THE YALE LAW JOURNAL FORUM
JANUARY 14, 2025

A Legislative Response to *303 Creative*

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ABSTRACT. After the Supreme Court's decision in *303 Creative LLC v. Elenis*, public accommodations may discriminate in the provision of expressive services or products. But states are not without options to limit discriminatory impact while adhering to the Court's ruling. This Essay argues that state legislatures can and should enact implied warranties of nondiscrimination. Such implied warranties would function as default rules, under which sellers implicitly promise not to discriminate unless they opt out. The *303 Creative* Court struck down the Colorado Anti-Discrimination Act because the nondiscrimination law was mandatory in nature. Legislatures could respond by enacting laws making the nondiscrimination rule a disclaimable default with respect to the relevant First Amendment-protected goods and services, thereby vesting the ultimate decision to discriminate in expressive sellers while also giving presumptive effect to the majoritarian preference for nondiscrimination. Courts need not invalidate the application of the public-accommodations statute's nondiscrimination norm to expressive sellers if those sellers have the power to opt out, because opting out relieves those sellers of any obligation to express ideas contrary to their own strongly held principles. The Essay proposes a simple altering rule—the process to displace the default rule—whereby sellers may disclaim the warranty by sending a brief statement to the state. The state could then compile such disclaimers into a central database. This database would not only allow the public to make informed consumer choices, but also mitigate the dignity-depleting impact of discrimination at the point of sale. The Essay considers and rejects a potential objection to our proposed default and altering rule: that the process for disclaiming the warranty unconstitutionally compels seller speech.

INTRODUCTION

In a momentous conclusion to its 2022-2023 Term, the Supreme Court struck down the application of the Colorado Anti-Discrimination Act to the expressive service of website design in *303 Creative LLC v. Elenis*.[1] Justice Gorsuch reasoned,

1. 600 U.S. 570, 602-03 (2023).

over an impassioned dissent from Justice Sotomayor,[2] that requiring a business to create websites celebrating the marriages of same-sex couples would force the seller to express a message with which it disagreed.[3] The reasoning of *303 Creative* is broad: after this opinion, public-facing businesses across the country may legally refuse to sell expressive services or products based upon not just a customer's sexual orientation, but also their race, gender, and creed.[4]

The stakes are high, with the "equal dignity" of many market participants in jeopardy.[5] As Justice Goldberg argued so powerfully in *Heart of Atlanta Motel, Inc. v. United States*, the "fundamental object" of public-accommodations law is to "to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'"[6] Because the Court's decision in *303 Creative* frustrates this "fundamental object," Justice Sotomayor warns, it not only harms LGBTQ+ consumers, but also "threatens to balkanize the market and to allow the exclusion of other groups from many services."[7]

One might be tempted to believe that the State of Colorado can do nothing to respond: the Supreme Court has spoken, and the Constitution trumps state law. But the Colorado legislature is still free to deploy a well-used tool of contract law—an implied warranty—to promote equal access to public accommodations in the state. Colorado and other states can and should pass an implied warranty of nondiscrimination.

Implied warranties are a cornerstone of both contract and property law. The Uniform Commercial Code (UCC), for example, includes an implied-warranty provision stating that, absent contrary indication, goods are presumptively "fit for the ordinary purposes for which such goods are used."[8] Contracts for construction of new homes likewise typically include an implied warranty that the

2. *See id.* at 603-40 (Sotomayor, J., dissenting).

3. *Id.* at 589-90 (majority opinion).

4. As described by the majority in *303 Creative*, the Colorado public-accommodations law "prohibits a public accommodation from denying 'the full and equal enjoyment' of its goods and services to any customer based on his race, creed, disability, sexual orientation, or other statutorily enumerated trait." 600 U.S. at 3 (citing COLO. REV. STAT. § 24-34-601(2)(a) (2022)). Nothing in the majority's reasoning limits its holding to expressive services involving gender or sexual orientation. Indeed, if Ms. Smith had objected to interfaith or interracial marriages, the Court's insistence that she should not be compelled to "create expressions that defy any of her beliefs" would as easily have led to the denial of service on the basis of race or religion. *Id.* at 575. The First Amendment's protections belong to all, "including to speakers whose motives others may find misinformed or offensive." *Id.* at 595.

5. 600 U.S. at 605 (Sotomayor, J., dissenting).

6. 379 U.S. 241, 250 (1964) (quoting S. REP. NO. 872, at 16 (1964)).

7. 600 U.S. at 638 (Sotomayor, J., dissenting).

8. U.C.C. § 2-314 (AM. L. INST. & UNIF. L. COMM'N 2022); *see also* § 2-315 (stating the implied warranty of fitness for particular purpose).

premises are habitable.[9] The warranty is "implied" in that it need not be explicitly set forth in a contract to be enforceable; it exists in the background of all contracting to protect consumers, who often lack full information about vendors and may fail to negotiate explicitly for important protections and promises they value.

An implied warranty of nondiscrimination would be a default[10] promise by a seller not to discriminate against any of the protected classes of consumers set forth in the statute — even with respect to the provision of expressive and bespoke services, like those at issue in *303 Creative*. Like other legal defaults, it would allow sellers to opt out. Sellers would not be forced to offer expressive products or services with which they disagree, because they could disclaim the warranty. The implied warranty of nondiscrimination would run alongside public-accommodations statutes, and opting out would only be permitted with respect to expressive products and services. A wedding-cake seller, for instance, would be permitted to opt out with respect to bespoke cakes specially crafted for specific occasions, but would not be permitted to opt out with respect to off-the-shelf products routinely offered to the general market of consumers. This proposal is thus consistent with existing public-accommodations statutes, and it would do nothing to displace or modify their impact on the vast majority of public-facing businesses.

Expressive sellers could disclaim by notifying the state that they reserve the right to discriminate on the basis of certain protected characteristics of consumers regarding specific types of expressive services or products. The state, in turn, would compile these declarations into a searchable database that would inform the public about such business reservations.

Expressive businesses that fail to opt out of the warranty would be subject to the same remedial consequences for discrimination that apply to nonexpressive products and services under the public-accommodations statute.[11] Instead of suing under the public-accommodations statute, however, customers subjected to

9. Daniel L. Lawrence, *Disclaiming Implied Warranties in New Home Contracts*, BRADLEY (Apr. 10, 2020), https://www.buildsmartbradley.com/2020/04/disclaiming-implied-warranties-in-new-home-contracts [https://perma.cc/X83Z-TG59].

10. *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 89 (1989) (defining default rules as those that govern in incomplete contracts only in the absence of overriding provisions to which parties can agree).

11. For example, any person who violates Colorado's act "shall be fined not less than fifty dollars nor more than five hundred dollars for each violation." COLO. REV. STAT. § 24-34-602(1)(a) (2024). Moreover, the Colorado Commission on Civil Rights "may order a respondent who has been found to have engaged in a discriminatory practice . . . to make reports as to the manner of compliance with the order of the commission; and to take affirmative action, including the posting of notices setting forth the substantive rights of the public . . . ." § 24-34-605.

discrimination could sue for the seller's breach of its implied promise not to discriminate.[12]

A disclaimable warranty of nondiscrimination would have three benefits. First, by requiring businesses to disclaim in advance of denying services, such a policy would allow the state to investigate proactively whether particular products or services were sufficiently expressive to fall within the ambit of the Supreme Court's *303 Creative* rule. Justice Gorsuch acknowledged that "determining what qualifies as expressive activity protected by the First Amendment can sometimes raise difficult questions."[13] Preemptive notification to the state would enable legislatures and courts to flesh out the contours of protected expressive activity before legal challenges would commence.

Second, the state registry would mitigate the dignity-depleting impact of discrimination by warning potential victims *before* they attempt to contract with a business that discriminates. Justice Sotomayor vividly described this danger in her dissent:

> Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his [social identity]. It is equally the inability to explain to a child that regardless of education, civility, courtesy, and morality he will be denied the right to enjoy equal treatment.[14]

Part of the Colorado statute that the Supreme Court struck down is a "Communication Clause."[15] This clause prohibits a public accommodation from indicating that a person will be denied "the full and equal enjoyment" of services based on a protected classification.[16] Our proposal flips the statute's

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12. The implied warranty could also give the state's office of civil rights the right to sue as a third-party beneficiary for breach of the implicit promise not to discriminate—so that nondisclaiming sellers would also be subject to suit by the same set of potential litigants as under the public-accommodations statute.

13. 303 Creative LLC v. Elenis, 600 U.S. 570, 599 (2023). Robert Post provides a number of problematic examples meeting the Court's requirements for "pure speech" including "a case in which the owners of a traditional advertising agency firmly believe in white supremacy and so refuse to accept Black clients . . . ." Robert Post, *Public Accommodations and the First Amendment:* 303 Creative *and "Pure Speech,"* 2023 SUP. CT. REV. 251, 294 (2024).

