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Pro-Gun Property Regulation: How the State of Oklahoma Controls the Property Rights of Employers Through Firearm Legislation

I. Introduction

On the morning of July 8, 2003, shotgun blasts filled Lockheed Martin's "cavernous hilltop" aeronautic assembly plant in Meridian, Mississippi.¹ Around 9:30 a.m., employee Doug Williams stormed out of a required "ethics and sensitivity training session" and went to his pick-up truck in the plant's parking lot. He loaded a semi-automatic rifle and a shotgun, tied on a red bandana, and strapped on bandoleers of extra shells before reentering the plant.² In what was called a "panorama of carnage," Williams murdered five co-workers that morning before taking his own life.³ Police investigating the crime scene discovered more weapons and ammunition in Williams' pickup.⁴

Like Mississippi, Oklahoma is no stranger to workplace violence. In 1986, an Edmond, Oklahoma, part-time letter carrier named Patrick Henry Sherrill "tucked two .45-caliber pistols into his postal satchel, locked the doors of a post office in this Oklahoma City suburb and systematically killed 14 people, then committed suicide."⁵ Sherrill was "facing possible dismissal after a troubled work history" and "thought he was being treated unfairly at work."⁶ Sherrill responded by shooting "more people in a single day than all but one other gunman in U.S. history up to that point."⁷

Shootings in the workplace are a recognized hazard in work places throughout Oklahoma and the United States. In San Diego, California, on March 25, 2009, bus mechanic Lonnie Glasco finished his shift just after 2 a.m., walked into the company break room, and shouted "nobody's going to leave!" before raising his handgun and killing two co-workers.⁸ In Manning, South Carolina, on May 10, 2009, an employee at the Waffle House was

1. David M. Halfinger & Ariel Hart, *Man Kills 5 Co-workers at Plant and Himself*, N.Y. TIMES, July 9, 2003, at A1.

2. *Id.*

3. *Id.*

4. Kevin Johnson, *6 Dead in Miss. Factory Shooting*, USA TODAY, July 9, 2003, at A01.

5. Tim Talley, *Survivors Recall Terror of Postal Massacre*, DESERET NEWS, Aug. 19, 2006, at A02.

6. Ken Raymond, *Edmond Post Office Massacre 20 Years Later*, THE OKLAHOMAN, August 13, 2006, at 1A.

7. *Id.*

8. Elliot Spagat, *Third Death from Shooting at San Diego Bus Depot*, VENTURA COUNTY STAR, March 25, 2009, <http://www.vcstar.com/news/2009/mar/25/third-death-from-shooting-at-san-diego-bus-02/>.

charged with assault and battery with intent to kill after an argument with a customer over the quality of the restaurant's food led to the shooting of that customer by the employee.⁹ The complaining customer threw a waffle at employee Yakeisha Ward. She responded by going to her van in the parking lot and grabbing her gun.¹⁰ She reentered the restaurant and shot the customer in the arm.¹¹

Given the frequency of incidents like these, it was understandable, if not laudable, that many Oklahoma employers enacted gun-free parking lot policies at their workplaces. In response to these gun-free policies, the Oklahoma legislature amended existing firearms laws to outlaw any workplace policy that prohibited employees from keeping guns in their cars while parked on workplace property. Several Oklahoma companies that maintained gun-free parking lot policies filed suit, requesting a permanent injunction against enforcement of this legislation on grounds that it was an unconstitutional violation of the Due Process Clause, the Takings Clause, and the Supremacy Clause. The Tenth Circuit Court of Appeals in *Ramsey Winch Inc. v. Henry* held that the Occupational Safety and Health Act (OSHA) does not preempt amendments ("The Amendments") to a pair of Oklahoma firearm laws that criminalize company policies which prohibit employees from storing firearms in their car during work.¹² This decision reversed the U.S. District Court for the Northern District of Oklahoma's decision to grant a permanent injunction against the enforcement of the Amendments in *ConocoPhillips v. Henry*.¹³

This is a case of federalism in the parking lot. The judicial interpretations that stand in the aftermath of this Tenth Circuit collision between federal occupational laws and state of Oklahoma gun laws have a profound effect on the property rights of Oklahoma employers. The traditional notions of property law regard the right to exclude certain persons from entering property as the most essential right "in the bundle of rights we call property."¹⁴ The decision in *Ramsey* excises important aspects of the right to exclude: specifically, the right of employers to regulate the presence of firearms on their property. The plaintiffs involved in this series of challenges asserted three primary legal theories to support the claim that the Amendments violate their Constitutional property rights. First, the Amendments amount to a violation of the Takings Clause. Second, the Amendments interfere with the

9. *Police: SC Waffle House Waitress Shoots Customer After Complaint*, WSBTV.COM, May 13, 2009, <http://www.wsbtv.com/news/19447180/detail.html>.

10. *Id.*

11. *Id.*

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

13. *ConocoPhillips v. Henry*, 520 F. Supp. 2d 1282 (N.D. Okla. 2007).

14. *Hendler v. United States*, 952 F.2d 1364, 1377 (Fed. Cir. 1991).

fundamental right to exclude, thereby violating substantive due process rights. Third, the Amendments violate the Supremacy Clause and are preempted by OSHA.

The Tenth Circuit Court of Appeals erred in determining that the Amendments do not violate the Supremacy Clause. This determination has a significant and adverse impact on the property rights of Oklahoma employers. Under the doctrine of obstacle conflict preemption, the Amendments impede compliance with OSHA's general duty clause and accomplishment of OSHA's overall purpose. Therefore, OSHA should preempt the Amendments, and Oklahoma employers should recover their right to exclude people with firearms from their property. This note also critiques the court's Takings Clause and substantive due process analysis. Part II discusses pre-*Ramsey* law over Oklahoma gun-at-work statutes. Parts III and IV discuss *Ramsey* and analyze the court's decision through a property lens. Part V offers a more sound legal approach to dealing with these pro-gun statutes than used by the court in *Ramsey*. This note concludes in Part VI.

Any legislative act that divests property owners of the ability to control the presence of firearms on their own property strikes a blow to the common sense understanding of property rights. The decision in *Ramsey* amounts to judicial approval of the State of Oklahoma's regulatory arm, wearing a pro-gun glove, reaching into and altering the realm of private property rights. While the Court of Appeal's decision could be labeled a victory for both states' rights and gun rights advocates, the logic and reasoning supporting the case remain vulnerable to criticism. The legal treatment of the Amendments prior to the *Ramsey* decision represents an approach to this issue that produced a well-reasoned constitutional review of the Oklahoma gun laws.

II. The Law Before Ramsey

A. Brief Overview of the Three Constitutional Issues Implicated by the Ramsey Decision

The *Ramsey* case implicated three Constitutional issues. The employer-plaintiffs claimed that the Amendments amount to a regulatory taking under the Fifth Amendment, a substantive due process violation under the Fourteenth Amendment, and a Supremacy Clause violation under Article VI, Clause II.

1. Takings Clause

The Fifth Amendment's Takings Clause reads, "nor shall private property be taken for public use, without just compensation."¹⁵ Justice Holmes noted

15. U.S. CONST. amend. V.

in *Pennsylvania Coal Co. v. Mahon* that certain government regulations may be disguised as police power but are in reality *de facto* takings of private property.¹⁶ This is the essence of a regulatory taking. The Supreme Court has subsequently stated that in “70-odd years of succeeding ‘regulatory takings jurisprudence,’ we have generally eschewed ‘any set formula’ for determining how far is too far, preferring to ‘engag[e] in . . . essentially ad hoc, factual inquiries.’”¹⁷

The Takings Clause does not limit the scope of government power. It only requires “just compensation” for the property being “taken.”¹⁸ In other words, the “Takings Clause does not prohibit the taking of private property but instead places a condition on the exercise of that power.”¹⁹ The purpose of the clause “is designed not to limit the governmental interference with property rights *per se*, but rather to secure compensation in the event of otherwise proper interference amounting to a taking.”²⁰ Success on a takings claim would not merit an injunction of the Amendments. It would only merit compensation for the “taking.”

The analytical framework provided by the Supreme Court in *Lingle v. Chevron U.S.A., Inc.* is used to determine if legislation amounts to a regulatory taking. Under this framework the court must determine if the regulation fits into one of two categories: a *per se* regulatory taking, or a *Penn Central* regulatory taking.

