

# The California Resale Royalty Act: *Droit de [not so] Suite*

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## Introduction

It is a generally accepted principal that an artist owns certain rights to exploit the economic value of his works. In the United States, an artist's rights are protected by various provisions of federal copyright law.<sup>1</sup> These pecuniary rights exist largely in the same form across the globe, however, some countries, and now the state of California, have begun to recognize personal rights of artists in their work.<sup>2</sup> These moral rights, or *droit moral*, are retained by the artist even after a work is sold.<sup>3</sup> The particular moral right this paper is concerned with, is the *droit de suite* or "art proceeds right."<sup>4</sup> The *droit de suite* grants artists the right to receive royalties based on the resale

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1. See United States Copyright Act, 17 U.S.C. §§ 101–801 (Supp. III 1979) ("Copyright Act").

2. See e.g., The Berne Convention for the Protection of Literary and Artistic Works (Paris Text, July 24, 1971), *reprinted in* 4 M. NIMMER, NIMMER ON COPYRIGHT app. 27 (1981); Universal Copyright Convention (Paris Text, July 24, 1971), *reprinted in* NIMMER, *supra*, at app. 25; see also California Resale Royalty Act of 1976, Cal. Civ. Code § 986 (1976).

3. See Peter E. Berlowe, Laura J. Berlowe-Heinisch, & Peter A. Koziol, *In this Digital Age, Are We Protecting Tomorrow's 'Masterpieces'? Protection of the Moral Rights of the Digital Graphic Artist*, 81 FLA. B.J. 30 (2007).

4. Diane B. Schulder, *Art Proceeds Act: A Study of the Droit De Suite and a Proposed Enactment for the United States*, 61 NW. U. L. REV. 19, 22 n.13 (1966).

of their work.<sup>5</sup> It is the proposition of this paper that California's statutory version of *droit de suite*, California Civil Code Section 986<sup>6</sup> ("Resale Royalty Act"), effects a Fifth Amendment taking of private property and thus, at a minimum, requires just compensation.<sup>7</sup> It is questionable whether this taking is for a public use, in which case, even just compensation would not cure its constitutional deficiencies.

### I. History of Droit de Suite

The *droit de suite* was first proposed in Europe around 1893, in response to a decrease in the importance of the salon, the end of the private patron, and to champion the cause of the "starving artist."<sup>8</sup> In the early 1920s newspapers ran stories of widows to famous artists selling flowers in the streets to survive, while their dead husband's works sold for exponentially higher and higher prices in luxe parisian galleries.<sup>9</sup> The image of the starving artist is heavily engrained in the collective consciousness of Western society—being portrayed in everything from Puccini's *La Boheme* to the modern musical *Rent*.<sup>10</sup>

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5. See Directive 2001/84/, art. 1, 2001 O.J. (L 272) 4 (EC), available at [http://europa.eu.int/eurlx/pri/en/oj/dat/2001/l\\_272/l\\_27220011013en00320036.pdf](http://europa.eu.int/eurlx/pri/en/oj/dat/2001/l_272/l_27220011013en00320036.pdf).

6. California Resale Royalty Act of 1976, CAL. CIV. CODE § 986 (1976) [hereinafter Resale Royalty Act].

(a) Whenever a work of fine art is sold and the seller resides in California or the sale takes place in California, the seller or the seller's agent shall pay to the artist of such work of fine art or to such artist's agent 5 percent of the amount of such sale. The right of the artist to receive an amount equal to 5 percent of the amount of such sale may be waived only by a contract in writing providing for an amount in excess of 5 percent of the amount of such sale. An artist may assign the right to collect the royalty payment provided by this section to another individual or entity. However, the assignment shall not have the effect of creating a waiver prohibited by this subdivision[.]

7. The Resale Royalty Act has not been challenged on Fifth Amendment takings grounds. It has, however, been challenged and upheld in the Ninth Circuit based on the Due Process and Contracts Clauses of the United States Constitution, see *Morseburg v. Balyon*, 621 F.2d 972 (9th Cir. 1980) (ruling that the California Resale Royalties Act did not preempt the Copyright Act of 1909 because there were no federal laws that addressed the issue and the resale royalty did not impermissibly restrict transfer of the art).

8. Rita E Hauser, *The French Droit de Suite: The Problem of Protection for the Underprivileged Artist Under Copyright Law*, 11 COPYRIGHT L. SYMP. (ASCAP) 1, 13–14 (1962).

9. *Id.*

10. See generally Jane C. Lee, *Upstaging the Playwright: The Joint Authorship Entanglement Between Dramaturgs and Playwrights*, 19 LOY. L.A. ENT. L. REV. 75 (1988).

