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Cover Page Footnote
* Forrest David Prull is a recent graduate from the University of New Mexico School of Law. As part of his education he spent a year at Southwestern Law School where he focused on entertainment law through the Biederman Entertainment and Media Law Institute. In addition to his Juris Doctorate, Forrest has earned degrees in music and business, and has worked in various areas of the entertainment industry.
The California Resale Royalty Act and the Fifth Amendment: Why the Act Survives Takings Challenges

Forrest David Prull*

The California Resale Royalty Act, which provides fine artists with a 5% inalienable royalty on future sales of their work, has been challenged on several legal grounds, including due process, freedom of contract and preemption. While these challenges have failed, it has also been suggested that the act amounts to a physical taking under the Fifth Amendment. While the act has yet to be challenged as such, the argument has been made that such a challenge would prevail. The question of whether or not the act is a taking is important because of the current expansion of similar statutes around the world, particularly in Europe and involves the question of whether or not the United States will follow with a similar federal statute. The argument that the California Resale Royalty Act amounts to a taking has been used in arguments against the adoption of a similar federal statute in the United States. Whether the United States adopts a similar federal statute may have significant impact on the sale of art in the global economy.

This article helps present analysis of takings law in the context of a fairly unique statute and contributes to the debate about artists’ rights in the United States by making the case that as far as the Fifth Amendment is concerned, the United States would be constitutionally permitted to adopt a federal statute similar to the California Resale Royalty Act. The article explores and rebuts the position that the California statute is a physical taking by illustrating through the use of precedent and analysis of the arguments that the proper analysis is a regulatory takings analysis and not a physical takings analysis. Under a regulatory takings analysis, the article demonstrates that the statute is not a taking under the Fifth Amendment. The article also raises the possibility that the courts may not hear a takings argument because of particular case law.

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I. INTRODUCTION

Sales of fine art differ from sales of other copyright-protected artistic endeavors. When a fine artist, such as a painter, creates a work and sells it, this work provides the artist with income on that particular sale. In contrast, the sale of a CD or book, where multiple copies of a work are sold, earns the artist a royalty on each sale. If a musician or author has a hit record or book, they are rewarded with increased revenue through the sale of more copies of the work. A fine artist on the other hand, who creates a “hit” work that goes on to resell for five or ten times what it originally sold for, does not benefit from the increased value of this work. Meanwhile, investors in such works make a nice profit. It is the recognition of this dynamic that gave rise to droit de suite statutes in Europe. Such statutes give fine artists a royalty right in future resale of their work. When a painting resells for ten times what it originally sold for, the artist receives a percentage of that sale. California, however, is the only jurisdiction in the United States that possesses a droit de suite statute. The structure of the royalty and its application vary throughout the jurisdictions where droit de suite is applied, but generally the fine artist is assigned an inalienable fixed royalty on future resale of works that have appreciated in value.

In the discussion of whether or not the United States should adopt a federal droit de suite statute, a number of objections are frequently raised. The two most common types are economic and legal objections. A good many of the economic objections have been rebutted, such as the proposed negative economic impact of such a statute, and the idea that it will lead to a disincentive to create. Legal challenges have also been defeated, such as due process, freedom

1. Chanont Banterghansa & Kathryn Graddy, The Impact of the Droit de Suite in the UK: An Empirical Analysis, 35 J. CULTURAL ECON. 81 (2011) (Study of the recent adoption and implementation of the EU droit de suite statute in the UK, finding that there was no identifiable negative impact in revenue or sales volume of art subject to the statute. This is contrary to economic projections that have suggested the statute will cause a decrease in the amount of sales because people will flee the venue to jurisdictions where there is no droit de suite, and it will cause revenue from art sales to be reduced).

of contract, and preemption of the 1909 Copyright Act.\(^3\)

However, some objections persist. One such objection is the theoretical (because the statute has yet to be challenged on these grounds) argument that the California Resale Royalty Act (CARRA) constitutes a physical taking under the Fifth Amendment.