14. 600 U.S. at 607 (Sotomayor, J., dissenting) (second alteration in original) (quoting Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 292 (1964) (Goldberg, J., concurring)).

15. *Id.* at 581 & n.1 (majority opinion) (noting that the "Communication Clause" fails to pass constitutional muster if the "Accommodation Clause"—the provision that prohibits a public accommodation from actually denying full and equal enjoyment of goods or services based on a protected classification—fails).

16. COLO. REV. STAT. § 24-34-601(2)(a) (2024).

Communication Clause on its head, instead *requiring* expressive firms to disclose such a warning if they want to opt out of the statute and reserve the right to deny provision of certain expressive products and services. Moreover, it requires the disclosure of this reservation in a centralized, searchable, online location, away from the public square or the site of the commercial activity, where the message could be as harmful as the actions it describes. Potential customers would be able to search the database, sparing themselves the ignominy of in-person service denial.[17]

Finally, the state registry would facilitate informed association, an independent First Amendment value.[18] Some customers would prefer to patronize businesses that stand behind a warranty of nondiscrimination, while others might gravitate towards sellers that disclaim the warranty. The aggregate outcome—a mix of boycotts and buycotts—would likely usher in greater accessibility to public accommodations for marginalized groups. We also provide examples below to show why discriminatory preferences are likely to be over-accommodated in a competitive market—so that buyers are likely to have ample options for both disclaiming and nondisclaiming sellers.[19]

Because sellers who want to opt out of potential liability would be required to declare their stance to the state publicly, some may wonder whether the implied warranty itself creates a constitutional "compelled speech" problem.[20] But the public declaration we propose falls squarely within the bounds of commercial-speech regulation. No specific state-endorsed ideology is imposed. Indeed, opting out of the warranty would involve speech the state does *not* prefer.[21] Businesses merely unveil and thereby clarify a detail of their contractual commitment. The Supreme Court, in its landmark decision in *Zauderer v. Office of Disciplinary Counsel*, held that requiring "purely factual and uncontroversial" disclosures is permissible if the disclosures are "reasonably related to the State's interest in preventing deception of consumers."[22] This disclosure disclaiming any responsibility for certain types of discrimination simply informs consumers—factually—of the legal attributes of their transactions. Just as sellers have been required to disclaim expressly various UCC warranties for years, sellers

17. *See* Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOK. L. REV. 61, 119 (2006) (describing trauma experienced by a same-sex couple denied service after arriving at a bed and breakfast).

18. *See* Jennifer Gerarda Brown, *Facilitating Boycotts of Discriminatory Organizations Through an Informed Association Statute*, 87 MINN. L. REV. 481, 482 (2002).

19. *See infra* notes 39-43 and accompanying text.

20. *See* Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867, 893 (2015).

21. *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 586 (2023) ("[T]he government may not compel a person to speak its own preferred messages.").

22. 471 U.S. 626, 651 (1985).

transacting under our proposed regime would be analogously required to disclaim expressly a nondiscrimination warranty.[23]

Compelled contractual speech is an inevitable aspect of contracting. Because of the Supreme Court's *303 Creative* decision, if sellers of expressive services want to make clear to consumers that they are not reserving the right to sell on a discriminatory basis, they must now include explicit *nondiscrimination* promises, while those who reserve the right to discriminate may remain silent. Under an implied warranty of nondiscrimination, the reverse would be true.

The rest of this Essay is divided into three Parts. Part I addresses what should be the default presumption with regard to whether a retailer of expressive products or services promises to serve the public without discriminating on the basis of protected characteristics. Part II discusses various "altering" rules—the requirements for opting out of the default—and argues that expressive retailers should be able to opt out of an implied warranty by sending a straightforward notice to the Secretary of State reserving the right to discriminate in specific types of contracts with regard to certain otherwise protected groups. Part III then defends the constitutionality of our proposal by addressing the concern that the implied warranty compels speech by some commercial entities.

I. CHOOSING THE DEFAULT

In his 1992 book, *Forbidden Grounds*, Richard A. Epstein argues that our civil-rights laws inappropriately displaced a bedrock principle of commercial activity: freedom of contract.[24] Epstein's central claim is that freedom of contract never had a chance because prior to 1964, state law *required* employers to discriminate against Black people; after 1964, Title VII prohibited discrimination.[25] Epstein thought that if state governments had protected businesses that were willing to hire and sell to minorities, unprejudiced entrepreneurs would have efficiently served the needs of the Black community.[26] His argument was not that all bigoted employers would be driven from the market, but that nonbigoted

23. Some may see a difference in kind between the Uniform Commercial Code (UCC) and our proposed default rule, in that the UCC stipulates implied warranties that adhere to contracts that are actually made, while our proposed rule imposes a disclosure requirement before the decision to enter into contracts/business relationships is made in the first place. But the implied warranty in both cases becomes part of seller *offers* before contracts are made and thus become a part of all expressive goods and services offered to the public.

24. For further elaboration of Epstein's argument, see generally RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992).

25. *See* Ian Ayres, *Alternative Grounds: Epstein's Discrimination Analysis in Other Market Settings*, 31 SAN DIEGO L. REV. 67, 68 (1994).

26. *Id.*

employers would enter the market and provide minorities with sufficient opportunities so "it would be *as if* bigotry didn't exist."[27]

A central problem with Epstein's argument is the non sequitur between his criticism of the civil-rights statutes and his remedy. Epstein's criticism is that our civil-rights laws are mandatory rules limiting freedom of contract. His remedy—repealing all civil-rights statutes—is a non sequitur because doing so goes beyond eliminating the statutes' mandatory nature.[28] Even if one accepted Epstein's libertarian argument that it is wrong for civil-rights law to displace freedom of contract, one would need a separate argument to explain why a default that permits discrimination is preferable to one that forbids discrimination. The former requires businesses to "opt in" to nondiscrimination if they want to signal credibly to the public their willingness to serve all consumers equally, while the latter requires businesses to "opt out" if they want to signal to consumers that they might discriminate against some consumers.

A parallel disconnect is at play in *303 Creative*. Justice Gorsuch, writing for the majority, was principally concerned that, with regard to expressive products and services, the mandatory nature of Colorado's public-accommodations law "compel[s] an individual to create speech she does not believe."[29] But the Court's holding that struck down the nondiscrimination law when applied to such contexts does more than simply nullify the mandatory nature of the law and hence does not exemplify judicial restraint. The decision also changes the presumptive or default coverage of the civil-rights law. Accepting the Court's conclusion that sellers of expressive goods and services cannot be *forced* to express views with which they disagree does not mean that the legislature could not create a default rule that *presumptively binds such sellers unless they opt out*. Nothing in the Court's opinion stops expressive sellers from promising nondiscrimination—because those sellers would be choosing whether or not to be so bound. But the same would hold true if the state legislature flipped the default with a statute presuming that expressive sellers implicitly warrant nondiscrimination unless they explicitly opt out by disclaiming the default.

Some may be concerned that an implied warranty of nondiscrimination is not comparable to other contractual warranties because it could create potential liability in the absence of privity. This could happen when a seller who has failed to disclaim the warranty nonetheless discriminates, refuses to deal, and then is held liable—even though (because of the refusal) there is no contractual

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27. Ian Ayres, *Price and Prejudice*, NEW REPUBLIC, July 6, 1992, at 30, 30 (reviewing EPSTEIN, *supra* note 24).

28. Ian Ayres, *Empire or Residue: Competing Visions of the Contractual Canon*, 26 FLA. ST. U. L. REV. 897, 909 (1999).

29. 303 Creative LLC v. Elenis, 600 U.S. 570, 579 (2023).

relationship with the victim plaintiff. We have three responses to this concern, grounded in (1) statutes prohibiting unfair, deceptive, or abusive practices; (2) solicitation fraud; and (3) third-party-beneficiary theories. Our first two responses offer bases for liability in the absence of privity, resorting to statutory and tort theories outside of contract; the third response returns to contract and shows how liability for discrimination could arise absent privity even within a more standard contract regime.

