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## **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**

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**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**

MARIE A. BAUER\*

*“Jason Aldean was several songs into his set when we heard some really loud noises. I remember one of my friends said fireworks. The next thing I knew, it felt like there was an explosion in my face and that my face was on fire. It kind of just hit me: Okay, you’ve been shot in the face, and there’s still gunshots going on. This isn’t over. We got down on the ground. It was chaos, 22,000 people crying and screaming, not knowing what to do.”<sup>1</sup>*

The deadliest mass shooting in American history took place at the Route 91 Harvest music festival in Las Vegas, Nevada on October 1, 2017.<sup>2</sup> A lone gunman sprayed bullets from the 32nd floor of the Mandalay Bay Resort and Casino into a crowd of 22,000 concertgoers.<sup>3</sup> The gunman singlehandedly fired over 1,100 rounds of ammunition, killing fifty-eight people and injuring more than 800.<sup>4</sup> The shooting lasted just ten minutes.<sup>5</sup>

For much of the American public, this was the first time they learned of the existence of a particular firearm accessory—the bump stock.<sup>6</sup> A bump stock is a device that can be attached to semiautomatic rifles, which shoot one bullet per trigger-pull, to increase the firing rate.<sup>7</sup> The Las Vegas shooter

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1. Anna Silman, *Before and After Route 91*, CUT (Oct. 1, 2018), <https://www.thecut.com/2018/10/las-vegas-shooting-year-anniversary-a-survivors-story.html>.

2. *Deadliest Mass Shootings in the US Fast Facts*, CNN (Apr. 14, 2021), <https://www.cnn.com/2019/08/19/us/mass-shootings-fast-facts>.

3. *Id.*

4. *Gunman Opens Fire on Las Vegas Concert Crowd, Wounding Hundreds and Killing 58*, HISTORY (Sept. 29, 2020), <https://www.history.com/this-day-in-history/2017-las-vegas-shooting>.

5. *Id.*

6. Martin Kaste, *The Politics of Bump Stocks, 1 Year After Las Vegas Shooting*, NPR (Sept. 26, 2018, 5:14 AM), <https://www.npr.org/2018/09/26/650454299/the-politics-of-bump-stocks-one-year-after-las-vegas-shooting>.

7. *Id.*

used rifles equipped with legally-owned bump stocks, enabling him to do more damage in less time.<sup>8</sup> Following the shooting, the public and elected officials called for bump stocks and similar devices, such as rapid fire trigger activators, to be banned nationwide.<sup>9</sup> As lawmakers began looking into changing firearms regulations, Gun Owners of America released a statement pledging its support for the “half a million bump stock owners [who] will have the difficult decision of either destroying or surrendering their valuable property.”<sup>10</sup>

In *Maryland Shall Issue, Inc. v. Hogan*,<sup>11</sup> the United States Court of Appeals for the Fourth Circuit considered whether a statute that deprived property owners of the right to possess, manufacture, sell, purchase, transfer, transport in-state, or receive a rapid fire gun trigger activator device was a “taking” requiring just compensation under the United States Constitution’s Fifth Amendment Takings Clause.<sup>12</sup> The court held that the statute was not a taking because it did not involve direct physical appropriation of personal property by the government.<sup>13</sup> The court myopically decided the case, relying on a wholly literal interpretation of the statute instead of analyzing the statute’s impact on property rights under the conceptual framework frequently used by the Supreme Court.<sup>14</sup> By summarily dismissing the appellants’ arguments, the majority disregarded the Supreme Court’s complex regulatory takings precedent.<sup>15</sup>

The starkly different approaches employed by the majority and dissenting opinions in *Maryland Shall Issue, Inc.* showcase the inconsistencies in Takings Clause precedent.<sup>16</sup> By performing an incomplete analysis, the majority missed an opportunity to draw attention to the need for the Supreme Court to revisit this area of law.<sup>17</sup> The Supreme Court must address two questions confounding its takings jurisprudence: (1) whether real and personal property should be treated differently under the Takings Clause; and (2) whether the creation of categorical tests is an effective means of analyzing regulatory takings cases.<sup>18</sup>

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8. *Id.*

9. *Md. Shall Issue v. Hogan*, 353 F. Supp. 3d 400, 404 (D. Md. 2018), *aff’d*, 963 F.3d 356, 359 (4th Cir. 2020).

10. *Gun Owners of America to File Suit Against Arbitrarily ATF Bump Stock Ban*, GOA (Dec. 18, 2018), <https://www.gunowners.org/gun-owners-of-america-to-file-suit-against-atf-bump-stock-ban/>.

11. 963 F.3d 356 (4th Cir. 2020).

12. *Id.* at 365.

13. *Id.*

14. *See infra* Section IV.A.

15. *See infra* Sections II–III.

16. *See infra* Section IV.A.

17. *See infra* Section IV.A.

18. *See infra* Section IV.B.

As to the first issue, the Court should hold that real property and personal property must be given equal consideration under the Takings Clause.<sup>19</sup> As to the second issue, the Court should reconsider its use of categorical takings classifications and instead rely on a multi-factor test that can account for the myriad of elements frequently encountered in modern takings cases.<sup>20</sup> If the Supreme Court clarifies its takings jurisprudence, cases like *Maryland Shall Issue, Inc.* could be decided by lower courts more consistently.<sup>21</sup>

## I. THE CASE

On April 24, 2018, Maryland Governor Lawrence Hogan signed Senate Bill 707 (“SB-707”) into law.<sup>22</sup> SB-707 made it illegal, starting October 1, 2018, for any person to “manufacture, possess, sell, offer to sell, transfer, purchase, or receive a rapid fire trigger activator” or to “transport” such a device into the State of Maryland.<sup>23</sup> The statute defined “rapid fire trigger activator” as “any device . . . constructed so that, when installed in or attached to a firearm: the rate at which the trigger is activated increases; or the rate of fire increases.”<sup>24</sup> Proponents of banning rapid fire trigger activators stated that such devices “turn legal weapons into machineguns”<sup>25</sup> and “mak[e] a semi-automatic weapon into an automatic weapon.”<sup>26</sup>

An exception clause purported to allow pre-existing owners to continue to possess a “rapid fire trigger activator” if they applied and received authorization to possess the device from the United States Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) before October 1, 2018.<sup>27</sup> On the day SB-707 went into effect, the ATF released an advisory statement

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19. See *infra* Section IV.B.1.

20. See *infra* Section IV.B.2.

21. See *infra* Section IV.C.

22. *Md. Shall Issue, Inc. v. Hogan*, 963 F.3d 356, 359 (4th Cir. 2020).

23. *Id.*; MD. CODE ANN., CRIM. LAW § 4-305.1 (West 2021).

24. MD. CODE ANN., CRIM. LAW. § 4-301(m)(1)–(2) (West 2021) (including in the definition of rapid fire trigger activator “a bump stock, trigger crank, hellfire trigger, binary trigger system, burst trigger system, or a copy or a similar device, regardless of the producer or manufacturer”); see also *Bump-Stock-Type Devices*, 83 Fed. Reg. 66,515, 66,534 (Dec. 26, 2018) (describing a “bump-stock-device” as effectively converting a semiautomatic firearm into a machine gun by “harnessing the recoil energy of the semiautomatic firearm” in a manner which allows the trigger to reset and continue firing without additional trigger manipulation by the shooter).

25. *Md. Shall Issue v. Hogan*, 353 F. Supp. 3d 400, 404 (D. Md. 2018), *aff’d*, 963 F.3d 356, 359 (4th Cir. 2020) (quoting Application of the Definition of Machinegun to “Bump Fire” Stocks and Other Similar Devices, 83 Fed. Reg 37, at 7949 (Feb. 20, 2018)); see also *id.* at 404 (“In crafting the law, legislators expressed concern about mass shootings, the lethality of firearms equipped with bump-stock-type devices, their unregulated status, and the danger to public safety.”).

