CONSTITUTIONAL GUN LITIGATION BEYOND THE SECOND AMENDMENT

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INTRODUCTION

Litigation, scholarship, and commentary about gun rights and regulation tend to focus nearly exclusively on the Second Amendment's right to keep and bear arms—a constitutional guarantee that was for all intents and purposes legally inert until the Supreme Court's decision in *District of Columbia v. Heller*.[1] In the twelve years since *Heller*, the Second Amendment has been the subject of substantial litigation[2] and an increasingly broad and deep scholarly conversation, as the questions presented now go beyond the threshold issue of whether the right to keep and bear arms encompasses private purposes like the ownership of arms for self-defense in the home.

This richer debate about the Second Amendment is a welcome development. But it still does not capture the full scope of gun rights and regulation. As a matter of law, let alone public discourse, the right to keep and bear arms is defined not only by the Second Amendment, but also by a wide range of statutory guarantees, including special immunity for manufacturers and sellers of guns,[3] state-level preemption laws,[4] "sanctuary" resolutions,[5] and other sub-constitutional lawmaking.[6] This "right to keep and bear arms

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1. 554 U.S. 570 (2008).

2. Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After* Heller, 67 DUKE L.J. 1433 (2018).

3. *See* 15 U.S.C. § 7903(5)(A) (2021) (providing that, except in certain narrow circumstances, no person can sue gun sellers or manufacturers for injuries "resulting from the criminal or unlawful misuse of a [gun] by the person or a third party").

4. *See* Rachel H. Simon, *The Firearm Preemption Phenomenon*, 43 CARDOZO L. REV. (forthcoming 2022).

5. *See generally* Shawn E. Fields, *Second Amendment Sanctuaries*, 115 NW. U.L. REV. 437 (2020) (discussing the legal viability of local governments resisting state gun-control measures they consider unconstitutional).

6. We do not posit a bright line between these rules and "constitutional law"—certainly statutes, ordinances, and even broader cultural and political forces

outside the constitution"[7] has been the focus of increased scholarly attention, not to mention litigation.[8]

But to fully understand the landscape of gun litigation, it is important also to account for *other* constitutional gun rights claims—those that do not derive, at least not directly, from the Second Amendment.[9] In Part I of this short Article, we highlight some of the most prominent of these claims, including those deriving from the Due Process Clause,[10] Takings Clause,[11] and the First Amendment.[12] Our goal is primarily to describe and illustrate, not to evaluate, though it is worth noting that some of these claims appear much stronger than others—and perhaps stronger than some

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have an important role to play in what we collectively regard as "constitutional." *See* Richard A. Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079 (2013). But we can nonetheless recognize something distinct about formal constitutional claims—those that a court might invoke to trump other forms of lawmaking—and those are our focus here.

7. Jacob D. Charles, *Securing Gun Rights by Statute: The Right To Keep and Bear Arms Outside the Constitution*, 110 MICH. L. REV. (forthcoming 2022); Adam Winkler, *Is the Second Amendment Becoming Irrelevant?*, 93 IND. L.J. 253 (2018).

8. The PLCAA, to take just one example, has been the subject of prominent cases attempting to get around the federal limitations on seller liability. *See, e.g.*, Soto v. Bushmaster Firearms Int'l, LLC, 203 A.3d 262, 272 (Conn. 2019) (holding that PLCAA did not bar claim that gun company violated Connecticut's unfair trade practices law when it "knowingly marketed, advertised, and promoted the XM15-E2S for civilians to use to carry out offensive, military style combat missions against their perceived enemies"), *cert. denied sub nom.* Remington Arms Co. v. Soto, 140 S. Ct. 513 (Nov. 12, 2019); Michael C. Dorf, *Mexican Government Lawsuit Against U.S. Gun Makers Tests the Limits of Territoriality*, VERDICT (Sept. 1, 2021), https://verdict.justia.com/2021/09/01/mexican-government-lawsuit-against-u-s-gun-makers-tests-the-limits-ofl-territoriality [https://perma.cc/2EY7-HZM9].

9. In fact, if we were to broaden the lens more to include constitutional claims that incidentally involve guns, then we would be well on our way to a complete constitutional law syllabus. *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997); United States v. Lopez, 514 U.S. 549 (1995); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); *see also* Jake Charles, *Forging Con Law Through a Gun Regulation Lens*, SECOND THOUGHTS BLOG (June 19, 2019), https://firearmslaw.duke.edu/2019/06/forging-con-law-through-a-gun-regulation-lens/ [https://perma.cc/3ZGX-JBJS].

10. *See infra* Section I.A.

11. *See infra* Section I.B.

12. *See infra* Section I.C. Because they have been discussed in detail elsewhere, we hold aside gun-related Fourth Amendment claims. *See, e.g.*, Caniglia v. Strom, 141 S. Ct. 1596, 1597 (2021) (finding that police's community caretaking responsibilities could not justify warrantless search of home and seizure of petitioner and his firearms); United States v. Robinson, 846 F.3d 694, 699 (4th Cir. 2017) (holding that a police officer's traffic stop of a lawfully armed person is inherently dangerous and thus justifies a *Terry* frisk); Jeffrey Bellin, *The Right to Remain Armed*, 93 WASH. U. L. REV. 1 (2015).

courts have credited. Moreover, some constitutional claims sometimes cut *against* the interests of gun owners (for example, by calling into question the constitutionality of "parking lot" laws that require private business owners to permit guns on their property).[13] The paths of argumentation therefore involve tradeoffs and countervailing considerations for gun advocates, courts, and other stakeholders.

In Part II of the Article, we address two broader and more speculative questions. First, how do these constitutional claims interact with traditional Second Amendment arguments? Evaluating that question suggests much about how litigants perceive the relative strength and utility of their rights—for example, whether these litigants might best vindicate their constitutional rights under provisions other than the Second Amendment. And, going forward, the answers will depend greatly on what the Supreme Court decides in the pending case of *New York State Rifle & Pistol Association v. Bruen*,[14] which involves the question of whether the right to keep and bear arms extends outside the home. An affirmative holding could shape the outcome of other constitutional claims, such as whether public carry is expressive conduct or whether Due Process protects a "liberty" in the context of public carry permits.

Second, we ask what this polycentric constitutional understanding of gun rights—that is, an understanding that includes the full scope of potential constitutional rights beyond the Second Amendment—entails for those who support gun regulation as a means to preserve not only their own physical safety, but their freedom to engage in free speech, assembly, worship and other constitutionally salient activities.[15]

I.
CONSTITUTIONAL GUN RIGHTS CLAIMS OUTSIDE THE SECOND AMENDMENT

A. Due Process

As with other constitutional rights whose exercise sometimes depends on state permitting schemes or other discretionary deci-

13. *See infra* notes 72–88 and accompanying text.

14. *See* New York State Rifle & Pistol Ass'n v. Corlett, No. 20-843, 2021 WL 1602643 (U.S. Apr. 26, 2021) (granting certiorari on the question "[w]hether the State's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment").

15. *See* Joseph Blocher & Reva B. Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation Under* Heller, 116 NW. U. L. REV. 139 (2021).

sion-making—free speech, for example[16]—gun rights sometimes intersect with due process. Claims based on due process have been particularly prominent in challenges to state licensing schemes for public carry of firearms, and more recently in challenges to extreme risk protection order laws, also known as "red flag laws."[17] We address each in turn.