Civil duties arising under "Unfair, Deceptive or Abusive Practices" (UDAP) statutes, which prohibit unfair or deceptive marketing, are not limited to settings where enforceable contracts have been formed.[30] UDAP duties have already been interpreted to cover discrimination and resulting failure to contract as "unfair."[31] For example, at the federal level, the Consumer Financial Protection Bureau announced on March 16, 2022, that "it considers discrimination to be a UDAAP and will begin examining for discrimination itself and for whether companies are adequately 'testing for' discrimination in their advertising, pricing, and other activities."[32]

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30. *See, e.g.*, V.S.H. Realty, Inc. v. Texaco, Inc., 757 F.2d 411, 415-17 (1st Cir. 1985) (finding liability under an "Unfair, Deceptive or Abusive Practices" (UDAP) statute for a seller who failed to disclose material nonpublic information). UDAP statutes have been enacted in all fifty states, but their effectiveness varies from state to state. *See* Carolyn Carter, *Consumer Protection in the States: A 50-State Evaluation of Unfair and Deceptive Practices Laws*, NAT'L CONSUMER L. CTR. 9 (Mar. 2018), https://www.nclc.org/wp-content/uploads/2022/09/UDAP_rpt.pdf [https://perma.cc/S6AC-5QTD].

31. Stephen Hayes & Kali Schellenberg, *Discrimination Is "Unfair": Interpreting UDA(A)P to Prohibit Discrimination*, STUDENT BORROWER PROT. CTR. 5 (Apr. 2021), https://protectborrowers.org/wp-content/uploads/2021/04/Discrimination_is_Unfair.pdf [https://perma.cc/3VCP-7MS4].

32. Chamber of Com. v. Consumer Fin. Prot. Bureau, 691 F. Supp. 3d 730, 734 (E.D. Tex. 2023); *see also* Press Release, Consumer Fin. Prot. Bureau, CFPB Targets Unfair Discrimination in Consumer Finance (Mar. 16, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-targets-unfair-discrimination-in-consumer-finance [https://perma.cc/6658-PS7W] ("[D]iscrimination may meet the criteria for 'unfairness' by causing substantial harm to consumers that they cannot reasonably avoid, where that harm is not outweighed by countervailing benefits to consumers or competition."); 12 U.S.C. § 5531(c) (2018) (describing how the Consumer Financial Protection Bureau (CFPB) may determine unfairness). A district court last year enjoined CFPB from conducting these discrimination examinations because interpreting discrimination as unfair went beyond the agency's statutory authority under the "major questions" canon of statutory interpretation. *Chamber of Com.*, 691 F. Supp. 3d at 743, 745. But the court's concern with CFPB's interpretation of the Dodd-Frank Act would not apply to a state statute creating an implied warranty of nondiscrimination because the statute itself would indicate that discrimination against protected classes (if not disclaimed) is a commercial practice that violates the statute.

A theory of solicitation fraud also supports potential liability in the absence of privity.[33] The seller, in soliciting offers from the public, implicitly represents that it will not discriminate among such offers on the basis of an offering consumer's protected status. Consumers who rely upon this implicit representation and undertake to deal with the seller are harmed when the seller will not abide by the implied representation of nondiscrimination, and that harm gives rise to a cognizable right of action. Solicitation fraud is a species of promissory fraud, and in this way an implied warranty of nondiscrimination would fall within a standard interaction of tort and contract law.

Finally, third-party-beneficiary theory can support liability in the absence of privity. Under traditional contract doctrine, the implied warranty can be viewed as an implied representation that the seller does not discriminate, with members of the protected class as the intended third-party beneficiaries. The implied representation is made to all of the consumers with whom the seller is in privity and thus becomes a part of their contracts.[34] When the implied warranty is breached through a refusal to deal with a member of the protected class, third-party-beneficiary law creates a right of action for the harmed individual.[35]

A principal advantage of flipping the default rule from "discrimination allowed" to "discrimination prohibited" is that it likely better aligns with contracting preferences. It is probable that a nondiscrimination warranty is a majoritarian default; this reduces the transaction cost of retailers attempting contractually to opt into a commitment not to discriminate.[36]

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33. *See* Ian Ayres & Greg Klass, *Solicitation Fraud: The Important Difference Between "Not Intending to" and "Intending Not to,"* BALKINIZATION (Oct. 5, 2016), https://balkin.blogspot.com/2016/10/solicitation-fraud-important-difference.html [https://perma.cc/85NC-EGMP].

34. As we argue *infra* text accompanying notes 36-37, in many states a majority of consumers will prefer to deal with nondiscriminatory businesses, such that it is reasonable to see members of the protected class as intended third-party beneficiaries on the consumers' side. Although the refusal to transact with a member of a protected class, in the absence of a disclaimer, would also breach the implied warranty in the contract with the person who entered the contract—in ways that might decrease the value of the product or service (since their expectations of dealing with a nondiscriminatory business were frustrated), we would expect to see few suits by the parties in privity; damages would likely be difficult to prove.

35. To facilitate the enforcement of commitments not to discriminate against LGBTQ+ people in employment contexts, we have elsewhere proposed a certification mark allowing sellers to promise not to discriminate; the license allowing employers to use the mark made the sellers' employees and applicants express third-party beneficiaries of the transaction. *See* Ian Ayres & Jennifer Gerarda Brown, *Mark(et)ing Nondiscrimination: Privatizing ENDA with a Certification Mark*, 104 MICH. L. REV. 1639, 1644 (2006).

36. *See Opinion Poll: Small Business Owners Oppose Denying Services to LGBT Customers Based on Religious Beliefs*, SMALL BUS. MAJORITY 4 (July 13, 2015), https://smallbusinessmajority.org/sites/default/files/research-reports/071315-National-RFRA-and-ND-poll.pdf [https://perma.cc/ECL4-MUXX] ("Two-thirds (66%) of small businesses say business

To assure that a nondiscrimination warranty is a majoritarian default, it might be prudent for it first to be enacted in "bluer" states with broader public commitments to equal treatment (indeed, the sort of public-accommodations statute involved in *303 Creative* would provide strong evidence of such majoritarian preferences). The statute creating an implied warranty of nondiscrimination might also include a provision empowering the state's office of civil rights to sunset the provision if it finds that a majority of sellers are disclaiming the warranty.[37]

But even in the most progressive states, we should expect that some group of sellers will disclaim the warranty. Some will disclaim as a matter of conscience, but others might respond to market incentives and disclaim the warranty to serve niche demand for discrimination. To see how competition might even lead to an overrepresentation of sellers who reserve the right to discriminate, let us imagine a stylized market consisting of ten sellers of some expressive service.[38] Suppose that the ten sellers' expressive products are equally appealing to the average consumer, such that each seller's market share is 10% of the market.[39] Suppose further that 5% of customers support the kind of discrimination at issue so strongly that they will go out of their way to buy from companies that reserve the right to discriminate on that basis. And imagine that four times as many consumers—20%—actively dislike or disapprove of discriminatory sellers (enough so that they will avoid purchasing from companies that have reserved the right to discriminate). The remaining 75% of the consumers do not care one way or the other. Now consider what happens to the first company that disclaims the nondiscrimination warranty. Even if that company loses all of its business from the pro-equality consumers (2%—their share of the market's consumers who dislike discrimination), that difference is more than made up by the pro-discrimination consumers who are induced to buy from the disclaiming

owners shouldn't be able to deny goods or services to someone who is lesbian, gay, bisexual or transgender based on the owner's religious beliefs. Forty-five percent strongly believe this."); Elizabeth Mehren, *Acceptance of Gays Rises Among New Generation*, L.A. TIMES (Apr. 11, 2004, 12:00 AM PT), https://www.latimes.com/archives/la-xpm-2004-apr-11-na-gaypoll11-story.html [https://perma.cc/8WBE-B7J6] (showing that 72% of American adults "favor laws to protect homosexuals from job discrimination").

37. For further analysis of the effects of such "conditional" sunset clauses on a law's popularity, see Kristen Underhill & Ian Ayres, *Sunsets Are for Suckers: An Experimental Test of Sunset Clauses*, 59 HARV. J. ON LEGIS. 101, 111-13, 122-23 (2022).

38. The following example is derived from Ayres & Brown, *supra* note 35, at 1684-86, which shows that there would be substantial business demand for a nondiscrimination market even if only a minority of consumers actively support nondiscrimination.

39. Granted, the assumption of consumer indifference between vendors may be at odds with markets for expressive services. *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 579 (2023) (characterizing each wedding site as "unique," "original," "customized," and "tailored.").

producer (5% of the total market, all of whom are drawn to the disclaiming business). The first mover increases from a market share of 10% (before disclaiming the warranty) to a 12.5% market share (after disclaiming the warranty). This increase in demand results despite the fact that the company loses all of the pro-equality customers' business. The disclaiming company is still getting its random tenth of the consumers who do not care (one-tenth of 75% = 7.5%), plus all the pro-discrimination consumers (5%).