This trope was a driving force behind creation of the *droit de suite* statutes in Europe, which in turn inspired the California law.<sup>11</sup>

## II. California's *Droit de Suite* Statute

California's *droit de suite* statute, the California Resale Royalty Act, was enacted in 1976.<sup>12</sup> It applies to all works of fine art resold in California, or resold anywhere by a California resident, for a gross sale of \$1,000 or more.<sup>13</sup> It mandates a five-percent royalty on the resale price of any work of fine art. An artist may only waive this right "by a contract in writing providing for an amount in *excess* of five-percent of the amount of such sale."<sup>14</sup> In other words, the five-percent royalty is not truly waivable in any sense; this provision merely restates the pre-existing right of a person to contract for a royalty percentage greater than the statutory minimum. The artist may assign the right to collect, but the assignment cannot have the effect of waiver of the mandatory five-percent<sup>15</sup>—that is, the artist cannot assign the collection right to the purchaser, for in that case the five-percent is, of course, effectively waived.

## III. Takings Under the Fifth Amendment

Although both the federal government and the states have the power of eminent domain—the authority to take private property when necessary for legitimate government public use—the Constitution contains a very important limit on this power. The Fifth Amendment declares in part: "nor shall private property be taken for public use without just compensation."<sup>16</sup> The Takings clause is the most important protection of property rights in the Constitution and was the first amendment in the Bill of Rights to be applied to the states.<sup>17</sup>

One of the bases for the clause is the principle that the government should not confiscate the property of some to give it to

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11. See Godfrey Barker, *Let Their Tiny Hands Freeze*, TIMES (London), Jan. 6, 2006, at 20, available at <http://www.timesonline.co.uk/tol/comment/thunderer/article785496.ece>.

12. Resale Royalty Act, *supra* note 6.

13. CAL. CIV. CODE § 986(a), (b)(2) (2010).

14. Resale Royalty Act, *supra* note 6 (emphasis added).

15. *Id.*

16. U.S. CONST. amend. V.

17. See *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226 (1897).

others.<sup>18</sup> Another basis is the belief that when the government takes away one person's property to benefit society, society should pay for the benefit conferred. The Supreme Court has explained that a principal purpose of the Takings Clause is to "bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."<sup>19</sup> The California law does not comport with either of these ideals; the state is confiscating the property of some and giving it to others with the policy goal of redistributing wealth from the rich to the "poor." It does this under the apparent auspices of attempting to benefit society by investing in the arts, however, it has mandated that individuals, rather than society as a whole, pay for this benefit.<sup>20</sup>

A takings clause analysis is comprised of essentially four sequential questions: (1) was there a "taking?"; (2) is the thing taken private property?; if so, (3) was the property taken for a public use?; and, if so (4) was "just compensation" paid?<sup>21</sup> Though these prongs provide helpful guidelines, they by no means constitute a bright-line test. The Supreme Court has admitted that it "has been unable to develop any 'set formula' for determining when 'justice and fairness' require the economic injuries caused by public action be compensated by the government."<sup>22</sup> This "ad hoc, factual inquir[y]" turns "upon the particular circumstances in [each] case."<sup>23</sup>

#### A. Has a 'Taking' Occurred?

The threshold question of whether particular actions amount to a taking has traditionally been one of the most heavily litigated prongs in any takings analysis.<sup>24</sup> When performing these analyses, courts generally designate the government action as belonging under one of two categories: either a regulatory taking or a possessory taking.<sup>25</sup> A "possessory" taking occurs when the government confiscates or

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18. See Frank Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097 (1981).

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

20. The Resale Royalty Act contains no legislative history or guidance as to the purposes of its enactment.

21. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW PRINCIPLES AND POLICIES* 640 (6th ed. 2006).

22. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

23. *Id.*

24. CHEMERINSKY, *supra* note 21, at 641.

25. *Id.*

physically occupies property.<sup>26</sup> A “regulatory” taking occurs when the government’s regulation leaves no reasonable economic use of the property.<sup>27</sup> Which category is designated will change the tests applied, however, the Supreme Court has not always been clear as to the particular definitions of these terms, and sometimes has blurred their distinctions.<sup>28</sup>

The 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. Expropriation of property in this manner is the paradigmatic example of a classic taking.<sup>29</sup> In *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*,<sup>30</sup> the Supreme Court found a taking when the state government took the interest accruing on an interpleader account.<sup>31</sup> In that case, a Florida statute provided that whenever a contested sum of money was deposited with the court, the interest on the account would become the property of the government.<sup>32</sup> The deposited funds in that case were the amount received as the purchase price for Webb’s assets.<sup>33</sup> The Supreme Court found that this property was “held only for the ultimate benefit of Webb’s creditors, not for the benefit of the court and not for the benefit of the county.”<sup>34</sup> The Court held that this was a classic taking because the government’s actions amounted to an expropriation of private property.<sup>35</sup> In reaching this conclusion, the Court noted that “[i]t is true, of course, that none of the creditor claimants had any right to the deposited funds until their claims were recognized and distribution was ordered.”<sup>36</sup> However, “[t]hat lack of immediate

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26. *Id.* at 640.