1. Concealed Carry Permits

Twenty-five states require citizens to apply for permits before carrying concealed weapons in public.[18] Each of these states has established minimum criteria that applicants must satisfy to receive their permits. For example, applicants in North Carolina must be at least 21 years old,[19] and those in California must have completed a training course.[20] Some citizens who have been denied a license (or had their licenses revoked) have raised Fourteenth Amendment due process claims. The viability of these claims has largely depended on the amount of discretion the state's permitting requirements vest with the issuing authority.

As a threshold matter, challengers invoking the Fourteenth Amendment's Due Process Clause must show that the state has deprived them of liberty or property.[21] In keeping with *Heller*'s indication that concealed carrying is not protected by the Second Amendment[22] (as opposed, perhaps, to open carrying[23]), courts have generally dismissed claims that applicants have a liberty inter-

16. *See, e.g.*, Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969) (holding that city council's unbridled power to deny public demonstration permits was an unconstitutional restraint on free speech); Freedman v. Maryland, 380 U.S. 51, 58 (1965) (requiring that Maryland's film censorship review board implement procedural safeguards that mitigate the burden on exhibitors' free speech).

17. *See infra* notes 33–52 and accompanying text.

18. *See Concealed Carry*, GIFFORDS L. CTR., https://giffords.org/lawcenter/gun-laws/policy-areas/guns-in-public/concealed-carry/ (last visited Oct. 7, 2021). The remaining twenty-five states generally allow people to carry concealed weapons in public without a permit. *Id.*

19. N.C. Gen. Stat. Ann. § 14-415.12.

20. Cal. Penal Code § 26150.

21. *See* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 569-70 (1972) ("The requirements of procedural due process apply only to the deprivation of interest encompassed by the Fourteenth Amendment's protection of liberty and property.").

22. District of Columbia v. Heller, 554 U.S. 570, 626 (2008) (stating that the Second Amendment right is not absolute and listing as an example the fact that "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues"); *see also* Peruta v. County of San Diego, 824 F.3d 919, 939 (9th Cir. 2016) (en banc) ("We therefore conclude that the Second Amendment right

est in holding a concealed firearms permit.[24] There is no constitutional right to engage in the activity at all, let alone to do so with a state permit.

Litigants have accordingly tended to train their due process arguments on their property rights. And in some cases, courts have found that the denial of a concealed carry permit can indeed constitute a deprivation of property eligible for due process protection. Specifically, challengers have been successful in states where officials have *no discretion* to deny applicants who meet the minimum criteria. Only then does a qualified applicant "have more than a unilateral expectation of [the permit] . . . instead, [the applicant has] a legitimate claim of entitlement to it."[25] The Fourteenth Amendment ensures due process protection over that entitlement.

Of course, that is not to say that these states cannot deny applications, only that they must comply with due process in doing so. That might require the state to allow evidentiary hearings in appeal of non-issuance decisions,[26] offer adequate notice of the reasons for permit revocation,[27] or provide for a reasonably swift appeal.[28]

States which give issuing authorities no discretion in denying applicants are often called "shall issue" states, of which there are currently ten.[29] It is important to note that seven other states use "shall issue" language in their permit application statutes, yet still grant some minimal discretion to state authorities.[30] Even the slightest grant of discretion can eliminate due process coverage for

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to keep and bear arms does not include, in any degree, the right of a member of the general public to carry concealed firearms in public.").

23. *See* Jonathan Meltzer, Note, *Open Carry for All: Heller and Our Nineteenth-Century Second Amendment*, 123 YALE L.J. 1486 (2013).

24. *See, e.g.*, Oquendo v. City of New York, 492 F. Supp. 3d 20, 28 (E.D.N.Y. 2020); White v. Illinois State Police, 482 F. Supp. 3d 752, 771 (N.D. Ill. 2020); Nichols v. Santa Clara, 223 Cal. App. 3d 1236, 1244-45 (1990).

The Supreme Court's pending decision in *Bruen* could alter the trajectory of these claims. If the right to carry a gun in public is recognized as a core Second Amendment right, then challengers might be better able to claim that permit non-issuances and revocations implicate due process.

25. *Roth*, 408 U.S. at 577.

26. *See* DeBruhl v. Mecklenburg Cnty. Sheriff's Off., 815 S.E.2d 1, 7 (N.C. Ct. App. 2018).

27. *See* Caba v. Weaknecht, 64 A.3d 39, 66 (Pa. Commw. Ct. 2013).

28. *See* Kuck v. Danaher, 600 F.3d 159, 167 (2d Cir. 2010).

29. *Concealed Carry*, GIFFORDS L. CTR., https://giffords.org/lawcenter/gun-laws/policy-areas/guns-in-public/concealed-carry/ (last visited Oct. 7, 2021). [perma.cc/9L7T-EWLV]

30. *See id.*

unsuccessful applicants,[31] because it takes away any property interest they might assert.

On a few occasions, permit applicants have also challenged state permit requirements for being unconstitutionally vague. To this point, courts have upheld states' concealed carry permit requirements against these challenges.[32] In short, due process challenges to permit provisions have generally not fared well.

2. "Red Flag" Laws

Nineteen states have adopted laws that allow courts to temporarily restrict individuals who pose an imminent risk of harm from possessing firearms.[33] These extreme risk laws – also called "red flag" laws – enable law enforcement officers or others[34] to petition a court to require gun owners to relinquish their firearms and abstain from acquiring others. Though some argue that extreme risk laws violate the Second Amendment, the more substantive concern is whether these laws comport with the Fourteenth Amendment's due process guarantee.[35]

Some critics assert that extreme risk laws punish individuals based not on conduct but on predictions of their future conduct.[36] Some have likened such laws to the film *Minority Report*, in which a "PreCrime" department arrests people based on mindreading and predictions of their future behavior.[37] Other opponents regard

31. *See* King v. Wyoming Div. of Crim. Investigation, 89 P.3d 341, 351-52 (Wyo. 2004). Wyoming has since removed such discretion from issuing authorities.

32. *See, e.g.*, Sibley v. Watches, 460 F. Supp. 3d 302, 316-18 (W.D.N.Y. 2020); Kuck v. Danaher, F. Supp. 2d 109, 135-36 (D. Conn. 2011); Bleiler v. Chief, Dover Police Dep't, 927 A.2d 1216, 1225-26 (N.H. 2007). *But cf.* Gowker v.Chicago, 923 F. Supp. 2d 1110, 1116-17 (N.D. Ill. 2012) (holding that a city ordinance was unconstitutionally vague when it treated simple possession of a firearm as "an unlawful use of a weapon that is a firearm").

33. *Extreme Risk Protection Orders*, GIFFORDS L. CTR., https://giffords.org/lawcenter/gun-laws/policy-areas/who-can-have-a-gun/extreme-risk-protection-orders/ (last visited Sept. 10, 2021)[https://perma.cc/X6QK-YX2Z].

34. *Id.* Twelve states allow household members and law enforcement to petition a court for an extreme risk protection order. Five states restrict petitioners to law enforcement officers. Other states allow mental health professionals, school administrators, medical professionals, coworkers, or others to submit petitions.

35. *See* Joseph Blocher & Jacob D. Charles, *Firearms, Extreme Risk, and Legal Design: "Red Flag" Laws and Due Process*, 106 VA. L. REV. 1285 (2020).