The result of our thought experiment contradicts the intuitions of some scholars who worry that boycotts would destroy businesses with the temerity to disclose their intention to discriminate.[40] How can it be that a firm has an incentive to disclaim the warranty when consumers who prefer the warranty outnumber those who do not four to one? The answer is that most of the pro-equality consumers were not going to buy from the first-mover firm anyway. Because there were ten identical firms in the market, the first mover only had a 10% chance of getting any consumer to buy. From the first mover's perspective, the pro-equality consumers fall from a 10% chance to a 0% chance of buying. But the pro-discrimination consumers rise from a 10% chance to a 100% chance of buying. Because of this disproportionate change in shifting probabilities, the buycott effect is likely to be much stronger than the boycott effect for first adopters in markets with many firms.[41]

Of course, in the real world, the pro-discrimination consumers will not go all the way to a 100% probability of buying. But the underlying idea that first adopters will not be deterred, even in the face of considerable antidiscrimination consumer sentiment, still holds true. Indeed, in our stylized example, a second firm will have an incentive to disclaim the nondiscrimination warranty as well. The two disclaiming firms will now split the pro-discrimination consumers, so each can expect to control 10% of the market—7.5% (one-tenth of consumers who do not care) plus 2.5% (one-half of the pro-discrimination consumers). Had the second adopter not disclaimed, it would have controlled only 9.5% of the market—7.5% (one-tenth of consumers who do not care) plus 2% (one-tenth of the pro-equality consumers). The example shows that a pro-discrimination demand segment as small as 5% might be able to induce 20% of producers to disclaim the nondiscrimination warranty.[42] One should expect a similar response

40. *See infra* note 57 and accompanying text.

41. *See* Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745, 812-14 (1995) (showing that with respect to legalizing same-sex marriage, a first mover state will stand to gain more from buycotts than it loses from boycotts).

42. This stylized model is buttressed by real-world empiricism in a somewhat analogous context. When the New York State legislature recently flipped the default on gun usage, so that businesses presumptively invited only unarmed patrons (unless the owner indicated

to a nondiscrimination warranty, where discrimination-friendly businesses might even affirmatively produce an analogue to the *Negro Motorist Green Book*[43]—this one designed for consumers who wish to reward discrimination. Thus, there are both theoretical and empirical reasons to believe that an implied nondiscrimination warranty will produce an equilibrium that provides substantial civil-rights protection while it simultaneously allows sufficient diversity in the marketplace to assure courts that businesses have a viable means of disclaiming the warranty. Indeed, our simple model provides reasons to think that in a world with substantial numbers of consumers who are indifferent to whether businesses pledge nondiscrimination, we should expect minority preferences for discrimination to be over-represented by a competitive market.

This thought experiment might make some readers wonder whether our proposal risks increasing the presence of discriminatory businesses in some markets. If publicly disclaiming the warranty comes with a competitive advantage in some markets, even those with majoritarian preferences for nondiscrimination, then is it possible that a public-disclaimer requirement will cause more discrimination than the status quo? We think the answer to this turns on how we describe the status quo. If the status quo, after *303 Creative* and prior to passage of an implied warranty of nondiscrimination, is that *any* expressive business can refuse service on the basis of some conscientious objection without prior warning, then discrimination may be occurring more often than we realize. It is quite likely that behavior carrying no negative legal consequences would receive little monitoring and occur without any centralized information gathering to quantify the frequency of discrimination. Our proposal, at least, provides a basis for data gathering.

Moreover, in our stylized model, the incentives for businesses to reserve the right to discriminate begin and end with their own expectations about consumer preferences. In dynamic markets, the percentage of consumers who are positive, negative, or neutral about discrimination on the basis of a particular characteristic may be in flux, and as other societal forces influence consumer hearts and minds, the business impact from declaring or disclaiming discrimination will

otherwise), a small but substantial number of businesses marketed themselves as being gun-friendly. *See* Thomas C. Zambito, *NY's New Gun Laws Restrict Weapons in Businesses, but Some Owners Welcome Them. Here's Why*, LOHUD (July 28, 2022, 5:02 AM ET), https://www.lohud.com/story/news/2022/07/28/as-nys-gun-laws-restrict-guns-in-businesses-some-owners-welcome-them/65382470007 [https://perma.cc/NU36-JH9P] (describing the positive customer reaction to New York State businesses that have posted signs reading "Concealed Carry is Welcome Here").

43. THE NEGRO MOTORIST GREEN BOOK: A CLASSIFIED MOTORIST & TOURIST GUIDE COVERING THE UNITED STATES & ALASKA (Victor H. Green ed., 1936). Analogous online databases are also emerging to help gun owners locate gun-friendly businesses. *See, e.g.*, FRIEND OR FOE, https://friendorfoe.us [https://perma.cc/DT89-7LAC].

change. In this way, the market participates in, but does not solely drive, the preferences for discrimination that attract or repel customers in our hypothetical market.

II. CHOOSING THE ALTERING RULES

Altering rules are the set of necessary and sufficient conditions for displacing a default rule.[44] Conditions that artificially impede businesses from disclaiming a nondiscrimination warranty might unreasonably burden constitutional interests by making it too difficult for business owners to preserve their free-speech rights.[45] Accordingly, it is prudent to craft an implied nondiscrimination warranty so that it can be easily disclaimed. We propose that any expressive business can accomplish this by sending their Secretary of State a letter reserving the right to discriminate and indicating (1) the expressive products or services that they sell, and (2) the (otherwise) protected characteristics on which they wish to reserve the right to discriminate. Thus, the plaintiff in *303 Creative* might have preserved her right to refuse service to a same-sex couple simply by sending a one-time, twenty-four-word message to the state: "303 Creative reserves the right to discriminate on the basis of sex and sexual orientation with regard to its service of creating wedding websites."

But beyond the concern that altering rules can be unconstitutionally burdensome, there are other dimensions on which policy analysts might reasonably differ. In the remainder of this Part, we consider two such dimensions—whether the law should require ex ante or ex post disclaimers, and whether the disclaimers should be more public.

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

45. For example, an onerous altering rule imposed by Texas in the context of concealed and open-carry firearms raises constitutional concerns because it may unreasonably impede the ability of businesses to opt out of the right-to-carry default rule. In Texas, a business is required to post two large signs or hand patrons two cards in order to opt out: one for concealed handguns and one for openly carried handguns. To opt out of the concealed-carry default rule, the card or sign must state, "Pursuant to Section 30.06, Penal Code (trespass by license holder with a concealed handgun), a person licensed under Subchapter H, Chapter 411, Government Code (handgun licensing law), may not enter this property with a concealed handgun." TEX. PENAL CODE ANN. § 30.06(c)(3)(a) (2023). An opt-out sign must display this text in both English and Spanish, consisting of block letters at least one inch in height, contrasted in color against the background. § 30.06(c)(3)(b). The language of the cards or signs prohibiting people from entering a property with an openly carried handgun requires substantially similar language and specifications. *See* § 30.07(c).

One might wonder whether ex post disclaimers (i.e., those that occur only *after* a business discriminates on a protected basis) should be sufficient.[46] After all, the Boy Scouts were allowed to wait until they were sued to announce publicly that they reserved the right to discriminate on the basis of sexual orientation.[47] We think there are decisive arguments favoring ex ante disclaimers. Just as the UCC does not allow post-sale disclaimers of merchantability warranties,[48] businesses should be required to disclose to the public in advance the terms on which they are doing business, including whether they reserve the right to discriminate.

A requirement that disclaimers occur ex ante helps foster the three core informational benefits set forth in this Essay's Introduction. First, ex ante disclaimers inform the state and thereby give it the ability to assess and potentially contest whether the claimed products and services are sufficiently expressive to fall within the protection of the *303 Creative* decision going forward. This is important because the Court's opinion in *303 Creative* does not provide guidance on how to evaluate the expressive nature of other products or services that sellers may withhold on a discriminatory basis (such as dressmakers, limo drivers, or florists, to name just a few businesses often associated with weddings). Filings with the state disclaiming the warranty would give each state the opportunity to establish the contours of expressive products and services, perhaps in ways that would provide advisory guidance to other businesses considering disclaimers for their activities. The state could provide — on the very website where businesses make their disclaimers — advisory guidelines and examples of business activities

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46. For discussions of whether there should be religious exemptions from public-accommodations laws, see Andrew Koppelman, *You Can't Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, 72 BROOK. L. REV. 125 (2006); and Douglas Laycock, *Afterword*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (2008). The first explicit proposal for a nondiscrimination default with an ex ante opt-out procedure was made in 2002. Brown writes:

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

Brown, *supra* note 18, at 483 (footnote omitted).

47. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 652, 665, 672 (2000) (explaining that the Boy Scouts had not publicly stated that they discriminate on the basis of sexual orientation though they disclosed this in litigation).