27. *Id.*

28. *Id.* at 641.

29. *See, e.g.,* *Transp. Co. v. Chicago*, 99 U.S. 635, 642 (1878), *abrogated by* *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 326 (2002); *see also* *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1981) (“When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking.”).

30. *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980).

31. An interpleader account is a sum of money deposited with a court when parties have competing claims for the sum.

32. *Webb*, 449 U.S. at 155.

33. *Id.* at 161.

34. *Id.*

35. *Id.*

36. *Id.* at 161–62 (citations omitted).

right . . . does not automatically bar a claimant ultimately determined to be entitled to all or a share of the fund from claiming a proper share of the interest, the fruit of the fund's use, that is realized in the interim."<sup>37</sup> Thus, the Court found a taking had occurred despite the fact that the government had, in a sense, created the asset *ex nihilo*, and merely kept its creation. The reasoning is that the government had "earned" money on an account it did not own, the ownership right to earn that money did not belong to the government, and use of that right, even for a brief time amounted to an expropriation from the rightful owner, whoever that turned out to be. The government "may not transform private property into public property without compensation, *even for the limited duration* of the deposit in court. This is the very kind of thing that the Takings Clause of the Fifth Amendment was meant to prevent."<sup>38</sup>

The Resale Royalty Act goes even further than the law at issue in *Webb*. The mandatory payment under the California law *permanently* dispossesses the owner of his property. It matters not that the money taken by the California statute is given to a private party rather than the California government; the state-enacted statute effects the confiscation. For example, in *Kaiser Aetna v. United States*, the Supreme Court found that there was a taking when the government required a private waterway be opened for public use.<sup>39</sup> In that case, the owners of a pond in Hawaii had spent a substantial amount of money to dig a channel connecting it to the Pacific Ocean.<sup>40</sup> The United States Corps of Engineers deemed their channel "navigable water" and thus open to use by the general public.<sup>41</sup> The Court held this was a taking because the government was, in essence, allowing the public to occupy the property.<sup>42</sup>

It is important to point out that the Resale Royalty Act mandates a transfer of five-percent of the *sale price*, not the *profit*.<sup>43</sup> Thus the amount taken could in fact be a confiscation of the entire profit at the point of sale. Once the artwork is sold, the only property interest held by the seller is his profit. This law thus creates the possibility of the entire profit, and thus entire property interest, being

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37. *Id.* at 162.

38. *Id.* at 164; *accord* Phillips v. Wash. Legal Found., 524 U.S. 156, 167 (1998).

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

40. *Id.* at 167.

41. *Id.* at 168.

42. *Id.* at 179–80.

43. CAL. CIV. CODE § 986(a) (2010).

expropriated. It even creates the possibility of the owner of the painting owing the artist more than he has made on the transaction. Although the statute applies only to sales where the gross sales price is more than the purchase price,<sup>44</sup> any sale for less than five-percent above the purchase price will create the scenario in which the seller is forced to pay out more money than he has earned. The statute also fails to take into account the fact that most galleries must pay to promote their artists and rent gallery space for the work's exhibition. When one considers the costs of individual-artist promotion along with the other overhead costs incurred by sellers in the secondary market and adds to these the necessity created by the Resale Royalty Act of paying the artist five-percent of the gross sales price, it becomes apparent that, generally, a seller must sell a work for substantially more than a five-percent gross profit to make any reasonable gain.

In reality though, the amount taken is of little moment. The 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.<sup>45</sup> In *Loretto v. Teleprompter Manhattan CATV Corp.*, for example, the Supreme Court found a taking where a city ordinance required apartment building owners to make space for cable boxes, even though the amount of space involved was only about one cubic foot.<sup>46</sup>

Thus under both the classic and current conceptions of takings jurisprudence, the California statute that requires the owner of a piece of artwork to part with five-percent of the sale price effects a taking of private property because it effects a permanent dispossession of that property.

#### **B. Could the Resale Royalty Act Be Considered a Tax?**

Another way that may be helpful to look at this mandated payment, and see it for the taking it is, is to demonstrate what it is not: It is not a valid tax. This discussion section will set aside, for the sake of argument, the fact that the payment mandated by the Resale Royalty Act is a forced transfer between two private parties, rather than a payment to the government.<sup>47</sup> If it would be constitutional for

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44. CAL. CIV. CODE § 986(b)(4) (2010).

45. *Loretto*, 458 U.S. at 419.