There are two types of *per se* takings under the *Lingle* framework. First, a *Loretto* taking occurs when property owners experience a “permanent physical occupation” of their property.²¹ Second, a *Lucas* taking occurs when the regulation completely deprives an owner of “all economically beneficial or productive uses” of the property.²² If the regulation is not a *per se* taking, the

16. Ronald J. Krotoszynski, Jr., *Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause*, N.C. L. REV. 713, 713 (2002) (citing *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922)).

17. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992) (quoting *Penn. Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978)).

18. U.S. CONST. amend. IV.

19. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536 (2005).

20. *Id.* at 537.

21. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (holding that a New York Law requiring certain property owners to allow the installation and maintenance of cable television lines on their property amounted to a regulatory taking because although the property invasion was minor, the cable installations represented a permanent physical occupation of the plaintiff’s property.).

22. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992) (holding that the South Carolina Beachfront Management Act, which prohibited the plaintiff/landowner from erecting any permanent habitable structures on two of his parcels of land, was a violation of the Fifth Amendment because the regulation deprived the plaintiff of all economically beneficial uses

court engages in the *ad hoc* balancing test set forth in *Penn Central Transportation Co. v. City of New York* to determine if a taking has occurred.

In *Penn Central*, the plaintiffs were the owners of New York City's Grand Central Station Terminal, which was subject to New York's Landmark Preservation Law.²³ The plaintiffs wanted to construct a 50-story office building over the terminal. The New York City Landmarks Preservation Commission refused to approve plaintiff's proposal.²⁴ The plaintiffs sued, alleging "the Landmarks Law has deprived them of any gainful use of their 'air rights' above the Terminal and that, irrespective of the value of the remainder of their parcel, the city has 'taken' their right to this super-adjacent airspace, thus entitling them to 'just compensation' measured by the fair market value of these air rights."²⁵ To analyze the plaintiffs' takings claim, the Supreme Court considered "the character of the government intrusion; the degree of interference with reasonable, investment-backed expectations of the property owner; and the economic impact of the action."²⁶ The Court rejected the plaintiffs' claim, holding that "the restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties."²⁷

While these different approaches each focus on different aspects of a particular regulation, each is a tool for the court to measure the "severity of the burden that the government imposes on private property rights" to determine if an unconstitutional taking has occurred.²⁸

2. Interference with Property Rights and the Substantive Due Process Clause

While the Takings Clause prohibits expropriations of private property without just compensation, all owners of property have unique rights that are protected from improper state action by the due process components of the Fifth and the Fourteenth Amendments.²⁹ The Fifth Amendment mandates that "[N]o person shall be . . . deprived of life, liberty, or property, without the due

of his property.).

23. *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 104 (1978).

24. *Id.*

25. *Id.* at 130.

26. *ConocoPhillips v. Henry*, 520 F. Supp. 2d 1282, 1313 (N.D. Okla. 2007).

27. *Penn. Cent. Transp. Co.*, 438 U.S. at 138.

28. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005).

29. *See Buchanan v. Warley*, 245 U.S. 60 (1917).

process of law.”³⁰ Similarly, the Fourteenth Amendment reads, “nor shall any State deprive any person of life, liberty, or property, without due process of law . . .”³¹ Article II, Section VII of the Oklahoma Constitution, which “has a definitional sweep that is coextensive with its federal counterpart,”³² states that “[n]o person shall be deprived of life, liberty, or property, without due process of law . . .”³³

The hallmark of constitutionally protected property interests is the right to exclude others.³⁴ As stated by Justice Brandeis, “[a]n essential element of individual property is the legal right to exclude others . . .”³⁵ Indeed, the right to exclude certain individuals from property is perhaps the most fundamental of all property rights. Property rights are often conceptualized as a bundle of sticks, with each stick representing a distinct right enjoyed by property owners.

The Supreme Court has referred to the right to exclude as “one of the most essential sticks in the bundle of rights that are commonly characterized as property.”³⁶

Under the doctrine of substantive due process,³⁷ certain rights are considered so fundamental under the Constitution that any regulation that restricts such a right shall be subject to strict judicial scrutiny.³⁸ To satisfy this level of review, the state must show that the Amendments are necessary and narrowly tailored to serve a compelling state interest, and that the state’s

30. U.S. CONST. amend. V.

31. U.S. CONST. amend. XIV.

32. *Gladstone v. Bartlesville Indep. Sch. Dist. No. 30* (I-30), 2003 OK 30, nn.15-16, 66 P.3d 442, 442 nn.15-16.

33. OKLA. CONST. art. 2, § 7.

34. *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 667 (1999).

35. *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (dissenting opinion).

36. *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979).

37. *See Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). The Court explained that the “established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition,’ and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’ Second, we have required in substantive-due-process cases a ‘careful description’ of the asserted fundamental liberty interest. Our Nation’s history, legal traditions, and practices thus provide the crucial ‘guideposts for responsible decision making,’ that direct and restrain our exposition of the Due Process Clause. As we stated recently in *Flores*, the Fourteenth Amendment ‘forbids the government to infringe . . . ‘fundamental’ liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.” *Id.* (citations omitted); *see also* Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479 (2008) (explaining the evolution of the Court’s substantive due process jurisprudence, and the problems associated with the two tier *Glucksberg* approach).

38. *See Lawrence v. Texas*, 539 U.S. 558, 586 (2003).

objectives could not be served by less restrictive measures.³⁹ If the particular right is determined to be non-fundamental, regulations curtailing the exercise of that right are only subject to rational basis review.⁴⁰ Rational basis review requires only that the Amendments be rationally related to a legitimate governmental interest.⁴¹

3. *The Doctrine of Preemption and the Supremacy Clause*

The Supremacy Clause⁴² is the Constitutional foundation that supports the doctrine of preemption. When a federal law conflicts with a state law, the Supremacy Clause, through the doctrine of preemption, operates to displace the state law and exalt the federal law to a position of supremacy.⁴³ Congressional intent is the principal subject of discussion during a preemption analysis.⁴⁴ The court must examine and define the federal legislation's purpose and objectives to engage in the necessary comparative analysis to determine if the state actually conflicts with the federal law.⁴⁵ Within the doctrine of preemption, there are three categories of inquiry: express preemption, field preemption, and conflict preemption.⁴⁶ The unique federalism clash in *Ramsey* triggers a conflict preemption inquiry.

The category of conflict preemption is further divided into impossibility preemption and obstacle preemption. The court in *Choate v. Champion Home Builders* described the essence of conflict preemption by stating, "the Court has found [conflict] pre-emption where it is impossible for a private party to comply with both state and federal requirements, or where the state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress."⁴⁷ For impossibility preemption to be applicable to

39. *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

40. *See Powers v. Harris*, 379 F.3d 1208, 1215 (10th Cir. 2004) (explaining that if the law does not implicate a fundamental right, heightened scrutiny is inappropriate, and the law is only subject to rational basis review by the court.).

41. *See United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

42. U.S. CONST. art. VI, cl. 2.

43. *See McCulloch v. Maryland*, 17 U.S. 316 (1816); *Edgar v. Mite Corp.*, 457 U.S. 624 (1982).

44. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299 (1988).

45. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992).

46. *Choate v. Champion Home Builders*, 222 F.3d 788, 792-97 (10th Cir. 2000). The court explained that "express preemption" operates when a federal law explicitly states that it preempts a state law, and explaining that "field preemption," also called "implied preemption," operates when a federal regulatory scheme is so pervasive that it occupies an entire field of law, and state legislation is passed within that field. *Id.* In these instances, courts will infer an intent to preempt the state law if the federal law is considered pervasive enough to occupy an entire field of law, hence the term "implied" preemption. *Id.*

47. *Id.* (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990)).

Ramsey, OSHA would have to expressly require employers to maintain no firearm policies in order for compliance under OSHA. Because “OSHA has not taken th[is] final step,” impossibility conflict preemption is not directly applicable to *Ramsey*.⁴⁸

Obstacle conflict preemption, however, is applicable to this particular federalism conflict. Obstacle preemption operates when a state law materially “impede[s] some policy or purpose of a federal statute or regulation.”⁴⁹ In *Ramsey*, the federal regulation is the general duty clause of OSHA, and the obstacle is the Oklahoma Firearm Amendments. The determination as to what is a sufficient obstacle “is a matter of judgment, to be informed by examining the federal statutes as a whole and indentifying its purpose and intended effects.”⁵⁰

B. OSHA and the General Duty Clause

The purpose of OSHA is to facilitate “safe and healthful working conditions and to preserve our human resources . . .” in order to “stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions.”⁵¹ The general duty clause of OSHA is embodied at 29 U.S.C. § 654a(1) and states that each employer “shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”⁵² This clause is referred to as the general duty clause because it “asks employers to protect employees from all kinds of serious hazards, regardless of the source.”⁵³ Congress intended this clause to cover unanticipated hazards.⁵⁴ Accordingly, Congress enacted the general duty clause to cover serious hazards that were not otherwise covered by specific regulations.⁵⁵ Courts have determined that the general duty clause extends to the prevention of harm caused by other employees.⁵⁶

48. *ConocoPhillips v. Henry*, 520 F. Supp. 2d 1282, 1329 (N.D. Okla. 2007).