36. *See, e.g.*, Alan M. Dershowitz, *A Yellow Light for Red-Flag Laws*, WALL ST. J. (Aug. 6, 2019, 6:55 PM), https://www.wsj.com/articles/a-yellow-light-for-red-flag-laws-11565132144?mod=searchresults&page=1&pos=5[https://perma.cc/QME7-DJFE].

37. *See* Blocher and Charles, *supra* note 35, at 1316-17.

these orders as "Kafkaesque. . .stripping Americans of their constitutional rights in secret proceedings where they have no voice."[38]

While the demands of due process are not formulaic, the government must generally provide both notice and a hearing before depriving a person of constitutionally protected liberty or property interests.[39] The challenge is that extreme risk statutes aim to quickly extinguish imminent risks of harm, and there might not always be time for a thorough evidentiary hearing before a temporary gun seizure. And in fact, the Supreme Court has recognized two situations where a post-deprivation hearing still satisfies due process demands: (1) occasions "where a State must act quickly" and (2) those "where it would be impractical to provide predeprivation process."[40]

In *Fuentes v. Shevin*,[41] the Supreme Court created a three-element test to analyze the constitutionality of deprivations conducted before a hearing.[42] First, the deprivation must be "directly necessary to secure an important governmental or general public interest."[43] Second, there must be "a special need for very prompt action."[44] Third, "the person initiating the seizure [must be] a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance."[45] Later, in *Mathews v. Eldridge*,[46] the Court refined its procedural due process jurisprudence with a test balancing three factors: (1) "the private interest that will be affected by the official action," (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," and (3) "the Gov-

38. *See* Michael Hammond, *Kafkaesque 'Red Flag Laws' Strip Gun Owners of Their Constitutional Rights*, USA TODAY (Apr. 19, 2018, 2:30 PM), https://www.usatoday.com/-story/opinion/2018/04/19/red-flag-laws-strip-gun-rights-violate-constitution-column/52622-1002/[https://perma.cc/T2BZ-AWY7].

39. Henry J. Friendly, "*Some Kind of Hearing*", 123 U. PA. L. REV. 1267 (1975).

40. *See* Gilbert v. Homar, 520 U.S. 924, 930 (1997); *see also* Parratt v. Taylor, 451 U.S. 527, 539 (1981) (stating that "either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process"), *overruled on other grounds by* Daniels v. Williams, 474 U.S. 327 (1986).

41. 407 U.S. 67 (1972).

42. *Id.* at 90–92.

43. *Id.* at 91.

44. *Id.*

45. *Id.*

46. 424 U.S. 319 (1976).

ernment's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[47]

Thus far, no court has found that an extreme risk statute violates due process.[48] Under the first *Eldridge* factor, extreme risk orders do impact a substantial private interest in armed self-defense, but only briefly (and often to protect an individual from self-harm).[49] Under the second *Eldridge* factor, the risk of an erroneous deprivation is not clear—it is not even clear how one could measure an erroneous deprivation.[50] Under the final *Eldridge* factor, the governmental and public interests are significant: immediate risk of suicide or homicide represent grave dangers that necessitate swift action.[51] Ultimately, the interest in public safety in emergencies likely overrides the delay of mere weeks for the final hearing.[52] Thus, the difficulty of showing a due process violation under *Eldridge* renders these challenges unlikely candidates for advancing gun rights.

B. Takings

The Fifth Amendment provides that states may claim private property for public use if they pay "just compensation."[53] The archetypal use of eminent domain involves an explicit taking of real property.[54] Regulatory takings (also known as implicit takings) can arise when regulations go "too far," for example, when they deprive property owners of all "reasonable beneficial use" of the property; they, too, require just compensation.[55]

Takings claims have proven to be a somewhat more fruitful avenue for gun rights advocates. The Supreme Court's apparently growing solicitude for property rights, including its recent takings

47. *Id.* at 335.

48. *See, e.g.*, Hope v. State, 133 A.3d 519, 524-25 (Conn. App. Ct. 2016) (rejecting due process challenge); Redington v. State, 992 N.E.2d 823, 830-39 (Ind. Ct. App. 2013) (same); Davis v. Gilchrist Cnty. Sheriff's Off., 280 So. 3d 524, 533 (Fla. Dist. Ct. App. 2019) (same).

49. *See* Blocher & Charles, *supra* note 35, at 1332.

50. *See id.* at 1333.

51. *See id.* at 1334.

52. *See id.*

53. U.S. CONST. amend. V.

54. *See, e.g.*, Berman v. Parker, 348 U.S. 26, 36 (1984) (holding that seizure of a blighted area for city development was a lawful exercise of eminent domain).

55. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 119, 138 (1978) (holding that a denial of a building permit application did not amount to a taking requiring just compensation).

decision in *Cedar Point Nursery v. Hassid*,[56] suggests the possibility of similar claims going forward. But not all of those claims will favor gun rights—some might end up undermining state statutes designed to protect gun possession on others' private property.

1. Magazine and Accessory Restrictions

Some forms of gun regulation focus on the implement itself, for example by prohibiting certain classes of firearms. Such laws have been the subject of regulatory takings challenges, which have occasionally succeeded.

California bans the possession of large capacity magazines (LCMs)—defined as magazines that hold over ten rounds of ammunition—and does not exempt those that are already lawfully owned.[57] Preexisting owners have four options: remove their LCMs from the state, sell them to a licensed dealer, submit them to law enforcement, or modify them to comply with the regulation.[58]

Maryland prohibits the possession of rapid-fire trigger activators (also known as bump stocks) which increase the fire rate of weapons.[59] Though Maryland law allows preexisting owners to maintain possession of their bump stocks so long as they receive authorization from the United States Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the ATF does not currently process applications for these authorizations. Therefore, as in California, Maryland residents must dispossess themselves of their property.[60]

Takings challenges to these two laws have produced very different results. The United States District Court for the Southern District of California in *Duncan v. Bonta* granted summary judgment for the challenger's claim that California's law was a *per se* taking (as well as a violation of the Second Amendment).[61] The appeal is currently pending in the Ninth Circuit, which heard oral argument in July 2021—with many questions from the bench addressing the tak-

56. 141 S. Ct. 2063 (2021) (holding that California's regulation permitting labor organizations to access an agricultural employer's property constituted a taking).

57. CAL. PENAL CODE § 32310(c) (Deering 2016).

58. *Id.* § 32310(d).

59. *See* MD. CODE ANN., CRIM. LAW § 4-305.1(a)(1) (LexisNexis 2019).

60. *See* Marie A. Bauer, Note, *Too Quick on the Trigger: How the Fourth Circuit's Review of Regulatory Takings in* Maryland Shall Issue, Inc. v. Hogan *Failed to Consider the Complexities of Takings Jurisprudence*, 80 MD. L. REV. ONLINE 89, 91–92 (2021).