26. *Id.* at 404–05 (quoting Testimony of Sen. Victor R. Ramirez in Support of SB-707 at 2, S. Judicial Proceedings Comm., 2018 Reg. Sess. (Md. 2018)).

27. *Md. Shall Issue, Inc.*, 963 F.3d at 360.

explaining that the agency was “without legal authority to accept and process [the exception] application,” and that any such application it received from a Maryland resident would be “returned to the applicant without action.”<sup>28</sup>

In response to SB-707, Maryland Shall Issue (“MSI”), a non-profit gun owners’ rights group, and four of its members filed a putative class action against Hogan in the United States District Court for the District of Maryland.<sup>29</sup> MSI alleged that the government must pay just compensation because SB-707 was a per se taking under the United States Constitution’s Takings Clause.<sup>30</sup> Hogan moved to dismiss the complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).<sup>31</sup>

After a hearing, the district court granted Hogan’s motion with respect to all counts in MSI’s complaint.<sup>32</sup> The district court stated that SB-707 was not a per se taking under any theory previously recognized by the Supreme Court because the devices were personal property, and the ban did not involve direct physical appropriation of the property.<sup>33</sup> The court characterized SB-707 as a “legitimate exercise of the state’s traditional police power,” and “consistent with the long history of state laws that criminalize, ban, or otherwise restrict items deemed hazardous.”<sup>34</sup> MSI appealed the dismissal of its complaint to the Fourth Circuit.<sup>35</sup>

## II. LEGAL BACKGROUND

The Supreme Court’s interpretation of the Takings Clause addresses instances when the government may interfere with private property rights without paying compensation.<sup>36</sup> The regulatory takings doctrine arose from this jurisprudence and is implicated when a property owner asserts that a

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28. *Id.* at 360; *see also id.* at 369 (Richardson, J., concurring in the judgment in part and dissenting in part) (“The ATF, a federal agency, lacks the authority to assess applications for the State of Maryland.”).

29. *Id.* at 369.

30. *Md. Shall Issue*, 353 F. Supp. 3d at 407–08 (enumerating that MSI alleged three additional theories of relief in its complaint which will not be addressed in this Note: that SB-707 retrospectively revoked vested property rights in violation of Article 24 of the Maryland Declaration of Rights; that SB-707 was unconstitutionally vague; and that ATF’s refusal to process applications for continued possession of the devices imposed a “legally impossible condition precedent”); *see* U.S. CONST. amend. V (“[P]rivate property [shall not] be taken for public use, without just compensation.”); *see also* *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984) (stating that “just compensation,” in the context of Takings Clause cases, generally equals “the market value of the [taken] property at the time of the taking”).

31. *Md. Shall Issue, Inc.*, 963 F.3d at 360; FED. R. CIV. P. 12(b)(6).

32. *Md. Shall Issue, Inc.*, 963 F.3d at 360.

33. *Md. Shall Issue*, 353 F. Supp. 3d at 413–14.

34. *Id.* at 408–09.

35. *Md. Shall Issue, Inc.*, 963 F.3d at 360.

36. *Id.* at 364.

government regulation has improperly infringed on private property rights.<sup>37</sup> The Court has struggled to delineate between a compensable regulatory taking versus an exercise of the government's police power, which requires no compensation.<sup>38</sup> Additionally, the nature of the property subject to regulation, whether real or personal, may impact the Court's rulings.<sup>39</sup> Section II.A examines the Supreme Court's interpretations and application of the Takings Clause involving regulatory takings.<sup>40</sup> Section II.B discusses the differential treatment of takings involving real property versus takings involving personal property.<sup>41</sup>

*A. The United States Supreme Court's Interpretation of the Regulatory Takings Doctrine*

The Takings Clause of the Fifth Amendment of the United States Constitution prohibits the taking of private property for public use.<sup>42</sup> Before the enactment of the Fourteenth Amendment, the Takings Clause only applied to federal takings of private property.<sup>43</sup> In 1897, however, the Court held that the Takings Clause bound the states as well.<sup>44</sup> Originally, the Court interpreted the Takings Clause to apply only to actual, physical government occupation of property.<sup>45</sup> However, in the beginning of the twentieth century, the Court recognized that a property-use regulation could also require compensation under the Takings Clause.<sup>46</sup> The regulatory takings doctrine arose from this application of the Takings Clause, attempting to define the boundary between a valid exercise of the government's police power and a taking that requires just compensation.<sup>47</sup>

The Court has historically avoided creating explicit rules that define when a regulation is a taking and when it is not.<sup>48</sup> The Court first addressed

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37. *Id.*

38. *Id.*

39. *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2427 (2015).

40. *See infra* Section II.A.

41. *See infra* Section II.B.

42. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

43. *Chicago, B. & Q.R. Co. v. City of Chicago*, 116 U.S. 226, 226 (1897).

44. *Id.* (holding that the takings provisions of the Fifth Amendment were incorporated by the Due Process Clause of the Fourteenth Amendment and thus were binding on the states).

45. *Pa. Coal Co. v. Mahon*, 43 S. Ct. 158, 159–60 (1922).

46. *Id.* at 160.

47. *Id.*

48. *Id.*; *see Penn Cent. Transp. Co. v. City of New York*, 98 S. Ct. 2646, 2659 (1978) (quoting *United States v. Cent. Eureka Mining Co.*, 78 S. Ct. 1097, 1104 (1958)) (“[W]hether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely ‘upon the particular circumstances [in that] case.’”); *see also Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2437 (2015) (Sotomayor, J., dissenting) (“Our Takings Clause

the concept of regulations as takings in *Pennsylvania Coal Company v. Mahon*,<sup>49</sup> stating that the distinction was a “question of degree[s].”<sup>50</sup> In *Mahon*, the Court held that a Pennsylvania statute requiring coal companies to leave pillars of coal in place to prevent the subsidence of surface soil was a taking.<sup>51</sup> The Court stated, “the general rule . . . is that while property may be regulated to a certain extent, if regulation *goes too far* it will be recognized as a taking.”<sup>52</sup> Justice Holmes, writing for the majority, identified several “fact[s] for consideration” when determining whether a regulation “goes too far.”<sup>53</sup> Courts should consider whether the regulation “destroy[s] previously existing rights of property and contract,” and whether the regulation decreases the value of the property.<sup>54</sup> The Court failed, however, to define the exact amount of loss in value that would invoke the Takings Clause.<sup>55</sup>

The Court would not establish its first standard of analysis for when a government regulation “goes too far” until more than fifty years later, in *Penn Central Transportation Co. v. City of New York*.<sup>56</sup> In *Penn Central*, the Court held that a historic preservation regulation that blocked a railroad’s request to build an addition on top of an existing historic landmark was a police measure and did not require any compensation.<sup>57</sup> The Court again emphasized that the evaluation of regulatory takings cases is an “essentially ad hoc, factual inquir[y].”<sup>58</sup> A multi-factor balancing test emerged, commonly known as the *Penn Central* test, outlining factors to be considered when determining whether a regulation is a taking.<sup>59</sup> The factors considered include diminution in value, interference with investment-backed expectations, and the character of the government action.<sup>60</sup> As in *Mahon*, the Court stated in *Penn Central* that diminution in value was relevant, but did not define the loss in value required to effect a taking.<sup>61</sup>

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jurisprudence has generally eschewed ‘magic formula[s]’ and has ‘recognized few invariable rules.’”).

49. 43 S. Ct. 158 (1922).

50. *Id.* at 160.

51. *Id.*

52. *Id.* (emphasis added).

53. *Id.* at 159–60.

54. *Id.* at 159.

55. *Id.* (“When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act.”).