49. *Mgmt. Ass’n for Private Photogrammetric Surveyors v. United States*, 467 F. Supp. 2d 596, 603 (E.D. Va. 2006); *Mount Olivet Cemetery Ass’n v. Salt Lake City*, 164 F.3d 480, 489 (10th Cir. 1998).

50. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000).

51. 29 U.S.C. § 651(b)(1) (2009).

52. 29 U.S.C. § 654(a)(2) (2009).

53. *United States v. Pitt-Des Moines, Inc.*, 168 F.3d 976, 982 (7th Cir. 1999).

54. *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799, 803 (6th Cir. 1984).

55. *S. Ohio Building Systems, Inc. v. OSHRC*, 649 F.2d 456, 458 (6 Cir. 1981).

56. *See Brennan v. Butler Lime & Cement Co.*, 520 F.2d 1011, 1017 (7th Cir. 1975). The court explained that under OSHA “an employer is responsible if it knew or, with the exercise of reasonable diligence, should have known of the existence of a serious violation. A particular

OSHA Standard Interpretations Letter 1900 provides guidance on analyzing the relationship between the general duty clause and an employer's duty to abate the risk of gun-related workplace violence.⁵⁷ In this letter, Director of Enforcement for OSHA, Richard E. Fairfax stated that while OSHA does not contain an express ban on guns in the American workplace, OSHA does regulate the risks related to workplace gun violence through the general duty clause.⁵⁸ The letter indicated that in situations where the risk of gun-related workplace violence rises to the level of a recognized hazard, the general duty clause "would require an employer to take feasible steps to minimize those risks," and any "failure of an employer to implement feasible means of abatement of these hazards could result in the finding of an OSH Act violation . . ." under the general duty clause.⁵⁹ A workplace hazard becomes "recognized" when the hazard is acknowledged by either the industry in which the employer operates, as a whole, or recognized independently by the employer.⁶⁰

In *Megawest Financial, Inc.*, the Secretary of Labor cited the owner of "The Villas," an apartment complex in a crime stricken area of Ft. Lauderdale, Florida, under the general duty clause for failing to implement security measures to protect employees from violent attacks by tenants.⁶¹ On appeal, an administrative law judge reversed the citation, holding that the risk of violence to the apartment workers did not rise to the level of a "recognized hazard" because the risk of violence was not recognized by the apartment management industry as a whole, or by actual employer.⁶² This decision shows that the general duty clause does extend to all situations where workplace violence is a threat;⁶³ however, it also shows that determining when a particular workplace hazard is in fact a "recognized hazard" under the

instance of 'hazardous employee conduct may be considered preventable even if no employer could have detected the conduct, or its hazardous nature, at the moment of its occurrence, . . . [where] such conduct might have been precluded through feasible precautions concerning the hiring, training, and sanctioning of employees.'"

57. OSHA Standard Interpretation Letter 1900, 2006 WL 4093048 (Dep't of Labor Sept. 13, 2006).

58. *Id.*

59. *Id.*

60. *Megawest Fin., Inc.*, 1995 OSAHRC Lexis 80 (Occupational Safety and Health Review Comm'n May 8, 1995).

61. *Id.*

62. *Id.* at *24.

63. *ConocoPhillips v. Henry*, 520 F. Supp. 2d 1282, 1330 (N.D. Okla. 2007). The court noted that "although it was not ultimately upheld by the ALJ, the Secretary of Labor issued the citation. This reveals that the general duty clause extends to injuries inflicted upon employees with weapons during a violent incident on company property."

general duty clause is done on a case-by-case basis.⁶⁴

C. *The Battle Over Guns in the Parking Lot*

The controversy underlying *Ramsey* began when several Oklahoma employees were fired for violating their employer's gun-free parking lot policy.⁶⁵ In 2003, these employees obtained counsel and argued unsuccessfully that the Oklahoma law permitting employers to implement such policies was in violation the Oklahoma Constitution.⁶⁶ While the plaintiffs were unsuccessful in their claim, their attorney was not satisfied with the outcome. He sounded the battle cry over guns in the parking lot, and the Oklahoma legislature listened.

1. *The Impetus: Bastible v. Weyerhaeuser Co.*

The underlying conflict reflected in *Ramsey* began with the 2003 case of *Bastible v. Weyerhaeuser Co.*⁶⁷ The plaintiffs were the employees of the defendant at a paper mill in Valliant, Oklahoma.⁶⁸ The defendant employer maintained a policy that "prohibit[ed] bringing onto Company property, including Company-owned or leased parking areas, any firearms, whether properly licensed or not."⁶⁹ The plaintiffs, terminated for violating this policy, sued to challenge the "Business Owners Rights" portion of the Oklahoma Self Defense Act, which expressly permitted such employer policies. The section provided that "nothing contained in any provision of the [Act] . . . shall be construed to limit, restrict or prohibit in any manner the existing rights of any person, property owner, tenant, employer, or business entity to control the possession of weapons on any property owned or controlled by the person or business entity."⁷⁰

The plaintiffs claimed that the statute violated Article II of the Oklahoma Constitution, which secured Oklahomans' right to carry firearms in certain situations.⁷¹ The court disagreed, ruling the plaintiffs' state constitutional

64. See *Megawest Fin., Inc.*, 1995 OSAHRC Lexis 80 at *29 (explaining that, "a high standard of proof must be met to show that the employer itself recognized the hazard of workplace violence.").

65. *ConocoPhillips*, 520 F. Supp. 2d at 1291.

66. *Id.* at 1291, n.15.

67. *Bastible v. Weyerhaeuser Co.*, 437 F.3d 999 (10th Cir. 2006).

68. *Id.* at 1001.

69. *Id.* at 1001 n.1.

70. 21 OKLA. STAT. § 1290.1 (2002) (amended 2004).

71. OKLA. CONST. art. II, § 26 ("The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons.").

rights were not violated because Oklahomans do not enjoy an “absolute common-law or constitutional right to carry loaded weapons at all times and in all circumstances.”⁷² Additionally, the court remonstrated that Article II of the Oklahoma Constitution provides: “nothing herein contained shall prevent the Legislature from regulating the carrying of weapons.”⁷³ The court concluded that because Oklahoma employees do not enjoy an “unfettered right to transport and use firearms,” the statute did not violate the Oklahoma state Constitution.⁷⁴

2. *The Amendments*

Lawrence A.G. Johnson was the attorney for the plaintiffs in *Bastible*.⁷⁵ His experience impelled him to author legislative amendments (the Amendments) that revised the Oklahoma Firearm Act (OFA) and the Oklahoma Self Defense Act (OSDA) to impose criminal sanctions on any employer that maintained a gun-free parking lot policy.⁷⁶ Johnson commented that the Amendments were inspired in response to the “continuous problem [that] arises relative to the conflict [that] law-abiding gun owners have regarding the exercise of their right to transport firearms to and from work and park in the employer’s parking lot.”⁷⁷ The Amendments were adopted by the Oklahoma legislature and became effective on March 31, 2004.⁷⁸ The revised “Business Owner’s Rights” section of the OSDA read, “no person, property owner, tenant, employer, or business entity shall be permitted to establish any policy or rule that has the effect of prohibiting any person, except a convicted felon, from transporting and storing firearms in a locked vehicle on any property set aside for any vehicle.”⁷⁹

3. *ConocoPhillips v. Henry*

Within a year, several Oklahoma businesses took to the courts, seeking to enjoin enforcement of the Amendments.⁸⁰ Whirlpool Corporation filed the initial complaint seeking an injunction against enforcement on October 27,

72. *Bastible*, 437 F.3d at 1006 (citing *State ex. rel. Okla. State Bureau of Investigation v. Warren*, 1998 OK 133, ¶ 13, 975 P.2d 900, 902).

73. OKLA. CONST. art. 2, § 26.

74. *Bastible*, 437 F.3d at 1006.

75. *ConocoPhillips v. Henry*, 520 F. Supp. 2d 1282, 1291, n.15 (N.D. Okla. 2007).

76. *Id.*

77. *Id.* at 1291.