61. Duncan v. Becerra, 366 F. Supp. 3d 1131, 1185–86 (S.D. Cal. 2019), *aff'd*, 970 F.3d 1133 (9th Cir. 2020), *vacated*, 988 F.3d 1209 (9th Cir. 2021).

ings claim.[62] The Fourth Circuit, on the other hand, held that Maryland's bump stock ban was *not* a taking under the Fifth Amendment.[63]

Subsequent developments in Supreme Court takings jurisprudence may provide a stronger basis for decisions like *Bonta* by widening the scope of *per se* takings to include appropriations of core property rights.[64] In *Cedar Point Nursery v. Hassid*, petitioners challenged a California regulation requiring agricultural employers to allow union organizers onto their farm on a limited, but substantial basis.[65] The Court's prior precedents seemed to distinguish physical occupations which are temporary/limited from those which are permanent; only the latter have typically been characterized as *per se* takings requiring just compensation.[66] Though California's access regulation was limited, the Court in *Cedar Point* found that it was a taking because it "appropriate[d] a right to invade the growers' property. . . ."[67] The decision in *Cedar Point* thus bolstered potential takings challenges to magazine restrictions as appropriations of core property rights, and it may also have implications for so-called "parking lot laws"—as we discuss in more detail below.[68]

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62. Noah Levine, *On* Cedar Point Nursery *and Firearm Regulations*, SECOND THOUGHTS BLOG (July 23, 2021), https://firearmslaw.duke.edu/2021/07/on-cedar-point-nursery-and-firearm-regulations/ [https://perma.cc/A2NV-8LSC].

63. Md. Shall Issue, Inc. v. Hogan, 963 F.3d 356, 367 (4th Cir. 2020); *see also* Ass'n of N.J. Rifle &Pistol Clubs, Inc. v. Attorney Gen. N.J., 910 F.3d 106, 110 (3d Cir. 2018) (holding that New Jersey's LCM ban was not an unconstitutional taking); McCutchen v. United States, 145 Fed. Cl. 42, 53–56 (2019) (holding that ATF's reclassifying bump stocks as machine guns, and thus prohibiting their possession, did not represent a taking).

64. Bauer, *supra* note 6060, at 106–08 (criticizing Fourth Circuit's decision in *Maryland Shall Issue* and advocating use of multi-factor test rather than categorical analysis).

65. 141 S. Ct. 2063, 2069–70 (2021); *see* CAL. CODE REGS. tit. 8, § 20900(e)(1)(A), (3)(A)–(B) (establishing a right of access by union organizers for a maximum of three hours per day, 120 days per year).

66. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) ("We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve."); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83–84 (1980) (holding that a requirement for a shopping center to permit speech and petitioning on company property was not a taking because the center could impose time, place, and manner restrictions).

67. 141 S. Ct. at 2072.

68. *See infra* notes 72–88 and accompanying text. *See also* Ilya Somin, *'Gun-at-Work Laws' Violate the Property Rights of Business Owners*, WASH. POST (April 25, 2022) https://www.washingtonpost.com/outlook/2022/04/25/gun-at-work-second-amendment/ [https://perma.cc/4W34-A6WY] (arguing that such laws constitute takings).

Moving forward, the Court seems likely to limit the scope of what state governments can regulate without payment of just compensation.[69] The challengers in *Bonta* have followed the example of the plaintiffs in *Cedar Point* and argued in supplemental briefs that California's LCM regulation appropriates "the right to possess, which is even more fundamental than the right to exclude."[70] Under current takings jurisprudence, it is currently unclear whether the distinction between real property (as in *Cedar Point*) and chattel (as in *Bonta* or *Maryland Shall Issue*) is significant, but Chief Justice Roberts's majority opinion in *Horne v. Department of Agriculture* seems to support the notion that they should be treated the same: "The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home."[71]

2. Parking Lot Laws

The revival of strong takings doctrine is welcome news for gun rights advocates seeking to challenge prohibitions on particular classes of arms and accessories, including LCMs. But those same takings principles—and, in particular, the Supreme Court's *Cedar Point* decision—also call into question some laws passed specifically to protect guns and gun owners.

At least twenty-four states have adopted what are sometimes called "parking lot laws" or "take your gun to work" laws.[72] They vary in their particulars, but the purpose and effect of these laws is to make it harder for private entities—often businesses—to exclude guns from their property, for example by requiring that they allow employees to leave guns in their cars during working hours. As the Tenth Circuit put it, such laws "hold employers criminally liable for

69. This seems especially true given some Justices' disdain for the broad interpretation of the "public use" requirement for takings in Kelo v. City of New London, 545 U.S. 469, 493-523 (2005) (permitting use of eminent domain to transfer property from one private property owner to another). *See* Eychaner v. City of Chicago, 141 S. Ct. 2422, 2423 (2021) (Thomas, J., dissenting in denial of cert.) ("[T]his petition provides us the opportunity to correct the mistake the Court made in *Kelo*.").

70. Rule 28(j) Letter with Supplemental Authorities for Appellees, Virginia Duncan et al. v. Rob Bonta, No. 19-55376 (en banc) (9th Cir. July 12, 2021); *see* 9th Cir. R. 28(j).

71. *See* 576 U.S. 351, 358 (2015).

72. *See* Dru Stevenson, *Workplace Violence, Firearm Prohibitions, and the New Gun Rights*, 55 U.S.F. L. REV. 179, 189–93 (2021) (describing spread of parking lot laws); J. Blake Patton, Note, *Pro-Gun Property Regulation: How the State of Oklahoma Controls the Property Rights of Employers Through Firearm Legislation*, 64 OKLA. L. REV. 81 (2011).

prohibiting employees from storing firearms in locked vehicles on company property."[73]

In *Ramsey Winch v. Henry*, the Tenth Circuit was faced with a set of constitutional challenges to Oklahoma's parking lot law, which made it illegal for any "person, property owner, tenant, employer, or business entity" to prohibit any person besides a convicted felon from bringing a gun onto "property set aside for any motor vehicle."[74] The court held that the law satisfied due process, was not preempted, was not unconstitutionally vague, and—relevant for our consideration here—that it did not constitute a taking.[75]

The plaintiffs argued that "the Amendments are a physical *per se* taking because they require Plaintiffs to provide an easement for individuals transporting firearms"[76]—a claim strongly analogous to the one advanced in *Cedar Point*.[77] But the Tenth Circuit held that there was no exaction (a kind of taking), because "the Amendments (1) apply to all property owners, not just Plaintiffs, (2) merely limit Plaintiffs [sic] use of their property, and (3) do not require Plaintiffs to deed portions of their property over to the state for public use."[78] Nor was there a *per se* taking, because "[a] *per se* taking in the constitutional sense requires a permanent physical occupation or invasion, not simply a restriction on the use of private property."[79] Instead, the court found that "[a]s in *PruneYard*, Plaintiffs have not suffered an unconstitutional infringement of their property rights, but rather are required by the Amendments to recognize a state-protected right of their employees."[80]

This appears to be precisely the line of reasoning that *Cedar Point* rejects, given its holding that "government-authorized invasions of property—whether by plane, boat, cable, or beachcomber—are physical takings requiring just compensation."[81] California's law, the Court concluded in *Cedar Point*, "appropriates a right to physically invade the growers' property—to literally 'take access,' as the regulation provides. It is therefore a *per se* physical taking under our precedents."[82]

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73. Ramsey Winch Inc. v. Henry, 555 F.3d 1199, 1202 (10th Cir. 2009).
74. 21 Okla. Stat. tit. 21, § 1289.7a; *see Ramsey Winch Inc.*, 555 F.3d at 1202.
75. *Ramsey Winch Inc.*, 555 F.3d at 1209-11.
76. *Id.* at 1209.
77. Cedar Point Nursery v. Hassid, 131 S. Ct. 2063, 2073–75 (9th Cir. 2021).
78. *Ramsey Winch Inc.*, 555 F.2d at 1209.
79. *Id.*
80. *Id.* (citing PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980)).
81. *Cedar Point*, 131 S. Ct. at 2074.
82. *Id.* (citation omitted). *See also id.* ("[W]e have held that a physical appropriation is a taking whether it is permanent or temporary."); *id.* at 2075 ("[W]e

If being required to permit labor organizers onto one's land is a *per se* taking, then it is hard to see how the same conclusion would not follow for armed individuals. After *Cedar Point*, then, it would appear that parking lot laws are on much shakier constitutional ground, and a case like *Ramsey Winch* might come out the other way.[83]

Cedar Point, it should be noted, attempts to distinguish its holding from cases like *PruneYard Shopping Center v. Robins* on the basis that the latter involved a mall that was "open to the public, welcoming some 25,000 patrons a day."[84] The Court continued: "Limitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public."[85] Assuming that such cases are indeed "readily distinguishable," perhaps parking lot laws are defensible insofar as they apply to public parking for business customers and the like. But even then, it would be hard to defend them as applied to employee lots and other "non-public" places not covered by *PruneYard*.

