COMMENTS

Guns and the Right to Exclude: Saving Guns-at-Work Laws from *Cedar Point*'s Per Se Takings Rule

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The Supreme Court's decision in Cedar Point Nursery v. Hassid *has left considerable uncertainty in the realm of takings law. In* Cedar Point*, the Court announced a new rule that government-authorized physical occupations of property, even temporary ones, constitute per se takings. But the* Cedar Point *decision left significant questions unresolved regarding the scope of its per se takings rule and its various exceptions.*

To resolve these questions, this Comment looks to the example of guns-at-work laws. Enacted by about half of the states, guns-at-work laws protect the right of a business's employees, customers, and invitees to store firearms in private vehicles, even if those private vehicles are on company property (e.g., parking lots and parking structures). In addition to having important public safety implications, guns-at-work laws serve as a fruitful example to understand takings doctrine.

Relying on this example, this Comment reaches three conclusions regarding takings doctrine and its application to guns-at-work laws. First, government-authorized physical occupations, even seemingly trivial ones, can constitute per se takings. This suggests that at least initially, guns-at-work laws constitute per se takings. Second, when applying the open-to-the-public exception, courts should look to the subsections of a business and not attempt to weigh between subsections to determine the character of the business as a whole. Consequently, courts should treat employee-only parking lots and parking lots open to the public differently for the purposes of the open-to-the-public exception: the open-to-the-public exception exempts parking lots open to the public, but not employee-only parking lots, from Cedar Point*'s per se takings rule. Finally, the longstanding-restrictions-on-property-rights exception only requires a contemporary law to have a historical analogue, not an exact historical match. Thus, Founding Era militia laws are a similar historical analogue to guns-at-work laws. Consequently, guns-at-work laws are not a per se taking under* Cedar Point.

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INTRODUCTION

The Supreme Court's decision in *Cedar Point Nursery v. Hassid*[1] has given rise to considerable uncertainty in the realm of takings law.[2] Derived from the Fifth Amendment's requirement that the

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1 141 S. Ct. 2063 (2021).

2 Nearly all state constitutions also contain their own version of the Takings Clause. State takings jurisprudence may diverge from its federal counterpart and is beyond the scope of this Comment. *See, e.g.*, CAL. CONST. art. I, § 19(a); ILL. CONST. art. I, § 15.

government not take "private property . . . for public use[ ] without just compensation,"[3] takings doctrine has come to implicate the government's power to regulate economic life. In *Cedar Point*, the Court announced the new rule that government-authorized physical occupations of property, even temporary ones, constitute per se takings.[4] The Supreme Court reasoned that because the right to exclude—the right to prevent others from occupying one's property—is a "fundamental element of the property right,"[5] preventing a property owner from engaging in such exclusion generally constitutes a per se taking.[6]

Concerned about *Cedar Point*'s doctrinal implications, scholars have questioned whether the new rule endangers the constitutionality of rent control,[7] antiretaliation laws,[8] the Fair Housing Act,[9] and employee-protection and nondiscrimination laws more generally.[10] These various policies appear to take the right to exclude from property owners. For example, laws that ban racial discrimination in public accommodations can be understood as "taking" the right to exclude people on the basis of their race.[11]

In light of *Cedar Point*'s threat to policies with center-left to left-wing political valences, scholars have attempted to save such laws from being per se takings by situating them within the four exceptions that *Cedar Point* laid out to its per se takings rule. First, because *Cedar Point* did not eliminate the distinction between "trespass and takings," it remains the case that "isolated physical invasions" will normally constitute torts and not takings, which entail "appropriations of a property right."[12] Second, government-authorized physical invasions do not constitute takings if they are consistent with "longstanding background restrictions on property rights."[13] Third, takings do not necessarily

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3 *See* U.S. CONST. amend. V.

4 *See* 141 S. Ct. at 2074.

5 *Id.* at 2072 (quoting Kaiser Aetna v. United States, 444 U.S. 164, 179–80 (1979)).

6 *See id.* at 2074.

7 *See* Abigail K. Flanigan, Note, *Rent Regulations After* Cedar Point, 123 COLUM. L. REV. 475, 498–510 (2023); *see, e.g.*, Aziz Z. Huq, *Property Against Legality: Takings After* Cedar Point, 109 VA. L. REV. 233, 262–63 (2023).

8 *See* Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160, 196–200 (2021).

9 *See* Amy Liang, Comment, *Property Versus Antidiscrimination: Examining the Impacts of* Cedar Point Nursery v. Hassid *on the Fair Housing Act*, 89 U. CHI. L. REV. 1793, 1810–14 (2022).

10 *See* Bowie, *supra* note 8, at 162, 196.

11 *Id.* at 197.

12 *Cedar Point*, 141 S. Ct. at 2078.

13 *Id.* at 2079.

occur when the government requires "property owners to cede a right of access as a condition of receiving certain benefits."[14] Finally, governmental appropriation of property rights belonging to a "business generally open to the public" does not constitute a taking under *Cedar Point*.[15]

Scholars have placed special emphasis on the open-to-the-public and longstanding-restrictions-on-property-rights exceptions. For example, scholars have argued that *Cedar Point*'s open-to-the-public exception justifies the exemption of nondiscrimination laws from *Cedar Point*'s per se rule.[16] Even under *Cedar Point*, the argument goes, businesses that hold themselves open to the public cannot bring Takings Clause claims if the government requires them to serve customers regardless of race, sex, or other protected characteristics.[17] *Cedar Point* specified that government-authorized physical invasions do not constitute takings if they are consistent with "longstanding background restrictions on property rights" and policies such as rent control have "spanned a century."[18] Other scholars have relied on the exception for longstanding restrictions on property rights to protect policies such as rent control.[19]

Building on these scholars' contributions, this Comment seeks to understand the application of these exceptions to *Cedar Point*'s per se rule through a different approach. This Comment studies guns-at-work laws, a policy with a politically conservative valence. Enacted by roughly half the states, guns-at-work laws protect the right of a business's employees, customers, and invitees to store firearms in private vehicles on company property (e.g., parking lots and parking structures).[20] They do so by prohibiting

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14 *Id.*; *see infra* Part I.C.

15 *Cedar Point*, 141 S. Ct. at 2077; *see infra* Part I.C.

16 *See, e.g.*, Liang, *supra* note 9, at 1823–26 (arguing that the Fair Housing Act's rental provision falls under the exception for businesses generally open to the public).

17 *See* Flanigan, *supra* note 7, at 502.

18 *Cedar Point*, 141 S. Ct. at 2079.

19 *See* Flanigan, *supra* note 7, at 506.

20 *See* Dayna B. Royal, *Take Your Gun to Work and Leave It in the Parking Lot: Why the OSH Act Does Not Preempt State Guns-At-Work Laws*, 61 FLA. L. REV. 475, 495–96, 526–27 (2013); ALA. CODE § 13A-11-90(b) (2024); ALASKA STAT. ANN. § 18.65.800(a) (West 2024); ARIZ. REV. STAT. ANN. § 12-781(A) (2023); ARK. CODE ANN. §§ 11-5-117(b)–(c) (2024); FLA. STAT. § 790.251(4) (West 2024); GA. CODE ANN. § 16-11-135(b) (West 2024); IND. CODE § 34-28-7-2(a) (2024); KAN. STAT. ANN. § 75-7c10(b) (2023); KY. REV. STAT. ANN. § 237.106(1) (West 2024); LA. STAT. ANN. § 32:292.1(A), (C) (2024); ME. REV. STAT. ANN. tit. 26, § 600(1) (2023); MISS. CODE ANN. § 45-9-55(1) (2024); NEB. REV. STAT.

employers from forbidding the storage of firearms in private vehicles, even if those vehicles are located on company property.

A focus on guns-at-work laws provides two benefits. To start, guns-at-work laws serve as a vehicle for a fruitful discussion of the doctrine since they wrestle with three elements of takings doctrine after *Cedar Point*. First, because the guns occupy seemingly trivial amounts of space in glove compartments, they test the Court's commitment to its claim that all restrictions on the right to exclude can constitute per se takings. Second, because some company parking lots are employee only and some are open to the public, they test whether *Cedar Point*'s open-to-the-public exception focuses on the subsections of businesses or the business as a whole. Finally, as explained below, historical analogues, but not exact historical matches, to guns-at-work laws existed at the Founding. Consequently, guns-at-work laws test whether the longstanding-restrictions-on-property-rights exception requires a historical analogue or an exact historical match.

Moreover, guns-at-work laws in and of themselves impact society in two ways. First, analysts across the political spectrum recognize their impact on public safety. Opponents point to studies indicating that workplaces that do not prohibit guns are up to seven times more likely to experience a homicide than those that do.[21] Proponents, by contrast, argue that employees heading to work need to carry guns in their cars for protection.[22] If an employee cannot bring a firearm into the workplace or store a firearm in their car at work, then they also cannot carry that firearm on the way to work for the purpose of self-defense. Regardless of one's position on the issue, guns-at-work laws impact public safety.

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§ 28-1202.01(6) (2023); N.D. CENT. CODE § 62.1-02-13(1) (2023); OHIO REV. CODE ANN. § 2923.1210(A) (West 2023); OKLA. STAT. ANN. tit. 21, § 1289.7a(A) (West 2024); TENN CODE ANN. § 39-17-1313(a) (West 2024); TEX. LAB. CODE ANN. § 52.061 (West 2023); UTAH CODE ANN. § 34-45-103(1) (West 2024); W. VA. CODE § 61-7-14(d) (2024); WIS. STAT. ANN. § 175.60(15m)(b) (West 2024).

[21] *See* Dana Loomis, Stephen W. Marshall & Myduc L. Ta, *Employer Policies Toward Guns and the Risk of Homicide in the Workplace*, 95 AM. J. PUB. HEALTH, 830, 830 (2005).

[22] *See* Royal, *supra* note 20, at 518–19 (surveying arguments and evidence from proponents of guns-at-work laws); Logan A. Forsey, *State Legislatures Stand Up for Second Amendment Gun Rights While the U.S. Supreme Court Refuses to Order a Cease Fire on the Issue,* 37 SETON HALL LEGIS. J. 411, 431–34 (2013) (noting that Oklahoma state senator Jerry Ellis, Florida state representative Dennis Baxley, and Indiana state senator Johnny Nugent, authors and sponsors of their states' respective guns-at-work laws, have defended the laws by arguing that they are necessary to allow employees to protect themselves in the case of armed confrontation).