56. 98 S. Ct. 2646, 2659 (1978); *Pa. Coal Co. v. Mahon*, 43 S. Ct. 158, 160 (1922).

57. *Penn Cent. Transp. Co.*, 98 S. Ct. at 2666.

58. *Id.* at 2659.

59. *Id.*

60. *Id.*

61. *Id.* at 2663 (stating that the Court has “reject[ed] the proposition that diminution in property value, standing alone, can establish a ‘taking’” and noting that the Court has failed to find compensable takings even in situations where up to 87.5% of the value of the property was lost).

Following establishment of the “ad hoc” *Penn Central* test, the Court outlined two categorical exceptions to this multi-factor approach.<sup>62</sup> In *Loretto v. Teleprompter Manhattan CATV Corp.*,<sup>63</sup> the Court held that when a government regulation results in a permanent physical occupation of real property, the regulation is always a taking.<sup>64</sup> In *Loretto*, a New York law required that landlords permit cable television companies to install and maintain certain facilities on the landlord’s property.<sup>65</sup> A landlord purchased a building and later discovered cable wires installed on the premises.<sup>66</sup> Because the New York law barred removal of the wires, the landlord filed suit, alleging a violation of the Takings Clause.<sup>67</sup>

Writing for the majority, Justice Marshall referenced the concept of property as a “bundle of rights.”<sup>68</sup> If the government takes a single strand from the bundle, the *Penn Central* approach applies, but if the government “chops through the bundle, taking a slice of every strand,” then the categorical rule applies.<sup>69</sup> Justice Blackmun, writing in dissent, stated that the wires allowed tenants to have access to cable television, therefore the rental and resale value were likely increased.<sup>70</sup> He pointed out that the majority disregarded the fact that the permanent physical occupation did not “diminish” the value of the property, but in fact likely increased the resale value.<sup>71</sup>

In contrast to the *Loretto* Court’s disregard of loss in value, the Court in *Lucas v. South Carolina Coastal Council*<sup>72</sup> elevated loss in value to be the deciding factor in a new categorical exception.<sup>73</sup> The *Lucas* Court held that regulations that made land “valueless” or denied “all economically beneficial or productive use of land” were categorically takings and would not be subject to the *Penn Central* multi-factor test.<sup>74</sup> With these two categorical approaches, the Supreme Court did not overrule the *Penn Central* test, but created narrow exceptions.<sup>75</sup>

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62. *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2427–28 (2015).

63. 102 S. Ct. 3164 (1982).

64. *Id.* at 3171.

65. *Id.* at 3168.

66. *Id.* at 3170.

67. *Id.*

68. *Id.* at 3175.

69. *Id.* at 3175–76.

70. *Id.* at 3185 (Blackmun, J., dissenting).

71. *Id.* at 3182, 3185.

72. 112 S. Ct. 2886 (1992).

73. *Id.* at 2902.

74. *Id.* at 2893, 2896.

75. *Id.* at 2893; *Loretto*, 102 S. Ct. at 3182.



The Court further limited the exception from *Lucas* in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.<sup>76</sup> In *Tahoe-Sierra*, landowners asserted that a moratorium on development of their properties constituted a regulatory taking.<sup>77</sup> The Court held otherwise, stating that the *Lucas* categorical approach did not apply because the moratorium was temporary.<sup>78</sup> The Court reasoned that cases involving temporary restrictions or prohibitions or anything short of a “complete elimination of value” or a “total loss” required a *Penn Central* analysis.<sup>79</sup> Thus, the *Penn Central* analysis remains the default analysis for takings cases, with *Loretto* and *Lucas* only meant to be applied in rare instances.<sup>80</sup>

### B. *The Treatment of Takings Involving Real Property*

The Court applies the regulatory takings doctrine differently to real property versus personal property.<sup>81</sup> In *Andrus v. Allard*,<sup>82</sup> a regulation of endangered bird feathers in Native American artifacts was found to not be a violation of the Takings Clause.<sup>83</sup> The Court stated that “government regulation—by definition—involves the adjustment of rights for the public good.”<sup>84</sup> In *Andrus*, the regulation did not force the owners to surrender their property, but they were barred from selling or buying endangered bird feathers.<sup>85</sup> The Court held that denial of one traditional property right did not amount to a taking.<sup>86</sup>

Later, in *Horne v. Department of Agriculture*,<sup>87</sup> the Court faced the question of whether the *Loretto* categorical exception for permanent government occupations of real property extended to government

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76. 122 S. Ct. 1465 (2002).

77. *Id.* at 1470.

78. *Id.* at 1484 (“[A] permanent deprivation of the owner’s use of the entire area is a taking . . . whereas a temporary restriction that merely cause a diminution in value is not.”).

79. *Id.* at 1483.

80. *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2437 (2015) (Sotomayor, J., dissenting).

81. *Id.* at 2425 (majority opinion).

82. 100 S. Ct. 318 (1979).

83. *Id.* at 328; Eagle Protection Act, 50 C.F.R. § 21.2(a) (1978); Migratory Bird Treaty Act, 50 C.F.R. § 22.2(a) (1978).

84. *Andrus*, 100 S. Ct. at 326.

85. *Id.* at 327; *see also id.* at 323 (stating that the law forbade all “commercial transactions” involving endangered bird feathers, even feathers obtained before the law was enacted, because any potential for financial gain would give individuals incentive to continue killing endangered birds for their feathers).

86. *See id.* at 327 (“[W]here an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking, because the aggregate must be viewed in its entirety.”).

87. 135 S. Ct. 2419 (2015).

appropriations of personal property.<sup>88</sup> In *Horne*, California raisin producers were fined for violating a regulation requiring that a certain amount of their raisins be diverted into a reserve market where the raisins were sold, allocated, or otherwise disposed of in ways that did not compete with the commercial market.<sup>89</sup> The Court held that a regulation limiting the number of raisins that could be released into the commercial market was a categorical taking.<sup>90</sup> Chief Justice Roberts, writing for the majority, stated that *Loretto* defined permanent occupations as chopping through all sticks in the property rights bundle, and that this reasoning is “equally applicable to a physical appropriation of personal property.”<sup>91</sup> In so holding, the Court extended the *Loretto* categorical exception for permanent government invasions of property to personal property in addition to real property.<sup>92</sup>

### III. THE COURT’S REASONING

In *Maryland Shall Issue, Inc. v. Hogan*,<sup>93</sup> the United States Court of Appeals for the Fourth Circuit affirmed the judgment of the United States District Court for the District of Maryland, dismissing MSI’s complaint for failure to state a claim.<sup>94</sup> Judge Thacker wrote the majority opinion, joined by Judge Floyd, holding that SB-707 was not a per se taking requiring just compensation under the United States Constitution’s Fifth Amendment Takings Clause.<sup>95</sup> Judge Richardson wrote an opinion concurring in the judgment in part and dissenting in part as to the takings claim, stating that SB-707 was a “‘classic’ taking” under the Fifth Amendment.<sup>96</sup>

Judge Thacker began by outlining two categories of cases in which the Supreme Court had found per se regulatory takings: (1) when a regulation is an actual “physical appropriation” as found in *Loretto* and (2) “‘where [a] regulation denies all economically beneficial or productive use of land’” as found in *Lucas*.<sup>97</sup> Judge Thacker stated that the Supreme Court in *Horne* had extended the per se category from *Loretto*—direct physical appropriation—

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88. *Id.* at 2425.

89. *Id.* at 2424–25.

90. *Id.* at 2428.

91. *Id.* at 2427.

92. *Id.* at 2427–28.

93. 963 F.3d 356 (4th Cir. 2020).

94. *Id.* at 359.