Parking lot laws are not the only ones potentially ripe for takings challenges after *Cedar Point*. Texas, for example, prohibits landlords from barring renters' firearm possession.[86] That, too, would seem to be an extreme imposition on the right to exclude. Harder questions arise with regard to other laws that burden, but do not forbid, exercise of that right. For example, some states have detailed and burdensome signage requirements for businesses wish-

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have recognized that physical invasions constitute takings even if they are intermittent as opposed to continuous."); *id.* at 2080 ("The access regulation grants labor organizations a right to invade the growers' property. It therefore constitutes a *per se* physical taking."); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 841-42 (1987) (requiring that California pay just compensation before it could mandate that property owners provide an easement on their beachfront property).

83. *See also* GeorgiaCarry.Org, Inc. v. Georgia, 687 F.3d 1244, 1264 (11th Cir. 2012) ("Thus, property law, tort law, and criminal law provide the canvas on which our Founding Fathers drafted the Second Amendment. A clear grasp of this background illustrates that the pre-existing right codified in the Second Amendment does not include protection for a right to carry a firearm in a place of worship against the owner's wishes.").

84. *See Cedar Point*, 131 S. Ct. at 2076–77.

85. *Id.* at 2077.

86. *See* David Tarrant & María Méndez, *What Are The Gun Laws In Texas, And What's Changing Sept. 1?*, THE DALLAS MORNING NEWS, (Aug. 9, 2019), https://www.dallasnews.com/news/2019/08/09/what-are-the-gun-laws-in-texas-and-what-s-changing-sept-1/.

ing to exclude firearms.[87] These effectively make it harder to exercise the core property rights celebrated in *Cedar Point*.[88]

C. *First Amendment*

The intersection of the First and Second Amendments has been the subject of substantial scholarly and judicial commentary. Much of that commentary has focused on the prospects for useful doctrinal borrowing—importing free speech doctrines to help give shape to the post-*Heller* right to keep and bear arms.[89] More recently, especially in the wake of prominent armed protests, scholars and advocates have focused on the constitutional implications of armed assembly.[90]

Since our focus in this Article is on constitutional claims outside the Second Amendment, we highlight here a subset of cases in which gun owners have argued that public carry of firearms is *itself* a constitutionally protected form of expressive conduct. Courts have been skeptical of these claims.[91]

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

88. For an interesting survey about public preferences on these issues, see Ian Ayres & Spurthi Jonnalagadda, *Guests with Guns: Public Support for "No Carry" Defaults on Private Land*, 48 J.L. MED. & ETHICS 183, 189-90 (2021) (finding that statistically significant majorities would prefer "no carry" defaults with regard to homeowners, employers, and retailers, but default permission in rented properties and parking lots).

89. *See, e.g.*, David B. Kopel, *The First Amendment Guide to the Second Amendment*, 81 TENN. L. REV. 417, 419 (2014); Nelson Lund, *Second Amendment Standards of Review in a* Heller *World*, 39 FORDHAM URB. L.J. 1617, 1623 (2012) ("Faced with harder cases, and with the fogginess of the Heller opinion, these courts understandably have reached for a framework resembling the familiar 'baggage' picked up by the First Amendment."); Jordan E. Pratt, *A First Amendment-Inspired Approach to* Heller*'s "Schools" and "Government Buildings"*, 92 NEB. L. REV. 537, 542 (2014) ("[T]his Article concludes that lessons from First Amendment doctrine counsel in favor of a narrow interpretation of *Heller*'s schools and government buildings.").

90. *See, e.g.*, Michael C. Dorf, *When Two Rights Make a Wrong: Armed Assembly Under the First and Second Amendments*, 116 NW. U. L. REV. 111 (2021); Eric Tirschwell & Alla Lefkowitz, *Prohibiting Guns at Public Demonstrations: Debunking First and Second Amendment Myths After Charlottesville*, 65 UCLA L. REV. DISC. 172 (2018); Timothy Zick, *Arming Public Protests*, 104 IOWA L. REV. 223 (2018); Luke Morgan, Note, *Leave Your Guns at Home: The Constitutionality of a Prohibition on Carrying Firearms at Political Demonstrations*, 68 DUKE L.J. 175 (2018).

91. For a broad and thoughtful overview, see Danny Li, *The First Amendment Weaponized: When Guns Become Public Discourse*, 30 WM. & MARY BILL RTS. J. (forthcoming 2022) (manuscript at 11-12) (on file with authors).

Most of these First Amendment claims have failed because toting a firearm in public, on its own, is not conduct imbued with the type of particularized message covered by the First Amendment.[92] For example, in *Northrup v. City of Toledo Police Division*, the plaintiff was walking his dog with a handgun holstered at the hip.[93] Police officers, responding to a 911 dispatch, stopped the plaintiff when they saw his gun and observed him making "furtive movements." After confirming he possessed a concealed-carry permit, they released him.[94] The district court granted summary judgment against the plaintiff's First Amendment claim because the plaintiff's holstered firearm, on its own, did not constitute protected expression.[95]

Courts have even been skeptical of First Amendment claims when the plaintiff has a plausible political motive. In *Burgess v. Wallingford*, the plaintiff bore a visibly holstered gun in a pool hall before police officers encountered him.[96] Unlike the plaintiff in *Northrup*, Burgess was wearing a shirt conveying support for the right to bear arms, and he carried Connecticut Citizens Defense League brochures on gun rights.[97] But the court still granted summary judgment against his claim, because "reasonable officers could disagree whether or not there was a great likelihood of plaintiff's [conduct] conveying a message to those who viewed it."[98]

At least one court has suggested that carrying a gun may only constitute protected expression when the actor is "a gun protestor burning a gun [or] a gun supporter waving a gun at an anti-gun control rally."[99] Thus far, however, even this form of expression has been insufficient to garner First Amendment protection. In 2020, gun rights advocacy groups planned an armed protest of pending Virginia gun control measures; in advance of the rally, Virginia Gov-

92. According to *Spence v. Washington*, the First Amendment's free speech clause covers conduct when the actor has an "intent to convey a particularized message," and the message is likely to be understood others. 418 U.S. 405, 410-11 (1974). Most carrying-as-expression claims fail this standard. *See, e.g.*, Baker v. Schwarb, 40 F. Supp. 3d 881, 893 (E.D. Mich. 2014); Deffert v. Moe, 111 F. Supp. 3d 797, 814 (W.D. Mich. 2015); Northrup v. City of Toledo Police Div., 58 F. Supp. 3d 842, 848 (N.D. Ohio 2014); Nordyke v. King, 319 F.3d 1185, 1190 (9th Cir. 2003); Chesney v. City of Jackson, 171 F. Supp. 3d 605, 616–17 (E.D. Mich. 2016).

