenway, *Community Firearms, Community Fear*, 11 EPIDEMIOLOGY 709 (2000).

<sup>184</sup> See Ayres, *supra* note 26, at 33 (“[T]he same advances in technology that have made Kickstarter and Groupon possible can be leveraged to allow new sets of similarly-minded citizens to make common cause.”).

affected by individual gun-acquisition decisions, it allows millions of geographically dispersed Americans to publicly signal their aggregate willingness to dispense with firearms.

The existence of a registry might either facilitate or impede the enactment of other gun-control measures. For example, citizens who would have supported an across-the-board mandatory waiting period as a commitment device may become quiescent once they can opt for their own. Or the legislative energy necessary to enact a waiver registry may divert attention from other gun control initiatives that might have larger impacts on public safety. On the other hand, if the associational marketplace “decides” that a substantial majority of citizens support waiver, this demonstration of support might lead legislators toward imposing a waiting period before all gun sales.

But to condition one’s support crudely on whether our proposal is likely to increase or decrease the prevalence of private possession of firearms continues the divisive trap that has plagued our national debate on gun control. The associational marketplace lets the people decide what kinds of self-defense communities they desire. It acknowledges the varying spillover effects that my decision to possess may have on others and on my future self. Giving people the right to waive their gun rights is not a silver-bullet solution to gun violence, but it is a low-cost and pragmatic enhancement of our liberty that can, by garnering the substantial support our two studies demonstrate, predictably save hundreds of lives each year.

## APPENDIX

### Appendix A: Proposed Amendment to Federal Law

#### **Insert into 18 U.S.C. § 922 the following new subsection:**

(g1) It shall be unlawful for any person to receive a firearm from any person or entity required to perform a background check if that would-be recipient pursuant to Section 922.1 has requested to be added to the NICS, that request has been processed, and that person has not been removed.<sup>185</sup>

#### **Add the bolded and underlined text to 18 U.S.C. § 922(t) each time the phrase appears:**

“would violate subsection (g), **(g1)**, or (n)”

#### **Add new 18 U.S.C. § 922.1:**

Section 1. The Federal Bureau of Investigation within 1 year of the passage of this Act shall develop and launch a secure Internet-based platform to allow any person in the United States to register to add their name to the National Instant Criminal Background Check System (NICS).

- (a) The Bureau shall assure that this Internet-based platform credibly (i) verifies the identity of any persons who opt to register, (ii) prevents unauthorized disclosures of any registering persons, and (iii) informs the individual of the legal effects of registration.
- (b) In addition, the Internet-based platform shall allow registered individuals to include at the time of registration or thereafter one or more email addresses. The platform shall be programmed to notify any such addressees that the individual has registered to add his or her name to the NICS list and thereby waived his or her right to bear arms, and the platform shall also be programmed to notify any such addressees if the individual subsequently seeks to rescind his or her waiver. Providing email contact information constitutes an express authorization of such use of records.

Section 2. Once the Internet-based platform becomes operative, any person may request via the platform to be added to the National Instant Criminal Background Check System (NICS). The FBI shall enter the information regarding any such requesting individuals into the NICS Index Denied Persons File. Being in the NICS Denied Persons File for this reasons renders both purchase and possession of a firearm illegal.

Section 3. A person requesting to be added to the NICS under this section may subsequently request that his or her name be removed from the NICS by a secure method conveyed to the FBI

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<sup>185</sup> Because the primary goal of our proposal is to facilitate self-protection, penalties for a violation should not be as harsh as for, say, convicted felons in possession of a firearm. Perhaps a fine would suffice or perhaps a fine plus imprisonment for not more than one year. A simple way to effectuate the latter would be to add subsection “(g1)” to 18 U.S.C. § 924(a)(5).

Internet-based platform. The FBI shall wait twenty-one days after receipt, then purge any and all records of the sign-up, transactions, and removal.