95. *Id.* at 367; *Md. Shall Issue v. Hogan*, 353 F. Supp. 3d 400, 410 (D. Md. 2018), *aff’d*, 963 F.3d 356, 367 (4th Cir. 2020).

96. *Md. Shall Issue, Inc.*, 963 F.3d at 358, 368 (Richardson, J., concurring in the judgment in part and dissenting in part).

97. *Id.* at 364–65 (majority opinion) (emphasis omitted) (quoting *Lucas v. S.C. Coastal Council*, 112 S. Ct. 2886, 2893 (1992)).

to encompass takings of personal property as well as real property.<sup>98</sup> She explained that the Court, however, had not extended the per se category from *Lucas*—denial of all economic value—to personal property.<sup>99</sup> Under *Lucas*, she stated, an owner of personal property “ought to be aware that new regulation might even render his property economically worthless” because of a “[s]tate’s traditionally high degree of control over commercial dealings.”<sup>100</sup>

Applying this framework to the facts of *Maryland Shall Issue, Inc.*, the majority held that SB-707 was not a per se taking.<sup>101</sup> Judge Thacker stated that because the statute did not require owners of the rapid fire trigger activator devices to “turn them over to the [g]overnment or to a third party,” it did not involve “physical appropriation” of property like in *Loretto* and *Horne*.<sup>102</sup> Even though SB-707 may render the rapid fire trigger activator devices “economically worthless,” Judge Thacker explained that the per se category from *Lucas*—denial of all economic value in the property—is only applicable to real property.<sup>103</sup> Additionally, she reasoned that the devices’ owners must have been aware of the possibility that their personal property may lose all value, because the devices fell into an “area[] where the [s]tate has a ‘traditionally high degree of control.’”<sup>104</sup> Because SB-707 did not fall under either of the per se regulatory takings categories outlined by the majority, the court held that the statute was not a per se taking under the Takings Clause.<sup>105</sup>

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98. *Id.* at 366 (“In *Horne*, the Supreme Court did hold that the first type of per se regulatory takings identified in *Loretto*—direct appropriation—applies to personal property.”).

99. *Id.* (“*Horne* distinguished *Lucas*: ‘[w]hatever *Lucas* had to say about reasonable expectations with regard to regulations, people still do not expect their property, real or personal, to be *actually occupied or taken away*.’” (emphasis in original)); see also *id.* at 365–66 (“In the case of land . . . we think the notion . . . that title is somehow held subject to the ‘implied limitation’ that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.”).

100. *Id.* at 366 (quoting *Holliday Amusement Co. of Charleston v. S.C.*, 493 F.3d 404, 410 (4th Cir. 2007)). In *Holliday Amusement Co.*, the Fourth Circuit held that a ban on the possession or sale of certain lawfully acquired gambling machines was not a taking, because gambling was historically a highly regulated area and the machine owners were aware that the state could “regulate [gambling] minutely or . . . outlaw it completely.” *Holliday Amusement Co.*, 493 F.3d at 410.

101. *Md. Shall Issue, Inc.*, 963 F.3d at 367.

102. *Id.* at 366 (emphasis omitted).

103. *Id.* at 367.

104. *Id.* (“We can think of few types of personal property that are more heavily regulated than the types of devices that are prohibited by SB-707.”).

105. *Id.*

Judge Richardson concurred in part<sup>106</sup> and dissented in part, stating that SB-707 was a “classic taking” under the Supreme Court’s “classic” takings jurisprudence.<sup>107</sup> He stated that a “classic taking” was originally understood to mean “a direct appropriation of property, or the functional equivalent of a practical ouster of the owner’s possession.”<sup>108</sup> Judge Richardson cautioned against confusing a classic takings analysis with a regulatory takings analysis.<sup>109</sup> He explained that a “classic taking” analysis—as opposed to a regulatory takings analysis—treats real and personal property the same, is not affected by a state’s police powers, and will require compensation if a taking is found, no matter how small the economic impact.<sup>110</sup>

Judge Richardson defined “property” as “the group of rights inherent in the citizen’s relation to [a] physical thing,” which has also been referred to by the Supreme Court as a “bundle of rights”—the right “to possess, use and dispose of an item.”<sup>111</sup> He stated that the government commits a *per se* “classic taking” when it “chop[s] through the bundle,” destroying the owner’s property rights.<sup>112</sup> Applying this framework, Judge Richardson stated that the statute amounted to a taking under the Fifth Amendment requiring just compensation.<sup>113</sup>

Judge Richardson stated that SB-707 expressly eliminated a rapid fire trigger activator device owner’s property rights “to possess, transport, donate, devise, transfer, or sell their device[.]”<sup>114</sup> He pointed out that the statute effectively “require[d] owners to physically dispossess themselves” of the devices, because the exception clause was defunct.<sup>115</sup> This was “the functional equivalent of a practical ouster of the owner’s possession.”<sup>116</sup> Because SB-707 completely removed the device owners’ property rights—

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106. *Id.* at 370 (Richardson, J., concurring in the judgment in part and dissenting in part) (agreeing with “the majority’s (implicit) determination that individual Plaintiffs have standing to bring their takings claims”).

107. *Id.* at 368, 379.

108. *Id.* at 371.

109. *Id.* at 372 (“Whatever the role of categorical rules in the ‘more recent’ regulatory-takings inquiry, the classic taking, ‘old as the Republic[,] . . . involves the straightforward application of *per se* rules.’”).

110. *Id.*

111. *Id.* at 373, 375.

112. *Id.* at 375; *see also id.* at 374 (“[P]hysical occupation is of a special character only because—to use the Supreme Court’s metaphor—that occupation ‘chops through the “bundle” of property rights, rather than takes ‘a single “strand.”’” (emphasis omitted)).

113. *Id.* at 379.

114. *Id.* at 375.

115. *Id.*

116. *Id.*; *see also id.* at 377 (“Property need not be turned over *to the government* to effect a classic taking. . . . Indeed, property need not physically be turned over to anyone at all—not even a ‘third party’—for a classic taking to arise.”).

chopping through the bundle of rights—he argued that the statute is a “classic taking” under the Fifth Amendment.<sup>117</sup>

#### IV. ANALYSIS

In *Maryland Shall Issue, Inc.*, the Fourth Circuit held that SB-707, a Maryland statute banning rapid fire trigger activator devices, was not a taking under the United States Constitution’s Fifth Amendment Takings Clause.<sup>118</sup> The reductive reasoning used by the majority failed to analyze takings jurisprudence completely.<sup>119</sup> The majority limited application of the regulatory takings doctrine to the narrow concept of direct “physical appropriations,” instead of also exploring the concept of property as a “bundle of rights” as outlined by the dissent.<sup>120</sup> The starkly different opinions in *Maryland Shall Issue, Inc.* are a symptom of a larger problem: the contradictions and inconsistencies in takings jurisprudence result in confusion among lower courts.<sup>121</sup> The Supreme Court should revisit its takings jurisprudence to clarify and simplify the area of law in two ways: (1) by holding that real and personal property must be treated equally in all takings cases and (2) by abandoning the use of per se categorical takings classifications in favor of the *Penn Central* multi-factor test.<sup>122</sup>

Section IV.A discusses how the majority and dissenting opinions in *Maryland Shall Issue, Inc.* showcase the consequences of the Supreme Court’s inconsistent Takings Clause jurisprudence in the lower courts.<sup>123</sup> Section IV.B explores why the Supreme Court should revisit and clarify two key issues in Takings Clause precedent.<sup>124</sup> Section IV.B.1 discusses the first issue—why the Supreme Court should hold that real and personal property must be given the same weight in takings cases.<sup>125</sup> Section IV.B.2 discusses the second issue—why per se categorical classifications should be abandoned in favor of a multi-factor test that would be more adaptable to modern takings cases.<sup>126</sup> Section IV.C applies the two suggested clarifications from Section

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117. *Id.* at 378–79.