46. *Id.* at 430.

47. This would seem to demonstrate in and of itself that this law is not effectuating what we generally think of as a tax.

the government to require this payment be made to the state and the state to then pay it to the individual artists, the argument could be made that this is enough like a tax to evade a takings clause analysis. Thus it is worth discussing.

A tax is a taking and a large body of scholarship has developed attempting to resolve the inherent conflict of a Constitution that contains both the power to tax and the limitation of the Fifth Amendment's takings clause. In short, the consensus of all this scholarship is that there is no definitive answer as to where one should draw the line between taxes and takings. "[T]he boundary between taxation and taking [is] none-too-clear."<sup>48</sup> Examples that fall far to one side or the other on the spectrum of tax to taking are simpler to designate. Professor Calvin Massey has explained that "[s]urely an income tax of 100% imposed on a single individual—for example, Bill Gates—would violate the Takings Clause. If that is so, then the problem becomes a matter of degree."<sup>49</sup>

Some scholars take this proposition even further, finding many forms of taxation to be takings. Richard Epstein argues that the United States government's progressive income tax structure violates the takings clause.<sup>50</sup> He maintains that imposing higher rates on higher incomes takes the property of the top earners at a disproportionate rate. According to Epstein, only a "flat tax" will satisfy the takings clause.<sup>51</sup>

To be sure, a tax like the Bill Gates tax example, singling out one or a handful of citizens, would be impermissible.<sup>52</sup> The takings clause is designed to "bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."<sup>53</sup> But whether Epstein is correct in carrying the line so far is disputable.<sup>54</sup> Essentially, no one has yet

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48. Calvin R. Massey, *Takings and Progressive Rate Taxation*, 20 HARV. J.L. & PUB. POL'Y 85, 86 (1996).

49. *Id.* at 104.

50. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 297–300 (1985).

51. *Id.*

52. Note that this may also be an impermissible bill of attainder, but I will leave that question for another article, or for an enterprising law student searching for a note topic.

53. *Armstrong*, 364 U.S. at 49.

54. See e.g., Larry Alexander, *Takings of Property and Constitutional Serendipity*, 41 U. MIAMI L. REV. 223 (1986) (criticizing Epstein's position); William W. Fisher III, *The Significance of Public Perceptions of the Takings Doctrine*, 88 COLUM. L. REV. 1774 (1988) (same).



managed a coherent theory of the relationship between taxes and takings.

Under the classic view of this conundrum, courts looked to how much a person paid in comparison with how much they received and focused on the breadth of the burdens imposed.<sup>55</sup> Courts treated taxes and takings as structurally similar, recognizing that both are exercises of the sovereign power over individual property, and both require the individual to receive some equivalent contribution.<sup>56</sup>

The right of taxation and the right of eminent domain rest substantially on the same foundation. Compensation is made when private property is taken in either way. Money is property. Taxation takes it for public use; and the taxpayer receives, or is supposed to receive his just compensation in the protection which government affords to his life, liberty and property, and in the increase of the value of his possessions by the use to which the government applies the money raised by the tax. When private property is taken by right of eminent domain, special compensation is made.<sup>57</sup>

Thus, under the classic view, both taxes and takings require compensation. While the compensation required by a taking is explicit, the compensation required for taxes is the government's implicit promise to "spend tax revenues on projects benefitting most if not all citizens."<sup>58</sup> "No taxation without representation" may sum up well the founding father's resolution of this inherent conflict; the compensation for taxation *is* representation. That is to say that both taxes and takings require compensation, but where takings are compensated explicitly, taxes are compensated implicitly.

The Resale Royalty Act does not comport with the classic conception of a tax; it is not written as a broad "tax" to benefit some general fund, or a fund for artists generally. What is more, it is exacted upon a small and ascertainable group of people, and only that group of people. It does not benefit the larger arts community. Droit de suite statutes are intended to allow artists to realize the rewards of their fame. The California Statute is written as a person-to-person transfer because the interest it is meant to protect—the artist's ability

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55. Eric Kades, *Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle, and Its Broader Application*, 97 NW. U. L. REV. 189, 200 (2002).

56. *Id.*

57. *Id.* (quoting *Griffin v. Mayor of Brooklyn*, 4 N.Y. 419, 422 (1851)).

58. *Id.*

to cash in on his fame—is personal to the individual; not all artists will become famous. This is not the type of exaction that falls under the rubric of a tax. It is a governmentally mandated private person to private person transfer, in which one person bears the burdens and most citizens receive no benefit. It is exactly the kind of wealth redistribution feared by the founding fathers when they wrote the takings clause into the Constitution.