Second, these laws provide protection for gun rights that extends beyond the protections of the Second Amendment.[23] For example, *New York State Rifle & Pistol Ass'n v. Bruen*,[24] the most expansive Second Amendment case so far, protected the right to carry firearms in public from government interference[25] but did not require private businesses to permit guns on their property. Guns-at-work laws go much further—they proactively grant increased protections for bringing guns into the workplace. If guns-at-work laws are per se takings, then their public safety implications (for good or for ill, depending on one's view) may decrease since the prospect of paying compensation to employers may deter their enactment.[26]

In analyzing the application of guns-at-work laws to private employers,[27] this Comment illuminates key features of the open-to-the-public and longstanding-restrictions-on-property-rights exceptions to *Cedar Point*'s per se takings rule. It proceeds in four parts. Part I describes the state of takings law both before and after *Cedar Point*. Part II surveys guns-at-work laws and takings challenges to them before *Cedar Point*. Part III explains why *Cedar Point* reopened the prospect of successful takings challenges to guns-at-work laws and why the success of such challenges hinges on whether guns-at-work laws fall under one (or more) of the four exceptions to *Cedar Point*'s general rule. Finally, after analyzing why guns-at-work laws do not fall under *Cedar Point*'s trespass and exactions exceptions, Part IV applies the open-to-the-public and longstanding-restrictions-on-property-rights exceptions to guns-at-work laws. First, this Part relies on the subsection-based approach to find that the open-to-the-public exception encompasses guns-at-work laws as applied to

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23 *See* U.S. CONST. amend. II.

24 142 S. Ct. 2111 (2022).

25 *See id.* at 2134.

26 The actual existence of this deterrence effect is an empirical question beyond the scope of this Comment.

27 The application of guns-at-work laws to public sector employers presents unique constitutional considerations because the Second Amendment, as incorporated by the Fourteenth Amendment, binds public sector employers but not private sector ones. *See* The Civil Rights Cases, 109 U.S. 3, 11 (1883) (explaining that, under the Fourteenth Amendment, "[i]t is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope."). By contrast, as extensions of state governments, public sector employers cannot bring takings claims because they, by definition, lack "private" property. Thus, the application of guns-at-work laws to public sector employers is beyond the scope of this Comment.

parking lots or other structures open to the public, but not as applied to employee-only parking lots. Second, this Part shows that the longstanding-restrictions-on-property-rights exception requires only a sufficiently similar historical analogue and finds that Founding Era militia laws qualify as such a historical analogue. Ultimately, this Comment explains that while the open-to-the-public exception can save guns-at-work laws from *Cedar Point*'s per se takings rule only as applied to employee-only parking structures, the longstanding-restrictions-on-property-rights exception provides more sweeping protection for all guns-at-work laws.

Cedar Point has threatened a broad swathe of regulations. If any restrictions on the right of property owners to exclude from their property are takings, then regulations protecting the public and marginalized groups such as nondiscrimination laws will face increased constitutional scrutiny. Simultaneously, guns-at-work laws, by increasing the presence of firearms in the workplace, substantially impact public safety. If guns-at-work laws are per se takings, then the increased costs from Takings Clause claims may deter state legislatures from adopting them. For these regulations to survive, they must find a home in one of the *Cedar Point* exceptions. This Comment seeks to clarify takings doctrine after *Cedar Point* to save not just guns-at-work laws, but regulations generally from constitutional scrutiny. In clarifying the doctrine, this Comment also shows the ways in which *Cedar Point* can threaten policies with right-wing, left-wing, and centrist political valences and, consequently, the ways that broadening the exceptions can protect all such policies from Takings Clause challenges.

I. LEGAL BACKGROUND

The Fifth Amendment, both on its own against the federal government and as incorporated against the states by the Fourteenth Amendment,[28] provides that private property shall not "be taken for public use, without just compensation."[29] This language, commonly known as the Takings Clause, stipulates that while the government can take private property for public use,[30] it must provide property owners with just compensation. In

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[28] *See* U.S. CONST. amend. XIV; Chi., Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226, 239 (1897) (incorporating the Takings Clause against the states).

[29] U.S. CONST. amend. V.

[30] The Supreme Court has held that the government satisfies the Takings Clause's "public use" requirement when it takes private property for a "public purpose." *See* Kelo v. City of New London, 545 U.S. 469, 480 (2005).

its discussion of the Takings Clause, the Supreme Court has emphasized the importance of private property rights that empower "persons to shape and to plan their own destiny in a world where governments are always eager to do so for them."[31]

Because the Takings Clause's text is not self-explanatory, the Supreme Court has developed a takings jurisprudence that includes a combination of balancing tests and per se rules. The clearest per se rule is that the government commits a taking when it physically acquires,[32] formally condemns,[33] or physically occupies a piece of property.[34] This approach primarily includes, but is not limited to, the practices of eminent domain and condemnation, where the government directly acquires property.[35]

In contrast to physical appropriations, a different framework applies when the government imposes regulations that limit an owner's use of their property. In *Cedar Point*, the Supreme Court recently unsettled the landscape of regulatory takings law. Parts I.A and I.B discuss the state of regulatory takings law before *Cedar Point*, including the early development of regulatory takings law, the *Penn Central Transportation Co. v. City of New York*[36] balancing test, and early per se takings rules.[37] Then, Part I.C discusses how *Cedar Point* upended takings law, making it significantly easier for plaintiffs to win per se takings claims.

A. The Development of Regulatory Takings and the *Penn Central* Balancing Test

Federal, state, and local governments can generally restrict the exercise of private property rights through regulations.[38] Before the twentieth century, the Takings Clause was understood to apply only to physical appropriations of property,

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31 Murr v. Wisconsin, 137 S. Ct. 1933, 1943 (2017).

32 *See, e.g.*, United States v. Gen. Motors Corp., 323 U.S. 373, 381–82 (1945) (finding a taking when the government seized property through eminent domain).

33 *See, e.g.*, United States v. Pewee Coal Co., 341 U.S. 114, 115–17 (1951) (plurality opinion) (finding a taking when the government physically took property without acquiring title to it).

34 *See, e.g.*, *Cedar Point*, 141 S. Ct. at 2071.

35 *But see, e.g.*, United States v. Cress, 243 U.S. 316, 327–28 (1917) (finding a taking when the government occupied property through flooding that resulted from the construction of a dam).

36 438 U.S. 104 (1978).

37 *See generally* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (holding that permanent physical occupations are per se takings).

38 *See* United States v. Carolene Prods. Co., 304 U.S. 144, 153–54 (1938) (holding that such regulations are reviewed for rational basis).

otherwise known as the practice of eminent domain.[39] Then, in *Pennsylvania Coal Co. v. Mahon*,[40] the Supreme Court held for the first time that the *regulation* of private property could give rise to a takings claim.[41] Justice Oliver Wendell Holmes, Jr., writing for the Court, explained that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[42] In the ensuing years, the Supreme Court struggled to explain what it meant to go "too far" besides noting that the Takings Clause's purpose was to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[43] But, this all-encompassing "fairness and justice" language failed to provide guidance to litigants and lower courts. Thus, *Pennsylvania Coal* largely left open the question of how to determine if a given regulation went "too far."

In 1978, the Court set forth the *Penn Central* balancing test to clarify this inquiry.[44] When determining whether a given regulation constitutes a taking under that test, courts consider (1) the economic impact of the regulation, (2) whether the regulation interferes with reasonable investment-backed expectations, and (3) "the character of the governmental action."[45]

The *Penn Central* Court applied this new test to review the constitutionality of a New York City law that required private owners of historic landmarks to obtain consent from the Landmarks Preservation Commission before modifying the exterior of the landmark in question.[46] Applying the *Penn Central* balancing test, the Court rejected the takings challenge.[47] The Court reasoned that, under New York City's regulation, (1) the same uses of the terminal were permitted as before;[48] (2) Penn Central could still earn "a reasonable return" on its investment;[49] and (3) Penn Central could still use the air rights above the terminal in some capacity.[50] Notably, the Court was not persuaded that the

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39 *See Cedar Point*, 141 S. Ct. at 2071.
40 260 U.S. 393 (1922).
41 *See id.* at 415.
42 *Id.*
43 Armstrong v. United States, 364 U.S. 40, 49 (1960).
44 *See Penn Cent.*, 438 U.S. at 137.
45 *See id.* at 124.
46 *See id.* at 108–15.
47 *Id.* at 138.
48 *See id.* at 136.
49 *See Penn Cent.*, 438 U.S. at 136.
50 *See id.* at 137.

economic harms imposed by the regulation—including Penn Central's expected "multimillion dollar loss"—rendered it a taking.[51] Even if a regulation imposed millions of dollars in economic damage, it could still not constitute a taking under the *Penn Central* balancing test, showing the test's regulation-friendly nature.

Thus, in practice, the government almost always wins under the *Penn Central* balancing test.[52] For this reason, governments seeking to avoid takings claims usually argue that the *Penn Central* test applies. Conversely, plaintiffs challenging government regulations as takings seek to avoid *Penn Central* by arguing that a per se takings rule applies.

B. Per Se Takings Rules Before *Cedar Point*

Until recently, regulations constituted per se takings only if one of two conditions was met. First, a regulation constituted a per se taking if it amounted to a permanent physical occupation or invasion.[53] For example, in *Loretto v. Teleprompter Manhattan CATV Corp.*,[54] the Supreme Court reviewed the constitutionality of a New York state statute that required landlords to permit cable companies to install cable facilities on the landlord's property.[55] The landlord argued that the statute constituted a per se taking without just compensation.[56] The *Loretto* Court sided with the landlord, reasoning that "when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred."[57] The Court further clarified that for the per se takings rule to apply, the occupation must be both "physical" and "permanent."[58] In other words, both permanence and physicality were independent requirements. Absent either, courts would need to apply the *Penn Central* balancing test.

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51 *Id.* at 147 (Rehnquist, J., dissenting).

52 *See* James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 59, 62–63 (2016) (explaining that "courts almost always defer to the regulatory decisions made by government officials, resulting in an almost categorical rule that *Penn Central*-type regulatory actions do not amount to takings").

53 *See Loretto*, 458 U.S. at 441. Crucially, a physical occupation occurs even when the government authorizes the occupation of even "relatively insubstantial amounts of space." *Id.* at 430.

54 458 U.S. 419 (1982).

55 *See id.* at 421.

56 *See id.* at 424–25.

57 *Id.* at 426.

58 *Id.* at 426–27, 430.

Second, a regulation constituted a per se taking if it led to a total deprivation of economic value.[59] But, two important caveats applied. First, when engaging in this analysis, the Supreme Court instructed lower courts not to engage in "conceptual severance," the delineating of a piece of property into smaller temporal and/or physical units to assess a per se taking.[60] Second, "pre-existing limitation[s]" on property rights would generally shield a regulation from the total-deprivation per se takings rule.[61] Guns-at-work laws are unlikely to fall under this per se takings rule; the business has not lost all economic value even though it has to allow guns on its premises.

In sum, until *Cedar Point*, a regulation constituted a per se taking if it either constituted a permanent, physical occupation or deprived the owner of all economically beneficial use of their property. If a regulation constituted a per se taking, then application of the *Penn Central* balancing test had no place. Otherwise, the property owner could still prove that the regulation was a taking but would have to do so under the government-friendly *Penn Central* balancing test.

C. Regulatory Takings After *Cedar Point*

Recently, however, the Supreme Court upended its regulatory takings jurisprudence. In *Cedar Point*, the Supreme Court reviewed the constitutionality of a California regulation, originally passed in 1975, which allowed union organizers to access an agricultural employer's property for up to 360 hours a year.[62] Specifically, union organizers could enter an employer's property for "up to one hour before work, one hour during the lunch break, and one hour after work" for up to 120 days out of the year.[63] California's regulation required unions to first provide written notice to the agricultural employer,[64] but if a union organizer was subsequently denied entry, then the union could bring unfair labor practice charges against the employer.[65]

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59 *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015–16 (1992).