78. *Id.*

79. 21 OKLA. STAT. § 1289.7a (Supp. 2004); 21 OKLA. STAT. § 1290.22(B) (Supp. 2004).

80. *See ConocoPhillips*, 520 F. Supp. 2d at 1291.

2004.⁸¹ On November 22, 2004, Whirlpool and defendants filed a stipulation of dismissal of Whirlpool, and ConocoPhillips stepped in as the sole plaintiff.⁸²

As *ConocoPhillips v. Henry* was pending, Governor Brad Henry signed another amendment to the OFA, on June 9, 2005.⁸³ This amendment provided:

No person, property owner, tenant, employer, or business entity shall maintain, establish, or enforce any policy or rule that has the effect of prohibiting any person, except a convicted felon, from transporting and storing firearms in a locked motor vehicle, or from transporting and storing firearms locked in or locked to a motor vehicle on any property set aside for any motor vehicle.⁸⁴

The *ConocoPhillips* court considered both the 2004 and 2005 Amendments when assessing whether to grant a permanent injunction against enforcement of the Amendments.⁸⁵

By the time *ConocoPhillips v. Henry* came before the court, Alaska, Kansas, Minnesota, and Kentucky had passed laws similar to the Oklahoma Amendments.⁸⁶ Thirteen other states had rejected such laws.⁸⁷ However, Judge Kern's opinion in *ConocoPhillips* noted that his court was "the first to address the constitutionality of these types of laws."⁸⁸ The plaintiffs identified three constitutional bases for their request for permanent declaratory and injunctive relief prohibiting enforcement of the Amendments.⁸⁹

First, the plaintiffs alleged that the Amendments violated the Fifth Amendment's Takings Clause because they amount to a regulatory taking of private property.⁹⁰ Second, the Amendments interfered with the fundamental property right to exclude and violated the Substantive Due Process Clause of the Fourteenth Amendment. Because the right to exclude is a fundamental right, the plaintiffs argued the Amendments should be subject to strict scrutiny.⁹¹ Third, the Amendments implicated the Supremacy Clause of the

81. *Id.* at 1287 n.7.

82. *Id.*

83. *Id.* at 1289; 21 OKLA. STAT. § 1289.7a.

84. 21 OKLA. STAT. § 1289.7a.

85. *ConocoPhillips*, 520 F. Supp. 2d at 1290.

86. David Harper, *Employers Can Forbid Guns, a Judge Rules*, TULSA WORLD, Oct. 6, 2007, at A-4.

87. *Id.*

88. *ConocoPhillips*, 520 F. Supp. 2d at 1287.

89. *Id.* at 1295 (indicating that the plaintiffs alleged that the Amendments are unconstitutionally vague, however the court determined that the plaintiffs lack standing for a vagueness challenge).

90. *Id.*

91. *Id.*

U.S. Constitution and were preempted by various federal statutes, including: OSHA, the Federal Gun Free School Zone Act, and the Brady Handgun Violence Prevention Act.⁹²

The court did not accept the plaintiff's claim that the Amendments amounted to a regulatory taking of private property by the state of Oklahoma.⁹³

The Fourteenth Amendment, which makes the Fifth Amendment's Takings Clause applicable to the states, mandates that no person shall be deprived of private property taken for public use without just compensation.⁹⁴ A regulatory taking can occur if the government enacts a regulation that is "so onerous that its effect is tantamount to a direct appropriation."⁹⁵

The *ConocoPhillips* court followed the analytical framework provided by the Supreme Court in *Lingle v. Chevron U.S.A., Inc.*, and determined that the Amendments did not amount to a regulatory taking.⁹⁶ The court did not conduct a *Lucas* economic taking analysis because that type of taking requires a deprivation of economic or productive benefit, and the plaintiffs did not allege in their complaints that they had ever suffered any such deprivation.⁹⁷ The court then conducted a *Loretto* physical taking analysis and determined that the "permanent physical invasion" required was not present.⁹⁸ For a physical occupation to occur, there must be an actual physical taking or forced easement upon the property owner.⁹⁹

The court distinguished physical *invasions* from physical *occupations*, and noted that these "physical invasions fall outside the *Loretto* rule."¹⁰⁰ The court held that even though "the right to exclude (most fundamental of all property interests) is impaired, the Court cannot conclude that the amendments qualify for *per se* treatment. Instead, the invasion is more akin to the temporary physical invasion cases that courts have analyzed under the *Penn Central* balancing analysis."¹⁰¹

Under the *Penn Central* analysis, the court analyzed the character of the governmental intrusion and the economic harm/interference with investment-

92. *Id.* at 1301-02 n.28. Halliburton filed an amicus brief arguing that the Amendments are preempted by the Atomic Energy Act of 1954 and the Safe Explosive Act. However, "courts generally refuse to consider issues as to the interpretation or constitutionality of a statutory provision unless such issues are also raised by, or joined in by, a party to the action." *Id.*

93. *Id.* at 1317.

94. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536 (2005).

95. *Id.* at 537.

96. *Id.* at 528.

97. *ConocoPhillips*, 520 F. Supp. 2d at 1307-08.

98. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982).

99. *ConocoPhillips*, 520 F. Supp. 2d at 1308-09.

100. *Id.* at 1308.

101. *Id.* at 1311-12.

backed expectations.¹⁰² However, the court commented that because “the Supreme Court has never sanctioned a finding of a *Penn Central* taking in the absence of allegations of economic harm . . .” the Takings Clause claim must fail.¹⁰³

The court also adopted a very narrow view of private property rights and rejected the plaintiff’s substantive due process claim.¹⁰⁴ The court refused to recognize the right to exclude people with firearms from one’s property, and held that the Amendments did not amount to an unconstitutional deprivation of a fundamental right.¹⁰⁵ The plaintiffs offered case law arising under the Takings Clause “that labels the right to exclude as one of the most treasured strands in an owner’s bundle of property rights.”¹⁰⁶ But, the court noted that the Supreme Court has “long eschewed heightened scrutiny when addressing substantive due process challenges to government regulation [of property rights].”¹⁰⁷ Consequently, the court held that “the right to exclude cannot be considered a ‘fundamental right’ under a substantive due process analysis, and the Amendments are not subject to heightened scrutiny.”¹⁰⁸ The court concluded that the appropriate standard of constitutional review was rational basis.¹⁰⁹

The court did, however, accept the plaintiff’s supremacy clause argument.¹¹⁰ The court determined that only the Occupational Safety and Health Act and the Brady Bill were applicable, because the plaintiffs did not have standing to sue under the other stated federal laws.¹¹¹ This standing determination was made because relief from the court would not redress their injury.¹¹² The court did not reach a Brady Bill preemption analysis because it determined that OSHA directly clashed with the Amendments and therefore preempted the

102. *Id.* at 1312.

103. *Id.* at 1317.

104. *See id.* at 1322.

105. *Id.*

106. *Id.* at 1318.

107. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 545 (2005).

108. *See generally* *Weems v. Little Rock Police Dep’t*, 453 F.3d 1010, 1015 (8th Cir. 2006); *United States v. 16.92 Acres of Land*, 670 F.2d 1369, 1373 (7th Cir. 1982); *Coal. for Equal Rights, Inc. v. Owens*, 458 F. Supp. 2d 1251, 1263 (D. Colo. 2006).

109. *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1580 (10th Cir. 1995).

110. *ConocoPhillips v. Henry*, 520 F. Supp. 2d 1282, 1339 (N.D. Okla. 2007).

111. *Id.* at 1303.

112. *Id.* Plaintiffs argued the Amendments are preempted by 39 C.F.R. § 232.1, which prohibits possession of a firearm on any postal property. Because the plaintiff’s did not own or operate a postal facility, any successful preemption claim based on this law would be inapplicable to them. In other words, even if this claim were successful, it would not allow plaintiff’s to maintain their policies free from the criminal prosecution provided by the Amendments. Therefore, plaintiffs did not have standing under this law.

state laws.¹¹³ The *ConocoPhillips* court concluded that the Amendments were preempted because of an “obstacle” conflict with OSHA.¹¹⁴ The court determined that this was a situation “in which state law stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress.”¹¹⁵ Specifically, the court held that “the Oklahoma Legislature’s attempt to disallow employers from choosing to abate the hazards of gun-related workplace violence and unauthorized firearms on company property must be enjoined because the Amendments stand as an obstacle to complying with the general duty clause and accomplishing OSHA’s purpose.”¹¹⁶

The permanent injunction granted by the *ConocoPhillips* court was appealed by the state. The result of this appeal is the principal case of this note, *Ramsey Winch Inc., v. Henry*.