Just how un-tax-like this law is can be seen by a simple exercise. If the California government had written a statute requiring the seller to pay the state a percentage of his profit (as opposed to a percentage of the sale price, which creates its own problems), and the state then placed this in a fund for the benefit of the arts, the statute would almost certainly be a valid exercise of the taxation power. If instead the government said that it would take this percentage to fund one specific arts charity, the law would start looking a bit less like a tax, but likely would still not be a taking. If, on the other hand, the statute said the government would collect this tax and distribute it to the individual artists, it would stop looking like a tax and begin to much more closely resemble a taking. Finally, if we look to the California Resale Royalty Act, noting it requires no payment to the government, but rather a payment from private party to private party,<sup>59</sup> for the benefit of a particular person only, and that the percentage exacted is a percentage of the *sale* price (which may be 100% of the profit and thus a perfect example of the aforementioned “Bill Gates tax”), then it becomes very plain that this is not a tax and cannot be saved from a takings clause analysis.

A more recent theory of the difference between taxes and takings was expressed by the Supreme Court in *Eastern Enterprises v. Apfel*,<sup>60</sup> but does not appear to have any precedential history before that case.<sup>61</sup> Under this theory, the takings clause applies only to

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59. The Supreme Court has actually alluded to the difference between private party transfers and payment to the states in its dicta. See *E. Enters. v. Apfel*, 524 U.S. 498, 556 (1998) (Breyer, J., dissenting) (“If the [Takings Clause] applies when the government simply orders A to pay B, why does it not apply when the government simply orders A to pay the government, i.e., when it assesses a tax?”).

60. *E. Enters.*, 524 U.S. at 498.

61. Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 903 (2000) (“The Breyer/Kennedy argument as to why no takings property was implicated by the Coal Act [in *Eastern Enterprises*] was a novel one, in the sense that neither Justice was able to cite any legal authority in support of his thesis.”); Kades, *supra* note 55, at 193 (quoting WALTER J. BLUM & HARRY KALVEN, JR., *THE ANATOMY OF JUSTICE IN TAXATION* 4 (Univ. of Chicago Law School, Occasional Papers, 1973) (“The idea that taxes and takings can be distinguished, by defining taxes as general obligations

deprivations of “identified property interests,” or to “specific interests in physical or intellectual property.”<sup>62</sup> The California statute is directed at taking a portion of the specific asset from its owner at the point of sale. It matters not that the asset has been liquidated; liquidity is not coextensive with fungibility. At the point of assessment of the five-percent royalty, the now liquid asset has not become fungible with all other assets, or no assessment could be made. The percentage payment requirement is entirely dependent upon that amount of money retaining its quality as a portion of the sold artwork, as retaining its “tie” to the artist. The California statute attempts to exact a portion of the seller’s specific interest in the value of his artwork and thus the Resale Royalty Act would not fall under this newer tax rubric either.

### **C. Is the Five-Percent Interest Property?**

As this is a taking (and not a permissible tax), the next question under a takings analysis is whether it is property. By its terms, the takings clause applies only if a court concludes “property” has been taken by the government. For this reason, a preliminary question in any takings clause analysis is whether the plaintiff had a property interest protected by the Fifth Amendment.<sup>63</sup> The scope of the property interest must be clearly understood in a takings analysis, because governmental limitations on property rights are permissible only if those limitations “inhere in the title itself.”<sup>64</sup> The existence of such a property interest is determined by reference to “existing rules or understandings that stem from an independent source such as state law.”<sup>65</sup>

The California Constitution, like the federal Constitution, contains language that requires the government to compensate property owners if it effectuates a taking of private property. The

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and takings as deprivations of specific assets, is of very recent origin. Blum and Kalven apparently were the first to consider this distinction” and even “[t]hey realized the problems inherent in such a formal distinction: ‘But [this rule] may on occasion fail to keep taxation and confiscation clearly apart. Taxes can be set so high that the taxpayer is forced to dispose of specific property or simply turn it over to the government in order to satisfy his tax obligation. This perception is at the core of the notion of confiscatory taxation. Indeed, revolutionary regimes have sometimes used the format of 100 percent taxation as the very vehicle for confiscation.’”)).

62. *E. Enters.*, 524 U.S. at 554.

63. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000–01 (1984).

64. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992).

65. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972).

California Constitution states that “[p]rivate property may be taken or *damaged* for a public use . . . only when just compensation . . . has first been paid to, or into court for, the owner.”<sup>66</sup> Note that the California Constitution includes a requirement of compensation not only when property is taken but also when it is damaged. The language “or damaged” was not within California’s original Constitution.<sup>67</sup> It was added by the legislature at the Constitutional Convention of 1878–1879 to create an additional remedy which would “superadd to the guaranty found in the former constitution of this state . . . a guaranty against damage where none previously existed.”<sup>68</sup> Courts have thus recognized that, as a general matter, the California provision “protects a somewhat broader range of property values’ than does the corresponding federal provision.”<sup>69</sup> These courts have noted that to hold otherwise would be to reduce the scope of the provision to its 1849 form, rendering superfluous the addition of the words “or damaged.”<sup>70</sup> Thus the definition of what can amount to a taking in California is exceedingly broad.