48. *See* Bowdoin v. Showell Growers, Inc., 817 F.2d 1543, 1545 (11th Cir. 1987) ("Under the Uniform Commercial Code . . . a manufacturer may disclaim the implied warrant[y] of merchantability . . . provided that the disclaimer is part of the parties' bargain. . . . If, however, the disclaimer was not presented to the purchaser before the sale, the court will hold such a disclaimer ineffective because it did not form a part of the basis of the bargain.").

that either do or do not meet the standards for expressiveness protected by *303 Creative*. If the state determines that a business is not expressive and publicizes both the nature of the business and the reasoning behind the rejection of the disclaimer, it could preemptively deter sellers from discriminating if those sellers perceive similarities between their business and one that was found not to be expressive.

Second, ex ante disclaimers can be standardized to allow the state to create a database that is searchable by consumers. Disclaiming in advance can allow potential victims of discrimination to reduce the dignitary harms of being refused service in person. And finally, the searchable database made possible by ex ante disclaimers facilitates more informed associational consumer choices — including both buycotts and boycotts.[49]

A more difficult question concerns how conspicuous disclaimers ought to be. For example, in addition to sending a disclaimer to the Secretary of State's office, a disclaiming business might be required to post a sign or contract provision outside the store or at the point of sale, informing all consumers that the business has reserved the right to discriminate on certain bases with regard to certain products. Public disclaimers could force businesses to "put their money where their mouth is" in ways that more rigorously test the sincerity of their beliefs and then hold businesses accountable for their discrimination, including potential boycotts by customers.[50] Public disclaimers might even dissuade businesses from reserving the right to discriminate, even though they would have been willing to disclaim in less public ways. Visible disclaimers might also stop some consumers from purchasing, even though they would have been willing to purchase if they were not forced to acknowledge to themselves that they were choosing to purchase from a potentially discriminatory business.[51]

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49. As our stylized example suggests, the market likely includes some percentage of consumers who prefer to patronize businesses that do not discriminate, even though they would not personally be subject to a refusal of service because they are not members of the excluded group.

50. One could even imagine super-charging public disclosure by requiring customers of disclaiming businesses to sign acknowledgements that they were consenting to patronize a business that has reserved the right to discriminate. *See* Brown, *supra* note 18, at 483.

51. An analogous impact occurred at Saint Thomas Episcopal Church, when a resolution was introduced requesting that clergy at the church "treat same-sex couples and different-sex couples equally when it comes to marriage." Alison Leigh Cowan, *A Moratorium on Weddings*, N.Y. TIMES (Jan. 14, 2005), https://www.nytimes.com/2005/01/14/nyregion/a-moratorium-on-weddings.html [https://perma.cc/U8SZ-QQWY]. At the time the resolution was being considered, a substantial proportion of the vestry would have preferred not to address the issue. But when the motion was seconded and individual members had to declare whether or not they favored disparate treatment, ten out of eleven vestry members voted in favor of the resolution. *Id.* The church warden remembers that some of the members could not bring themselves to make an active choice in favor of discrimination.

Ronan Avraham and Daniel Statman have offered some thoughtful analysis of refusals to sell or serve, with an aim to help distinguish between refusal to serve a client that "stems from objection to the content of the service" versus "rejection of the client," with the former not constituting discrimination.[52] They have also suggested that, to minimize the dignity-deteriorating impact of an effective disclaimer, the wording should be "formulated not only negatively but also positively," such as the following: "We happily serve all clients regardless of their religion, race, gender or sexual orientation. However, for religious reasons, we apologize for not being able to provide [for instance] photographing services to same-sex weddings."[53]

They do worry that disclaimers "exactly because of their overtness, might be 'contagious,' increase social polarization, and make service providers less compromising and less tolerant."[54] They also worry that in "more conservative towns or neighborhoods, the cost to businesses might be much lower (such businesses might even benefit financially from such disclaimers), and same-sex couples might be worse off as a result."[55]

Douglas Laycock, conversely, has worried that public disclaimers might subject business owners to harassment or even vandalism. Laycock writes:

> The real reason we can't require public notice is that no conscientiously objecting merchant could afford to give it. It was not clear in 2008, but it is clear now that any such merchant would risk boycotts, defamatory reviews, and, simultaneously, repeated confrontational demands for service from gay couples. The merchant would also risk vandalism and worse. . . . [T]he conscientious objectors' only hope in much of the country is to lie low as much as possible and to invoke any exemption rights as quietly and diplomatically as possible.[56]

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52. Ronen Avraham & Daniel Statman, *Wedding Crashers: When Refusal to Provide Service to Protected Groups Is Not Wrongful Discrimination*, 10 J.L. RELIGION & ST. 1, 6 (2022).

53. *Id*. at 20-21.

54. *Id*. at 21.

55. *Id*.

56. 3 DOUGLAS LAYCOCK, RELIGIOUS LIBERTY 836-37 (2018). Laycock originally had "no objection to a requirement that merchants that refuse to serve same-sex couples announce that fact on their website or, for businesses with only a local service area, on a sign outside their premises." Douglas Laycock, *Afterword*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 198 (2008). Our stylized model suggests, contrary to Laycock's concern, that in a large market with some portion of consumers preferring discrimination, one or more of the sellers in that market can afford to disclaim the warranty because buycott effects will likely outweigh boycotts.

Laycock's suggestion that objectors "lie low," however, may give inadequate weight to the associational interests and sincere scruples of many consumers, who *want* to know whether they are supporting businesses that would refuse service or products to members of protected classes. If a product or service is expressive, giving a business owner associational and expressive interests in withholding their work from certain consumers, surely those who purchase those products or services (because their identity is not objectionable to the proprietor) also have cognizable interests in knowing what the proprietor is expressing by accepting their business (e.g., "You're OK since you're not gay"). They might wish not to be a part of such a message.

Andrew Koppelman acknowledges the potential danger Laycock has identified, but argues that leaving consumers in the dark is no solution: "[T]he state can create its legal preconditions: rules that if obeyed, will create safe space for everyone. . . . A disclosure regime can do that. A regime in which gay people face unforeseeable discrimination cannot."[57]

We should acknowledge that a public list of expressive businesses opting out of the nondiscrimination warranty might harm not only the businesses but also the otherwise protected groups that have been specified for denial of the relevant services. This raises a difficult and important question about the psychological harm of discrimination. Which is worse: to view a public list of businesses that have declared their unwillingness to sell to or serve you, or to walk through the world and into a business knowing that *any* potential seller could be the one that will deny you a service or product, because the law does not require them to disclaim nondiscrimination ex ante?

The specter of discord and harassment may be sufficiently threatening that we should give careful consideration to the way disclaiming businesses make known their reservation of rights to discriminate. It is possible that if the implied warranty opt-out system requires too much explanation from businesses — even at the level supposed by Laycock and Avraham & Statman — the warranty could force citizens to speak about their personal (religious) beliefs in a way that goes beyond the normal bounds of commercial-speech regulation. This is why our proposal calls upon businesses to specify only two things: the expressive nature of the product or service they wish to sell selectively, and the characteristics of consumers to whom they reserve the right not to sell. We do not call for disclaimers to set forth the rationale for their reservation of the right to discriminate. The Court's holding in *303 Creative* is not limited to religious expression, so we see no reason to require such explanations from businesses.

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57. ANDREW KOPPELMAN, GAY RIGHTS VS. RELIGIOUS LIBERTY?: THE UNNECESSARY CONFLICT 140 (2020). Koppelman further points out, probably accurately, that in a world as connected and transparent as ours "[i]t is also doubtful that any exemption can be asserted without the world finding out that this has happened." *Id.*

The state might assist sellers who wish to opt out by providing safe-harbor language, with blanks for the seller to fill in, such as the following: "Our business involves the following product and/or service: _____ and we reserve the right to deny our services on the basis of _____." The state could make things even easier by providing a check-box form listing (1) qualities of products or services that would make them expressive and (2) personal characteristics protected by the public-accommodations statute that would be the basis for denial of service. Sellers would remain free to go beyond this language and provide customers with additional information in more accessible and salient ways if they chose.

Altering-rule requirements can powerfully influence the mixture of buycotts and boycotts. For example, consider the "Orthodox Union" emblem (a letter "U" encased in a larger circle or letter "O") certifying that a product is kosher.[58] The symbol is so opaque to non-Jewish people that consumers who might be disinclined to buy kosher products are likely to miss its meaning.[59] By creating a kind of "acoustic separation" between consumers who disprefer and consumers who prefer kosher products, the symbol is likely to promote more buycotts than boycotts.[60] A similar strategy might be adopted by businesses who signal to like-minded consumers that they oppose celebrating same-sex marriage.[61] These more opaque signals of disclaiming are likely to become known by consumers with more intense preferences on the issue—both those who strongly support and those who strongly oppose nondiscrimination—and less likely to be understood by the many consumers who have less passionate preferences on the issue.[62] The downside of opaque signaling will be experienced primarily by

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58. Chaim Goldberg, *OU Kosher Symbols Explained*, KOSHER CERTIFICATION SERV., https://oukosher.org/blog/industrial-kosher/all-ou-symbols-explained [https://perma.cc/7CMU-JCKC].