60 *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 331 (2002); *see, e.g.*, *id.* at 341–42 (explaining that a thirty-two-month limitation on economic activity does not constitute a per se *Lucas* taking).

61 *Lucas*, 505 U.S. at 1028–29.

62 *See* 141 S. Ct. at 2069–72.

63 *Id.* at 2069 (citing CAL. CODE REGS., tit. 8, § 20900(e)(3)(A)–(B), (4)(A)).

64 CAL. CODE REGS., tit. 8 § 20900(e)(1)(B).

65 *Id.* § 20900(e)(5)(c).

Cedar Point Nursery challenged the regulation, contending that it constituted a per se taking. Both the district court[66] and the Ninth Circuit[67] upheld the regulation, reasoning that even if it effected a physical occupation, it was only a temporary one. For that reason, it did not fall under *Loretto*'s per se takings rule, which required a permanent physical occupation.[68] In the words of the Ninth Circuit, the regulation did not effect a permanent physical occupation because "it did not 'allow random members of the public to unpredictably traverse [the growers'] property 24 hours a day, 365 days a year.'"[69]

The Supreme Court reversed, ultimately striking down the regulation. Reasoning that the right to exclude is a fundamental element of property ownership and that the regulation prevented agricultural employers from excluding unions, the Court announced the new rule that government-authorized physical occupations of property, even temporary ones, constitute per se takings.[70]

One important implication of *Cedar Point* is that it calls into question the Court's prior prohibition on conceptual severance. While the *Cedar Point* Court repeatedly cited *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[71] the leading case supporting the ban on conceptual severance, suggesting that it is still good law, the logic of *Cedar Point* seems to undermine *Tahoe-Sierra*. If the *Cedar Point* Court could divide up the various rights in the bundle of property rights, then why can courts not also divide a parcel into temporal or physical subunits?[72] And if the temporally limited entrance of union organizers in Cedar Point was a per se taking, why can other temporally limited regulations not also constitute per se takings?

However, Chief Justice John Roberts's majority opinion announcing this new rule also laid out four important exceptions. Government-authorized physical occupations will not constitute per se takings if they (1) are isolated physical invasions; (2) are

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66 *See Cedar Point*, 141 S. Ct. at 2070 (quoting Cedar Point Nursery v. Gould, 2016 WL 1559271, at *5 (E.D. Cal. Apr. 18, 2016), *rev'd*, 141 S. Ct. 2063 (2021)).

67 *See id.* (citing Cedar Point Nursery v. Shiroma, 923 F.3d 524, 532 (9th Cir. 2019), *rev'd*, 141 S. Ct. 2063 (2021)).

68 *See id.*

69 *Id.* (alteration in original) (quoting *Shiroma*, 923 F.3d at 532).

70 *See id.* at 2074–80.

71 535 U.S. 302 (2002).

72 *See* Lee Anne Fennell, *Escape Room: Implicit Takings After* Cedar Point Nursery, 17 DUKE J. CONST. L. & PUB. POL'Y 1, 41 (2022) ("The other possibility seems far more likely: that at the next available opportunity, the Court will overrule *Tahoe-Sierra* to bring it into line with *Cedar Point*.").

consistent with longstanding background restrictions on property rights; (3) result from exactions subject to *Nollan v. California Coastal Commission*[73] and *Dolan v. City of Tigard*'s[74] congruence and rough proportionality requirements; or (4) concern the appropriation of property rights from businesses generally open to the public.[75] Each of these exceptions constitutes an independent basis upon which a physical occupation can avoid *Cedar Point*'s per se takings rule.

First, *Cedar Point* does not erase "the distinction between trespass and takings."[76] Consequently, "[i]solated physical invasions, not undertaken pursuant to a granted right of access" will normally constitute torts and not takings, which entail "appropriations of a property right."[77] Second, government-authorized physical invasions do not constitute takings if they are consistent with "longstanding background restrictions on property rights,"[78] since such physical appropriations merely assert a "pre-existing limitation upon the landowner's title."[79] Such background restrictions on property rights include, for instance, "common law privileges to access private property" and government searches consistent with the Fourth Amendment and state law.[80]

Third, Chief Justice Roberts reasoned that takings do not necessarily occur when the government requires "property owners to cede a right of access as a condition of receiving certain benefits."[81] Such conditions on government benefits, commonly known as exactions, do not constitute takings as long as both a nexus[82] and a rough proportionality[83] exist between the government's proposed condition on the use of a piece of property and the costs of the applicant's proposed use. Thus, the government can usually provide a property owner with certain benefits, like land use permits, in exchange for the property owner's compliance with certain conditions on their use of the property. For instance,

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73 483 U.S. 825 (1987).
74 512 U.S. 374 (1994).
75 *See Cedar Point*, 141 S. Ct. at 2078–80.
76 *Id.* at 2078.
77 *Id.*
78 *Id.* at 2079.
79 *See Lucas*, 505 U.S. at 1028–29.
80 *Cedar Point*, 141 S. Ct. at 2079.
81 *Id.*
82 *See Nollan*, 483 U.S. at 837.
83 *See Dolan*, 512 U.S. at 391.

in *Dolan v. City of Tigard*, the city conditioned approval of a building permit for the expansion of a hardware store on the granting of an easement on the store's property for a bike path and a greenway.[84] The city argued that a nexus and a rough proportionality existed between the condition and the costs of the use because the bike path and greenway would mitigate the expected negative impacts (increased traffic, for example) of the hardware store's expansion.[85] The *Dolan* Court held that a nexus existed between the expected negative impact of the hardware store's development and the burdens that the government imposed on the landowner.[86] Nevertheless, the exaction constituted a taking because the government had not provided sufficient data to demonstrate that the exaction was roughly proportional to the harms it sought to address.[87] Relying on this precedent, Chief Justice Roberts in *Cedar Point* reasoned that governmental health and safety inspection regimes will generally not constitute takings since property owners accept such health and safety inspection regimes in order to get permits.[88]

Finally, governmental appropriation of property rights belonging to a "business generally open to the public" does not constitute takings under *Cedar Point*.[89] On this basis, the Court distinguished the facts in *Cedar Point* from those in *PruneYard Shopping Center v. Robins*,[90] where the Supreme Court upheld the California state constitution's protection of the right to distribute leaflets at a private shopping center.[91] The Court reasoned that while the mall in *PruneYard* held itself open to the public, welcoming "some 25,000 patrons a day," the regulated farm in *Cedar Point* did not.[92] Consequently, "[l]imitations on how a business generally open to the public may treat individuals on the premises" meaningfully differ "from regulations granting a right to invade property closed to the public."[93]

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84 *See id.* at 379–80.
85 *See id.* at 381–82.
86 *See id.* at 387–88.
87 *See id.* at 391, 394–96.
88 *See Cedar Point*, 141 S. Ct. at 2079.
89 *Id.* at 2077.
90 447 U.S. 74 (1980).
91 *See id.* at 77, 83–84.
92 *Cedar Point*, 141 S. Ct. at 2076 (citing *PruneYard*, 447 U.S. at 77–78).
93 *Id.* at 2077.

In sum, *Cedar Point* changed the law so that all government-authorized physical invasions of private property, even temporary ones, will normally constitute per se takings. However, such government-authorized physical occupations will not constitute per se takings if they (1) are instances of trespass; (2) are consistent with longstanding background restrictions on property rights; (3) result from exactions subject to the congruence and rough proportionality requirements; or (4) concern the appropriation of property rights from businesses generally open to the public. And, even if government-authorized physical occupations are not per se takings, they will still be reviewed under the *Penn Central* balancing test.

II. GUNS-AT-WORK LAWS BEFORE *CEDAR POINT*

Cedar Point's expansion of the domain of per se takings jeopardizes guns-at-work laws. To understand why, it helps to first consider why guns-at-work laws withstood Takings Clause challenges before *Cedar Point*. Since around 2009, roughly twenty-four states have enacted guns-at-work laws, which bar employers, including private employers, from prohibiting their employees, customers, invitees, and the public at large from keeping firearms in their private vehicles located on company property.[94] The sections below provide (1) an overview of guns-at-work laws, including their political economy, sweep, and limitations, and (2) a discussion of why, before *Cedar Point*, courts relying on the *Penn Central* balancing test uniformly rejected takings challenges to guns-at-work laws.

A. The Political Economy, Sweep, and Limitations of Guns-at-Work Laws

In the wake of the gun rights movement's victory in *District of Columbia v. Heller*,[95] primarily (but not exclusively) Republican state legislatures increasingly started passing guns-at-work laws.[96] While *Heller* did not provide legal justification for guns-at-work laws, both *Heller* and guns-at-work laws were rooted in a belief in the importance of the private ownership of firearms. Proponents argued that guns-at-work laws protected employees' rights to possess arms for self-defense while traveling to and from

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94 *See supra* note 20 and accompanying text.

95 554 U.S. 570 (2008).

96 *See supra* note 20 and accompanying text.

work.[97] If employees could not possess firearms in their cars while at work, then they were also precluded from carrying firearms for the sake of armed self-defense on the way to work.[98]

While guns-at-work laws differ somewhat from state to state, they often share several common features. First, they generally prohibit employers from taking adverse actions—including discipline and termination—against individuals for lawfully leaving their guns in their private vehicles while on company property.[99] Second, the laws generally only protect the storage of guns locked in a personal vehicle.[100] If employees remove the firearm from the vehicle, then the employer can still take adverse action against them.[101] Third, many of the laws include provisions waiving employers' civil liability for costs resulting from or connected with compliance with the laws.[102] Fourth, they create private rights of action that allow the individuals affected to bring suit if an unlawful adverse action has been taken against them.[103] Fifth, most guns-at-work laws do not apply to employees exclusively, also covering members of the public when they keep guns in their vehicles in a business's parking lot.[104] In other words, even if one is not an employee, the laws still grant a right to keep a gun in one's vehicle in a company-owned parking lot. Finally, while guns-at-work laws prevent employers from flatly forbidding the storage of firearms in one's personal vehicle while on the employer's property, employers can still generally regulate the manner in which employees store firearms in their personal vehicle at work.[105]

Accordingly, suits filed under guns-at-work laws partially displace the at-will employment doctrine. For example, in

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97 *See* Forsey, *supra* note 22, at 427.

98 *See id.* at 431–32.

99 *See* Royal, *supra* note 20, at 496–503 (surveying state guns-at-work laws).

100 *See id.*

101 *See id.*

102 *See id.* These civil immunity waivers are quite broad and preclude a variety of types of civil liability, including, but not limited to, gun-related injuries at work. *See, e.g.*, UTAH CODE ANN. § 34-45-104 (West 2024) (referring to the lack of civil liability "for any occurrence resulting from, connected with, or incidental to the use of a firearm, by any person, unless the use of the firearm involves a criminal act by the person who owns or controls the parking area").

103 *See, e.g.*, Swindol v. Aurora Flight Scis. Corp., 194 So. 3d 847, 855 (Miss. 2016) (holding that the Mississippi statute created an exception to the at-will employment doctrine); ALA. CODE § 13A-11-90(g) (2024).