The definition of what constitutes property in California is likewise very broad. Under the California Civil Code, property is defined as “a thing” that it is “the right of one or more persons to possess” and “use to the exclusion of others.”<sup>71</sup> Property that is not land, not affixed to the land, not incidental or appurtenant to the land, or not immovable by law<sup>72</sup> is defined to be “personal”—that is to say, not “real”—property.<sup>73</sup> The artwork targeted by the Resale Royalty Act is personal property by this definition.

This broad statutory definition of what constitutes personal property has been affirmed in the courts. For example, the California Supreme Court has cited with approval another more descriptive,

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66. CAL. CONST. art. I, § 19(a) (emphasis added).

67. *Id.* The California Constitution of 1849 originally only required compensation when property was taken, but a constitutional amendment adopted in 1879 extended the right of compensation to damaged property. *See* *Customer Co. v. City of Sacramento*, 10 Cal. 4th 368, 378–79 (1995).

68. *Reardon v. City and Cnty. of San Francisco*, 66 Cal. 492, 505 (1885).

69. *San Remo Hotel, L.P. v. City and Cnty. of San Francisco*, 27 Cal. 4th 643, 664 (2002) (quoting *Hensler v. City of Glendale*, 8 Cal. 4th 1, 9, n.4 (1994)) (citations omitted); *see also* *Varjabedian v. City of Madera*, 20 Cal. 3d 285, 298 (1977).

70. *Reardon*, 66 Cal. at 501.

71. CAL. CIV. CODE § 654 (2009).

72. *Id.* at § 658; *see also id.* at §§ 659, 660, 662.

73. *Id.* at § 663.

though still all-encompassing, description of what constitutes property in California:

The term “property” is sufficiently comprehensive to include every species of estate, real and personal, and everything which one person can own and transfer to another. It extends to every species of right and interest capable of being enjoyed as such upon which it is practicable to place a money value. As applied to lands the term comprehends every species of title, inchoate or complete. It is supposed to embrace those rights which lie in contract—those which are executor as well as those which are executed.<sup>74</sup>

Thus under California case law, the definition of property is very broad. Unlike the corresponding provision in the United States Constitution, the California Constitution requires just compensation not only for a dispossession but also for damage to property. Of course, it also includes traditionally crucial rights, such as the right to exclude and the right to transfer.<sup>75</sup> Transferability is generally considered to be one of the most valuable “stick[s] in the bundle” of property rights, and unlawful conditions that restrain alienation will be found “when repugnant to the interest created.”<sup>76</sup> In upholding these key hallmarks of property, California law voids unreasonable restraints on the alienation of property.<sup>77</sup>

The artwork targeted by the Resale Royalty Act is property under the broad California definition. Fee simple ownership of that property entitles the owner to all traditionally crucial ownership rights, such as excludability and transferability. Exaction or damage one of these property rights effects a taking under California law, unless the thing taken was never the owner’s to begin with—i.e., the right of the state to take it inhered in its title.

The California Resale Royalty Act mandates the payment of a five-percent royalty to the artist on resale of the piece, whether or not this five-percent royalty inheres in the owner’s title. That is, it creates the possibility that a seller who purchases artwork in fee simple will be dispossessed of a portion of his title. Most likely, a piece of artwork purchased from an artist in California, after enactment of the California Resale Act, was purchased subject to the artist’s

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74. *Yuba River Power Co. v. Nev. Irrigation Dist.*, 207 Cal. 521, 523 (1929).

75. *See, e.g., Yuba River Power Co.*, 207 Cal. at 523.

76. CAL CIV. CODE § 711 (2009).

77. *Id.*

mandatory five-percent royalties; i.e., not in fee simple. In this limited circumstance, it can be said that the five-percent royalty right inheres in the title at purchase. As a person cannot sell more than he owns, every resale would be less than fee simple and subject to the inherent five-percent royalty. Thus in those limited circumstances, the mandatory five-percent royalty would inhere in the title and the Resale Royalty Act would not effect a taking. However, for the vast majority of transactions, this will not be the case. For example, if an alien<sup>78</sup> seller, who purchased his artwork outside of California, sells his fee simple interest in California, the California government cannot force the seller to pay a five-percent royalty to the artist without effecting a taking because the five-percent royalty did not inhere in his title.<sup>79</sup> Even a California resident who purchased his painting in California could become subject to a taking if his purchase of the work occurred prior to the law's enactment. In that case, the owner would have purchased in fee simple, and the five-percent royalty would not have inhere in his title. People who move to California with their art collections and then become California residents also face the possibility of a taking. They too acquired title in fee simple and thus this five-percent royalty did not inhere in their titles. Despite this, they will be required to pay the royalty upon resale *anywhere*.<sup>80</sup> Therefore, although the law is not unconstitutional on its face, it is unconstitutional as applied in a majority of instances because it expropriates or damages an owner's vested property interests.