59. Occasionally, anti-Semitic groups do call for boycotts of products labeled as kosher, but these movements seem to attract few followers. *See, e.g.*, *The "Kosher Tax" Hoax: Anti-Semitic Recipe for Hate*, ANTI-DEFAMATION LEAGUE (Jan. 30, 2017), https://www.adl.org/resources/backgrounder/kosher-tax-hoax-anti-semitic-recipe-hate [https://perma.cc/S6LX-K44A] (noting that some extremist groups "call for a boycott of foods and companies that succumb to the 'kosher conspiracy'").

60. *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 630-31 (1984).

61. An analogous choice of an opaque signal was chosen for the "Fair Employment" mark, a certification mark registered with U.S. Patent and Trademark Office, certifying that the licensee had promised not to discriminate in employment on the basis of sexual orientation. *See* Ayres & Brown, *supra* note 35, at 1641 (showing a mark with the encircled letters "FE," which is of low salience, similar to the kosher symbol).

62. Conversely, one could imagine an altering rule that required the disclaiming business to post an encircled KKK hood at the point-of-sale to powerfully signal to a broad group of consumers that the business is choosing to associate itself with discrimination. We oppose such a

consumers who care, but are unwilling or unable to research the meaning of an opaque symbol disclaiming the warranty. Because this undermines the value of transparency and raises consumer information costs relative to more overt signage or online disclosures, it is not the optimal approach in our view.

In the end, we would not require point-of-sale signage (whether overt or opaque) because, to our minds, the costs to protected group members of having to see salient messages of discrimination — somewhat akin to "Irish need not apply"[63] — outweigh the potential benefits of transparency when businesses publicly disclaim the implied warranty at the point of sale. But we acknowledge that reasonable people could differ on this question.

III. IS AN IMPLIED WARRANTY OF NONDISCRIMINATION CONSTITUTIONAL?

The preceding two Parts have attempted to defend, as a welfare-enhancing policy, our proposed default of nondiscrimination as well as the nonburdensome method by which the warranty may be disclaimed. In this Part, we respond to the concern that the altering rule constitutes unconstitutional compelled speech.

Some readers of this Essay could be concerned that our proposal runs afoul of the First Amendment's compelled-speech doctrine.[64] After all, our proposal

requirement in part because it falls outside the commercial speech doctrine's sanction of purely factual disclosure requirements. *See infra* notes 76-82 and accompanying text.

63. Rebecca A. Fried, *No Irish Need Deny: Evidence for the Historicity of NINA Restrictions in Advertisements and Signs*, 49 J. SOC. HIST. 829, 831-32 (2016).

64. A second constitutional concern could be suggested by the work of Jed Rubenfeld, who has referenced the foundational principle that "[w]hat the First Amendment precludes government from commanding directly, it also precludes government from accomplishing indirectly." Rutan v. Republican Party of Ill., 497 U.S. 62, 73, 77-78 (1990). Rubenfeld has subsequently applied this principle to government regulation of social media. Vivek Ramaswamy & Jed Rubenfeld, *Save the Constitution from Big Tech*, WALL ST. J. (Jan. 11, 2021, 12:45 PM ET), https://www.wsj.com/articles/save-the-constitution-from-big-tech-11610387105 [https://perma.cc/TA7P-K2MN]. Rubenfeld has argued that because federal officials cannot constitutionally suppress social-media content containing protected free speech, they also cannot constitutionally encourage social-media companies to do so. Although this argument gained some traction in the Fifth Circuit, the U.S. Supreme Court ultimately reversed for lack of standing and concluded that a court order forbidding government officials from communicating with social media companies would have little to no effect on decision-making by those entities, since they could continue to enforce their own policies either way. *See* Missouri v. Biden, 80 F.4th 641, 661-62 (5th Cir. 2023); Murthy v. Missouri, 603 U.S. 43, 45 (2024) (explaining that the restrictions the plaintiffs complained of were not sufficiently "traceable" to the conduct of government officials). Similarly, in the context of our proposed implied warranty of nondiscrimination, setting a legal presumption of nondiscrimination would not unconstitutionally restrict or influence private decision-making, because businesses would be free to disclaim the warranty without governmental repercussions.

compels businesses of expressive products and services to speak if they wish to reserve the right to discriminate on the basis of a characteristic that is otherwise protected by a public-accommodations statute. This Part examines whether forcing sellers to send a few words to the state unconstitutionally compels speech.

The speech compelled by an implied warranty of nondiscrimination does not offend the Constitution for two reasons, one structural and one doctrinal. First, structurally, the government cannot avoid setting a default respecting whether or not a business reserves the right to discriminate. And any default rule compels speech of contractors who wish to opt out of the default and recreate the kind of potential liability for discrimination that existed before the *303 Creative* decision. Our proposal compels speech from businesses that want to disclaim a warranty of nondiscrimination. But the *303 Creative* decision also created a default which analogously compels speech because, unless sellers of expressive services contractually commit *not* to discriminate, consumers can reasonably assume that businesses are free to discriminate without legal consequence.[65] That is, the *303 Creative* default rule compels speech by forcing pro-equality sellers of expressive products and services who want to credibly communicate their views to the public to come forward and expressly warrant that they do not discriminate.

And while any default compels speech by imposing altering rules for those who wish to opt out of the default, the nondiscrimination default compels less speech, both because its altering rules are not cumbersome and because it is likely to be a majoritarian default. The implied warranty of nondiscrimination default has a simple altering rule with which a seller can comply, as described above, in a single twenty-four-word statement to the enacting state's Secretary of State. In contrast, the *303 Creative* default requires a more cumbersome and repetitive contracting process establishing potential victims as intended third-party beneficiaries.[66] Moreover, a substantial majority of the public disapproves of businesses discriminating against employees or customers, so there is every reason to believe that an implied warranty of nondiscrimination is a majoritarian default.[67] When compelled speech cannot be avoided, majoritarian defaults structurally reduce the number of contractors who would want to opt out.[68]

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65. Indeed, the Fair Employment Mark provides a model for such a contractual commitment whereby the business makes the class of potential victims of their discrimination intended third-party beneficiaries of a nondiscrimination promise as part of their contracts with employees or patrons. Ayres & Brown, *supra* note 35, at 1645-46.

66. *See id.*

67. *See supra* note 36 and accompanying text.

68. The "affirmative choice" default that requires sellers of expressive products or services to announce affirmatively whether or not they reserve the right to discriminate has the previously stated advantage of not presuming a private preference, but structurally compels all expressive businesses to state their policy as a condition of licensure. *See infra* note 83.

The second justification for the speech required by our proposal grows out of the Supreme Court's own jurisprudence. Commercial speech only began to receive First Amendment protection in 1976.[69] And the Court has repeatedly made clear that commercial speech is subject to "modes of regulation that might be impermissible in the realm of noncommercial expression."[70] Quite simply, "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity."[71] Because the state may lawfully suppress inaccurate commercial speech, even "[c]ontent discrimination is . . . routinely practiced within commercial speech" despite its "impermissib[ility] within public discourse."[72]

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

> [A business's] constitutionally protected interest in *not* providing any particular factual information in [its] advertising is minimal. Thus, in virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, "warning[s] or disclaimer[s] might be appropriately required . . . to dissipate the possibility of consumer confusion or deception."[73]

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

> If we just open our eyes, we can see that American society is full of examples of compelled pure speech, ranging from required product

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

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

71. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563 (1980).

72. Post, *supra* note 20, at 876; *see also id.* ("Although the state may not suppress public discourse because it is misleading or deceptive, it may censor deceptive or misleading commercial speech. Speech is ordinarily deemed to be 'misleading' from the perspective of a reasonable audience.").