This paper addresses the issue of CARRA and Fifth Amendment challenges. While the Act has not yet been challenged as such, the takings argument raises interesting issues about property rights and government interference in commerce. The United States, as a common law country, has a different perspective about personal property and government regulation than many of the civil law countries where droit de suite has been implemented. We tend to assign a higher value to personal and real property and the rights that go along with those types of property, such as the right to be compensated when the government interferes with our use and enjoyment of our land. However, as intriguing as the argument is, there is a body of case law that suggests that a takings challenge of such a statute cannot be made because the statute simply creates an obligation to make a payment, and also because there may be insufficient property interests. Even if, arguendo, such a challenge were allowed to proceed, it would be as a regulatory taking and not a physical taking, and under a regulatory taking analysis the Act does not amount to a taking.

II. HISTORY

The concept of droit de suite, meaning the “right to follow” began in France and was first statutorily applied around 1920. The French Act is based on the belief that the artist has the right to partake in the future exploitation of her work through a royalty percentage of future sales.\(^4\)

Several other European countries recognized and implemented droit de suite statutes as well, including Germany and Italy.\(^5\) Recently, the European Union established a uniform structure of droit de suite for all EU member states. All EU members had until January 1, 2006 to implement the new standard.\(^6\) This unification throughout the EU raises the question of whether or not the United States will implement a version of droit de suite nationally, or whether California will continue to be the only state within the United States that recognizes the artists’ right to future profits in their works.

The United States did consider adopting a droit de suite statute when the Visual Artists Rights Act (VARA) was created in 1989, as a result of the United States ratification of the Berne Treaty.\(^7\) VARA provides artists with two of

3. Morseburg v. Balyon, 621 F.2d 972 (9th Cir. 1980) (holding that the Resale Royalty Act does not violate the contracts clause or due process).
5. Id. at 237.
7. DUBOFF ET AL., supra note 4, at 238.
the moral rights commonly found in Europe, the Right of Attribution and the Right of Integrity, but did not adopt a *droit de suite* provision.8 Congress commissioned a study to consider adopting such a provision, but ultimately the federal government adopted VARA without a *droit de suite* provision.9

California’s implementation of *droit de suite* predated VARA and was created in 1976 as CARRA.10 CARRA is fairly typical of other *droit de suite* provisions. CARRA provides a 5% royalty to artists for the resale of works of fine art over $1,000 in California, or by a California resident outside of California. The royalty applies to sales at auction, at an art gallery, by a museum, dealer, or by a person acting as the artist’s agent. The royalty right cannot be waived unless by writing, and only for an amount greater than the 5%. The right is assignable, but the assignment cannot effect a waiver of the right. The right transfers to the artist’s heirs upon death for a period of 20 years.11

### III. PRECLUSION OF TAKINGS CHALLENGES

The court may reject a challenge to CARRA under a takings claim because there is a lack of property interest and because the Act simply amounts to a liability to make a payment.12 At the moment, it is relatively unclear how the courts will treat takings claims when they involve government-mandated payments. The Federal Circuit Court of Appeals has held that where there is simply an obligation to make a payment, there cannot be a takings challenge.13 The cases that have so held relied on the rule that the takings clause pertains to physical and intellectual property, and that the requirement of payment of money does not effect a taking because it does not affect a property interest.14

The above rule originated in the concurring and dissenting opinions of *Eastern Enterprises v. Apfel*.15 In that case, the plaintiff challenged the constitutionality of the Coal Industry Retiree Health Benefit Act under the Fifth Amendment takings clause. The plaintiff argued that the Act, which assessed premiums against coal operators to fund a health plan, was a taking by the government. The Supreme Court ultimately ruled that the Act did amount to a taking.16 However, the most interesting implication of *Eastern Enterprises* is found in the concurring and dissenting opinions. Five Justices—four dissenting

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9. DUBOFF ET AL., supra note 4, at 238.
11. Id.
14. Id. at 1340.
16. Id. at 537.
and Justice Kennedy concurring—questioned whether money in the context of a government-mandated payment could be the subject of a takings claim. Kennedy, in his concurring opinion, wrote:

Our cases do not support the plurality’s conclusion that the Coal Act takes property. The Coal Act imposes a staggering financial burden on the petitioner, Eastern Enterprises, but it regulates the former mine owner without regard to property. It does not operate upon or alter an identified property interest, and it is not applicable to or measured by a property interest. The Coal Act does not appropriate, transfer, or encumber an estate in land (e.g., a lien on a particular piece of property), a valuable interest in an intangible (e.g., intellectual property), or even a bank account or accrued interest. The law simply imposes an obligation to perform an act, the payment of benefits.\(^{17}\)

Four Justices agreed with Kennedy in the dissenting opinion:

The ‘private property’ upon which the [Takings] Clause traditionally has focused is a specific interest in physical or intellectual property. This case involves not an interest in physical or intellectual property, but an ordinary liability to pay money and not to the Government, but to third parties.\(^{18}\)

Even though the rule is raised in the concurring and dissenting opinions, other courts have elected to follow the statements by the majority of the Supreme Court, and not the holding of the case by the plurality. In Commonwealth Edison Co. v. U.S.,\(^{19}\) in considering a takings claim involving government-imposed payments, the Federal Circuit Court of Appeals said that it was obliged to follow the opinion of the majority in Eastern Enterprises. The court held that “while a taking may occur when a specific fund of money is involved, the mere imposition of an obligation to pay money, as here, does not give rise to a claim under the Takings Clause of the Fifth Amendment.”\(^{20}\) Other cases have raised similar issues about the validity of takings claims that involve monetary payments.\(^{21}\)

CARRA may very well fall within this line of analysis. The royalty payment is an obligation to perform an act — the payment of a royalty to an artist — just as the contributions in Eastern Enterprises and Commonwealth were an “obligation to perform an act, the payment of benefits.”\(^{22}\) Furthermore, the Act does not specify a specific fund from which the royalty is to be paid, which fits the rule established in Commonwealth, where the court noted that there was no takings issue because the Act did not deal with a specific fund.

\(^{17}\) Id. at 540.

\(^{18}\) Id. at 554.

\(^{19}\) Commonwealth Edison Co., 271 F.3d 1327.

\(^{20}\) Id. at 1340.

\(^{21}\) See Atlas Corp. v. United States, 895 F.2d 745 (Fed. Cir. 1990) (holding that payments are not a taking); United States v. Sperry Corp., 493 U.S. 52, 62 n. 9 (1989) (Government fee on an award was not a taking).

\(^{22}\) E. Enters., 524 U.S. at 540.
However, because the rule originated in the concurring and dissenting opinion of Eastern Enterprises, and because the California Supreme Court and the Ninth Circuit have not yet followed the rule, it is unclear if courts in California will hear a takings claim based on CARRA. It is quite possible that the courts will go along with the federal circuit in following the majority statements from Eastern Enterprises and the rule established in Commonwealth, but it is also possible that the courts will decide to hear a takings challenge of CARRA and disregard that line of analysis.

Another issue that could bar a takings suit was observed by the District Court of Maine in York Hospital v. Health Care Finance Commission.\textsuperscript{23} In discussing future potential profits of a hospital, the court stated that “no entitlement on the part of Plaintiffs to ‘profits’ from its administration of care under the Medicare Act. Absent legal entitlement to specific profits, there can be no property interest, and thus, no taking.”\textsuperscript{24} This applies to CARRA in that the owner of a piece of artwork does not have a legal entitlement to future profits, just as the hospital had no legal entitlement to future profits in York. The purchase or ownership of art in no way guarantees future profits. It is entirely possible that a work of art will not appreciate in value, and it is also possible that the artwork will lose value. Additionally, no law specifically gives the owner of a piece of art legal entitlement to profits, which means that the owner does not have a property interest in future sales and cannot make a takings claim based on future profits. Only when the owner can show that they have a property interest can they make a takings claim.

However, an art seller who does make a sale that is subject to CARRA will then have a property interest in the profits and would be able to bring a takings claim. Assuming the California courts do not follow Commonwealth, consideration of how a takings challenge would proceed if the court should choose to hear such a case is warranted.