104 *See* Royal, *supra* note 20, at 502.

105 *See, e.g.*, Mullins v. Marathon Petroleum Co., 2014 WL 467240, at *3–5 (E.D. Ky. Feb. 5, 2014).

Swindol v. Aurora Flight Sciences Corp.,[106] the plaintiff sued in federal district court, alleging that his employer terminated him for "having a firearm inside his locked vehicle in the company parking lot."[107] The district court dismissed the complaint, relying on Mississippi's at-will employment doctrine.[108] On appeal, the Fifth Circuit certified to the Mississippi Supreme Court the question of "[w]hether in Mississippi an employer may be liable for a wrongful discharge of an employee for storing a firearm in a locked vehicle on company property in a manner that is consistent" with Mississippi Code § 45-9-55.[109] Subsequently, the Mississippi Supreme Court sided with the plaintiff, reasoning that through Mississippi's guns-at-work law, the Mississippi legislature had created an exception to the at-will employment doctrine, declaring "that terminating an employee for having a firearm inside his locked vehicle" was legally impermissible.[110]

By contrast, guns-at-work laws generally still allow employers to regulate their employees' storage of firearms while on company property. For example, in *Holly v. UPS Supply Chain Solutions, Inc.*,[111] the plaintiff asked another employee if he could store his gun in the car of the other employee.[112] The other employee initially agreed, and the plaintiff removed his gun from his car to transfer it to the other employee's vehicle.[113] The employer learned of these events and terminated the plaintiff's employment.[114] Subsequently, the plaintiff filed suit, alleging a violation of Kentucky's guns-at-work law.[115] The Sixth Circuit rejected this argument, reasoning that, by its plain terms, Kentucky's statute did not cover the plaintiff's conduct: removing his gun from his vehicle and placing it in another employee's vehicle.[116]

Similarly, employers can still require employees to meet certain administrative requirements before storing firearms in their personal vehicles while on company property. For example, in *Mullins v. Marathon Petroleum Co.*,[117] the employer allowed the

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106 194 So. 3d 847 (Miss. 2016).
107 *Id.* at 847.
108 *See id.* at 847–48.
109 *Id.* at 848.
110 *Id.* at 854.
111 680 F. App'x 458 (6th Cir. 2017).
112 *See id.* at 459.
113 *See id.*
114 *See id.* at 459–60.
115 *See id.* at 460.
116 *See Holly*, 680 F. App'x at 461.
117 2014 WL 467240 (E.D. Ky. Feb. 5, 2014).

plaintiff to store firearms in his personal vehicle but required him to first "complete and have on file a current Weapons Approval Form disclosing the weapon."[118] After the plaintiff violated the disclosure requirement, the employer imposed a one-day suspension and placed the employee on probation for twenty-four months.[119] The plaintiff claimed that the employer's policy violated Kentucky's guns-at-work law.[120] The court rejected the plaintiff's argument, reasoning that Kentucky's guns-at-work law only proscribed employer policies that prohibited employees from having guns in their personal vehicle.[121]

B. Takings Challenges to Guns-at-Work Laws Before *Cedar Point*

Prior to *Cedar Point*, guns-at-work laws clearly did not constitute per se takings because they did not constitute a permanent, physical occupation. In the wake of the passage of guns-at-work laws, employers challenged their constitutionality, arguing, among other legal claims, that guns-at-work laws constituted takings without just compensation. Before *Cedar Point*, courts generally held that the Supreme Court's takings jurisprudence easily disposed of such claims. For example, in *Ramsey Winch Inc. v. Henry*,[122] the Tenth Circuit reviewed a challenge to an Oklahoma law that prohibited property owners from banning the storage of firearms locked in vehicles located on the owner's property.[123] The plaintiffs, relying on *Nollan* and *Dolan*, argued that the Oklahoma law constituted a per se physical taking because it required them to provide "an easement for individuals transporting firearms."[124] The *Ramsey Winch* court rejected this argument, reasoning that a per se taking "requires a permanent physical occupation or invasion [and] not simply a restriction on the use of property."[125] In reaching this conclusion, the court analogized Oklahoma's guns-at-work law to the constitutional provision in *PruneYard* that prevented owners of a private shopping center from prohibiting

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118 *Id.* at *3.
119 *See id.* at *1.
120 *See id.*
121 *See id.* at *3.
122 555 F.3d 1199 (10th Cir. 2009).
123 *See id.* at 1208–10.
124 *Id.* at 1209.
125 *Id.*

the distribution of leaflets on their property.[126] Both laws recognized state-protected rights, and thus both laws were restrictions on the use of property and not per se takings.[127]

After finding that the Oklahoma guns-at-work law did not constitute a per se taking, the *Ramsey Winch* court applied the *Penn Central* test. The court concluded that the law did not constitute a *Penn Central* taking since (1) it only caused an incidental increase in costs to employers, (2) the plaintiffs did not assert any interference with investment-backed expectations, and (3) the Oklahoma law involved public crimes of general applicability.[128]

The United States District Court for the Northern District of Florida reached a similar result when evaluating the constitutionality of Florida's guns-at-work law in *Florida Retail Federation, Inc. v. Attorney General of Florida*.[129] Rejecting a takings challenge, the court distinguished *Nollan* and *Dolan*, reasoning that the statute did not increase the number of persons on company property, but rather addressed the storage of guns by people who would be on the property anyway.[130] Consequently, Florida's guns-at-work law was not a per se taking.[131]

III. *CEDAR POINT*'S THREAT TO GUNS-AT-WORK LAWS

Cedar Point upended the logic of *Ramsey Winch* and *Florida Retail*. While employers have not brought renewed Takings Clause challenges after *Cedar Point*, they very much can do so. Part III.A explains why *Cedar Point* undermined the reasoning of *Ramsey Winch* and *Florida Retail*. Then, Part III.B explains why if guns-at-work laws are not a per se taking, they must fall under a *Cedar Point* exception.

A. *Cedar Point* Revived the Viability of Takings Challenges to Guns-at-Work Laws

After *Cedar Point*, the logic of the *Ramsey Winch* and *Florida Retail* courts no longer makes sense. First, these decisions relied on the assumption that only permanent, physical occupations could

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126 *See PruneYard*, 447 U.S. at 83.

127 *See Ramsey Winch*, 555 F.3d at 1209.

128 *See id.* at 1210.

129 576 F. Supp. 2d 1281 (N.D. Fla. 2008); *see id.* at 1289–91 (holding that Florida's guns-at-work statute does not effect a taking).

130 *See id.* at 1289–91.

131 *See id.*

give rise to a per se takings claim.[132] *Cedar Point* rejected this assumption, holding that all government-authorized physical occupations give rise to per se takings claims.[133] Second, *Cedar Point* undermines the logic by which the *Ramsey Winch* court relied on *PruneYard*. The *Ramsey Winch* court argued that the California constitutional provision at issue in *PruneYard* was analogous to the Oklahoma guns-at-work law because both recognized state-protected rights.[134] However, the California regulation at issue in *Cedar Point* also recognized a state-protected right: the right for union organizers to enter the property of agricultural employers.[135] Yet, that regulation was still a per se taking.[136] Instead, the *Cedar Point* Court distinguished the regulation in *PruneYard* on a different basis: that the regulated mall was generally open to the public.[137]

The upshot is that guns-at-work laws likely fall under *Cedar Point*'s per se takings rule, at least absent an applicable exception.[138] Just as the regulation in *Cedar Point* took the right to exclude union organizers from one's property, guns-at-work laws take employers' right to exclude firearms from parking lots. Nor does the fact that guns-at-work laws merely effect the physical invasion indirectly blunt the Takings Clause claims. The *Cedar Point* regulation did not see the government directly occupying private property; it only allowed union organizers, not affiliated with the government, to enter the property. Yet, the *Cedar Point* regulation was nevertheless a taking. Accordingly, per *Cedar Point*, states with guns-at-work laws would appear to owe employers just compensation.

At this point, an objection arises: the gun inside the car does not occupy any additional space. Given that the gun is likely inside a glove box and thus takes up no additional room relative to the employer's parking space, the government has not truly engaged in a physical appropriation under *Cedar Point* and *Loretto*.

This argument, while perhaps intuitive, falters because it misunderstands the fundamental point that Takings Clause violations are not about space, but about the seizure of rights in the

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132 *See supra* Part II.B.
133 *See supra* Part I.C.
134 *See infra* Part III.B.
135 *See supra* Part I.C.
136 *See supra* Part I.C.
137 *See supra* Part I.C.
138 *See supra* Part I.C.

bundle of property rights. For example, in *Nollan*, a government seizure of an easement to cross a beach constituted a taking.[139] The easement in question was only for the specific purpose of crossing the beach. Nevertheless, the Supreme Court found a taking because the government seized the right to exclude; it reasoned that a "'permanent physical occupation' has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises."[140] The underlying point is significant: takings are not about the occupation of space, but rather about the seizure of specific rights in the bundle of property rights. By the same logic, even if the firearm in the car in the parking lot takes up no additional space, the government has still seized the right to exclude firearms, "an easement for individuals transporting firearms" in the words of the *Ramsey Winch* plaintiffs.[141]

B. Guns-at-Work Laws Violate the Takings Clause Unless One of the *Cedar Point* Exceptions Applies

Given that guns-at-work laws fall under *Cedar Point*'s rule that government-authorized physical invasions, however temporary, constitute per se takings, it appears that guns-at-work laws violate the Takings Clause unless they fall under one of the four *Cedar Point* exceptions. The inverse would also appear to be true: if guns-at-work laws fall under one of the four exceptions to *Cedar Point*'s per se takings rule, they do not violate the Takings Clause. Before reaching that stage of the analysis, however, it is important to dispose of three arguments that could, in the context of guns-at-work laws, undermine the one-to-one relationship between a per se taking and a Takings Clause violation.

First, the Takings Clause applies to government-authorized physical invasions that occur through objects as well as people. There is no carve out to the Takings Clause for government-authorized physical invasions that occur through objects. This principle is well-established. For instance, *Loretto*, the case that established that some physical invasions are per se takings, concerned a New York state requirement that a landlord "permit a

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139 *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 827–31 (1987).

140 *Id.* at 831–32.

141 *See Ramsey Winch*, 555 F.3d at 1209.

cable television company to install its cable facilities" on the landlord's property.[142] Thus, objects like cables and firearms can constitute the basis for takings claims.

In addition, this also means that one cannot rely on the difference between objects and persons to distinguish guns-at-work laws from the *Cedar Point* regulation that required agricultural employers to allow union organizers to enter their property. One cannot distinguish guns-at-work laws from the regulation in *Cedar Point* by arguing that the *Cedar Point* regulation allowed union organizers to enter private property, while guns-at-work laws only allow firearms to enter private property. This distinction bears no legal significance. Government-authorized physical invasions via objects give rise to takings claims just as much as government-authorized physical invasions via persons.