#### D. Is It for Public Use?

The government only has the power to take private property under the Fifth Amendment when it does so for "public use."<sup>81</sup> If the taking is found to be for private use, it is invalidated and the government must return the property to the owner.<sup>82</sup> The Supreme Court has long held that "one person's property may not be taken for

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78. The term "alien" as used here means any seller that is not located in, or a resident of, California.

79. The fact that this law may inhibit movement of artwork into and out of California may even raise dormant commerce clause concerns, but that is an issue for another paper.

80. If this law were more uniformly enforced, it is likely that people with large art collections would choose not to domicile in California. This could cost the state millions in income taxes.

81. CHEMERINSKY, *supra* note 21, at 662.

82. *Id.*

the benefit of another person without justifying public purpose, even though compensation be paid.”<sup>83</sup> The “framers’ obvious concern was that the government might use its eminent domain power to play Robin Hood and take from some private owners and give to others.”<sup>84</sup>

The California Resale Act effects precisely the type of social judgment and expropriation that the framers intended to prevent through enactment of the Fifth Amendment. The California government has chosen to play Robin Hood, taking property from the “rich” art seller to give it to the “poor” artist, and it has done so on an individualized basis. This is not in any sense a public use of this property. Thomas Cooley explained the basis of the power of government to take property in his seminal treatise:

When property is appropriated under the right of eminent domain, a particular item or parcel is taken, because for public purposes there is a special need of it, and the state takes it under proceedings which amount, so far as the owner is concerned, to a forced sale.<sup>85</sup>

There does not appear to be any special need for this property such that taking it is the only way to effectuate the government’s goals.<sup>86</sup>

However, in recent years, the Supreme Court has adopted a very expansive definition of public use. The Court has proclaimed that “where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.”<sup>87</sup> Hence a taking is for a public use so long as the legislature had a reasonable belief that exercise of the takings power would benefit the public, and it had a rational basis for its belief.<sup>88</sup>

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83. *Thomson v. Consol. Gas Corp.*, 300 U.S. 55, 80 (1937); *see also Cincinnati v. Vester*, 281 U.S. 439, 447 (1930); *Mo. Pac. R.R. Co. v. Neb.*, 164 U.S. 403, 416 (1896).

84. CHEMERINSKY, *supra* note 21, at 662.

85. THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 715–16 (Alexis C. Angell ed., 6th ed. 1890).

86. An example of a valid special need would be something like a plot of land standing in the way of completion of a public highway.

87. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (citing generally *Berman v. Parker*, 348 U.S. 26 (1954)).

88. *See Joseph Sax, Takings and the Police Power*, 74 *YALE L.J.* 36 (1964).

This definition is broad enough to swallow the public use requirement. The California statute is intended to help individual artists realize the benefits of their individual fame. It cannot be said rationally that its ultimate goal is to help promote up-and-coming artists because the benefit can only be realized once the artist achieves enough fame for the works to increase in price. In fact, the most recent data shows that in the United States, resale rights benefit only a few established artists.<sup>89</sup> The top twenty-percent of all eligible artists would stand to collect over ninety-five percent of all royalties, with the top five artists collecting over fifty-five percent of all possible resale royalties.<sup>90</sup> The artists themselves are aware of the limited effect resale royalty laws have on developing artists,<sup>91</sup> and the concentration of resale royalties in the hands of the successful fails to benefit new artists in their climb to fame.

Worse than the fact that this law only helps established artists is the fact that it may actually hurt the chances of up-and-coming artists to get the exposure needed for eventual fame. The art market has two major sectors: (1) the “primary market,” which is comprised of the first sale from the artist; and (2) “the secondary market,” or resale market.<sup>92</sup> The Resale Royalty Act by its terms applies only to transactions that take place in the secondary market. The secondary market is more discriminating than the primary market.<sup>93</sup> Of the hundreds of thousands of working artists in the United States, only perhaps two or three hundred have a significant secondary market.<sup>94</sup>

[These are the] elite of artists who have already succeeded, who are recognized by critics and art historians, whose works have entered major private collections and are acquired by leading

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89. See generally Jeffrey C. Wu, *Art Resale Rights and the Art Resale Market: A Follow-Up Study*, 46 J. COPYRIGHT SOC'Y U.S.A. 531, 543 (1999).