93. *Northrup*, 58 F. Supp. at 845.

94. *Id.* at 845–46.

95. *Id.* at 847–49 ("Northrup also fails to identify any case in which a court concluded that gun possession alone conveys any message at all.").

96. No. 11-CV-1129, 2013 WL 4494481, at *1 (D. Conn. May 15, 2013).

97. *See id.*

98. *Id.* at 9.

99. Nordyke v. King, 319 F.3d 1185, 1190 (9th Cir. 2003).

ernor Ralph Northam temporarily banned guns on capital grounds.[100] The protestors sought an injunction on the ban and made First Amendment arguments in their complaint: "[T]he act of peaceably and openly carrying firearms. . .is itself a form of protected speech, particularly when the Rally is specifically intended to express opinions to public officials through the symbolic act of bearing arms."[101] The trial court ignored the First Amendment claim and denied the injunction,[102] and the Virginia Supreme Court dismissed the appeal.[103]

Gun owners have also unsuccessfully attempted to invoke the First Amendment's free exercise clause to protect their right to carry in traditionally gun-free places. In *GeorgiaCarry.Org, Inc. v. Georgia*, the plaintiffs argued that a state restriction on firearms in places of worship interfered with their free exercise of religion.[104] The court dismissed the claim because there was no evidence that the law infringed on any "sincerely held religious belief"; personal preferences regarding the ability to act in self-defense did not suffice to establish First Amendment coverage.[105]

The vast majority of guns-as-expression claims have failed, and perhaps they will continue to do so, notwithstanding the current trend of First Amendment expansionism. If such a claim were to succeed, though, it might—like broad takings doctrine—represent a bit of a mixed bag for gun owners. After all, the "expressive" quality of gun carrying will not always be a vindication of constitutional rights; sometimes, it will constitute a tort or even a crime. When the person carrying the gun is the proverbial "law-abiding citizen,"[106] the communication might be coded as positive—a deterrent to would-be wrongdoers. But that is purely contingent on the identity of the parties and their mental states. What about when that "law-abiding citizen" wrongly perceives another person—or the world as

100. Li, *supra* note 0, at 2.

101. Complaint at 7-8, Gun Owners of America, Inc. v. Northam, No. CL20000279-00 (Va. Cir. Ct. Jan. 16, 2020).

102. Gun Owners of America, Inc. v. Northam, No. CL20000279-00, at 2 (Va. Cir. Ct. Jan. 16, 2020).

103. Gun Owners of America, Inc. v. Northam, No. CL20000279-00 (Va. Jan. 17, 2020).

104. GeorgiaCarry.Org, Inc. v. Georgia, 687 F.3d 1244, 1249 (11th Cir. 2012). Georgia's statute exempts only licensed individuals who receive prior permission from security or management personnel and comply with all their directions. Noncompliance constitutes a misdemeanor. O.C.G.A. § 16-11-127.

105. *GeorgiaCarry.Org, Inc.*, 687 F.3d at 1255.

106. District of Columbia v. Heller, 554 U.S. 570, 635 (2008) (declaring that the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home").

a whole—to be a threat? In that situation, the same message is being communicated—"I can hurt or kill you"—but in a way that the law does *not* protect. Indeed, the armed individual has quite plausibly committed brandishing, menacing, or even assault.[107] Judicial recognition of the expressive quality of gun carrying should raise the stakes in those cases as well.

Consider, too, that some states have passed rules requiring public universities to permit people to carry guns on campus,[108] despite opposition from administrators, faculty, and students.[109] Three professors from the University of Texas brought a challenge to Texas's law, arguing *inter alia* that it infringed academic freedom and free expression.[110] The Fifth Circuit found that there was no harm sufficient to support standing. But if public carry of guns is doctrinally recognized as expression, the professors' claim is far stronger—for if bringing a gun into a classroom can be communicative, then excluding a gun can be as well. Thus, recognizing these expressive interests has the potential to strengthen claims both for and against the ability to carry guns in these spaces.

II.
SOME IMPLICATIONS OF POLYCENTRIC GUN RIGHTS

The litigation story we describe in Part I is still unfolding, and its future course depends in large part on the Supreme Court's disposition of *New York State Rifle & Pistol Association v. Bruen*.[111] In Section II.A, we discuss the incentives that litigants have in bringing alternative—that is, non-Second Amendment—constitutional chal-

107. Joseph Blocher, Samuel W. Buell, Jacob D. Charles, & Darrell A.H. Miller, *Pointing Guns*, 99 TEX. L. REV. 1173, 1175 (2021). *See also* Kimberly Kessler Ferzan, *Taking Aim at Pointing Guns? Start with Citizen's Arrest, Not Stand Your Ground*, 100 TEX. L. REV. ONLINE 1, 2 (2021) (arguing *inter alia* that "the shift in cultural norms is moving from citizen defense to citizen offense. It is this cultural norm, and the laws that enable it, that cry for immediate attention.").

108. Shaundra K. Lewis, *Crossfire on Compulsory Campus Carry Laws: When the First and Second Amendments Collide*, 102 IOWA L. REV. 2109, 2113 (2017).

109. EMILY REIMAL ET AL., URBAN INST., GUNS ON COLLEGE CAMPUSES: STUDENTS' AND UNIVERSITY OFFICIALS' PERCEPTIONS OF CAMPUS CARRY LEGISLATION IN KANSAS 2 (2019) ("An abundance of research documents the predominantly negative attitudes of students, faculty, and staff toward laws permitting guns on college campuses").

110. Glass v. Paxton, 900 F.3d 233, 237 (5th Cir. 2018).

111. *See* New York State Rifle & Pistol Ass'n v. Corlett, No. 20-843, 2021 WL 1602643 (U.S. Apr. 26, 2021) (granting certiorari on the question "[w]hether the State's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment").

lenges to gun laws, and how those incentives might change after the Court decides *Bruen*. In Section II.B, we assess the difficulties that this polycentric understanding of gun rights poses for citizens who support gun regulations as a means to protect their own constitutional rights.

A. Litigant Incentives

The frames of constitutional litigation discussed in Part I indicate how gun rights advocates evaluate their litigation options and how those alternative rights frames compare to the Second Amendment itself. The more interesting point is what such litigation frames say about the perceived strength of these claims as compared to straight-up Second Amendment claims. Presumably, litigants emphasize the claims that they think have the best chance of success,[112] which for challengers typically means the claim that will trigger the most stringent form of scrutiny. So, for example, some religion claims that might appear to be about free exercise are cast as free speech (or free association, being a derivative of free speech), in part because of the strong doctrinal protection accorded to free speech claims.[113] Thus, as Zick notes, "starting in the 1980s, in both their general advocacy and litigation of specific cases, religious liberty advocates started to abandon the Free Exercise Clause in favor of the Free Speech Clause."[114] These incentives became even more clear after *Employment Division v. Smith* rendered the Free Exercise Clause a relatively unattractive doctrinal road.[115]

It is not hard to imagine a similar story about gun rights and the Second Amendment. Empirically speaking, the vast majority—more than 90%—of Second Amendment claims have failed in the years since *Heller*.[116] This undoubtedly contributes to the belief, widespread among gun rights advocates, that the right to keep and bear arms is being unfairly under-enforced.[117] Indeed, the notion

112. This is not the *only* conceivable motivation. Some movement litigants, for example, might "win by losing"—parlaying litigation defeats into other forms of support.