118. *Id.* (majority opinion).

119. *Id.*

120. *Id.* at 364; *id.* at 375 (Richardson, J., concurring in the judgment in part and dissenting in part); see also RAYMOND T. NIMMER ET AL., INFORMATION LAW § 2:3 (2021) (“There are various ways to define ‘property’ or ‘ownership.’ The most useful approach holds that property refers to a bundle of rights recognized in law in reference to a particular subject matter.”).

121. Christopher E. Mills, *Raisin Cane?: Takings Jurisprudence After Horne v. Department of Agriculture*, 23 GEO. MASON L. REV. 1, 2 (2015).

122. See *infra* Section IV.B.

123. See *infra* Section IV.A.

124. See *infra* Section IV.B.

125. See *infra* Section IV.B.1.

126. See *infra* Section IV.B.2.

IV.B to the facts of *Maryland Shall Issue, Inc.* to show how a modified takings jurisprudence can yield more coherent and equitable results.<sup>127</sup>

A. *The Competing Theories in Takings Clause Jurisprudence Have Resulted in Inconsistency Among Lower Courts*

While courts have reliably found takings in cases involving actual physical appropriation of property, courts have applied the Takings Clause less consistently when a regulation only affects property *rights*.<sup>128</sup> The concept of property as an intangible item, a set of related interests, or a “bundle of property rights,” appears throughout Supreme Court takings jurisprudence, yet courts do not apply it consistently.<sup>129</sup> For example, if SB-707 from *Maryland Shall Issue, Inc.* had dictated that rapid fire trigger activator device owners must physically give their devices to a government agency, the Fourth Circuit would have found a taking.<sup>130</sup> In actuality, SB-707 revoked an owner’s right to possess, manufacture, sell, purchase, transfer, transport in-state, or receive a rapid fire trigger activator device.<sup>131</sup> Although the statute does not explicitly state that the owners must turn the devices over, the owners are nonetheless compelled under threat of imprisonment to “physically dispossess themselves” of the devices.<sup>132</sup> The result for the device owners is the same in both instances—a total loss of property rights—but the court’s holding varied based on the analytical framework it used.<sup>133</sup>

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127. See *infra* Section IV.C.

128. Steven C. Begakis, *Stop the Reach: Solving the Judicial Takings Problem by Objectively Defining Property*, 91 NOTRE DAME L. REV. 1197, 1203 (2016) (“The simplest application of the Takings Clause involves a physical appropriation of tangible property. It involves no philosophical speculation or conceptual line drawing—either a government has taken possession of property, or it has not. . . . However, the doctrine of regulatory takings is not so clean cut and poses unique conceptual challenges in its application.”).

129. Compare *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2438 (2015) (Sotomayor, J., dissenting) (“[W]here governmental action impacts property rights in ways that do not chop through the bundle entirely, we have declined to apply *per se* rules.”), with *Md. Shall Issue, Inc. v. Hogan*, 963 F.3d 356, 378 (4th Cir. 2020) (“[I]t is simply incorrect that the government must destroy every stick in the bundle of property rights to effect a taking.”), with *Andrus v. Allard*, 100 S. Ct. 318, 327 (1979) (“At least where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking, because the aggregate must be viewed in its entirety.”).

130. *Md. Shall Issue, Inc.*, 963 F.3d at 366 (stating that SB-707 is not a taking because “SB-707 does not require owners of rapid fire trigger activators to turn them over to the Government or to a third party”).

131. *Id.* at 359.

132. *Id.* at 375 (Richardson, J., concurring in the judgment in part and dissenting in part).

133. *Id.* at 367 (majority opinion); *id.* at 379 (Richardson, J., concurring in the judgment in part and dissenting in part); see also *Mills*, *supra* note 121, at 5 (“The use of an ends-based analysis typically results in the taking being characterized as categorical, favoring the property owner. The use of a means-based analysis, by contrast, typically results in a taking being characterized as regulatory, favoring the government.”).

The majority and dissenting opinions in *Maryland Shall Issue, Inc.* both display reasonable—and opposite—conclusions stemming from Supreme Court takings precedent, which is precisely the problem with the precedent as it stands.<sup>134</sup> The Supreme Court has interpreted per se takings in both literal and conceptual terms.<sup>135</sup> A literal interpretation, used by the majority in *Maryland Shall Issue, Inc.*, dictates that the government takes property when it “actually” or “physically” takes the property.<sup>136</sup> Because the Supreme Court did not explicitly extend the *Lucas* “depriv[ation] . . . of all economically beneficial use” category to personal property, anything less than an actual physical appropriation of personal property is not a per se taking.<sup>137</sup> The rapid fire trigger devices are personal property, but because SB-707 did not explicitly involve physical appropriation, the statute *is not* a taking.<sup>138</sup>

Using a conceptual interpretation, employed by the dissent in *Maryland Shall Issue, Inc.*, the Supreme Court has held that traditional “property rights in a physical thing” are “to possess, use and dispose of it.”<sup>139</sup> These property rights make up what the Court has termed a “bundle” of rights.<sup>140</sup> The Court has found takings when government action “chops” through the “bundle.”<sup>141</sup> SB-707 chops through the device owner’s bundle of property rights because the statute destroys the owner’s right to possess, transport, donate, devise, transfer, or sell their devices.<sup>142</sup> In this way, the statute “actually and physically defeats [the owners’] property rights”; therefore, the statute *is* a taking.<sup>143</sup>

In addition to provoking the competing opinions in *Maryland Shall Issue, Inc.*, Supreme Court takings jurisprudence has also led to variance

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134. *Md. Shall Issue, Inc.*, 963 F.3d at 367 (majority opinion); *id.* at 379 (Richardson, J., concurring in the judgment in part and dissenting in part); *see also* André LeDuc, *Twilight of the Idols: Philosophy and the Constitutional Law of Takings*, 10 ALA. C.R. & C.L. L. REV. 201, 344–45 (2019) (“[T]akings cases split the Court, not just as a matter of the outcomes that the justices would reach but also as a matter of the reasons for the various decisions. Justices who vote together nevertheless often disagree in their reasoning. This judicial behavior is powerful evidence that the law is not settled and that the Court’s jurisprudence is not broadly accepted as compelling.”).

135. *Md. Shall Issue, Inc.*, 963 F.3d at 367 (majority opinion); *id.* at 379 (Richardson, J., concurring in the judgment in part and dissenting in part).

136. *Id.* at 365–66 (majority opinion).

137. *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2427 (2015); *id.* at 2437 (Sotomayor, J., dissenting).

138. *Md. Shall Issue, Inc.*, 963 F.3d at 366–67.

139. *Id.* at 374 (Richardson, J., concurring in the judgment in part and dissenting in part).

140. *Id.*

141. *Id.*

142. *Id.* at 375.