Section 4. (a) In employment, education, government benefits, and contracting, it shall be illegal to inquire whether an individual under this Section has requested to be added to or removed from NICS and it shall be illegal to take action based such information. However, notwithstanding the foregoing prohibition, it shall not be illegal for an insurer with regard to life, home-owners or renter's insurance to inquire or base the terms, premia or issuance of insurance on the basis of such information. Nor shall it be illegal for a cotenant, landlord, homeowner's association, or condominium association to condition terms of ownership, tenancy, occupancy, or status as an invitee on such information.<sup>186</sup> (b) Individuals or organizations who learn, from the Internet-based platform or otherwise, the identity of someone who has requested to be added to or removed from the registry shall have a duty not to disclose that information to others unless the individual or organization receives separate non-platform authorization from the waiving individual to share that information.

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<sup>186</sup> As discussed above, *supra* note 97, an alternative would allow this type of discrimination but only if it is applied equally to all cotenants, renters, and owners. Specifically, the footnoted sentence might read: "Nor shall it be illegal for a cotenant, landlord, homeowner's association, or condominium association to condition terms of ownership, tenancy, occupancy, or status as an invitee on such information, *if the conditions applied equally to all occupants and owners.*"

## Appendix B: Proposed “No Guns Registry” Model State Act

**SYNOPSIS:** Under current law, people who fear that they may become a risk to themselves or others are not allowed to restrict their legal ability to purchase firearms.

This bill would authorize people to add their own names into the background check system to protect themselves and others against impulsive gun violence.

BE IT ENACTED BY THE LEGISLATURE OF [STATE]:

Section 1. [The STATE AGENCY RESPONSIBLE FOR NICS REPORTING] within one-year of the passage of this Act shall develop and launch a secure Internet-based platform to allow any person in the United States to register to add their name to the “[STATE] No Guns Registry.”

- (a) The [AGENCY] shall assure that this Internet-based platform credibly (i) verifies the identity of any persons who opt to register, (ii) prevents unauthorized disclosures of any registering persons, and (iii) informs the individual of the legal effects of registration.
- (b) In addition, the Internet-based platform shall allow registered individuals to include at the time of registration or thereafter one or more email addresses. The platform shall be programmed to notify any such addressees that the individual has registered his or her name with the “[STATE] No Guns Registry” and has thereby waived his or her right to bear arms, and the platform shall also be programmed to notify any such addressees if the individual subsequently seeks to rescind his or her waiver. Providing email contact information constitutes an express authorization of such use of records.

Section 2. Once the Internet-based platform becomes operative, any person may request via the platform to be added to the “[STATE] No Guns Registry.” The [AGENCY] shall on an ongoing basis forward registry information to the Federal Bureau of Investigation to be entered into the NICS Index Denied Persons File, and to any other state that adopts an analogous “No Guns Registry.”

Section 3. Registering for the “[STATE] No Guns Registry” or registering in any other state that adopts an analogous “No Guns Registry” renders possession of a firearm illegal in [STATE]. If a person is in the NICS due to registering in [STATE] or in another state, receipt of a firearm from a person or entity required to perform a background check violates [STATE] law. Knowing possession of a firearm by a person validly registered on the “No Guns Registry” is punishable by a fine and/or imprisonment for no more than one year.

Section 4. A person requesting to be added to the “[STATE] No Guns Registry” may subsequently request that his or her name be removed from the registry by a secure method conveyed to the [STATE]’s Internet-based platform. The [AGENCY] shall wait twenty-one days after receipt, before notifying the FBI to remove the requesting person from the NICS Index

Denied Persons File and then the [AGENCY] shall purge any and all records of the sign-up, transactions, and removal.

Section 5. (a) In employment, education, government benefits, contracting, it shall be illegal to inquire whether an individual under this Section has requested to be added to or removed from the “[STATE] No Guns Registry” and it shall be illegal to take action based such information. However, notwithstanding the foregoing prohibition, it shall not be illegal for an insurer with regard to life, home-owners or renter’s insurance to inquire or base the terms, premia or issuance of insurance on the basis of such information. Nor shall it be illegal for a cotenant, landlord, homeowner’s association, or condominium association to condition terms of ownership, tenancy, occupancy, or status as an invitee on such information.<sup>187</sup> (b) Individuals or organizations who learn, from the “[STATE] No Guns Registry” or otherwise, the identity of someone who has requested to be added to or removed from the registry shall have a duty not to disclose that information to others unless the individual or organization receives separate non-registry authorization from the waiving individual to share that information.

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<sup>187</sup> See *supra* note 186 for alternative language limiting this exception.