113. *E.g.*, Masterpiece Cakeshop Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719, 1721 (2018).

114. TIMOTHY ZICK, THE DYNAMIC FREE SPEECH CLAUSE: FREE SPEECH AND ITS RELATION TO OTHER CONSTITUTIONAL RIGHTS 33 (2018).

115. 494 U.S. 872 (1990) (denying heightened scrutiny for free exercise claims involving neutral laws of general applicability).

116. Ruben & Blocher, *supra* note 2, at 1472.

117. For thoughtful arguments in favor of the second class and underenforcement thesis, see David B. Kopel, Data Indicate Second Amendment Underenforcement, 68 DUKE L.J. ONLINE 79 (2018); George A. Mocsary, *A Close Reading of an*

that the Second Amendment is being treated as a "second class right" has become the dominant rhetorical claim of many gun rights advocates.[118] Whether or not that argument is justified—and we are not convinced that it is[119]—it helps explain why so many gun rights claims seek shelter in areas of doctrine that are perceived to be more protective Incidentally, it also helps explain the frequent calls to borrow doctrines from other areas of constitutional law.[120]

This kind of perceived comparative advantage could soon change, however. The Supreme Court is currently considering *New York State Rifle & Pistol Association v. Bruen*,[121] a challenge to New York's "good cause" requirement for public carry permits.[122] The underlying question is whether the right to keep and bear arms extends outside the home. But there is also a lurking methodological question: How should gun regulation be evaluated under the Second Amendment? The federal courts of appeals have overwhelmingly adopted a two-part framework that first asks whether the challenged law falls within the scope of the Amendment at all (*Heller* indicates that certain categories of law—like those pertaining to

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Excellent Distant Reading of Heller *in the Courts*, 68 DUKE L.J. ONLINE 41, 43 (2018) (concluding that data show "evidence of judicial defiance" (footnote omitted)).

118. For a conceptual and empirical overview of the "second class" claim and its prevalence in briefs and opinions, see Eric Ruben & Joseph Blocher, *"Second Class" Rhetoric, Ideology, and Doctrinal Change*, 110 GEO. L.J. (forthcoming 2022).

119. Ruben & Blocher, *supra* note 2, at 1475; Adam M. Samaha & Roy Germano, *Is the Second Amendment a Second-Class Right?*, 68 DUKE L.J. ONLINE 57, 59 (2018) (concluding that there are plausible alternative explanations for the data other than the "second-class" argument); Timothy Zick, *The Second Amendment as a Fundamental Right*, 46 HASTINGS CONST. L.Q. 621 (2019) (arguing that the Second Amendment's treatment compares favorably to that of other constitutional rights at various stages of their development, and that the available evidence does not show judicial hostility, resistance, or political ideology).

120. There is a growing literature on such borrowing and intersection in constitutional doctrine. *See, e.g.*, Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U.L. REV. 1309, 1309-10 (2017) (discussing "cumulative," "hybrid," and "intersecting" rights); Jennifer E. Laurin, *Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 674 (2011); Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 460 (2010).

For specific discussion of borrowing in the Second Amendment context, see Jacob D. Charles, *Constructing a Constitutional Right: Borrowing and Second Amendment Design Choices*, 99 N.C. L. REV. 333 (2021).

121. *See* New York State Rifle & Pistol Ass'n v. Corlett, No. 20-843, 2021 WL 1602643 (U.S. Apr. 26, 2021) (granting certiorari on the question "[w]hether the State's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment").

122. *See* N.Y. Penal Law § 400.00 (2021). Technically these are permits for *concealed* carry, since open carry is generally prohibited in New York.

felons, the mentally ill, "dangerous and unusual weapons," and concealed carrying—do not[123]), and second, if so, whether the law's burdens on protected conduct can be justified in light of the governmental interests served.[124]

Many gun rights advocates argue that this test is under-protective and should be replaced either with strict scrutiny[125] or—more likely—a test that would evaluate gun laws based solely on text, history, and tradition. Under the latter test, a gun regulation's "historical or traditional pedigree is both a necessary and sufficient condition" for its constitutionality.[126] This test is often credited to a dissenting opinion by then-Judge Brett Kavanaugh,[127] and although he took pains to emphasize that it would not rule out gun regulation, and that it is not necessary for all contemporary laws to have exact historical replicas,[128] many believe that it would be more restrictive than the existing two-part framework.[129]

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123. District of Columbia v. Heller, 554 U.S. 570, 626-27 (2008).

124. *See* Gould v. Morgan, 907 F.3d 659, 668 (1st Cir. 2018); N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 254 (2d Cir. 2015); United States v. Chovan, 735 F.3d 1127, 1136 (9th Cir. 2013); GeorgiaCarry.Org, Inc. v. Georgia, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012); United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012); Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 194 (5th Cir. 2012); Ezell v. City of Chicago, 651 F.3d 684, 703–04 (7th Cir. 2011); United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010); United States v. Reese, 627 F.3d 792, 800–01 (10th Cir. 2010); United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010).

125. Brief of Plaintiffs-Appellants at 39, Gould v. O'Leary, 907 F.3d 659 (1st Cir. 2018) (No. 17-2202), 2018 WL 1610774 ("Applying anything less than strict scrutiny would relegate the Second Amendment to a 'second-class right.'"); Colloquy, *McDonald v. Chicago: Which Standard of Scrutiny Should Apply to Gun Control Laws?*, 105 NW. U. L. REV. 437, 455 (2011) (comment of Joyce Lee Malcolm) ("Since fundamental rights are not to be separated into first- and second-class status, the strict scrutiny applied to the First Amendment freedom of the press and freedom of speech should also be applied to Second Amendment rights.").

126. Jake Charles, *The "Text, History, and Tradition" Alternative*, SECOND THOUGHTS BLOG (Dec. 5, 2019), https://sites.law.duke.edu/secondthoughts/2019/12/05/the-text-history-and-tradition-alternative/ [https://perma.cc/55SR-N8NS].

127. Heller v. District of Columbia, 670 F.3d 1244, 1276 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

128. *Id.* at 1275 (Kavanaugh, J., dissenting); *see also* United States v. Skoein, 614 F.3d 638, 641 (7th Cir. 2010) (en banc) ("[A]lthough the Justices have not established that any particular statute is valid, we do take from *Heller* the message that exclusions need not mirror limits that were on the books in 1791.").

129. One of us filed a brief in *Bruen* advocating the two-part framework over the text, history, and tradition alternative—not because the former is more forgiving, but because it is more administrable. *See* Brief of Second Amendment Law Professors as Amici Curiae in Support of Neither Party at 8, New York Rifle & Pistol

If *Bruen* does adopt a more stringent test, then the incentives to try other constitutional arguments would change. And the result could well be not only increased constitutional litigation, but an increased emphasis on the Second Amendment itself, rather than on the Takings Clause or other alternatives.