IV. ECONOMIC REGULATION IS SUBJECT TO REGULATORY TAKINGS ANALYSIS

In the event that the court chooses not to follow Commonwealth, and hears a takings claim based on CARA, the Act is subject to a regulatory takings analysis.

When determining if there is a taking by the government, there must be property and there must be a physical or regulatory act that amounts to a taking.\textsuperscript{25} When determining if a physical taking occurs, the court looks to see if the government has physically confiscated or occupied a property.\textsuperscript{26} When determining if there is a regulatory taking, a court considers the economic impact of the regulation, along with the interference with the reasonable investment-

\textsuperscript{24.} Id. at 1121.
\textsuperscript{26.} Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
backed expectations of the owner and the character of the government action. Here the focus is on whether there is a physical taking.

In her paper California Resale Royalty Act: Droit de [not so] Suite}, Emily Eschenbach Barker argues that CARA is an unconstitutional physical taking of property. She contends that because of the inalienable 5% royalty, “[t]he Resale Royalty act falls squarely under the rubric of a ‘possessory’ taking because it effects a confiscation and permanent dispossession of the property, as opposed to a regulation that merely restricts the owner’s use.” Barker also argues that “[t]he Supreme Court has made clear that when property is confiscated or occupied, the government action will amount to a taking no matter how small the amount of property involved.”

As support for this position, Barker cites Loretto v. Teleprompter Manhattan CATV Corp. Loretto is the seminal case that establishes “when the character of the governmental action is a permanent physical occupation of property” there is a taking, no matter the scope of the intrusion. The Supreme Court reasoned that when the government physically intrudes through physical occupation, it destroys the right to possess and dispose of property, and therefore must compensate the property owner. The Supreme Court held that in Loretto the intrusion by the cable company through the installment of cable and cable boxes on residential buildings was a taking and that compensation was due. Unlike Loretto, however, there is never actually a physical taking of money, nor is there a physical occupation of a property under CARRA. The statute merely requires that an artist that creates a qualifying work receive a 5% royalty for resale of their works. This does not amount to physical taking or occupation; it is merely an obligation to make a payment.

Barker further relies on Webb’s Fabulous Pharmacies, Inc. v. Beckwith, another case in which the Supreme Court found a physical taking. In that case the court held that the keeping of interest earned on an interpleader account by the Florida court amounted to a taking under the Fifth Amendment. The Supreme Court noted that interest on an interpleader account generally follows the principal and will be allocated to whoever is determined to be the owner of the principal. There, the court physically kept the interest rather than turning it over with the principal. The Supreme Court held that this amounted to a physi-

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29. Id. at 6.
30. Id. at 7.
31. Loretto, 458 U.S. 419.
32. Id. at 428.
33. Id. at 429.
34. Id. at 432.
36. Id. at 163.
37. Id. at 162.
cal taking of property under the Fifth Amendment because the court had no right to the property, given that the retention was not reasonably related to the cost of using the court.38

Similarly, and citing Webb, Phillips v. Washington Legal Foundation39 held that interest earned on lawyer trust accounts kept by the state was a physical taking of property under the Fifth Amendment because the owner of the principal had a property right to the interest. In both Webb and Phillips, the money involved pertained to a particular fund from which the government physically removed or kept money.

CARRA differs from these two cases because under CARRA, the government never physically takes possession of money. As the Supreme Court noted in Loretto, physical occupation or confiscation restricts the owner’s ability to possess and dispose of property. CARRA does not have such an effect. The owner of a piece of art still fully possesses the work and still has the ability to dispose of it in any way she likes (i.e., through sale, gift, or barter). Nor does the government specify where the 5% royalty comes from or who pays it. Both Webb and Phillips turned on the fact that the money was withheld from specific funds. Under CARRA, the party selling or buying the piece of art has the ability to increase the sales price to compensate for the 5% royalty, or they can contract with the other party and insist that they absorb the cost of the royalty; there is no specific fund of money involved. CARRA simply places a requirement on the sale that 5%, when applicable per the rules of the statute, must somehow find its way to the artist, by any means. This indicates that the royalty is not a physical taking, but an economic regulation similar to those imposed in Eastern Enterprises v. Apfel40 and Usery v. Turner Elkhorn Mining Co.41