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

> disclosures, to disclosures in real estate transactions, to the required testimony of witnesses in a trial, to a raft of statutory obligations to report various events and circumstances, to the myriad of miscellaneous disclosure requirements imposed on commercial transactions.[74]

The relatively relaxed scrutiny of commercial-speech regulation makes an implied warranty of nondiscrimination even more likely to pass constitutional muster than, for instance, a default rule requiring that noncommercial actors disclose if they reserve the right to discriminate.[75]

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74. Post, *supra* note 13, at 273 (footnotes omitted); *see also* 20 U.S.C. § 1092(f) (2018) (compelling speech from universities by imposing a duty to "prepare, publish, and distribute . . . an annual security report containing" information regarding "campus security policies and campus crime statistics"); 29 C.F.R. § 1904.2(a) (2024) (compelling speech from "all employers" by imposing a duty to "report to [the Occupational Safety and Health Administration] any workplace incident that results in an employee's fatality, in-patient hospitalization, amputation, or loss of an eye"); N.Y. PUB. HEALTH LAW § 2130(1) (McKinney 2024) (compelling speech from physicians by imposing a duty to report diagnoses of human immunodeficiency virus and acquired immune deficiency syndrome); N.Y. VEH. & TRAF. LAW § 601 (McKinney 2024) (compelling speech from drivers who "strike and injure any horse, dog, cat or animal classified as cattle" by imposing a duty to "report the matter to [the animal's] owner, custodian or [a police] officer" and provide their "name and residence"); Simpson v. Gen. Dynamics Ordnance & Tactical Sys.-Simunition Operations, Inc., 429 F. Supp. 3d 566, 579 (N.D. Ind. 2019) (compelling speech from sellers by upholding a statutory duty to "(1) properly . . . label the product to give reasonable warnings of danger about the product; [and] (2) give reasonably complete instructions on proper use of the product"); Liriano v. Hobart Corp., 700 N.E.2d 303, 307 (N.Y. 1998) (compelling speech from manufacturers by upholding a duty "to warn of the dangers of foreseeable modifications that pose the risk of injury"); Roe v. Hesperia Unified Sch. Dist., 300 Cal. Rptr. 3d 340, 357 (Ct. App. 2022) (compelling speech from "teachers and other specified school employees" by upholding a statutory duty "to make a report to a law enforcement agency or a county welfare department" regarding reasonable suspicion of child abuse or neglect); OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 3 (2014) ("'Mandated disclosure' may be the most common . . . regulatory technique in American law."); KOPPELMAN, *supra* note 57, at 139 ("As a general matter, it is not an impermissible speech compulsion when property owners and product manufacturers are required to warn of hidden dangers.").

75. For example, in 2002, as a response to *Dale v. Boy Scouts of America*, 530 U.S. 640 (2000), one of us (Brown) proposed that an "informed association" default be enacted with regard to noncommercial expressive associations:

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

Brown, *supra* note 18, at 483 (footnote omitted); *see also* IAN AYRES & JENNIFER GERARDA BROWN, STRAIGHTFORWARD: HOW TO MOBILIZE HETEROSEXUAL SUPPORT FOR GAY RIGHTS 154 (2005) ("In our Informed Association Statute, silence is a covenant not to

The clearest articulation of the Supreme Court's approach to scrutinizing compelled commercial speech can be seen in its landmark *Zauderer v. Office of Disciplinary Counsel* decision.[76] In *Zauderer,* the Court upheld the constitutionality of compelled speech in the context of a state requirement that attorney advertisements contain particular factual disclosures:

> In requiring attorneys who advertise their willingness to represent clients on a contingent-fee basis to state that the client may have to bear certain expenses even if he loses, Ohio has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present.
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> . . . .
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> . . . Ohio has not attempted to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." The State has attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a requirement that appellant include in his advertising *purely factual and uncontroversial information about the terms under which his services will be available*.[77]

The Court concluded that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."[78] To be reasonably related to this interest, the mandated disclosure must also "relate to the good or service offered by the regulated party."[79] If a mandated commercial disclosure fulfills these prerequisites, then it is subject only to rational-basis review.[80]

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discriminate. . . . To discriminate, organizations would have to affirmatively 'opt out' of this covenant . . . .").

76. 471 U.S. 626 (1985).

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

78. *Id.* at 651.

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

80. Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 554 (D.C. Cir. 2015) ("The Supreme Court has stated that rational basis review applies to [*Zauderer*] disclosures . . . ."). The D.C. Circuit has analogized the fulfillment of these *Zauderer* prerequisites to the doctrine of *res ipsa loquitur*, reasoning that such a fulfillment satisfies the more searching scrutiny of *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). *See Am. Meat Inst.*, 760 F.3d at 26 ("*Zauderer,* like the doctrine of *res ipsa loquitur,* identifies specific circumstances where a party carries part of its evidentiary burden in a way different from the customary one. . . . [B]y

An implied warranty of nondiscrimination falls squarely within the *Zauderer* safe harbor. Businesses are only compelled to disclose "purely factual and uncontroversial information about the terms under which [their] services will be available."[81] As Robert Post has explained, the requirement that a disclosure be "uncontroversial" is best understood as "a description of the epistemological status of the information that a speaker may be required to communicate . . . . [I]f the truth of information is seriously controverted, the state cannot appeal to the relaxed *Zauderer* test to sanction its compelled disclosure." [82] When an expressive business opts to disclaim the implied warranty of nondiscrimination, the compelled disclosure is "factual" information regarding the terms of service — it clarifies whether or not those terms include a nondiscrimination warranty.[83] In *Zauderer*'s terms, the disclosure is "uncontroversial" in that it is not subject to epistemological dispute — it truthfully presents whether or not the terms include a nondiscrimination warranty.

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acting only through a reasonably crafted disclosure mandate, the government meets its burden of showing that the mandate advances its interest . . . ."); *see also* Post, *supra* note 20, at 887 ("*AMI* justifies its approach by analogizing *Zauderer* to the doctrine of *res ipsa loquitur*. *AMI* suggests that compelled disclosures necessarily directly advance the goal of disseminating information in a narrowly tailored way . . . ." (footnote omitted)).

81. *Zauderer*, 471 U.S. at 651.

82. Post, *supra* note 20, at 910, (citing CTIA—The Wireless Ass'n v. City & Cnty. of S.F., 827 F. Supp. 2d 1054, 1060 (N.D. Cal. 2011) ("Whether or not cell phones cause cancer is a debatable question and, at this point in history, is a matter of opinion, not fact. San Francisco has its opinion. The industry has the opposite opinion. Can San Francisco force the industry to disseminate the government opinion?"), *aff'd*, 494 F. App'x 752 (9th Cir. 2012) (per curiam)); *see also Nat'l Ass'n of Mfrs.*, 800 F.3d at 538 (Srinivasan, J., dissenting) ("[E]ven if the disclosure qualifies as 'purely factual,' it would still fall outside of *Zauderer* review if the accuracy of the particular information disclosed were subject to dispute. The requirement that disclosures be 'uncontroversial' in addition to 'purely factual' thereby removes from *Zauderer*'s purview disclosures whose accuracy is contestable. *AMI* in fact assumes 'controversial' in this context means exactly that: a 'dispute about . . . factual accuracy.'" (second alteration in original) (quoting *Am. Meat Inst.*, 760 F.3d at 27)).

83. The legislature could avoid putting a thumb on either side of the scale by instead mandating that sellers of expressive products and services affirmatively state their nondiscrimination policies to the state. An "affirmative choice" is a special form of information-forcing default that penalizes private actors if they fail to announce their preferred policy affirmatively. Ayres, *supra* note 44, at 2098-99. In this case, a condition of being licensed to do business in the state would be that sellers are required to state their policy on whether or not they wish to be covered by a nondiscrimination duty with regard to any expressive products or services. The affirmative-choice rule thus does not encourage or discourage either side of the issue, but merely requires the private actor to pick a side. *See also* Ian Ayres & Frederick Vars, Opinion, *Patrons Packing Heat: Businesses Should Be Required to Tell Customers Whether Guns Are Allowed*, HILL (Dec. 20, 2023, 10:30 AM ET), https://thehill.com/opinion/civil-rights/4368020-patrons-packing-heat-businesses-should-be-required-to-tell-customers-whether-guns-are-allowed [https://perma.cc/EP3G-GN6S] (arguing for an affirmative-choice rule requiring businesses open to the public to announce their policy on whether visitors are invited to carry firearms).

In addition, the disclosure is "reasonably related to the State's interest in preventing deception of consumers."[84] The deception would occur if, while the commercial entity seemed to be holding itself out as doing business with the public generally, it was only willing to transact with a selective subset of the public.[85] The government has a substantial interest in ensuring that consumers are adequately informed about whether the seller is offering its goods or services to (or soliciting offers from) them or not.[86] Accordingly, an implied nondiscrimination warranty does not unconstitutionally compel speech.