III. Ramsey Winch Inc. v. Henry

A. Procedural History

After the Amendments were enjoined in *ConocoPhillips*, Oklahoma Governor Brad Henry and Attorney General Drew Edmondson appealed to the Tenth Circuit Court of Appeals. They claimed that OSHA should be “interpreted in a manner that prevents the interference with states’ exercise of police power to protect their citizens.”¹¹⁷ Governor Henry and Attorney General Edmondson urged that the state and federal laws could coexist without implicating the Supremacy Clause because “OSHA rules do not stand for the proposition that law-abiding citizens cannot carry their guns.”¹¹⁸

Ramsey Winch Inc. and several other businesses joined *ConocoPhillips* as plaintiffs for the appeal.

B. Issues

The court of appeals in *Ramsey* addressed the same three issues as the *ConocoPhillips* court. First, whether the district court correctly held that the Amendments were preempted by the general duty clause of the Occupational Safety and Health Act. More specifically, does OSHA’s general duty clause cover gun-related violence? Second, whether the lower court correctly held that the Amendments did not constitute an unconstitutional regulatory taking

113. *Id.* at 1304 n.32.

114. *Id.* at 1330.

115. *Choate v. Champion Home Builders*, 222 F.3d 788, 792 (10th Cir. 2000).

116. *ConocoPhillips*, 520 F. Supp. 2d at 1329 n.56.

117. Roger Boczkiewicz, *AG, Governor Seek Reversal on Gun Ruling*, TULSA WORLD, Jan. 26, 2008, at A1-A4.

118. *Id.* at A4.

under the Fifth Amendment. Third, whether the district court correctly determined that the Amendments did not violate a substantive due process right under the Fourteenth Amendment by infringing on employer's right to exclude people with firearms from their property.

C. Holding

The district court in *ConocoPhillips* concluded that the Amendments were preempted by the general duty clause of OSHA under the doctrine of obstacle conflict preemption.¹¹⁹ The court rejected the plaintiff's Takings Clause and Substantive due process claim. The court in *ConocoPhillips* recognized that gun-related workplace violence is a recognized workplace hazard and is therefore subject to federal regulation under OSHA.¹²⁰ Because the Amendments "materially impede the ability to comply" with OSHA and "thwart [the] federal objective of promoting workplace safety," the Supremacy Clause requires the Amendments to be permanently enjoined.¹²¹

On appeal, the Tenth Circuit reversed the District Court's permanent injunction, finding no Supremacy Clause violation. The court found no preemption by OSHA, no Takings Clause violation, and no substantive due process violation.

IV. The Tenth Circuit's Reasoning in Ramsey

A. Takings Clause Claim

The Tenth Circuit Court of Appeals flatly rejected the Takings Clause violation claim. The plaintiffs argued that the Amendments amounted to a *per se* taking in the form of a "land-use exaction" because they require plaintiffs to provide an easement for people carrying firearms.¹²² In the alternative, the plaintiffs argued that the Amendments were a taking under *Penn Central* because of their economic impact and high degree of interference with legitimate property interests.

The plaintiff's *per se* takings claim, that the Amendments represented an unconstitutional land use exaction on their property, did not persuade the Tenth Circuit. The court refused to expand *per se* regulations beyond the physical taking realm and into an analysis regarding a non-physical taking. The court rejected the plaintiff's argument that under *Penn Central* the Amendments were a taking because the presence of firearms on employer

119. See *ConocoPhillips*, 520 F. Supp. 2d at 1339-40.

120. *Id.* at 1330.

121. *Id.* at 1334.

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

property would inevitably increase costs associated with workplace violence.¹²³ Aside from the general claim that guns at work inevitably increase costs associated with workplace violence, the plaintiff's offered no specific details regarding the economic impact they suffered due to the Amendments.¹²⁴

B. Substantive Due Process Claim

The *Ramsey* court refused to recognize the right to exclude as a fundamental right and subjected the Amendments to rational basis review. The court commented: "We need not decide the long-running debate as to whether allowing individuals to carry firearms enhances or diminishes the overall safety of the community. The very fact that this question is so hotly debated, however, is evidence enough that a rational basis exists for the amendments."¹²⁵

C. Supremacy Clause Claim

When undertaking an obstacle preemption inquiry, the court must determine if the state law impedes the policy or purpose of a federal statute or regulation.¹²⁶ To do this under the facts of *Ramsey*, the court looked to the legislative objectives and policies offered by Congress when they created OSHA for guidance.¹²⁷ The principle task before the *Ramsey* court involved interpreting the general duty clause of OSHA.

The court held that gun-related workplace violence was not a "recognized hazard" by employing a very narrow view of the hazards covered by OSHA's general duty clause.¹²⁸ The court refused to accept the argument that the general duty clause should be extended to recognize random gun violence.¹²⁹ The court determined that because there was no Congressional intent for OSHA to target gun-related workplace violence¹³⁰ there was no conflict, and

123. *Id.* at 1210.

124. *Id.* ("The only economic impact cited by Plaintiffs is the general claim (located in a footnote of their brief) that allowing firearms onto an employer's property inevitably increases costs linked to workplace violence. A constitutional taking requires more than an incidental increase in potential costs for employers as a result of a new regulation.")

125. *Id.* at 1211.

126. *See* *Mgmt. Ass'n for Private Photogrammetric Surveyors v. United States*, 467 F. Supp. 2d 596, 603 (E.D. Va. 2006); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000); *Mount Olivet Cemetery Ass'n v. Salt Lake City*, 164 F.3d 480, 489 (10th Cir. 1998).

127. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987).

128. *Ramsey Winch Inc.*, 555 F.3d at 1206. The court seems to rely on a view that Congress intended only to cover "traditional work related hazards." *See id.* at 1205.

129. *Id.* at 1206.

130. *Id.* at 1208.

OSHA must yield to state police powers.¹³¹ This narrow interpretation of OSHA by the court has a dramatic effect on the property rights of Oklahoma business owners.

V. Critique of the Reasoning in Ramsey

The reasoning behind the *Ramsey* decision is subject to critique from both a doctrinal and a policy perspective. While the logic driving the court's Takings Clause and Substantive Due Process Clause analyses has deficiencies, the most flagrant misapplication of constitutional law appears in the court's preemption analysis.

From a policy standpoint, the *Ramsey* decision is an improper reversal of a sound district court opinion. The lower court recognized the threat posed by workplace violence and interpreted the general duty clause accordingly. The American Bar Association reported that "roughly one thousand people are killed at work each year, and guns are used in nearly eighty percent of those deaths."¹³² The ABA went on record in 2007 supporting the right of employers "to exclude from the workplace and other private property persons in possession of firearms or other weapons."¹³³ The *Ramsey* decision cuts against sound workplace policy.

Much of the Supreme Court jurisprudence regarding Takings Clause claims reflects a strained attempt to conceptually "disentangle" the concepts of a Takings Clause violation and a substantive due process, "right to exclude," violation.¹³⁴ Critics have claimed that the Court's expansion of the Takings Clause reflects a willingness to use the clause as a "catchall guarantor of property interest."¹³⁵ This note clarifies the proper boundary of the Takings Clause in regulatory takings claims and analyzes the substantive due process implications of the Amendments in a separate framework.

A. Takings Clause Claim

The court rejected the plaintiffs' argument that under *Penn Central* the Amendments amount to a taking because the presence of firearms on employer property would inevitably increase costs associated with workplace violence.¹³⁶ This determination is questionable. Under the *Penn Central*

131. *Id.*

132. David Harper, *Employers Can Forbid Guns, a Judge Rules*, TULSA WORLD, Oct. 6, 2007, at A4.

133. *Id.*

134. Krotoszynski, *supra* note 16, at 714.

135. *Id.* at 715.