In Eastern Enterprises v. Apfel, the Supreme Court noted that “[t]his case does not present the ‘classi[c] taking’ in which the government directly appropriates private property for its own use.”42 The court also noted that government interference with property through economic regulation can effect a taking.43 The Supreme Court stated that analysis of regulatory takings claims differs from analysis of physical taking claims, and that three factors have particular significance in relation to regulatory takings: “[T]he economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action.”44 Similarly, Usery v. Turner Elkhorn Mining Co45, which is cited in Eastern Enterprises, also used a regulatory analysis to determine whether the Coal Mine Health and Safety Act’s requirement that the company contribute to the fund amounted to a taking under

38. Id. at 163.
42. E. Enters., 524 U.S. at 522.
43. Id. at 523.
44. Id. at 523-24.
45. Usery, 428 U.S. 1.
the Fifth Amendment.\textsuperscript{46}

In both of these cases, the government required a certain contribution from the coal companies. There was neither a requirement to draw money from a specified fund, nor a method to make the payment. The regulation simply required a certain contribution, which the court held should be analyzed as a regulatory taking and not a physical taking. This is comparable to CARRA, which requires that the qualifying artist receive the royalty but does not specify where the money must come from.

CARRA, like the Coal Mine Health and Safety Act and the Coal Industry Retiree Health Benefit Act, never results in the government physically taking or occupying property, unlike \textit{Loretto}, \textit{Webb} and \textit{Phillips}, where the government physically occupies or directly takes property. Additionally, the sale of art is an economic venture, and thus CARRA, which applies to the sale of art, is an economic regulation. Like \textit{Eastern Enterprises} and \textit{Usery}, CARRA should be analyzed as a regulatory taking and not a physical taking when challenged under the Fifth Amendment.

\textbf{V. CARRA NOT A TAKING UNDER REGULATORY TAKINGS ANALYSIS}

As an economic regulation, CARRA must be challenged as a regulatory taking if it is challenged under the Fifth Amendment. Under such analysis, the Act does not amount to a taking. Analysis of a regulatory takings claim that does not result in complete economic deprivation\textsuperscript{47} consists of three elements: (1) the economic impact of the regulation, (2) the degree of interference with the reasonable investment backed expectations of the owner, and (3) the character of the government action, as established in \textit{Penn Central Transportation Co. v. City of New York}.\textsuperscript{48}

\textbf{A. Degree of Economic Impact}

CARRA’s economic impact is minimal. The Supreme Court held in \textit{Penn Central Transportation Co. v. City of New York} that a regulatory takings analysis does not have a “set formula” but is rather an “essentially ad hoc, factual inquiry.”\textsuperscript{49} Looking at the degree of impact, the Supreme Court noted that it has uniformly rejected the position that diminution in value alone is sufficient to establish a taking.\textsuperscript{50} In addressing the economic impact on the property owner in \textit{Lingle v. Chevron U.S.A Inc.},\textsuperscript{51} the Supreme Court observed that the rules

\textsuperscript{46} \textit{Id.} at 51.
\textsuperscript{47} \textit{Lucas v. S.C. Coastal Council}, 505 U.S. 1003 (1992) (holding that it is a regulatory taking when the government action deprives the land owner of all economically viable use of the property.)
\textsuperscript{48} \textit{Penn Central Transportation Co.}, 438 U.S. 104.
\textsuperscript{49} \textit{Id.} at 117.
\textsuperscript{50} \textit{Id.} at 120.
established in *Loretto, Penn Central*, and *Lucas*\(^{52}\) share the same purpose:

Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights.\(^{53}\)