143. *Id.* at 376.

among other lower courts.<sup>144</sup> In the Ninth Circuit case *Duncan v. Beccera*,<sup>145</sup> California owners of high-capacity firearms magazines filed suit against the California Attorney General, alleging that California Penal Code Section 32310 was a taking under the Fifth Amendment.<sup>146</sup> The statute required that lawful owners of firearm magazines capable of holding more than ten rounds of ammunition “dispossess them” by removing them from the state, selling them to a licensed firearms dealer, or surrendering them to a law enforcement agency for destruction.<sup>147</sup> The United States District Court for the Southern District of California held that the statute was a taking, noting that “California will deprive Plaintiffs not just of the *use* of their property, but of *possession*, one of the most essential sticks in the bundle of property rights. . . . [T]he Takings Clause prevents [the State] from compelling the physical *dispossession* of such lawfully-acquired private property without just compensation.”<sup>148</sup>

The variance in the application of takings jurisprudence exposes the need for the Supreme Court to revisit this area of law.<sup>149</sup> In its brief, MSI pointed out the similar facts between its case and *Duncan*, as well as the analytical approach the *Duncan* court used for the takings issue.<sup>150</sup> The United States District Court for the District of Maryland, however, dismissed *Duncan* as “[a] single case in a non-controlling jurisdiction that is inconsistent with binding authority on related legal questions.”<sup>151</sup> Based on the existing precedent, it is unlikely that lower courts will conform to the same method of analysis in regulatory takings cases:

[T]here is every reason for the Court to endeavor to develop a unified judicial takings doctrine that could equip reviewing courts and signal to lower state courts that sloppy or crafty opinions that fail to accord proper respect to essential property rights, as well as those property rights established in state law, will be at least compensated—and, if serious enough, overturned.<sup>152</sup>

Property rights are “a bedrock principle of . . . constitutional tradition” and it is past time for the Supreme Court to revisit and clarify this area of

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144. *Id.* at 379.

145. 742 F. App’x 218 (9th Cir. 2018).

146. *Duncan v. Beccera*, 265 F. Supp. 3d 1106, 1114 (S.D. Cal. 2017), *aff’d*, 742 F. App’x 218 (9th Cir. 2018).

147. *Id.* at 1110.

148. *Id.* at 1138 (alteration in original).

149. Begakis, *supra* note 128, at 1223.

150. Brief of Appellants at 41–42, *Md. Shall Issue, Inc., v. Hogan*, 963 F.3d 356 (4th Cir. 2020) (No. 18-2474).

151. *Md. Shall Issue v. Hogan*, 353 F. Supp. 3d 400, 416 (D. Md. 2018), *aff’d*, 963 F.3d 356 (4th Cir. 2020).

152. Begakis, *supra* note 128, at 1223.



law.<sup>153</sup> Especially because, as can be seen in *Maryland Shall Issue, Inc.*, property rights often intersect with another “bedrock principle” of “constitutional tradition”—states’ broad exercise of their police powers to protect public safety.<sup>154</sup>

*B. The Supreme Court Must Revisit its Takings Clause Jurisprudence to Clarify the Treatment of Personal Property and Eliminate the Use of Categorical Classifications*

The inconsistencies and confusion inherent in the Supreme Court’s takings jurisprudence can be minimized by the Court revisiting two complications that reappear throughout Takings Clause cases.<sup>155</sup> First, the Supreme Court has unreasonably developed a preference for the rights of real property owners as opposed to the rights of personal property owners.<sup>156</sup> Second, the Supreme Court continued to create categorical takings classifications even though the *Penn Central* multi-factor balancing test sufficiently analyzes regulatory takings cases.<sup>157</sup> By eliminating these two complications from Takings Clause jurisprudence, the Supreme Court could provide lower courts with the coherent guidance required to analyze takings cases.<sup>158</sup>

*1. The Supreme Court Should Hold that Real and Personal Property Must be Given Equal Weight in Takings Cases*

The preferential treatment given to real property in takings cases is not grounded in the language or origins of the Takings Clause and has unnecessarily complicated lower courts’ analyses.<sup>159</sup> The text of the Fifth

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153. James W. Ely, Jr., *The “Despotic Power” Reconsidered*, 23 GEO. MASON L. REV. 319, 319 (2016); see also LeDuc, *supra* note 134, at 317 (“Takings Clause cases present issues about the nature of property, fairness, the power of the state, democratic decision-making, corruption, and the role of property in defining individual freedom and ensuring individual autonomy.”).

154. Ely, *supra* note 154; see also *Md. Shall Issue, Inc.*, 963 F.3d at 367 (stating that traditionally, the government has regulated firearms-related devices heavily, and may do so in the interests of “the public good”); but see Harry Cheadle, *A ‘Bump Stock’ Ban Would Barely Affect Gun Violence in America*, VICE (Oct. 5, 2017, 4:39 PM), <https://www.vice.com/en/article/wjxypw/a-bump-stock-ban-would-barely-affect-gun-violence-in-america> (“Most gun violence comes in more mundane forms: domestic abuse incidents . . . arguments between friends or strangers . . . or suicides—which make up the majority of gun deaths. That violence generally involves handguns, rather than rifles. A bump stock ban wouldn’t affect any of that.”).

155. See *infra* Sections IV.B.1–2.

156. See *infra* Section IV.B.1.

157. See *infra* Section IV.B.2.

158. See *infra* Section IV.C.

159. Eduardo Moisés Peñalver, *Is Land Special? The Unjustified Preference for Landownership in Regulatory Takings Law*, 31 ECOLOGY L.Q. 227, 282 (2004) (“Despite the weak intellectual foundations for a distinction between land and personal property in regulatory takings law, the

Amendment states that “*private property* [shall not] be taken for public use, without just compensation.”<sup>160</sup> The language of the Fifth Amendment does not delineate differing treatment for real “private property” as opposed to personal “private property.”<sup>161</sup>

The origins of the Fifth Amendment also point to a lack of foundation for the idea that real property should be given more weight than personal property.<sup>162</sup> The Takings Clause “codified the principles of Clause 28 of Magna Carta and was intended to . . . [restrict] the instances in which government could seize a person’s property by requiring the government . . . to pay the person just compensation.”<sup>163</sup> Clause 28 specifically forbade the taking of personal property such as “corn or other provisions” without compensation.<sup>164</sup> Government appropriation of personal property during the Revolutionary War also provided a foundation for the Fifth Amendment:

That part . . . which declares that private property shall not be taken for public use, without just compensation, was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practised [sic] during the revolutionary war, without any compensation whatever.<sup>165</sup>

The text and roots of the Takings Clause indicate no preference for the rights of real property owners over personal property owners and “[t]he historical evidence suggesting stronger constitutional protection of land is weak and reflects a bygone era.”<sup>166</sup>

Judges created the idea that real property should be treated differently than personal property, and the Supreme Court indicated in *Horne* that its

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modern Court’s regulatory takings jurisprudence undoubtedly has been characterized by favoritism towards land.”)

160. U.S. CONST. amend. V (emphasis added); see also William Sumner Macdaniel, *No Appropriation Without Compensation: How Per Se Takings of Personal Property Check the Power to Regulate Commerce*, 48 ST. MARY’S L.J. 509, 521 (2017) (“Nowhere in the text of the Fifth Amendment is it apparent the Takings Clause was intended to apply only to real property.”).

161. U.S. CONST. amend. V.

162. Macdaniel, *supra* note 160, at 521.

163. *Id.* at 513.

164. *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2426 (2015).

165. 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. at 305–06 (Philadelphia, William Young Birch & Abraham Small 1803).

166. Lynda L. Butler, *The Horne Dilemma: Protecting Property’s Richness and Frontiers*, 75 MD. L. REV. 787, 789 (2016).

future decisions may break with that precedent.<sup>167</sup> The Supreme Court should finish the business it started in *Horne* and hold that real and personal property must be given equal consideration in all takings cases.<sup>168</sup> Chief Justice Roberts, writing for the *Horne* majority, stated that “[t]he Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home. The Takings Clause provides: ‘[N]or shall private property be taken for public use, without just compensation.’ It protects ‘private property’ without any distinction between different types.”<sup>169</sup>

Yet later in the *Horne* opinion, Chief Justice Roberts emphasized that “[w]hatever *Lucas* had to say about reasonable expectations with regard to regulations, people still do not expect their property, real or personal, to be actually occupied or taken away.”<sup>170</sup> The phrase “whatever *Lucas* had to say . . . with regard to regulations” introduced ambiguity and allowed the Court to avoid addressing whether the distinction between real and personal property should be abolished in *all* takings cases.<sup>171</sup> It is not difficult to see how some courts could view *Horne* as reaffirming the disparate treatment of real and personal property in regulatory takings, while others could view *Horne* as signaling that real and personal property should be given equal weight.<sup>172</sup> The Supreme Court needs to revisit *Horne* to finish what it started—establishing that real and personal property should be treated equally in all cases.<sup>173</sup>

## 2. *The Supreme Court Should Abandon Categorical Tests and Rely on the Penn Central Multi-Factor Test When Analyzing Takings Cases*

The Court should rely on the *Penn Central* multi-factor balancing test instead of implementing a string of categorical takings classifications.<sup>174</sup> Takings cases are diverse and can be complicated.<sup>175</sup> Therefore, any analysis

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167. *Horne*, 135 S. Ct. at 2427; Peñalver, *supra* note 159, at 233; *see also* Macdaniel, *supra* note 160, at 540 (stating that the decision in *Horne* was “critical to acknowledge personal and real property equally in the eyes of the law”).