Second, guns-at-work laws almost certainly do not constitute takings under the *Penn Central* test. The *Ramsey Winch* court's reasoning regarding the application of the *Penn Central* test is not undermined by *Cedar Point*, which did not change the operation of the *Penn Central* balancing test.[143] Thus, the *Ramsey Winch* court's reasoning that guns-at-work laws do not constitute a *Penn Central* taking still applies.[144]

Finally, eliminating civil liability does not eliminate the employer's claim to just compensation. Many guns-at-work laws include provisions eliminating an employer's liability for complying with the law. These provisions do not prevent viable takings claims. Damages for a takings claim proceed from the loss of the property right and not the beneficial consequences that would result from the use or nonuse of the property right.[145] Consequently, even with the attachment of provisions eliminating civil liability, guns-at-work laws, if per se takings, require the payment of compensation.

At this point, the underlying features of takings doctrine may appear counterintuitive. Can objects really give rise to Takings Clause claims? Do physical occupations really constitute per se

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142 *Loretto*, 458 U.S. at 421.

143 *See Cedar Point*, 141 S. Ct. at 2072.

144 *See Ramsey Winch*, 555 F.3d at 1210.

145 *See* Fennell, *supra* note 72, at 55 (explaining that in the context of *Cedar Point*, California "need not compensate for whatever economic leverage the growers think they might lose if the workers succeed in organizing; that has nothing to do with the property encroachment, but rather involves labor market power dynamics that the landowner has no legitimate right to control"). *But see* Bowie, *supra* note 8, at 198–99.

takings regardless of how temporary they are? Despite one's potential intuitions, the Court has squarely held that temporary physical occupations and occupations via objects can constitute per se takings in *Cedar Point* and *Loretto*, respectively. And as explained above, the logical extension is that guns-at-work laws are per se takings. If one is skeptical of that conclusion, then one is just skeptical of the underlying doctrine. But, given that doctrine, guns-at-work laws are per se takings absent a *Cedar Point* exception. It is to those exceptions that this Comment now turns.

IV. APPLYING THE *CEDAR POINT* EXCEPTIONS TO GUNS-AT-WORK LAWS

To protect guns-at-work laws from *Cedar Point*'s per se takings rule, defenders of guns-at-work laws can rely partially on the open-to-the-public exception and fully on the longstanding-restrictions-on-property-rights exception. First, Part IV.A demonstrates why guns-at-work laws do not fall under the trespass and exactions exceptions. Second, Part IV.B applies the open-to-the-public exception to guns-at-work laws. After showing that the open-to-the-public exception should look to the subsections of businesses such as restrooms and parking lots, Part IV.B shows that the best understanding of the open-to-the-public exception protects guns-at-work laws as applied to parking lots open to the public—but not employee-only parking lots—from *Cedar Point*'s per se takings rule. It then argues that even if one is skeptical of the subsection-based approach, that is a reason to reject the open-to-the-public exception generally, not the subsection-based approach specifically. Third, Part IV.C applies the longstanding-restrictions-on-property-rights exception to guns-at-work laws. After showing that the exception requires a historical analogue, not an exact historical match, Part IV.C demonstrates that Founding Era militia laws serve as a sufficiently similar historical analogue. Thus, in contrast to the open-to-the-public exception, the longstanding-restrictions-on-property-rights exception justifies guns-at-work laws in their entirety.

A. The Trespass and Exactions Exceptions Do Not Apply

Guns-at-work laws do not fall within the trespass or exactions exceptions to *Cedar Point*'s per se takings rule. As a reminder, the *Cedar Point* Court held that "[i]solated physical invasions" will normally constitute torts and not takings, which entail

"appropriations of a property right."[146] Additionally, takings do not necessarily occur when the government requires "property owners to cede a right of access as a condition of receiving certain benefits."[147] Such conditions are otherwise known as exactions. Neither of these exceptions can save guns-at-work laws from *Cedar Point*'s per se takings rule.

First, guns-at-work laws do not fall under the trespass exception. Guns-at-work laws are not isolated physical invasions, but rather continual appropriations of the right to exclude firearms from one's property. Thus, the trespass exception cannot save guns-at-work laws from being per se takings.

Second, guns-at-work laws also do not fall under the exactions exception. Guns-at-work laws directly take the right to exclude firearms; the government is not conditioning certain benefits on the forfeiture of the right to exclude firearms from one's property.[148] By contrast, for example, one could imagine a municipality conditioning access to certain parking permits on a business giving up the right to exclude firearms. Such a policy might fall under the exactions exception, although it would still be subject to *Nollan*'s and *Dolan*'s congruence and rough proportionality tests. Here, guns-at-work laws do not involve such conditions; they provide an unconditional command for businesses to allow employees and members of the public to keep firearms in the businesses' parking lots. Thus, the exactions exception does not apply.

B. Guns-at-Work Laws and the Open-to-the-Public Exception

In contrast to the trespass and exactions exceptions, guns-at-work laws have better prospects of falling under the open-to-the-public exception. *Cedar Point*'s creation and application of the open-to-the-public exception left open important questions about the exception's application to subsections of businesses. The *Cedar Point* Court reasoned that "[l]imitations on how a business generally open to the public may treat individuals on the premises" meaningfully differ "from regulations granting a right to invade property closed to the public."[149] This raises key questions: What is the proper unit of analysis? In other words, what is the "business"? And how do you distinguish part of a business

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[146] *Cedar Point*, 141 S. Ct. at 2078.

[147] *Id.* at 2079.

[148] Different considerations apply for government employers, which are not within the scope of this Comment. *See supra* note 27.

[149] *Cedar Point*, 141 S. Ct. at 2077.

from the business as a whole? When it comes to subsections of businesses, do you assess each subsection of a business on its own? Or do you weigh different subsections to determine the character of the business as a whole? While courts have not answered these questions so far, they will have to if employers bring Takings Clause claims challenging guns-at-work laws.

The answers should consider the Takings Clause's underlying purpose. The Supreme Court has explained that the Takings Clause bars the "[g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[150] While Chief Justice Roberts did not make this point explicitly, the open-to-the-public exception can be justified in relation to this purpose. Being open to the public confers benefits on a business, enhancing opportunities to gain revenue by expanding the number of available customers. Given these advantages, the business should also bear certain costs by being subject to a variety of regulatory legislation imposed by the public as a whole. Thus, the open-to-the-public exception serves principles of reciprocity rooted in the Takings Clause's purpose to serve fairness and justice.[151] Even if such regulation would constitute a taking if imposed on businesses not open to the public, the business's open status should be understood to change the decision calculus.

The following sections proceed in two parts. First, Part IV.B.1 argues that courts must assess subsections of a business individually rather than engaging in an amorphous weighing analysis between different subsections to determine the "open" or "closed" character of the business as a whole. Then, Part IV.B.2 applies this exception to guns-at-work laws. Finally, Part IV.B.3 argues that challenges to the subsection-based approach demonstrate the difficulties of the open-to-the-public exception itself.

1. The open-to-the-public exception and subsections of businesses.

To apply the open-to-the-public exception, courts should delineate between different subsections of a business. In other words, part of a business can be open to the public even if the

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150 Armstrong v. United States, 364 U.S. 40, 49 (1960).

151 *See id.*

remainder—indeed, even if most of a business's physical footprint—is not. In addition, this approach does not require weighing different aspects of a business to determine the character of a business as a whole. Consider a few examples. First, imagine a store, with one part open to the public but a backroom open only to employees. Under my subsection-based approach, the backroom is not open to the public, but the rest is. Second, consider another store with one part open to the public but an employee-only parking lot. Under my subsection-based approach, the parking lot is not open to the public, but the rest is. Third, take a corporation that owns multiple establishments with only some of those establishments open to the public. Under my subsection-based approach, some of the stores are open to the public and some are not. Fourth, consider a parking lot with some spaces open to the public and some that are employee-only. While that is a harder case, the most likely scenario (as explained below) is that these subsections will be treated similarly because they serve similar purposes.[152]

This approach is both more administrable than an amorphous weighing analysis and also complies with *Cedar Point*'s description of the open-to-the-public exception. First, looking to the subsections of a business avoids an amorphous weighing analysis to determine the character of the business as a whole. Return to the example of a store, with part open to the public and a backroom open only to employees. Is the store as a whole open to the public? The question lacks a clear answer; the different subsections of the business meaningfully differ, and one cannot arrive at a singular answer for the business as a whole. A second example of the same store with a part open to the public and with an employee-only parking lot makes this point even clearer. Does the customer-facing part or the parking lot count more for determining if the business as a whole is open to the public? Because no method of weighing can provide a clear answer, if courts adopted this approach the judicial task would become akin to determining "whether a particular line is longer than a particular

[152] Courts may differ on the correct interpretation of what it means to be open to the public. This Comment argues that, regardless of which approach they adopt, the subsection-based approach is still preferable to the weighing approach.

rock is heavy."[153] In other words, it would require the weighing of incommensurable goods.[154]

These problems are further amplified if one considers my third example of a corporation that owns multiple establishments with only some of those establishments open to the public. If a corporation owns two stores open to the public and two that are not, is the business as a whole open to the public? Or is it even a single coherent business? In addition, does one look to the size of the various stores to weigh between them? The difficulties with engaging in such weighing appear endless. By contrast, looking to the subsections of a business avoids this nebulous weighing analysis—each individual subpart of the business has its own unique character aside from the other subsections.

Second, looking to the subsections of a business complies with *Cedar Point*. To be sure, the *Cedar Point* Court's explanation of the open-to-the-public exception referred to "[l]imitations on how a business generally open to the public may treat individuals on the premises."[155] One could argue that this language requires courts to apply the aforementioned weighing analysis. The argument goes that *Cedar Point* spoke of businesses "generally open to the public," not subsections of businesses generally open to the public.

This line of argument, while perhaps intuitive, misunderstands takings doctrine. While the Supreme Court's precedents permit a weighing analysis, they do not require it; nothing in the Court's takings precedents proscribes a subsection-based analysis. The alternative reading of the Court's takings precedents suffers from three major flaws. First, to the extent that one could read language in *Cedar Point* to require a weighing analysis, that language is dicta. *Cedar Point* dealt with a farm that did not let in union organizers. That situation did not require the Court to compare different subsections of a business, so any language that one could potentially read to relate to a different situation was not necessary to the holding and therefore dicta.[156]

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153 Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring in judgment).

154 Some might note that interest balancing occurs in other areas of the law. *See, e.g.*, Addington v. Texas, 441 U.S. 418, 425 (1979) (discussing interest balancing in civil commitment proceedings). Even if it is desirable and workable in other contexts, it is specifically unworkable in the context of the open-to-the-public exception.

155 *See Cedar Point*, 141 S. Ct. at 2077.

156 *See* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1065 (2005).

Second, reading the Court's takings precedents to preclude a subsection-based analysis would "read too much into too little."[157] The Court has warned that an opinion's language is "not always to be parsed as though we were dealing with language of a statute."[158] The context of a particular case or controversy matters when understanding the meaning of a judicial opinion.[159] Here, the context of *Cedar Point* and the Court's other takings precedents shows that the Court was not (and, as explained above, could not have been without ruling beyond the issue at hand) comparing between a weighing and a subsection-based analysis.