136. *Ramsey Winch Inc.*, 555 F.3d at 1210.

analysis, the court gauges “the magnitude of a regulation’s economic impact and the degree to which it interferes with legitimate property interests.”¹³⁷ Success under this inquiry requires that the Amendments create “more than an incidental increase in potential costs for employers as a result of a new regulation.”¹³⁸

The Amendments are not a regulatory taking of property *per se* because the Amendments do not amount to a physical invasion of the plaintiffs’ property, nor do they take all economic value or productive capacity from the plaintiffs’ property. The Amendments do, however, function as a restriction that is “functionally equivalent to the classic taking in which government directly appropriates private property . . .”¹³⁹

However, the *Ramsey* court found that the plaintiffs failed to allege any quantified economic losses as a result of the Amendments.¹⁴⁰ The plaintiffs’ attorneys should have offered a more detailed description of the economic costs associate with the Amendments, instead of simply alleging in a footnote of their brief that “it is beyond reasonable dispute that if the injunction against enforcement of the Amendments is dissolved, it would inevitably cause financial harm to the Appellees.”¹⁴¹ The footnote concluded, “ultimately, the Amendments would unquestionably impose financial burdens on Appellees, and it cannot be argued to the contrary. It is however difficult to quantify those burdens . . .”¹⁴² This suspicious and conclusory claim did not slip past the Tenth Circuit; apparently the issue was well within the realm of “reasonable dispute.” The court noted the insufficiency in this portion of the plaintiffs’ takings claim by first noting, “the only economic impact cited by Plaintiffs is the general claim (located in a footnote of their brief) that allowing firearms onto an employer’s property inevitably increases costs linked to workplace violence.”¹⁴³ The court continued, “[p]laintiffs do not assert *any* interference with their investment backed expectations, and therefore, ‘have failed to demonstrate that the right to exclude others’ is so essential to the use or economic value of their property that the state-authorized limitation of it amount[s] to a taking.”¹⁴⁴

137. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 540 (2005).

138. *Ramsey Winch Inc.*, 555 F.3d at 1210.

139. *Lingle*, 544 U.S. at 539.

140. *Ramsey Winch Inc.*, 555 F.3d at 1210.

141. Plaintiffs’/Appellees’ Brief in Response to Defendants’/Appellants’ Opening Brief at n.31, *ConocoPhillips v. Henry*, 520 F. Supp. 2d 1282 (N.D. Okla. 2007) (No. 07-5166).

142. *Id.*

143. *Ramsey Winch Inc.*, 555 F.3d at 1210.

144. *Id.* (citing *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 84 (1980)).

The court's analysis failed "to capture the actual economic value" of the costs forced upon Oklahoma employers and their investment backed expectations.¹⁴⁵ Because of these costs, employers cannot make full productive use of their property. The costs related to workplace violence include "lost work time and wages, reduced productivity, medical costs, workers' compensation payments, and legal and security expenses . . ." that "clearly run into many billions of dollars."¹⁴⁶ The *Ramsey* court failed to consider employer litigation costs (negligent hiring, supervision, training, retention), increases in insurance premiums, and increased security costs all linked to workplace violence. The court also failed to consider the loss of productivity. The National Safe Workplace Institute calculates that the average cost to employers of a single episode of workplace violence can amount to \$250,000 in lost work time and legal expenses.¹⁴⁷ While the plaintiffs in *Ramsey* failed to allege in detail the negative economic impact of Amendments in their Takings Clause claim, these costs associated with workplace violence are substantial and inhibit employers' ability to make full economic use of their property.

B. Substantive Due Process Claim

Property owners should possess consistent property rights. These property rights should be considered fundamental rights under the Fourteenth Amendment and its substantive due process component. The court found a certain degree of merit in the substantive due process challenge but rejected the claim in the end.¹⁴⁸

Real property rights "have always been fundamental to and part of the preservation of liberty and personal freedom in the United States."¹⁴⁹ Additionally, the right to exclude certain people from property is "the most fundamental of all property interest."¹⁵⁰ Under the widely used *Glucksberg v.*

145. *Babbitt v. Youpee*, 519 U.S. 234, 239 (1997). The Supreme Court in *Babbitt* heard a Takings Clause claim that involved a provision of the Indian Land Consolidation Act that operated to deprive property owners of their right to pass on their land by devise or by intestacy. The court's discussion of a "right of an individual to direct the descent of his property" rings of substantive due process; however, the "extraordinary character" of the governmental regulation shocked the court and significantly impacted the takings analysis. The court noted regulations like this amount "to a virtual abrogation" of a particular of property interest, and are unconstitutional under the Fifth Amendment.

146. FED. BUREAU OF INVESTIGATION, *WORKPLACE VIOLENCE: ISSUES IN RESPONSE* (2004).

147. BUREAU OF JUSTICE STATISTICS, *VIOLENCE AND THEFT IN THE WORKPLACE* (1994).

148. *Ramsey Winch Inc.*, 555 F.3d at 1210.

149. David L. Callies & J. David Breemer, *The Right to Exclude Others from Private Property: A Fundamental Constitutional Right*, 3 WASH. U. J. L. & POL'Y 39 (2000).

150. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005).

Washington two-step approach to determine if a right is fundamental,¹⁵¹ Chief Justice Rehnquist “divided the inquiry into two discrete steps: first one defines the right carefully, and second one asks whether the right, so defined, is ‘deeply rooted in this Nation’s history and tradition.’”¹⁵² Under “the *Glucksberg* Two-Step, a right must be carefully defined before a court can decide whether it is deeply rooted.”¹⁵³ How a particular right is defined is often the essential factor determinative of the outcome of the case.¹⁵⁴

In *Ramsey*, the right at play should have been defined as the right of property owners to exclude firearms from their property. Accordingly, under step two of the *Glucksberg* analysis, because the right to exclude is the *sine qua non* of property rights in the United States,¹⁵⁵ regulations like the Amendments violate the doctrine of substantive due process by restricting a fundamental right and should be subject to strict scrutiny. Regulations that restrict fundamental rights are unconstitutional when the law fails to serve a compelling state interest or where the law is not narrowly tailored to advance a compelling state interest.¹⁵⁶

The Amendments could not survive strict scrutiny review. Under this level of analysis the State of Oklahoma must demonstrate that the Amendments are necessary to serve a compelling state interest and that the State’s objective could not be achieved by any less restrictive measures.¹⁵⁷ The legislative goals of the Amendments, as defined by the Oklahoma Court of Criminal Appeals in *Whirlpool v. Henry*, are to promote the public health, safety and welfare of Oklahomans, deter crime, and protect the community as a whole.¹⁵⁸ The Oklahoma Court of Criminal Appeals also noted that the Amendments “concern protection of the community as a whole rather than individual citizens.”¹⁵⁹

151. Barnett, *supra* note 37, at 1495 (“And lower courts, like the Ninth Circuit in *Raich*, largely continue to employ the *Glucksberg* Two Step. . .”).

152. *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997)).

153. *Id.* at 1489.

154. *Id.* at 1489-90 (comparing the plaintiff’s definition and the Court’s definition of the particular right at play in *Gonzales v. Raich*, 545 U.S. 1, 5 (2005). The plaintiff, Angel Raich, claimed that the Controlled Dangerous Substance Act restricted her *right to preserve her life*, because it restricted her ability to use medical cannabis. However, the Court characterized the right as *the right to obtain and use marijuana*.)

155. Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998).

156. *See Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993).

157. *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

158. *Whirlpool v. Henry*, 2005 OK CR 7, ¶ 8, 110 P.3d 83, 86.

159. *Id.*

The Amendments do not serve their stated legislative goals because they are not at all tailored to achieve their goal of promoting public safety. There is little or no evidence that a regulation that facilitates the presence of guns in the workplace promotes the public health, safety and welfare of Oklahomans, deters crime, or protects the community as a whole. In fact, the Amendments actually directly operate against the stated legislative goals of the Amendments. The district court in *ConocoPhillips* commented, “the Amendments would likely not survive any degree of heightened scrutiny. They force property owners to allow potentially dangerous weapons on their private property in order to *increase* public safety and deter crime.”¹⁶⁰ The lower court concluded that “as a matter of common sense, and as argued by Plaintiffs, an increased number of firearms in vehicles on private property would logically lead to an overall decrease in public safety.”¹⁶¹ Additionally, Tulsa Police Chief David Been noted that the “presence of firearms in a locked vehicle on an employer’s parking lot increases the risk of workplace violence . . . The Amendments will pose a higher likelihood of the use of firearms, and a corresponding greater risk of violence from them.”¹⁶² Because of this massive disconnect between the Amendments’ actual effect and their legislative goals, the Amendments would fail strict scrutiny.

Moreover, the Amendments are overinclusive in their attempt to serve the goal of the legislation, even assuming *arguendo* that increasing the potential for guns in the workplace does in fact promote public safety. The Amendments’ broad application would extend to places like daycare centers, mental health clinics, state and federal courthouses, and battered women’s shelters.¹⁶³ Unreasonable examples such as these reveal both the over inclusive nature of the Amendments, and their lack of a rational nexus to any legislative goal concerning public safety.