CONCLUSION

Constitutional thinking about defaults is underdeveloped. We are accustomed to treating constitutional rules as mandates that either prohibit or require certain results. This is all the more true with regard to civil rights, where

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

85. Businesses can often exempt themselves from the requirements of public-accommodation laws by not holding themselves out as transacting with the general public. *See* Post, *supra* note 13, at 255 n.23 (citing Elizabeth Sepper, *The Role of Religion in State Public Accommodations Laws*, 60 ST. LOUIS U. L.J. 631, 650 (2016) (enumerating "selectivity" as one factor in a "multifactor analysis" – which also includes "profit status," "commercial nature," "exclusivity," and "intimacy of an entity" – employed to "police" the "public-private divide"); then citing Vejo v. Portland Pub. Schs., 204 F. Supp. 3d 1149, 1168 (D. Or. 2016), *rev'd on other grounds*, 737 F. App'x 309 (9th Cir. 2018), (holding that a private university, despite its status as a commercial entity, is not a public accommodation under Oregon law because "its [admissions] processes are not so unselective that it is *de facto* open to the public"); then citing Barnett v. E:Space Labs LLC, No. 18-cv-00419, 2018 WL 3364660, at *4 (D. Or. July 10, 2018) (holding that a "membership-based technology incubator" is not a public accommodation under Oregon law because it "grants permission to use its facilities on a selective basis, and has exercised its discretion to revoke permission"); then citing Emilee Carpenter, LLC v. James, 575 F. Supp. 3d 353, 378 n.13 (W.D.N.Y. 2021) ("[I]t is worth noting that [a 'distinctly private'] exemption seems particularly well-suited to artists who must be selective in their clientele in order to express their desired message."); and then citing Fulton v. City of Phila., 593 U.S. 522, 1880 (2021), (holding that the Catholic Social Services is not a public accommodation in part because "[c]ertification as a foster parent is not readily accessible to the public" and "involves a customized and selective assessment that bears little resemblance to staying in a hotel, eating at a restaurant, or riding a bus")).

86. An implied warranty of nondiscrimination responds to the undisclosed selectivity deception at issue in *Lefkowitz v. Great Minneapolis Surplus Store, Inc.*, 86 N.W.2d 689, 690 (Minn. 1957), in which a seller claimed that it need not transact with a male buyer attempting to accept the seller's newspaper offer because, pursuant to a "house rule" not stated in the offer, it was only open to women.

mandatory rules prohibiting discrimination take center stage. The underappreciation of defaults yields non sequiturs like Richard Epstein's, in which criticism of the mandatory nature of civil-rights legislation led mistakenly to his proposal for a full undoing of such legislation without considering the more responsive middle ground of a disclaimable prohibition.[87]

More work needs to be done by courts and commentators to flesh out the circumstances under which the government can constitutionally flip defaults.[88] At a minimum, when private actors have ultimate control over an issue and when there are constitutional interests on both sides, states should be empowered to establish majoritarian defaults with nonburdensome altering rules. An implied warranty of nondiscrimination meets this standard. Businesses that sell expressive goods or services have a right to make binding promises not to discriminate as well as a right—per *303 Creative*—*not* to make such a commitment. There are constitutional interests on both sides of the issue: the Court has made clear that expressive sellers have a First Amendment interest in not being forced to espouse views with which they disagree, but it is equally clear that customers have a First Amendment interest in informed association.[89] Indeed, patrons may feel defrauded if they learn they were transacting with a business that discriminates on the basis of a protected characteristic.

Legislatures might also do well to pay more attention to default choice. Given the mandatory nature of the Colorado Anti-Discrimination Act and its collision with business owners' freedom of expression as understood by the *303 Creative* majority, invalidation of the Colorado law seemed inevitable as applied to such expressive businesses. But this need not be the final chapter for nondiscrimination norms in Colorado and other states. If legislatures enact an implied warranty of nondiscrimination—and provide a reasonable process for expressive businesses to disclaim the warranty—states can address the Court's central

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87. *See supra* text accompanying note 28.

88. Two potentially fertile areas for such discussions would be defamation law, *see* Ian Ayres, *First Amendment Bargains*, 18 YALE J.L. & HUMAN. 178, 191-96 (2006) (discussing compensation for individuals injured through negligent misrepresentation in a newspaper), and concealed carry of firearms on business premises, *see* Antonyuk v. Chiumento, 89 F.4th 271, 289 (2d Cir. 2023) (No. 22-2908), 2023 WL 1776724 (arguing that there is no constitutional right to a default presumption allowing customers to carry firearms unless the business expressly indicates that they may not). *See also* Ian Ayres & Fredrick Vars, Tell Me What You Want: An Affirmative-Choice Answer to the Constitutional Concern About Concealed-Carry on Private Property (Dec. 27, 2024) (unpublished manuscript) (on file with authors) (arguing that affirmative-choice defaults avoid state action concerns raised by no-carry default statutes).

89. And, of course, the government has Fourteenth Amendment interests in not promoting, incentivizing, or facilitating discrimination. Shelley v. Kraemer, 334 U.S. 1, 20 (1948) ("We hold that, in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws, and that, therefore, the action of the state courts cannot stand.").

constitutional misgiving regarding the mandatory nature of the Colorado Anti-Discrimination Act[90] and still preserve consumers' interest in access to a market free of discrimination where sellers fail to opt out.

Some might argue that the *303 Creative* decision was so unexpected that legislatures could not have reasonably foreseen the possibility that nondiscrimination mandates would be struck down with regard to expressive sellers. And the decision might be considered a unique one, cabined to the rare circumstances of what Justice Gorsuch characterized as regulating "pure speech."[91] But the Supreme Court may not be finished paring back the reach of our civil-rights laws. In his concurrence in *Ricci v. DeStefano*, Justice Scalia warned that "the war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how — and on what terms — to make peace between them."[92]

There is a nontrivial chance that the Court's recently empowered conservative majority will strike down disparate-impact liability as invidious government discrimination.[93] Foreseeing this possibility, one could imagine state or federal

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90. *See supra* text accompanying note 29.

91. 303 Creative LLC v. Elenis, 600 U.S. 570, 587 (2023); *see also* Post, *supra* note 13, at 264 (noting that the "four criteria of 'pure speech'" — that it must be composed of (1) expression (such as images, words, or symbols) that (2) is "original" and "customized," (3) is designed to communicate ideas, and (4) consists of the vendor's own message (rather than constitute mere transmission of the customer's message) — "are meant to ensure that the holding of *303 Creative* will not uncontrollably expand to include all" provision of goods and services). *But see* Post, *supra* note 13, at 253 ("[T]he wobbly, innovative abstraction of 'pure speech' . . . is so obscure that it effectively gives lower courts a free hand to use First Amendment doctrine to mutilate antidiscrimination laws of all kinds.").

92. 557 U.S. 557, 595-96 (2009) (Scalia, J., concurring).

93. *See* Reva B. Siegel, *Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L. REV. 653, 654-55 (2015); *see also* 28 C.F.R. § 42.104(b)(2) (1966) (providing that recipients of federal funds, in "determining the type of disposition, services, financial aid, benefits, or facilities which will be provided under any such program, . . . may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin . . . ."); C.R. Div., *Title VI Legal Manual*, U.S. DEP'T OF JUST. 2, https://www.justice.gov/crt/book/file/1364106/dl?inline [https://perma.cc/XM2D-XME7] (discussing disparate impact as "a cause of action independent of any intent," and noting that "[t]he disparate impact regulations seek to ensure that programs accepting federal money are not administered in a way that perpetuates the repercussions of past discrimination"). According to guidance issued by the Equal Employment Opportunity Commission, Title VII also "generally prohibits employers from using neutral tests or selection procedures that have the effect of disproportionately excluding persons based on race, color, religion, sex, or national origin, if the tests or selection procedures are not 'job related for the position in question and consistent with business necessity.'" *Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Acts Right of 1964*, U.S. EQUAL EMP.

legislation with a savings clause creating a disclaimable warranty not to discriminate in ways that create unjustified disparate impacts. Reasonable legislatures might eschew such a proactive savings-clause approach because it could be seen as inviting judicial invalidation of the original nondiscrimination mandates. The more prudent legislative approach would be to respond following invalidation.

In any case, now, in the wake of *303 Creative*, Colorado and other states need not remain silent. By enacting an implied warranty of nondiscrimination, states can adroitly furnish themselves and their populaces with valuable information about what is and is not being promised. In such a regime, most sellers would stick with the nondiscrimination default; others would take advantage of the state's opt-out provision and declare their intention potentially to discriminate in ways otherwise prohibited by a nondiscrimination statute. In this regime, a state would be able to cabin appropriately the discriminatory impact of the *303 Creative* decision while simultaneously maintaining a vibrant space for free expression.

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OPPORTUNITY COMM'N (May 5, 2023), https://www.eeoc.gov/laws/guidance/select-issues-assessing-adverse-impact-software-algorithms-and-artificial [https://perma.cc/MR5G-PH2Z].