Thus, the measure of the degree of the regulation’s economic impact is the extent to which it is the functional equivalent to a physical taking.\(^{54}\) Additionally, in *Cienega Gardens v. U.S.*\(^{55}\) the Supreme Court stated that “what has evolved in the case law is a threshold requirement that plaintiffs show ‘serious financial loss’ from the regulatory imposition in order to merit compensation.”\(^{56}\) While there is no numerical threshold, it is established that the financial loss must be significant.\(^{57}\)

In *Penn Central*, the Supreme Court held that a zoning restriction that designated Grand Central Station a landmark and thus prevented the property owner from building a 50-story office building over it was not a taking. Looking at the degree of the economic impact, the court found that there was not sufficient interference to constitute a taking. The court noted that Penn Station could still be used as a train station, as it had been used up to that point, and that the air rights, which could not be used to build the high-rise above Penn Station, had been made transferrable and were therefore still usable at another location.\(^{58}\) The court also held that because the zoning regulation did not restrict the use of the station as it had always been used it did not create restrictions on the use of the station that caused an economic impact.\(^{59}\)

By contrast, in *Cienega Gardens*, the Supreme Court held that “[t]he loss of 96% of the possible rate of return on the investment is, even under the most conservative view, a ‘serious financial loss.”\(^{60}\)

The royalty under CARRA is similar to *Penn Central* and clearly distinct from *Cienega Gardens*, and does not effect a physical taking as required under *Lingle*.

CARRA is similar to *Penn Central*, where the owners of the station were allowed to use their air rights at another location. Under CARRA, the seller through various means, for instance, can recover the royalty by requiring the buyer or gallery to absorb the cost, or by raising the price of the work by the amount of the royalty. In both *Penn Central* and under CARRA, the potential

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\(^{52}\) *Loretto*, 458 U.S. 419; *Penn Central Transportation Co.*, 438 U.S. at 118; *Lucas*, 505 U.S. 1003.

\(^{53}\) *Lingle*, 544 U.S. at 534.

\(^{54}\) Meltz, supra note 25, at 314.

\(^{55}\) *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003).

\(^{56}\) *Id.* at 1340.

\(^{57}\) *Id*.

\(^{58}\) *Penn Central Transportation Co.*, 438 U.S. at 120.

\(^{59}\) *Id.* at 126.

\(^{60}\) *Cienega Gardens*, 331 F.3d at 1343.
revenue is not being per se denied; the means by which it is made have simply been shifted.

Additionally, like Penn Central, CARRA does not restrict the regular use of the work of art. Under CARRA there is neither a restriction on use or display, nor on transferability of the work of art. Just as Penn Central was allowed to continue normal operations of the station, the owner of a work of art under CARRA is still allowed to make normal use of the work in any way she wants.

Furthermore, under the Lingle analysis CARRA does not effect a physical taking. The requirement that the artist receive a 5% royalty is open-ended, allowing any party in the transaction to pay the fee and thus not necessarily taking anything from the seller. Nor does the government ever physically take possession of the property or the money involved in any transaction.

CARRA is also unlike Cienega Gardens, where the court found a 96% deprivation sufficient as a “serious financial loss.” 61 CARRA imposes a mere 5% royalty. The Supreme Court in Cienega Gardens made it clear that the loss must amount to serious financial loss or there is no taking. Furthermore, the Supreme Court in Penn Central made clear that economic diminution alone is not sufficient to show a taking. Therefore, claiming that CARRA reduces the value of a work is not sufficient to prove a taking in itself.

The economic impact of CARRA is minimal and does not support the finding of a taking for the following reasons: (1) CARRA does not restrict the ability of a seller of a work of art to recover the cost of the royalty; (2) the statute does not restrict the use of the work in a way that causes other economic impact, or effect a physical taking; and (3) the degree of deprivation does not create a “serious financial loss.”

B. Interference with Reasonable Investment Backed Expectations

Regarding the second element of the Penn Central test—interference with the investment backed expectations of the owner—CARRA also has minimal impact. In Cienega Gardens, the court established that the claimant must have had investment-backed expectations which were objectively reasonable (i.e that another similarly situated objective person would have had the same expectations). 62 Thus, if a takings claim is brought under CARRA, the owner of the work must demonstrate that there was a real expectation that there would be investment income derived from the property, and that CARRA interferes with those expectations. They would also have to show that these expectations are reasonable and that an objective, similarly situated person would have the same expectations.