The Amendments survive, however, under the court’s rational basis analysis.¹⁶⁴ According to the Tenth Circuit’s rational basis review, a statute that enables employee to bring firearms to workplace parking lots promotes the general welfare of society and deters crime. Although the level of scrutiny is not heightened, there should be a baseline level of review, even under this notoriously lax standard. It strains the bounds of acceptable public policy to conclude that a regulation eliminating an employer’s ability to exclude firearms from their property protects the public welfare, maintains good order,

160. *ConocoPhillips v. Henry*, 520 F. Supp. 2d 1282, 1321 (N.D. Okla. 2007).

161. *Id.*

162. *Id.* at 1337.

163. Plaintiffs’/Appellees’ Brief in Response to Defendants’/Appellants’ Opening Brief, *supra* note 141, at 41.

164. *Ramsey Winch Inc. v. Henry*, 555 F.3d 1199, 1211 (10th Cir. 2009).

promotes safety or preserves morals.¹⁶⁵ Under rational basis review, however, “if a regulation is fairly debatable, then legislative judgment must control.”¹⁶⁶

While the standard of rationality is very deferential, it still requires that there be a rational connection between the legislation and the aims of the legislature.¹⁶⁷ It is irrational to conclude that substantially increasing the likelihood of guns related violence in the workplace promotes the public safety of Oklahoma employers and property owners. The principle behind states’ police power is “the control and regulation of private interests for the public good.”¹⁶⁸ Commentators have argued, “the mere invocation of public safety must not serve as a shibboleth that precludes any meaningful judicial inquiry into the real intent and effect of the regulation at issue.”¹⁶⁹ The classification of the right to exclude as a non-fundamental right removes the ability of the courts to rationally assess the Amendments, because any meaningful rational basis review is clouded by the constant partisan gun rights debate. This is evident in *Ramsey* when the court stated, “We need not decide the long running debate as to whether allowing individuals to carry firearms enhances or diminishes the overall safety of the community. The very fact that this question is so hotly debated, however, is evidence enough that a rational basis exists for the Amendments.”¹⁷⁰

In the aftermath of this decision, it is clear that if courts continue to consider the right to exclude to be outside the protection of the due process clause, then the legislature’s collective public policy determination wins the day. On the other hand, if courts accept the notion that the plaintiffs’ right to exclude is worthy of heightened judicial protection, both traditional notions of property ownership and workplace safety are served.

C. Supremacy Clause Claim

The Amendments must give way to OSHA because “the state law impermissibly ‘conflicts’ with the general duty clause and the accomplishment of the express congressional purpose set forth in the OSH Act.”¹⁷¹ This particular conflict in federalism is an excellent illustration of state legislation that violates the Supremacy Clause through the doctrine of obstacle preemption. Even without a specific standard addressing gun-related workplace violence, OSHA requires employers to “abate the hazard of gun-related

165. *Bittle v. Bahe*, 2008 OK 10, n.15, 192 P.3d 810, 823 n.15.

166. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).

167. *Crider v. Bd. of Cnty. Comm’rs of Boulder*, 246 F.3d 1285, 1289 (10th Cir. 2001).

168. *Bittle*, n.15, 192 P.3d at 823 n.15.

169. *Krotoszynski*, *supra* note 16, at 718.

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

171. *ConocoPhillips v. Henry*, 520 F. Supp. 2d 1282, 1339 (N.D. Okla. 2007).

workplace violence and comply with the general duty clause to the best of its ability.”¹⁷²

The court in *Ramsey* incorrectly applied OSHA Standard Interpretations Letter 1900 to determine that Congress did not intend for the general duty clause to cover gun-related work place violence.¹⁷³ This letter does not contain an express statement that workplace violence is not covered by the general duty clause, but the court reads the following text to reach that conclusion. The letter notes that:

While generally deferring to other federal, state, and local law-enforcement agencies to regulate workplace homicides, OSHA did develop an enforcement policy with regard to workplace violence as early as 1992 in a letter of interpretation that stated: In a workplace where the risk of violence and serious personal injury are significant enough to be “recognized hazards,” the general duty clause [specified by Section 5(a)(1) of the Occupational Safety and Health Act (OSH Act)] would require the employer to take feasible steps to minimize those risks. Failure of an employer to implement feasible means of abatement of these hazards could result in the finding of an OSH Act violation.¹⁷⁴

The *Ramsey* court ignored the emphasis of the 1992 letter, and determined that declining to expressly proffer a standard on workplace gun violence foreclosed the general duty clause from extending to workplace violence. The letter clarified that employers may be cited for a general duty violation in a “workplace where the risk of violence and serious personal injury are significant enough to be ‘recognized hazards.’” The lower court correctly read the clause with the understanding that OSHA was intended by Congress to cover unanticipated hazards.¹⁷⁵

On January 16, 2009, about a month before the court decided *Ramsey*, OSHA Assisting Secretary Thomas Stohler authored a “statement of agency position” letter regarding the meaning of the general duty clause.¹⁷⁶ This letter was sent to Tenth Circuit Court of Appeals Clerk Elisabeth Shumaker days before the *Ramsey* decision.¹⁷⁷ Stohler wrote, “since no OSHA standard

172. *Id.*

173. OSHA Standard Interpretation Letter 1900, 2006 WL 4093048 (Dep’t of Labor Sept. 13, 2006).

174. *Id.*

175. *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799, 803 (6th Cir. 1984).

176. Letter from Thomas Stohler, Acting Assistant Sec’y of Labor, to Jerry Ellis, Oklahoma State Senate (Jan. 16, 2009).

177. *Id.*

specifically governs the issue of the presence of firearms in vehicles in company parking lots, states generally retain broad authority regarding individual rights under the Second Amendment.”¹⁷⁸ The letter continued, “[The Amendments] do not on their face pose a conflict with the general duty clause or purpose of the OSH Act. Gun-related violence is not a recognized occupational hazard in industry as a whole, under normal working conditions.”¹⁷⁹ Therefore, “state law protecting an employees right to transport and store firearms in a locked car on employer premises would not on their face impede the employer’s ability to comply with the general duty clause.”¹⁸⁰

The general duty clause is an essential key to the success of the overall goal of OSHA, which is the abatement of dangers in the workplace. It allows employers to craft policies, such as gun-free parking lot policies, that are aimed at preventing hazards that are recognized in that particular workplace. When the threat of violence at a workplace rises to the level of “recognized hazard,” as recognized by the industry or independently by the employers like the plaintiffs,¹⁸¹ the general duty clause requires employers to take feasible steps to decrease that hazard in the form of polices such as these. The general duty clause breathes life into these policies. This approach ensures for effectiveness of hazard reduction for an employers unique occupational environment.

In order for an employer to be cited for a violation of the general duty clause, the Secretary of Labor must determine if the danger satisfies a three part test: “(1) a hazard likely to cause death or serious bodily harm existed at a citable workplace; (2) th[e] hazard was recognized as such be the cited employer or generally within the industry; and (3) there was a feasible method by which the cited employer could have abated the recognized hazard.”¹⁸² Companies with gun-free parking lot policies are implementing a “feasible method” of abatement of the recognized gun violence hazard in order to avoid OSHA citation under the general duty clause.

Under the general duty clause, there need be no “specific OSH standard” regarding an activity in order for that activity to fall within the sweep of the general duty clause. The contention that OSHA must contain a specific standard on gun-related workplace violence for the general duty clause to apply appears to be a claim that flows from an impossibility preemption

178. *Id.*

179. *Id.*

180. *Id.*

181. Megawest Fin., Inc., 1995 OSAHRC Lexis 80, *24 (Occupational Safety and Health Review Comm’n May 8, 1995).

182. Bariod Div. of NL Ind., Inc. v. Occupational Safety & Health Review Comm’n, 660 F.2d 439, 444 (10th Cir. 1981).

analysis, and this is not the correct framework of analysis for *Ramsey*. If OSHA provided a specific standard against guns in the parking lot, impossibility preemption would come into play. Under impossibility preemption, the federal law preempts only if “it is impossible for a private party to comply with both state and federal requirements.”¹⁸³ If OSHA offered a specific standard including gun-related violence in the meaning of “recognized hazard,” then it would be impossible for Oklahomans to comply with both the federal general duty clause and the state Amendments. On the other hand, because there is no specific standard regarding gun violence, as determined by the Tenth Circuit and Assisting Secretary Stohler, there is no potential for impossibility preemption. But, Assisting Secretary Stohler’s letter and the *Ramsey* court’s reasoning do not fully address the issue of obstacle preemption.