Substantively, too, a holding that public carry is protected by the Second Amendment will have ripple effects for many of the other forms of constitutional argument discussed here. It seems unlikely that the Court will fully endorse a constitutional right to concealed carry, since the historical evidence clearly does not support it.[130] But if the Court were to do so, then there would be a much stronger claim for a "liberty" interest under due process in the permitting cases discussed above; that is, litigants seeking due process protection from permit denials could more easily satisfy the threshold requirement that their liberty has been deprived.[131]

Or consider what might happen to the expressive conduct claims discussed in Section I.C. If the Court recognizes a broad right to public carry under the Second Amendment, then perhaps there will be less need to argue for the same right being protected as free expression. And yet there might still be some interesting legal space between the two claims. The right to keep and bear arms, for example, does not extend into "sensitive places such as schools and government buildings."[132] Presumably that exception would persist even if public carry were recognized. But the First Amendment does not contain a "sensitive places" exception, so there might still be some benefit to pursuing the free expression claim. For that matter, such parallel tracks of litigation might ultimately encourage convergence between the rationale and even substantive outcomes of "sensitive place" litigation under the Second Amendment and "nonpublic forum"[133] litigation under the First.

We could speculate further on other possible changes, but these examples serve to illustrate and emphasize the possible ripple effects of Second Amendment doctrine on other areas of constitutional law. Scholars have, as we noted earlier, begun to explore those ripple effects with regard to statutory guarantees—not simply

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Ass'n v. Bruen, (No. 20-843), 2021 WL 3144391 (brief of Joseph Blocher, Darrell A.H. Miller, and Eric Ruben).

130. *See* Meltzer, *supra* note 2322, at 1500 (explaining that concealed carry has long been regulated more stringently than open carry).

131. *See supra* note 24 and sources cited therein.

132. *Heller*, 554 U.S. at 626.

133. Cornelius v. NAACP Legal Def. and Educ. Fund, 473 U.S. 788, 796-97 (1985).

deregulation, but pro-rights regulation.[134] The impact on other areas of constitutional law must also be considered.

B. Equality, and Other Rights-holders

Perhaps *Bruen* will herald more Second Amendment cases—both as an absolute matter and as a proportion of constitutional gun litigation. But what about possible growth in other constitutional gun claims? Our discussion has largely set aside, for example, perhaps the most frequent and predictable claims—those deriving from the Fourth Amendment and other criminal procedure rights. We do so not because they are unimportant, but because they are already well-recognized.[135]

A less recognized but potentially growing area of constitutional gun litigation involves claims that echo in equal protection. Here, too, we take our signals somewhat from gun rights rhetoric which, especially in recent years, has emphasized the racist origins of many historical gun laws.[136] The relationship between racism and gun regulation is not new, of course, and historians and scholars have been exploring and illuminating it for decades.[137] But the suggestion that this racist history should call modern gun regulations into constitutional question is increasingly prominent—including in many of the amicus briefs in *Bruen*.[138]

Interestingly, though, this history of racist enforcement tends to be folded into Second Amendment arguments, rather than equal protection claims. In that sense, it cuts in a different direction than the examples we have discussed above—but perhaps it is explicable for the same reason: equal protection claims are perceived to be even weaker than Second Amendment claims, given the current state of doctrine. And indeed, a review of cases in which equal pro-

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134. Charles, *supra* note 7.

135. *See supra* note 12 and sources cited therein.

136. *See, e.g.*, Justin Aimonetti & Christian Talley, *Race, Ramos, and the Second Amendment Standard of Review*, 107 VA. L. REV. ONLINE 193, 219 (2021).

137. Among the foundational early work is Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991).

138. *See, e.g.*, Brief of Black Guns Matter et al. as Amici Curiae Supporting Petitioners, New York State Rifle & Pistol Ass'n v. Bruen, No. 20-843 (U.S. filed Jul. 20, 2021); Brief of Italo-American Jurist and Attorneys as Amici Curiae Supporting Petitioners, New York State Rifle & Pistol Ass'n v. Bruen, No. 20-843 (U.S. filed Jul. 15, 2021).

tection claims *have* been advanced indicates that they face a tough road.[139]

Gun-control-is-racist arguments invoke equality, and—we have suggested—might actually be best understood and evaluated as equal protection arguments. But they are not the only form of equality argument and rhetoric beginning to take root in the gun debate. Supporters of gun regulation, too, have increasingly begun to identify their own interests in constitutional terms. Some invoke the right to life (hence "March for Our Lives") or the right not to be shot.[140] Others point to their own equal rights to peaceably assemble, speak, learn, worship, and vote without fear of armed violence or intimidation by others.[141]

As a matter of litigation, there are some obvious obstacles to making a direct constitutional argument—whether from due process or equal protection—*for* gun regulation. The state action requirement is perhaps the biggest one,[142] though as we have shown above there are a surprising number of direct state actions that *do* arguably violate constitutional rights in the course of furthering some gun owners' interests.[143]

But such direct claims are not the only way for such claims of constitutional equality to be litigated. As one of us has argued in recent work with Reva Siegel, the government has a valid interest in regulating guns not only to keep citizens alive and free from physical harm, but also to protect their equal claims to citizenship and the exercise of constitutional rights free from terror and intimidation.[144] That principle is clear from the common law history of gun regulation and is specifically incorporated in Part III of the *Heller*

139. *See, e.g.*, Drummond v. Twp. of Robinson, 784 F. App'x 82, 83–84 (3d Cir. 2019) (quickly dismissing an equal protection argument against gun-related zoning).

140. Jonathan Lowy & Kelly Sampson, *The Right Not to Be Shot: Public Safety, Private Guns, and the Constellation of Constitutional Liberties*, 14 GEO. J.L. & PUB. POL'Y 187 (2016).

141. Blocher & Siegel, *supra* note 15.

142. See, e.g., DeShaney v. Winnebago Cty. Dep't. of Soc. Services., 489 U.S. 189, 196–97 (1989); Town of Castle Rock v. Gonzales, 545 U.S. 748, 768 (2005).

143. *See supra* notes <*CITE* _Ref82436036">-88 and accompanying text (describing apparent viability of takings claims against bring-your-gun-to-work laws).

144. Blocher & Siegel, *supra* note 15. The argument has begun to appear in briefs. *See, e.g.*, Brief of Survivors of the 101 California Shooting and Giffords Law Center to Prevent Gun Violence as *Amici Curiae* in Support of Appellee and Affirmance at 22, *Rupp v. Becerra*, No. 19-56004 (9th Cir. filed Jun. 2, 2020) (arguing for the constitutionality of California's assault weapons prohibition in part because "[g]overnments also have a significant interest in securing for their communities

opinion. In that respect, it is nothing new. But like the other developments we have tried to emphasize in this short Article, it deserves further attention from lawmakers, judges, advocates, and scholars.

CONCLUSION

Our goals in this Article have been both descriptive and conceptual: To enumerate and illustrate some of the constitutional rights litigation involving guns that is happening outside of the Second Amendment, and to explore the implications of that litigation and what it might mean for our understanding of gun rights and regulation going forward. The latter goal complicates the seeming simplicity of the first. The picture that emerges is about more than rights on one side and government intervention on the other; it is the polycentric, complex interaction of rights and interests that increasingly characterizes US constitutional law.[145] As the Second Amendment matures, both as a matter of law and a focus of scholarship, these are the kinds of challenges that judges and scholars must confront.

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the ability to engage in public and political life without the fear wrought by particularly intimidating weapons—those that are used to intimidate while they kill").

145. Jamal Greene, *Rights as Trumps?*, 132 HARV. L. REV. 28, 34 (2018).