Third, even if one reads the Court's takings precedents like a statute, such a line of argument begs the question of what the word "business" means in the context of the open-to-the-public exception. The word "business" likely does not refer to a business entity such as a corporation because such a reference would require one to weigh the public and nonpublic nature of potentially thousands of various locations of the corporation. Instead, the word "business" in the context of *Cedar Point* can and should refer to the various facilities, the subsections, that constitute the corporate entity. Thus, the subsection-based approach, while not required by the Court's takings precedents, is compatible with them. And, when faced with two approaches compatible with its prior precedents, courts should opt in favor of the more administrable subsection-based analysis.

In addition, one could object that the subsection-based analysis is inconsistent with the Court's instructions against conceptual severance. If courts should not divide a parcel temporally or physically when analyzing a taking under *Lucas v. South Carolina Coastal Council*,[160] why should they divide a business into subsections for the purposes of the open-to-the-public exception?[161] This argument, however, suffers from a few problems. Set aside the question of whether *Cedar Point* substantially undermined and set up the future overruling of the Court's ban on conceptual severance. Even so, the subsection-based approach is consistent with the ban on conceptual severance. The conceptual severance question is about determining whether a per se taking has occurred. The

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157 Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1155 (2023).

158 Reiter v. Sonotone Corp., 442 U.S. 330, 341 (1979).

159 *See Nat'l Pork* 143 S. Ct. at 1155–56 (explaining that Supreme Court cases "must be read with a careful eye to context").

160 505 U.S. 1003 (1992).

161 *See supra* Part I.B–C.

subsection-based analysis, by contrast, is about determining whether the open-to-the-public exception applies once a court has determined that a per se taking would have otherwise occurred. Thus, the Court's instructions against conceptual severance does not undermine the subsection-based approach.

Moreover, another potential objection might question how one is supposed to delineate between different subsections of a business. The answer is that courts can distinguish different subsections of the business by reference to their specific purpose for the enterprise as a whole. The various hypotheticals discussed above illustrate how to engage in this inquiry. Start with the store with a front-facing part open to the public and an employee-only backroom. Courts should know that the part of a store open to the public is a different subsection than the employee-only area because they serve distinct purposes. The front-facing part exists to provide services to customers and the employee-only area would exist for other specific business, such as processing to-go orders. The employee-only parking lot hypothetical illustrates the same idea. The front-facing part of the business open to the public serves a purpose of providing and selling goods to customers while the employee-only parking lots exists to provide parking. The different subsections serve different purposes, so courts can delineate between them by reference to the purpose of the various parts considered in the context of the business as a whole. Finally, another hypothetical is a parking lot with some employee-only parking spots and some parking spots open to the public generally. While this is a closer case, it is far from clear that the employee-only parking spots serve a different purpose than the parking spots open to the public. Perhaps one could establish in a particular case that the employee-only parking spot serves a specific employee-retention purpose. But otherwise, the employee-only parking spot and the parking lot open to the public would not be distinguishable.

Even so, it is important to recognize that even with the analysis above, there will be hard cases. For example, even if a store has an employee-only parking lot, the government could argue that the parking lot serves the public by allowing for employee retention. By contrast, the government could seek to frame as much of the business as private as possible. Courts would have to consider evidence and testimony regarding the purpose of the subsection. In some cases, this will be easy; in other cases, this will be hard. But even if line drawing is difficult in some cases, line drawing

between subsections of a business is still more administrable than the nebulous weighing analysis that exists as an alternative. The line drawing under the subsection-based approach, while sometimes counterintuitive, still draws a predictable line. By contrast, a weighing approach lacks specific and clear criteria by which to decide the overall character of the business. Given that both approaches have problems, courts must make a difficult choice. And, given that choice, the subsection approach is the best option available for courts.

A final objection relates to potential counterintuitive consequences of the subsection-based approach. That approach suggests that nondiscrimination laws are takings as applied to employee-only bathrooms, but not to the rest of the business. Can it really be the case that a store cannot discriminate based on race when conducting public-facing elements of the business such as hiring employees, but can discriminate in access to restrooms and other employee-only facilities? This objection, while normatively troubling, should be properly understood as an indictment not of the subsection-based approach, but of *Cedar Point* itself. This Comment's goal is not to fix *Cedar Point* but rather to make *Cedar Point*'s exceptions more workable while it remains binding precedent.

For a few reasons, the subsection-based approach best makes the open-to-the-public exception workable. First, the above objection only indicts the open-to-the-public approach generally, not the subsection-based approach in particular. The fact that the open-to-the-public exception conditions Takings Clause violations on whether a business is open to the public means that a business can attempt to avoid nondiscrimination laws by framing itself as closed to the public. Thus, counterintuitive consequences of the subsection-based approach are ultimately reasons to doubt the validity of the open-to-the-public exception generally as an escape hatch from *Cedar Point*'s per se rule. Perhaps the Supreme Court should overrule this aspect of *Cedar Point*. But, given that the open-to-the-public exception exists, courts should prefer the subsection-based approach as the most administrable approach.

Second, even if the subsection-based approach might allow nondiscrimination laws to constitute Takings Clause violations sometimes, the alternative weighing approach compounds this problem. Given that there are no clear criteria for weighing the subsections of a business, the weighing approach allows businesses to argue that, given the totality of the circumstances, they are closed to the public. Consider the store that is generally open

to the public, but that has an employee-only restroom. The weighing approach allows the business to argue, for example, that given the importance of the restroom to customers, the restroom predominates in determining the character of the business as a whole. Given the reality of implicit bias,[162] this uncertainty can benefit businesses engaging in discrimination. And, even if this argument does not ultimately win, it gives the business leverage in subsequent litigation and settlement discussions since it is uncertain who will win under the weighing approach.

By contrast, the subsection-based approach precludes this line of argument because it does not ask whether the part of the business closed to the public "outweighs" the part open to the public. While it is true that the subsection-based approach is worse for nondiscrimination laws in some cases, the dangers of the uncertainty of the weighing approach and the accompanying implicit bias are comparatively greater. In addition, because the part of a business that can rise to a Takings Clause claim is limited (only the restroom), it is less likely that the financial rewards of litigation to the business will outweigh the costs of a lawsuit. Consequently, the subsection-based approach better protects nondiscrimination laws from Takings Clause challenges than the weighing approach.

In sum, when dealing with a business with some subsections open to the public and other subsections not, courts should assess each subsection individually rather than attempting to weigh between those subsections to determine the character of the business as a whole. This approach is more administrable, complies with Takings Clause precedent, and better protects nondiscrimination laws from Takings Clause challenges than the alternative weighing approach. We now turn to the application of the subsection-based approach to guns-at-work laws.

2. Applying the open-to-the-public exception to guns-at-work laws.

The implication of the approach described above is that, for the purposes of the open-to-the-public exception, parking lots open to the public differ meaningfully from employee-only parking lots. Because the analysis looks to subsections of businesses, it is irrelevant whether the business as a whole is open to the

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[162] *See generally* Bernice Donald, Jeffrey Rachlinski & Andrew Wistrich, *Getting Explicit About Implicit Bias*, 104 JUDICATURE, no. 3, 2020, at 75.

public. Instead, courts should look to whether the relevant subsection—the parking lot or structure—is open to the public to determine if the open-to-the-public exception applies. Here, the parking lot or structure is a distinct subsection because it serves a purpose (providing parking to employees and the public) that is distinct from other subsections that may exist to serve customers.

Thus, parking lots open to the public differ from employee-only parking lots. The former naturally fall under the open-to-the-public exception. Since the government is merely preventing a parking lot open to the public from excluding individuals based on their gun possession, it has not committed a per se taking. By contrast, the open-to-the-public exception does not apply to employee-only parking lots because they are only available to employees. With employee-only parking lots, the government is not, in the words of *Cedar Point*, limiting how a "business generally open to the public may treat individuals on the premises."[163] Rather, it is "granting a right to invade property closed to the public."[164] Consequently, the open-to-the-public exception cannot save regulations governing employee-only parking lots from constituting per se takings.

While this distinction may appear formalistic at first glance, it serves the Takings Clause's underlying purposes.[165] Businesses realize certain benefits by making their parking lots open to the public, such as attracting customers who they would not otherwise have access to. By contrast, businesses with employee-only parking lots do not have access to those same benefits. Consequently, the government can more easily subject these parking lots to regulation that would otherwise constitute a taking.

To be sure, there will be cases where making a parking lot open to the public confers minimal (or no) benefits on a business. The reasons for the open-to-the-public distinction will not map onto the facts of a particular case. But, here, the open-to-the-public distinction's formalism is a feature, not a bug. An alternative approach, of course, could ask courts to determine whether in each case the business is benefitting from the open-to-the-public

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163 *Cedar Point*, 141 S. Ct. at 2077.

164 *See id.*

165 Some might argue that courts should consider other policy goals outside the Takings Clause context. For example, what about the potential impact of guns-at-work laws on gun violence? Perhaps courts should adjust Takings Clause jurisprudence based on the costs of guns in the workplace. While these concerns are normatively important, it is important to recognize that a taking does not preclude regulation; rather, it simply requires just compensation. *See* U.S. CONST. amend. V.

nature of its parking lot such that it is not bearing burdens that, considering fairness considerations, "should be borne by the public as a whole."[166] But such an ambiguous approach would invite too much judicial discretion and be administratively burdensome. Courts would first have to determine how much a business needs to benefit from a parking lot for the open-to-the-public exception to apply. Then, they would have to determine how much a particular business actually benefits from a parking lot open to the public. In addition, courts would have to address whether the calculus changes if adjacent businesses also benefit from parking lots open to the public. Thus, despite potential concerns about the formalism of this distinction, it still constitutes the best approach for determining whether guns-at-work laws fall under the open-to-the-public exception.

3. The subsection-based approach and skepticism of the open-to-the-public exception.

At this point, one might respond: Is the subsection-based approach satisfactory even if the weighing approach is worse? One could point to the seeming arbitrariness of treating employee-only parking lots and parking lots open to the public differently. One could argue that this arbitrariness aligns with the arbitrariness of the open-to-the-public exception generally. Chief Justice Roberts explained that because the farm in *Cedar Point* was private and not open to the public, it could exclude union organizers unless California provided compensation.[167] But, under that logic, the farm could also exclude employees based on race, sex, or other protected characteristics unless it received compensation for nondiscrimination laws' impingement upon its absolute right to exclude.[168]

Similarly, one might point to the example of employee-only restrooms. Under *Cedar Point*, is it really the case that the application of nondiscrimination laws to employee-only restrooms is a taking? Or alternatively, one could question if a business as a whole is closed to the public, can it deny restroom access based on protected characteristics?

If one finds these arguments persuasive, then one might predict that the Supreme Court may soon overrule *Cedar Point*'s per se takings rule and the accompanying open-to-the-public exception

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166 *See Armstrong*, 364 U.S. at 49.

167 *See Cedar Point*, 141 S. Ct. at 2077.

168 *See* Bowie, *supra* note 8, at 162.

as their flaws become more and more evident. Such a prediction may prove accurate in the long run, even if it is unlikely in the short run due to the decision's recent vintage. But if *Cedar Point*'s per se takings rule continues to exist, then how do lower courts make it workable in a fallen world? The subsection-based approach is most workable; it avoids the administrability problems that plague the weighing approach. Thus, absent drastic changes to *Cedar Point*'s framework, courts should adopt the subsection-based approach, including in the case of guns-at-work laws.