Under obstacle preemption the federal law preempts “where the state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress.”¹⁸⁴ Under this analysis, there need not be an express OSHA standard addressing guns in parking lots for there to be an “obstacle to the accomplishment and execution of the full purpose and objectives . . .” of the general duty clause.¹⁸⁵ If gun-related violence is considered a “recognized hazard” under the general duty clause, then under the doctrine of obstacle preemption, the Oklahoma firearm amendments are undoubtedly an obstacle to employer compliance with the OSHA’s general duty clause.

The court in *Ramsey* relied heavily on *Megawest Financial Inc.* to define the general duty clause in relation to violence in the workplace.¹⁸⁶ The facts of *Megawest* are distinguishable from the facts of *Ramsey* because the risk of violence in *Megawest* was from non-employee tenants.¹⁸⁷ This is an important distinction. The Oklahoma firearm Amendments allow both employees and non-employees to bring guns to work, and this creates a direct OSHA conflict — a situation where state legislation empowers employees to engage in an activity that decreases workplace safety below federal standards. In *Ramsey*, the employees themselves generate the risk of violence while at their place of work; therefore the general duty clause is on point.

The administrative law judge in *Megawest* held that the “hazard of physical assault . . . arises not from the process or materials of the workplace, but from

183. *Choate v. Champion Home Builders*, 222 F.3d 788, 792 (10th Cir. 2000).

184. *Id.*

185. *Id.*

186. *Megawest Fin., Inc.*, 1995 OSAHRC Lexis 80 (Occupational Safety and Health Review Comm’n May 8, 1995).

187. *Id.* at *2.

the anger and frustration of people.” It does not matter from where the hazard *arises* because that is not the concern of OSHA. The Act is associated with hazards that are *present* in the workplace. Presence, not origin of the hazard is of importance. In fact, it is called the general duty clause because it “asks employers to protect employees from all kinds of serious hazards, regardless of the source.”¹⁸⁸

Employers do not have the ability to accurately predict and prepare for each instance of workplace violence, but this does not mean workplace violence is not recognized as a hazard under the general duty clause. The claim that gun-related violence is not a recognized hazard in the workplace belies reality. From 1997 to 2007, “there were more than 7,000 occupational homicides nationwide . . . ” according to the U.S. Bureau of Labor Statistics.¹⁸⁹ Additionally, 2008 was a record setting year for workplace suicides with 251.¹⁹⁰ This is a 28% increase from 2007.¹⁹¹ Economic recession also “fuels worries of workplace violence.”¹⁹² The “fears of violence fueled by financial worries [grow] as [a] recession puts strain and stress on anxious workers.”¹⁹³ These financial stresses coupled with accessible firearms in the parking lot create a potentially dangerous situation.

The court’s unsound conclusion regarding this issue is the central flaw of this decision. The court narrowly confined the general duty clause’s recognized hazards to the types of hazards that Congress clearly “had in mind.”¹⁹⁴ This approach guts the purpose of the general duty clause; courts should define “recognized hazards” as hazards that the employer or the employer’s industry have in mind. The American business landscape is too diverse for Congress to determine what risks are recognized — and what risks are not — with regard to every workplace in the nation. The general duty clause circumvents this problem and protects American workers by allowing the actual employer’s particular knowledge of risks to determine if a particular hazard is recognized. Under the *Ramsey* court’s approach, the general duty clause is stripped of this essential feature.

188. *United States v. Pitt-Des Moines, Inc.*, 168 F.3d 976, 982 (7th Cir. 1999).

189. Ellen Wulforth, *Recession Fuels Worries of Workplace Violence*, FORBES, April 22, 2009, <http://www.forbes.com/feeds/afx/2009/04/22/afx6320908.html>.

190. Catherine Rampell, *More on Workplace Suicides*, N.Y. TIMES, August 31, 2009, <http://economix.blogs.nytimes.com/2009/08/31/more-on-workplace-suicides/>.

191. *Id.*

192. Wulforth, *supra* note 189.

193. *Id.*

194. *Oil, Chem. & Atomic Workers Int’l Union v. Am. Cyanamid Co.*, 741 F.2d 444, 449 (1984).

The Tenth Circuit disregarded the plain meaning of the words in the text of the clause. The clear and manifest purpose of the general duty clause is apparent from the text of the clause itself: “to furnish . . . a place of employment which [is] free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”¹⁹⁵ If OSHA were required to set forth precise standards for each particular workplace danger before it could fall under the general duty clause, the clause would lose the ability to regulate those dangerous but unaccounted for hazards that exist in the workplace.

D. The Bullet Loophole

The decision in *Ramsey* represents an erosion of employer property rights. There is a potential “bullet loophole” left by the Amendments, however, which allows employers to promote a gun-free workplace despite the Tenth Circuit’s approval of the Amendments.

While the Amendments require that the guns stored be unloaded, the text of the law would not be applicable to an employer policy that banned the presence of bullets, rather than guns, in the cars of employees. This policy would be in accord with the statute, maintain the deterrent effect of firearms, and provide employers with a tool to keep their business free from firearm violence. This could be called the “bullet loophole.” The statute requires the guns to be “open and unloaded,” so a policy such as this would be in direct conformity with the statute.¹⁹⁶

An employer policy exploiting this loophole might read,

“To be in accordance with OKLA. STAT. tit. 21, § 1289.1 *et seq.* (The “Oklahoma Firearms Act”) and OKLA. STAT. tit. 21 § 1290.1 *et seq.* (The “Oklahoma Self-Defense Act”), this company’s firearm policy permits employees to keep unloaded firearms in their car while at work, pursuant to these statutes. Additionally, to satisfy the “unloaded” requirement of the statutes, all bullets, shells, cartridges, or ammunition are prohibited from company property. Any employee found to possess ammunition while on company premises will be in direct violation of company policy and may be terminated.”

This provision would give Oklahoma employers the ability to control gun violence on their property through an alternate method. This method is certainly not as effective as directly prohibiting firearms, but it comports with

195. 29 U.S.C. § 654(a)(2) (2009).

196. 21 OKLA. STAT. § 1289.7 (Supp. 2005).

the Amendments. Most importantly, removing bullets from the scenario renders firearms impotent.

VI. Conclusion

According to a 2005 study by the American Journal of Public Health, “workplaces where guns were specifically permitted were 5 to 7 times more likely to be the site of a worker homicide relative to those where all weapons were prohibited.”¹⁹⁷ The plaintiffs in the *Ramsey* line of cases all recognized the correlation between the presence of firearms near the workplace and homicides at the workplace. They enacted workplace policies in light of this knowledge. The Amendments shot these policies down.

Through its Substantive Due Process Clause and Takings Clause analyses, the *Ramsey* court limited the property rights enjoyed by Oklahoma employers. These clarifications have a significant impact on the workplace environment of many Oklahoma businesses. Additionally, the court’s preemption analysis indicated that gun-related violence is not within the realm of workplace hazards covered by OSHA’s general duty clause.

The District Court in *ConocoPhillips* resolved this Supremacy Clause dispute with sound Constitutional theory and reasonable statutory interpretation. Oklahoma employers should have the ability to control the presence of firearms on the totality of their property. The decision in *Ramsey* makes this impossible. Congress crafted OSHA and the Act’s general duty clause with the intent of providing employees a workplace free of recognized hazards. Gun-related workplace violence is a recognized hazard that is covered by the general duty clause. The Amendments operate as a major obstacle for the plaintiffs in their attempts to comply with OSHA’s objectives and goals. This obstacle takes “the form of a criminal sanction, rendering it impossible for Plaintiffs to utilize their chosen method of reducing workplace hazards associated with firearms.”¹⁹⁸

News reports are filled with accounts of workplace violence. Shootings in the workplace are an “all too common event,” and this type of legislation makes a gun “available in the parking lot for any employee who may be unstable and who reaches a snapping point.”¹⁹⁹ Because gun-related workplace violence is a recognized hazard by many employers in the American workplace, the Amendments stand as a significant obstacle to compliance with the general duty clause of OSHA. This substantial

197. Dana Loomis, Stephen W. Marshall & Myduc L. Ta, *Employer Policies Toward Guns and the Risk of Homicide in the Workplace*, 95 AM. J. OF PUB. HEALTH 830, 831 (2005).

198. *ConocoPhillips v. Henry*, 520 F. Supp. 2d 1282, 1339 (N.D. Okla. 2007).

199. David Harper, *Employers Can Forbid Guns, a Judge Rules*, TULSA WORLD, Oct. 6, 2007, at A4.

“frustration of the federal purpose” merits permanent injunction against enforcement of the Amendments.²⁰⁰

J. Blake Patton

200. *ConocoPhillips*, 520 F. Supp. 2d at 1338.