Fees and withholdings are a regular, even common, occurrence in the sale of art. Galleries retain a percentage of sales, while auction houses charge seller and buyer commissions and fees. In fact, CARRA fees are much lower than the

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61. Id.
62. Id. at 1346.
other types of fees and commissions commonly charged. In the face of this, the owner would have to demonstrate that they did not anticipate having to pay the 5% royalty. Given the prevalence of such fees, and the fact that this is an established statute, it seems likely the owner would have a hard time demonstrating that the expectation of not losing some amount of the sale to fees and commissions is reasonable.

C. Character of the Government Action

CARRA also passes the third element of the Penn Central test, the character of the government action. The Supreme Court noted in Penn Central that a takings claim may be more readily found when there is a physical taking than “when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”63 Common good developed into “substantially” advancing legitimate state interests in Agins v. Tiburon.64 This test became a standalone element that was used in several decisions until the Supreme Court in Lingle v. Chevron rejected the test, concluding:

We hold that the “substantially advances” formula is not a valid takings test, and indeed conclude that it has no proper place in our takings jurisprudence. In so doing, we reaffirm that a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed under one of the other theories discussed above—by alleging a “physical” taking, a Lucas-type “total regulatory taking,” or a Penn Central taking.65

The Supreme Court in Lingle points out that the character element from the Penn Central test may be relevant in evaluating “whether [a taking] amounts to a physical invasion or instead merely affects property interests, but is not an evaluation of the level of interest the government has in the action.”66 The Supreme Court reasoned that “this prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence.”67

Analyzing the character of CARRA, it becomes clear that the statute merely has an effect on a property interest and is not a physical occupation or taking as discussed above. Under the holding in Lingle, it is unnecessary and inappropriate to inquire further as to the significance of the interest of the government in the regulation. As pointed out in Lingle, that is a due process issue which should be taken up if a due process challenge is raised and should not be part of a takings analysis.

CARRA does not amount to a regulatory taking under the Penn Central
test for a number of reasons: (1) The royalty of 5% under CARRA does not restrict the normal use of the work of art, (2) it is in no way interpretable as a “significant loss”, (3) the regulation in no way effects a physical taking, and (4) the owner would have difficulty establishing interference with reasonable investment backed expectations.

VI. CONCLUSION

The question of whether or not CARRA or some other droit de suite statute should be implemented nationwide still lingers, and plenty of room for debate remains. What is clear, however, is that objections to the statute on Fifth Amendment takings grounds are not salient.

Given the body of case law suggesting that takings challenges of payment obligations will not be heard, it is possible that a takings challenge of CARRA will be rejected. However, since neither the Ninth Circuit nor the California Supreme Court has decided a case following this line of ruling, it is also possible that such a challenge will survive and be heard. In the event that a takings challenge is heard, the challenge must be analyzed as a regulatory taking, not as a physical taking.

The regulation never requires the government to take or occupy a property. It is simply an open-ended requirement that the artist receive 5% of the sale from any source whatsoever, and there is no particular account or fund targeted by the regulation.

Going forward under a regulatory taking analysis established in *Penn Central*, it is also clear that the regulation does not amount to a taking. The 5% royalty is not a “significant loss”, nor is it required to be borne by any one party. Furthermore, the regulation places no restrictions on the use or transferability of the work of art.

The burden will be on the challenger to demonstrate that they had reasonable investment-backed expectations, which, given the nature of the art market, will be challenging because of the prevalence of fees and commissions throughout the industry. Because there is no need to evaluate the interest of the government under a takings clause challenge, there can be no objection to the statute on the basis of the government purpose. If that challenge is to be made, the appropriate venue is through a due process challenge, which has already failed against CARRA.68

For these reasons, CARRA will withstand a takings challenge under the Fifth Amendment.

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68. *Morseburg*, 621 F.2d 972 (holding that the Resale Royalty Act does not violate due process).