168. *Horne*, 135 S. Ct. at 2426.

169. *Id.* (internal citations omitted) (quoting U.S. CONST. amend. V).

170. *Id.* at 2427.

171. *Id.*

172. Butler, *supra* note 166, at 795 (“The *Horne* decision raises more questions than it resolves. The Court declared that personal property is as worthy as real property of protection from physical takings, yet it left intact—and without explanation—the different treatment recognized in *Lucas* for regulatory takings.”).

173. *Horne*, 135 S. Ct. at 2427.

174. Richard A. Epstein, *The Unfinished Business of Horne v. Department of Agriculture*, 10 N.Y.U. J. L. & LIBERTY 734, 776 (2016).

175. Butler, *supra* note 166, at 787.

of such cases should be adaptable to varying circumstances.<sup>176</sup> Takings are also often a question of “degree[s],” and an effective takings test should be able to weigh relevant factors against each other.<sup>177</sup>

The Court should rely on the *Penn Central* test, an ad hoc factual inquiry, to determine whether government action effects a taking, instead of piecemeal adding categorical tests.<sup>178</sup>

Regulatory takings claims often simultaneously implicate questions of basic fairness, distributive justice, utility and efficiency, an individual’s ability to rely on settled expectations in pursuit of life plans, and society’s need to regulate private activity for the sake of health, safety and the preservation of the environment for future generations. These diverse considerations suggest that it will be the rare bright line test that can consistently do justice across a broad array of takings cases. The much-maligned balancing test set forth in *Penn Central* provides the needed flexibility.<sup>179</sup>

Although *Penn Central* provides flexibility, it may also “raise[] more questions than it answers” and “yield[s] unpredictable, sometimes wildly inconsistent, results.”<sup>180</sup> But the categorical classifications have done nothing to lessen the confusion in takings analyses, and have caused additional problems.<sup>181</sup> In *Loretto*, which generated the first categorical exception to the *Penn Central* test, Justice Blackmun pointed out another danger of straying from the multi-factor test—“[T]he Court does not further equity so much as it encourages litigants to manipulate their factual allegations to gain the benefit of its *per se* rule.”<sup>182</sup> The most effective way to streamline takings jurisprudence is for the Supreme Court to abandon the categorical classifications and return to a sole, if imperfect, multi-factor test.<sup>183</sup>

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176. *Id.* (“Both real and personal property come in many sizes, shapes, and colors. Takings analysis should not ignore differences in the types of property.”).

177. *Pa. Coal Co. v. Mahon*, 43 S. Ct. 158, 160 (1922).

178. *Penn Cent. Transp. Co. v. City of New York*, 98 S. Ct. 2646, 2659 (1978).

179. Peñalver, *supra* note 159, at 285–86; *see also* Epstein, *supra* note 175 (“[T]he real institutional mystery here is this: why the deep reliance on half measures that don’t work? Part of the reason comes from the inveterate habit of Supreme Court justices to take some minimalist strategy as if they could break off one part of a larger whole. But that solution results in a makeshift body of doctrine that no one in the end defends. . . . [I]t is precisely the eager avoidance of any clear theory that leaves everything up in the air.”).

180. Luke A. Wake, *Check Your Rights at the Door: Rethinking Confiscatory Regulation*, 68 *DRAKE L. REV.* 123, 132 (2020).

181. *Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S. Ct. 3164, 3184 (1982) (Blackmun, J., dissenting).

182. *Id.*

183. *Id.* (“[H]istory teaches that takings claims are properly evaluated under a multifactor balancing test.”).

C. *Lower Courts Would Be Able to Analyze Regulatory Takings Cases Such as Maryland Shall Issue, Inc. More Uniformly if Takings Jurisprudence Was Simplified*

Lower courts could produce more consistent and equitable outcomes by applying the *Penn Central* test instead of categorical exceptions to regulatory takings cases and eliminating the difference in treatment between real and personal property.<sup>184</sup> For example, if these two changes were implemented in the case of *Maryland Shall Issue, Inc.*, there would be no need to begin an analysis by determining whether SB-707 was a per se taking.<sup>185</sup> The court could immediately begin with the fact-based *Penn Central* test, weighing the economic impact of the regulation on the claimant, the degree of interference with investment-back expectations, and the character of the government action.<sup>186</sup>

1. *The Economic Impact of the Regulation*

SB-707 revokes rapid fire trigger activator device owners' right to possess, transport, donate, devise, transfer, or sell their devices.<sup>187</sup> The owners are left with a valueless item which they must "physically dispossess."<sup>188</sup> Because the Supreme Court should give equal weight to both real and personal property when considering loss of economic value, the fact that the devices become valueless is relevant even though they are personal property.<sup>189</sup> The argument that the device owners retained the right to transport their property out-of-state contravenes the spirit of the Takings Clause and is not dispositive under a classic takings analysis.<sup>190</sup> It would be bad policy for any court to find that a property owner could not succeed in a state government takings claim so long as there remained at least one other state in the country where that owner would not lose all rights to his property.<sup>191</sup>

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184. *See supra* Section IV.B.

185. Begakis, *supra* note 128, at 1206.

186. *Penn Cent. Transp. Co. v. City of New York*, 98 S. Ct. 2646, 2659 (1978).

187. *Md. Shall Issue, Inc. v. Hogan*, 963 F.3d 356, 375 (4th Cir. 2020) (Richardson, J., concurring in the judgment in part and dissenting in part).

188. *Id.* ("The dispossession mandate leaves the owner with a finite list of tangible options to effect dispossession of their rapid fire trigger activators: destroy them, trash them, abandon them, or surrender them.").

189. *See supra* Section IV.B.

190. *Md. Shall Issue, Inc.*, 963 F.3d at 378–79 ("The Fifth Amendment prohibits uncompensated takings; it does not require flight to avoid them.").

191. *Id.* at 379 ("[I]ncorporation would be hollow indeed if it provided no protection from State power so long as one can go elsewhere to exercise his 'rights.'").

Additionally, the Court found takings in *Loretto* and *Horne*, despite the fact that the owners did not lose *all* of their property interests.<sup>192</sup> SB-707 rendered the rapid fire trigger activator devices valueless and effectively stripped the owners of all property rights—perhaps the most severe economic impact possible.<sup>193</sup>

## 2. *Interference with Investment-backed Expectations*

The Fourth Circuit’s argument that owners of rapid-fire trigger devices should have been “aware of [the] possibility” that their devices would be made “economically worthless” fails upon perfunctory review.<sup>194</sup> A rational person simply would not purchase property with the expectation that the property would be rendered completely worthless and unusable, regardless of whether that property was firearms-related.<sup>195</sup> Firearms *have* traditionally been heavily regulated, but these regulations often contain “use restrictions or registration options for existing owners” which keep them from being considered takings.<sup>196</sup>

For example, proponents of banning rapid fire trigger activator devices compared the devices to machineguns, which were banned in 1986.<sup>197</sup> Machineguns themselves, however, were subject to a grandfather clause when they were first banned.<sup>198</sup> An owner of a machinegun in 1986 may still own that same machinegun in 2021 if the owner legally registered it before the date of the ban’s enactment.<sup>199</sup> An owner of a rapid fire trigger activator device has no such recourse because the exception clause in SB-707 is illusory.<sup>200</sup>

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192. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S. Ct. 3164, 3176 (1982) (stating that the owner could still sell the property at issue, even if that right did not hold any value); see also *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2423 (2015) (acknowledging that the owners still had a contingent interest in the profits from the sale of raisins that were set aside).