C. Guns-at-Work Laws and the Longstanding-Restrictions-on-Property-Rights Exception

Having established that the open-to-the-public exception partially supports guns-at-work laws, this Section assesses whether the longstanding-restrictions-on-property-rights exception also protects guns-at-work laws from Takings Clause claims. This Section contends that, in contrast to the open-to-the-public exception, the longstanding-restrictions-on-property-rights exception encompasses guns-at-work laws in their entirety. The *Cedar Point* Court derived this exception from *Lucas*, where the Court stated that the government does not take property when it merely asserts a "pre-existing limitation" on the owner's title.[169] The Court clarified that to determine if a limitation is preexisting, one must refer to background restrictions on property rights. But despite its appearance in *Cedar Point*, the longstanding-restrictions-on-property-rights exception is undertheorized. The following sections identify the limits and nature of that exception before applying it to guns-at-work laws.

1. The search for analogues under the longstanding-restrictions-on-property-rights exception.

To assess whether a limitation on property rights coheres with longstanding restrictions on property rights, courts look to history. But unlike in other contexts like the Second Amendment,[170] the Supreme Court has not explicitly spelled out the specifics of its approach to history in the Takings Clause context. The longstanding-restrictions-on-property-rights exception is thus undertheorized. Drawing on the historical approach that the Court developed in the Second Amendment context, this Section

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169 *See Lucas*, 505 U.S. at 1028–29.

170 *See Bruen*, 142 S. Ct. at 2135–38.

advocates for a similar historical approach to the longstanding-restrictions-on-property-rights exception.

In conducting historical analysis under the longstanding-restrictions-on-property-rights exception, courts should determine if a historical analogue is relevantly similar to a modern-day limitation on property rights. This inquiry requires consideration of the manner in which a given regulation burdens property rights. Importantly, this approach does not require an exact historical match.[171] Even if a historical example is not an exact match to a modern-day law, the modern-day law will still survive constitutional scrutiny if it is relevantly similar to the historical example. As the Supreme Court has explained in the context of the Second Amendment, historically based analogical reasoning is neither a "regulatory straightjacket nor a regulatory blank check."[172] This approach both complies with the Court's takings precedents and is necessary to make a historical inquiry workable.

Start with precedent—*Lucas* specifically. The *Lucas* Court explained that a regulation of a property owner's use of a piece of property is not a taking if "the proscribed use interests were not part of his title to begin with."[173] Drawing on language from *Pennsylvania Coal*, the Court explained that "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power."[174] Thus, the government may justify its approach by reference to background principles of property law.[175]

Cedar Point confirmed this understanding. There, the Court noted that the common law allowed individuals to enter property in the event of "public or private necessity."[176] Similarly, the common law "recognized a privilege to enter property to effect an arrest" or to engage in searches consistent with the Fourth Amendment.[177] In such cases, because the property owner traditionally had no right to exclude to begin with, the Court reasoned that the government could not be said to have taken a property right from

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171 *Cf. id.* at 2132–33 (discussing a similar approach in the context of the Second Amendment).

172 *Id.* at 2133.

173 *Lucas*, 505 U.S. at 1027.

174 *Id.* (quoting *Pa. Coal*, 260 U.S. at 413).

175 *See id.* at 1029.

176 *Cedar Point*, 141 S. Ct. at 2079.

177 *Id.*

them.[178] Importantly, none of these examples suggest a requirement for an exact historical match. The necessity privilege does not constitute a taking today, even if the exact facts of a contemporary invocation of the privilege could not have been anticipated at the Founding.[179] Similarly, the point that searches consistent with the Fourth Amendment do not constitute takings applies even to contemporary searches that the Framers could not have anticipated.

In addition to cohering with precedent, a focus on historical analogues, not exact matches, is necessary because otherwise the historical inquiry would be unworkable. All historical examples differ in at least one respect from contemporary laws: they occurred in the past. There are many other seemingly trivial descriptive distinctions between past and present laws. The reason one is inclined to disregard these distinctions is because they are not legally relevant, even if they are descriptively accurate. Thus, because everything is infinitely similar to and infinitely different from everything else,[180] the application of the longstanding-restrictions-on-property-rights exception cannot require an exact historical match. Simply put, no exact historical matches exist. Rather, the underlying historical analogue must only relevantly be similar. In sum, a modern-day incursion on property rights requires only a relevantly similar historical analogue, not an exact historical match, to fall under the longstanding-restrictions-on-property-rights exception.

2. Early colonial era and Founding Era militia laws are a relevantly similar historical analogue to guns-at-work laws.

Given the approach described above, early colonial era and Founding Era militia laws show that guns-at-work laws fall under the longstanding-restrictions-on-property-rights exception. Start with colonial era laws. In 1658, Virginia required that "every man able to beare armes have in his house a fixt gunn."[181] Similarly, New York in 1658 required the keeping of "arms and

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178 *See id*.

179 This Comment uses the term "the Founding" to refer to the time surrounding the 1791 ratification of the Constitution.

180 *See* Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 774 (1993).

181 John Levin, *The Right to Bear Arms: The Development of the American Experience*, 48 CHI.-KENT L. REV. 148, 149 (1971).

ammunition in their houses."[182] South Carolina had a similar requirement.[183] Thus, these laws each imposed a duty to keep arms in the home. The colonies, in today's terms, took away the right to exclude guns from one's home.

By contrast, post–Founding Era militia laws were less explicit about requiring citizens to keep guns in the home. They generally imposed a requirement that citizens possess firearms in their homes. For example, in 1792, Congress passed the Uniformed Militia Act,[184] which provided in relevant part:[185]

> [E]very citizen so enrolled and notified, shall, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball: or with a good rifle, knapsack, shot-pouch and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder.

Thus, citizens were generally required to possess arms for the purposes of militia service.[186] And in practice, these arms were kept at home.[187] In other words, the federal government, in today's terms, took away the right of citizens to not keep arms in their homes.

In response, one might note that the Militia Act's text only imposed a possession mandate, not a mandate to keep guns at

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182 *Id.*

183 *See id.* (requiring the keeping of all arms not in use in the house).

184 Militia Act of 1792, ch.33, 1 Stat. 271 (1792) (repealed 1903).

185 *See id.*

186 There is an important scholarly and jurisprudential debate about whether the 1791 or the 1868 understanding of a right should prevail when the two are in conflict. *See, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 243 (1998) (explaining that "the Fourteenth Amendment has a doctrinal 'feedback effect' against the federal government, despite the amendment's clear textual limitation to state action"); Kurt T. Lash, *Respeaking the Bill of Rights: A New Doctrine of Incorporation*, 97 IND. L.J. 1439, 1441 (2022) ("When the people adopted the Fourteenth Amendment, they readopted the original Bill of Rights, and did so in a manner that invested those original 1791 texts with new 1868 meanings."). While this debate is important, it is not dispositive here. For example, the 1792 Militia Act was repealed in 1903, so it is also relevant to the 1868 understanding of firearms-based restrictions on property rights. *See* Militia Act of 1792, ch. 33, 1 Stat. 271 (1792) (repealed 1903).

187 *See* Caetano v. Massachusetts, 577 U.S. 411, 419 (2016) ("*Miller* and *Heller* recognized that militia members traditionally reported for duty carrying 'the sorts of lawful weapons that they possessed at home . . . .'" (quoting District of Columbia v. Heller, 554 U.S. 570, 627 (2008) (Alito, J., concurring))).

home. To be sure, the Militia Act does not as strongly support requirements to keep guns in the home as the colonial era laws or the early state laws discussed below. Nevertheless, this textual difference only mitigates, but does not defeat, the Militia Act's relevance. While this textual difference is real, there is no reason that courts should not consider the implementation of the Militia Act in actual practice when assessing whether it functions as a relevantly similar analogue for guns-at-work laws. Historical practice can illuminate the meaning of the text of a statute.[188] And, the actual practice of colonial era militia laws, which both by their text and in practice required the presence of guns in the home, informed the background against which the Militia Act was drafted.[189] Thus, the Militia Act still serves as a Founding Era example of citizens being required to keep guns in the home.

Early state laws imposed similar requirements. These laws generally specified what weaponry citizens "were required to procure to meet" their militia-related obligations.[190] For example, New York required each citizen to "furnish and provide himself at his own expence with a good musket or fire-lock fit for service[,] a sufficient bayonet with a good belt, a pouch or cartouch box containing not less than sixteen cartridges . . . of powder and ball . . . and two spare flints[,] a blanket and a knapsack."[191] Virginia law specifically required "officers, non-commissioned officers, and privates" to "constantly keep" arms and ammunition "ready to be produced whenever called for by his commanding officer."[192] The language of "keeping" arms matters. The word "keep" described "the requirement that militia members store their arms at their homes, ready to be used for service when necessary."[193] Thus,

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188 *See* Cont'l Can Co. v. Chi. Truck Drivers, Helpers and Warehouse Workers Union (Indep.) Pension Fund, 916 F.2d 1154, 1157 (7th Cir. 1990) ("You don't have to be Ludwig Wittgenstein or Hans-Georg Gadamer to know that successful communication depends on meanings shared by interpretive communities."); Herrmann v. Cencom Cable Assocs., Inc., 978 F.2d 978, 982 (7th Cir. 1992) ("Language in general, and legislation in particular, is a social enterprise to which both speakers and listeners contribute, drawing on background understandings and the structure and circumstances of the utterance.").

189 *See Herrmann*, 978 F.2d at 982.

190 Saul Cornell & Nathan DeDino, *A Well-Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 509 (2004).

191 *Id.* (citing Act of Apr. 3, 1778, ch. 33, 1778 N.Y. Laws 62).

192 United States v. Miller, 307 U.S. 174, 182 (1939).

193 *Heller*, 554 U.S. at 650 (Stevens, J., dissenting). While Justice John Paul Stevens dissented in *Heller*, his definition of "keep" was in line with the views of advocates of an individual right to keep arms. *See* Glenn Harlan Reynolds, *A Critical Guide to the Second*

early state laws show a historical tradition of the government taking the right to exclude guns from the home.

Early debates about conscientious objection buttress this conclusion. It is true that early state constitutions and statutes allowed conscientious objectors to refuse militia service in exchange for payment of a fee, provision of a substitute, or alternative service. Pennsylvania's 1776 Constitution provided that ""[n]or can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent."[194] Other states required conscientious objectors to locate "proper substitutes to serve in their stead."[195] Consequently, "Quakers and similar conscientious objectors were exempt from military service in person, but were required to provide a substitute, pay a commutation fee, or less commonly, perform alternative service."[196] But these examples only show that respect for conscientious objection to militia service was based in questions of religious liberty and conscience more generally, not property—the realm of the Takings Clause. If the Takings Clause protected conscientious objection, then militia service would have to constitute a property interest, protectible under the Takings Clause. But paying a fee does not square with the necessary premise since such a payment would merely substitute the provision of one form of property (militia service) for another form. Thus, the Framers understood that if there was a basis for conscientious objection, the Takings Clause did not provide it.