193. *Md. Shall Issue, Inc.*, 963 F.3d at 375 (Richardson, J., concurring in the judgment in part and dissenting in part).

194. *Id.* at 367 (majority opinion).

195. Peñalver, *supra* note 159, at 251 (stating that the *Lucas* Court’s argument that “a reasonable owner of personal property . . . does not expect to receive compensation when regulation reduces the value of that property to zero” is “circular because it would justify the Court’s decision not to compensate on the basis of expectations generated in large part by the Court’s own decisions not to compensate”).

196. *Md. Shall Issue, Inc.*, 963 F.3d at 376 (Richardson, J., concurring in the judgment in part and dissenting in part).

197. *Md. Shall Issue v. Hogan*, 353 F. Supp. 3d 400, 404 (D. Md. 2018), *aff’d*, 963 F.3d 356, 369 (4th Cir. 2020) (Richardson, J., concurring in the judgment in part and dissenting in part); *United States v. Hunter*, 843 F. Supp. 235, 238 (E.D. Mich. 1994).

198. *Hunter*, 843 F. Supp. at 238; 18 U.S.C. § 922(o).

199. 18 U.S.C. § 922(o); *United States v. Kuzma*, 967 F.3d 959, 965 (9th Cir. 2020).

200. *Md. Shall Issue, Inc.*, 963 F.3d at 369.

Therefore, it is not reasonable to assume that an owner of a rapid fire trigger activator device must have been “aware of the possibility that new regulation might . . . render his property economically worthless,” when machineguns, an analogous device, were historically grandfathered in.<sup>201</sup> At most, an owner may have been aware that a grandfather clause would *limit* the extent of his property rights in the future, not that those rights would be abolished completely.<sup>202</sup> Because the Supreme Court should give the expectations of real and personal property owners the same consideration, the fact that the devices are personal property should not lessen the device owners’ expectation that they would retain their property rights.<sup>203</sup>

### 3. *Character of the Government Action*

SB-707 did not involve direct physical appropriation of the rapid fire trigger activators, but the resulting effects of the regulation are tantamount to physical invasion.<sup>204</sup> The most severe form of government intrusion is an actual physical occupation or appropriation of real or personal property, and SB-707 did not involve such an intrusion.<sup>205</sup> The statute did, however, revoke the rapid fire trigger activator device owners’ right to possess, transport, donate, devise, transfer, or sell their devices—in effect requiring owners to “physically dispossess themselves” of their property.<sup>206</sup>

Additionally, the fact that the government included an exception clause in SB-707 shows that the government could have achieved its ends without revoking the existing property owners’ rights to possess the rapid fire trigger activators.<sup>207</sup> The exception clause from SB-707 purported to allow device owners to continue to possess their rapid fire trigger activator devices after enactment of the statute, but the clause was defunct.<sup>208</sup> Because the ATF is a federal agency, it was unable to process applications related to SB-707, a state law, as required by the SB-707 exception clause. If the clause was functional, allowing for the continued lawful ownership of the devices, SB-

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201. *Id.* at 365 (majority opinion); 18 U.S.C. § 922(o); *Hunter*, 843 F. Supp. at 238.

202. *Md. Shall Issue, Inc.*, 963 F.3d at 376 (Richardson, J., concurring in the judgment in part and dissenting in part).

203. *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2427 (2015) (“[P]eople . . . do not expect their property, real or personal, to be actually occupied or taken away.”).

204. *Md. Shall Issue, Inc.*, 963 F.3d at 368 (Richardson, J., concurring in the judgment in part and dissenting in part).

205. *Id.*

206. *Id.* at 375 (“The dispossession mandate leaves the owner with a finite list of tangible options to effect dispossession of their rapid fire trigger activators: destroy them, trash them, abandon them, or surrender them.”).

207. *Id.* at 369.

208. *Id.*

707 would not be a taking.<sup>209</sup> The exception clause shows that the State acknowledged that it could accomplish its goal to increase public safety without revoking the existing owners' right to possess the devices.<sup>210</sup> Without a functioning exception clause, SB-707 encroaches on private property rights more than is necessary to accomplish legitimate state interests—the exact type of government action the Takings Clause is meant to address.<sup>211</sup>

The legislature aimed to use SB-707 to increase public safety—a legitimate state interest—however, “a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.”<sup>212</sup> By analyzing the facts of *Maryland Shall Issue, Inc.* using the *Penn Central* multi-factor test and treating real and personal property equally, it is clear that SB-707 exceeds the state's police power and is therefore a regulatory taking requiring just compensation.<sup>213</sup>

## V. CONCLUSION

In *Maryland Shall Issue, Inc. v. Hogan*,<sup>214</sup> the Fourth Circuit considered whether SB-707 was a taking requiring just compensation under the Fifth Amendment's Takings Clause.<sup>215</sup> The court held that the statute was not a per se taking because it did not involve direct physical appropriation of personal property by the government.<sup>216</sup> *Maryland Shall Issue, Inc.* is an important case—not because of the facts themselves—but because of the way the Fourth Circuit analyzed the facts.<sup>217</sup> The majority omitted the Supreme Court's competing and evolving regulatory takings precedent, which was nonetheless addressed by the dissent.<sup>218</sup>

The contrasting opinions in *Maryland Shall Issue, Inc.* showcase the inconsistencies in takings precedent and the resulting complexity lower

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209. *Id.* at 376.

210. *Id.*

211. *Id.* at 368, 376; see generally Mark Eichmann, *Delaware's Bump Stock Ban to Take Effect After Buyback Events*, WHYY (Oct. 31, 2018), <https://whyy.org/articles/delawares-bump-stock-ban-to-take-effect-after-buyback-events/> (detailing an initiative in Delaware where the state offered to buy bump stocks and related devices from owners prior to, and in open anticipation of, banning the devices).

212. *Pa. Coal Co. v. Mahon*, 43 S. Ct. 158, 160 (1922).

213. *Id.*

214. 963 F.3d 356 (4th Cir. 2020).

215. *Id.* at 360.

216. *Id.* at 366–67.

217. See *supra* Section IV.A.

218. See *supra* Section III.



courts face when analyzing regulatory takings cases.<sup>219</sup> The Supreme Court needs to revisit this area of law, abandon its use of categorical classifications, and hold that real property and personal property be given the same weight under the Takings Clause.<sup>220</sup> If the Supreme Court clarifies its Takings Clause jurisprudence, cases like *Maryland Shall Issue, Inc.* could be decided by lower courts in a more consistent manner.<sup>221</sup>

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219. *See supra* Section IV.B.

220. *See supra* Section IV.B; *see also* Petition for Writ of Certiorari, *Md. Shall Issue, Inc. v. Hogan*, (No. 20-855) (filed Dec. 21, 2020) (requesting that the United States Supreme Court clarify its Takings Clause jurisprudence and overrule the decision of the Fourth Circuit). The Court denied the petition for writ of certiorari on May 3, 2021. *Md. Shall Issue, Inc. v. Hogan*, No. 20-855, 2021 U.S. LEXIS 2303 at \*1 (May 3, 2021).

221. *See supra* Section IV.C.