In addition, the debates leading up to the adoption of the Bill of Rights support the Takings Clause's limited reach. On August 17, 1789, Representative Elias Boudinot introduced an amended version of the Second Amendment, providing that "no person religiously scrupulous shall be compelled to bear arms."[197] While some urged the option to pay a fee or provide a substitute,[198] others argued for an even more expansive religious exemption. For

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Amendment, 62 TENN. L. REV. 461, 482 (1995) ("[T]he term 'keep' refers to owning arms that are kept in one's household." (citing Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 267 (1982))).

194 PA. CONST. of 1776, art. VIII; *see also* Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1632–33 (1989) (listing state constitutional provisions).

195 *See* JOHN J. DINAN, KEEPING THE PEOPLE'S LIBERTIES: LEGISLATORS, CITIZENS, AND JUDGES AS GUARDIANS OF RIGHTS 39 (1998) (quoting 1777 Va. Acts 337, 345).

196 Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1808 (2006).

197 *Id.* at 1809 (citing 1 ANNALS OF CONG. 749 (Aug. 17, 1789) (Joseph Gales ed., 1834)).

198 *See id.* (discussing a statement by Representative James Jackson).

example, some members, such as Representative Roger Sherman, argued that the justifications for religious exemptions applied equally to the payment of fees or the provision of substitutes.[199] While these advocates ultimately did not win, this evidence suggests that the Takings Clause was not understood to undermine militia laws; there is little reason to think that these advocates would have pushed for religious-exemption language in the Second Amendment if the proposed Takings Clause was expected to protect the right to refuse aspects of militia service. Consequently, early historical debates suggest that the Framers did not think that the Takings Clause protected the right to refuse any aspects of militia service.

To be sure, property owners did not historically object to militia laws on Takings Clause grounds. If courts had rejected such challenges, then the historical support for the immunity of militia laws from Takings Clause challenges would grow stronger. Nevertheless, the Supreme Court's approach to history in other contexts has considered historical practice to be relevant, even absent the litigation of that historical practice.[200] Thus, the absence of Takings Clause challenges to militia laws only slightly mitigates, but does not eliminate, the historical support for the immunity of militia laws from Takings Clause challenges.

This tradition of militia laws shows that guns-at-work laws are consistent with longstanding restrictions on property rights. Just as militia laws required citizens to store weapons at their homes, guns-at-work laws require employers to allow employees to store their firearms on company property. Indeed, guns-at-work laws are less expansive restrictions on property rights than colonial era militia laws for several reasons. First, while militia laws required citizens to store firearms at home, guns-at-work laws only require employers to allow guns on their property if their employees and customers choose to do so. It is true that militia laws did not concern letting other people bring guns onto one's property. But that distinction is not at issue here because the employer has already consented to the employee or customer's presence. The only issue and basis for a Takings Clause claim is the gun itself. Second, while militia laws usually imposed a requirement for one to have guns in the home, guns-at-work laws

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[199] *See* Adams & Emmerich, *supra* note 194, at 1633.

[200] *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2248–54 (2022) (relying on early state laws criminalizing abortion despite the absence of Fourteenth Amendment challenges to such laws).

only apply to businesses. This distinction is meaningful because courts have long recognized, in a variety of contexts, that constitutional rights are strongest in the context of the home.[201] This is also true with property rights, which seek to empower "persons to shape and to plan their own destiny,"[202] and the home can serve as a critical foundation for individuals to engage in such planning and action.[203] It is true that the Takings Clause protects property outside the home, but that does not deny that the home is also constitutionally protected property. Thus, if firearms-based property rights incursions were permissible in the home at the Founding, then they likely would and should also be permissible in the context of a place of business today. Finally, substantial historical evidence indicates that at the Founding, corporations possessed substantially weaker constitutional rights than individuals.[204] The upshot is that if firearms-based property rights incursions were permissible for individuals, then they should also be permissible for corporations today. To be sure, many of the businesses impacted by guns-at-work laws may be sole proprietorships as opposed to corporations. However, to the extent that guns-at-work laws affect corporations, the weak constitutional rights of corporations at the Founding provide another reason why militia laws more than suffice to serve as a relevantly similar historical analogue.

In response, one could argue that militia laws were designed for a specific purpose, militia service, and guns-at-work laws do not similarly serve that purpose. In contrast to militia laws, guns-at-work laws have no connection to service in the militia. This line of argument suffers from two primary problems. First, even in the Second Amendment context, where this argument would be

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[201] *See, e.g.*, Stanley v. Georgia, 394 U.S. 557, 565 (1969) ("If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."); Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (explaining that, in the Fourth Amendment context, "a man's home is, for most purposes, a place where he expects privacy").

[202] Murr v. Wisconsin, 137 S. Ct. 1933, 1943 (2017).

[203] *See* D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 256 (2006) ("Homes are different in meaningful ways from other types of property, and their unique nature justifies a favored legal status in many circumstances.").

[204] *See, e.g.*, Adam Winkler, *Corporate Personhood and the Rights of Corporate Speech*, 30 SEATTLE U. L. REV. 863, 863 (2007) ("When the Founders established the principle of free speech in both the Federal and state constitutions, corporate speech was far from their minds."); *id.* ("[I]n the early decades of the U.S., the states exercised considerable control over corporations that made them unlikely holders of so-called rights against the government.").

strongest due to the Second Amendment's textual reference to militias,[205] the Court has rejected this distinction. The *Heller* Court explained that the Second Amendment protects an individual right to keep and bear arms unrelated to service in the militia.[206] In *McDonald v. City of Chicago*,[207] the Court confirmed that this individual right to keep and bear arms also restricts action by the states.[208] Thus, if one cannot assign a unitary militia-based purpose to the Second Amendment with its explicit reference to a "well-regulated militia," one likely also cannot assign a unitary militia-based purpose to Founding Era militia laws. Second, and more fundamentally, even if this distinction mattered in the context of the Second Amendment, it does not follow that it matters in the context of the Takings Clause. Founding Era militia laws imposed at least as large a burden on property rights as contemporary guns-at-work laws, so if Founding Era militia laws did not give rise to takings claims historically, then guns-at-work laws should not today.

In addition, one might respond that a focus on historical analogies, without requiring exact historical matches, allows any law to survive Takings Clause challenges. Any historical practice, the argument goes, is at least somewhat similar to any modern law. However, even under the historical analogue approach, the Court has often sided with Takings Clause challenges. For example, in *Lucas*, South Carolina argued that its Beachfront Management Act, which barred the petitioner from erecting permanent habitable structures on his beachfront property, resounded in underlying principles of nuisance law.[209] Justice Antonin Scalia, writing for the Court, stated that this argument was available upon remand but subject to constraints. Such an argument, the Court reasoned, must rely on more than the legislature's declaration that the prohibited use is "inconsistent with the public interest" or the conclusory invocation of a common law maxim.[210] Thus, a historical inquiry focused on relevantly similar historical analogues does not provide a blank check to the government.

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[205] *See* U.S. CONST. amend. II.

[206] *Heller*, 554 U.S. at 592.

[207] 561 U.S. 742 (2010).

[208] *See id.* at 754 (plurality opinion); *id.* at 806 (Thomas, J., concurring in part and concurring in the judgment).

[209] *See Lucas*, 505 U.S. at 1007, 1027–28.

[210] *See id.* at 1031.

Finally, one could argue that, unlike other longstanding restrictions on property rights, Founding Era militia laws no longer exist today. For example, while Fourth Amendment searches have existed since the Founding, Founding Era militia laws no longer exist. This line of argument suffers from two major problems. First, notice how this argument analyzes Fourth Amendment searches and Founding Era militia laws at different levels of generality. While Fourth Amendment searches are analyzed as a general principle, Founding Era militia laws are analyzed specifically. But scaling up and down the level of generality based on the particular example gets the analysis wrong. The analogous inquiry is to look to specific Fourth Amendment searches, and that inquiry confirms that only the principle needs to be longstanding. Even if modern Fourth Amendment searches (such as GPS searches) did not exist at the Founding, they still are not takings today. Similarly, even if the government does not force guns into someone's home or place of business in the same way that they did at the Founding, the principle persists today. Second, and more fundamentally, this counterargument assumes that to be longstanding is to be permanent. But that equivalence has no basis in Takings Clause precedent. Fourth Amendment searches of Ford Model Ts largely no longer exist today, but if Model Ts suddenly became most people's choice for an ideal car once again, Fourth Amendment searches of Model Ts would still not constitute a taking. In sum, Founding Era militia laws serve as a relevantly similar historical analogue for guns-at-work laws, and consequently, guns-at-work laws are not takings even under *Cedar Point*.

CONCLUSION

In announcing a new per se takings rule with four exceptions, *Cedar Point* raised many new questions and opened up challenges to a broad swath of federal, state, and local regulations. This Comment uses the example of guns-at-work laws to address three aspects of takings doctrine after *Cedar Point*.

First, *Cedar Point* suggested that physical occupations, even temporary ones, can constitute per se takings. But does the Court really mean what it said? What about objects like guns in glove compartments that take up seemingly trivial amounts of space? This Comment argues that after *Cedar Point*, the amount of space occupied by an object is not dispositive of whether that object can give rise to a Takings Clause claim. Instead, the focus is on whether a regulation takes, even temporarily, the property

owner's right to exclude. This conclusion is counterintuitive, but *Cedar Point* and *Loretto* held that temporary physical occupations and objects, respectively, can give rise to Takings Clause claims. Consequently, the post–*Cedar Point* evolution of takings doctrine suggests guns-at-work laws, which take employer's right to exclude guns from their property, are per se takings.

Second, the Court's creation of the open-to-the-public exception left open substantial questions. Specifically, how does the exception work for businesses with some parts open and some parts closed to the public? Does the open-to-the-public exception require one to weigh different aspects of a business to determine whether the business as a whole is open to the public? This Comment argues that the open-to-the-public exception should be best understood as allowing analysis of specific subsections of businesses rather than requiring weighing between those subsections to reach a conclusion about the business as a whole. This approach is more administrable and complies with Takings Clause precedents. To be sure, this approach raises uncomfortable questions about whether regulations like nondiscrimination laws are per se takings. But those counterexamples are just indictments of the open-to-the-public exception, not the subsection-based approach. And given that the open-to-the-public exception exists, the subsection-based approach better protects nondiscrimination laws from Takings Clause challenges than the alternative weighing approach. Perhaps the Court should overrule the open-to-the-public exception or revise *Cedar Point*'s per se rule. But absent such changes, courts should adopt the subsection-based approach, including in the case of guns-at-work laws.

Finally, the longstanding-restrictions-on-property-rights exception also was undertheorized in *Cedar Point*. Specifically, *Cedar Point* left open the question of how exact a match a historical example needs to be to exempt modern-day regulations from its per se takings rule. This Comment argues, drawing on the Second Amendment context, that courts should require a historical analogue. This approach is not only consistent with Takings Clause precedent, but also necessary for historical inquiry to be workable. Under this approach, guns-at-work laws are not per se takings because Founding Era militia laws are a relevantly similar historical analogue. Critically, the longstanding-restrictions-on-property-rights exception provides more expansive protection for guns-at-work laws than the open-to-the-public exception. The upshot is that even after *Cedar Point*, guns-at-work laws likely

survive takings challenges. Consequently, contestation of guns-at-work laws must occur at the ballot box.