90. See *id.* at 543–45 (noting the wide discrepancy between the artists in the top twenty percent who would have received a median royalty of over one-thousand dollars a month versus the next twenty percent who would have received just over one-hundred dollars a month. The language “would have” is used, because in fact most artists do not know about this Act and thus do not collect.).

91. See David Hockney, Michael Craig-Martin, Sir Howard Hodgkin, Anthony Green, Ian Davenport, Gillian Ayres, Letter to the Editor, *Resale Right is Wrong for Art*, TIMES (London), January 21, 2006.

92. John Henry Merryman, Comment, *The Wrath of Robert Rauschenberg*, 41 AM. J. COMP. L. 103, 105 (1993).

93. *Id.* at 106.

94. See Tome R. Camp, *Art Resale Rights and the Art Resale Market: An Empirical Study*, 28 BULL. COPYRIGHT SOC. U.S.A. 146 (1980).



museums, who are the subjects of articles in *ARTnews* and *Art in America*, whose works are in demand and sell for high prices on the primary market: The Rauschenbergs, Lichtensteins, Hockneys, Johnses, Stellas, Frankenthalers, Diebenkorns, and a few score others. Their art world success correlates with their market success; they have a secondary market because they have succeeded.<sup>95</sup>

Most artists are shut out of the secondary market by simple economics; “secondary market dealers do not accept their works for resale because they know from experience that such works are unlikely to resell at any price, and the few that [do] sell w[ill] bring [royalties] too small to cover the expense of sale.”<sup>96</sup> Resale royalties, such as the mandatory five-percent found in California’s Resale Royalty Act, will only increase the risk that secondary market sellers will face diminished profits upon resale.<sup>97</sup> As the primary actors in the resale or secondary market, auction houses are reluctant to take a chance on reselling art which is unlikely to cover the expense of sale.<sup>98</sup> This increased risk based upon the possibility of a decreased return magnifies the effect on the resale of less-established artists, in effect shutting new artists out of the resale market.<sup>99</sup> This phenomenon negates the desired effect of the California law, as less established artists face a diminished number of actors willing to take a chance on selling their works and creating a secondary market where the value of their works will increase.<sup>100</sup>

Thus I would argue that armed with even a rudimentary knowledge of the art market, the legislature could not rationally believe this law would have the effect of helping new artists generally or promoting fledgling artists. It will only help, and has only helped, those artists with substantial secondary markets. Although stories can be invented as to how the California Resale Royalty Act serves a public purpose under the Supreme Court’s broad definition, it is hard to imagine a more non-public use than a mandated person-to-person

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95. Merryman, *supra* note 92, at 106–07.

96. *Id.* at 107.

97. See Gordon P. Katz, *Copyright Preemption Under the Copyright Act of 1976: The Case of the Droit de Suite*, 47 GEO. WASH. L. REV. 200, 220–21 (1978) (explaining the paradox between the *droit de suite*’s goal of creating an economic incentive for artists and its opposing effect of decreasing investment in new artists).

98. Merryman, *supra* note 92, at 107.

99. *Id.*

100. *Id.*

transaction that benefits only the individual, already successful, artist. If this exercise of police power is considered a valid public use, then the public use prong of the Fifth Amendment has truly lost its teeth.

However, answering whether or not the mandated five-percent royalty to artists under the California Resale Royalty Act amounts to a public use merely settles the question of whether the government *can take* the property. The owner of property validly taken for a public use must still be justly compensated. Thus the outcome of this prong is non-determinative for an analysis showing that just compensation is required. It does, however, highlight just how out of step the Act is with our classical conceptions of legislative power and may show that this is a wholly invalid taking, incurable by compensation.

#### **E. What Is the Requirement for ‘Just Compensation?’**

Once it has been determined that a taking has occurred and that the thing taken was “property” within the meaning of the Fifth Amendment, a court must measure the amount the government must pay to effectuate “just compensation.” Justice Oliver Wendell Holmes declared long ago that the measure is “what has the owner lost, not what has the taker gained.”<sup>101</sup> The Supreme Court has consistently ruled in accordance with this reasoning, that just compensation is measured in terms of loss to the owner; the gain to the taker is irrelevant. The value of the loss is assessed in terms of market value to the owner<sup>102</sup> as of the time of the taking.<sup>103</sup>

Thus it matters not that the California government receives none of the five-percent royalty. The only consideration is how much was lost by the seller forced to pay this five-percent. In the case of all sellers for whom the mandatory five-percent royalty did not inhere in their title, just compensation then will be equivalent to the sum they are required to pay to the artist. This sum is the market value of what they have lost at the time of the taking. Therefore, in those instances in which the California Resale Royalty Act requires a seller to pay the artist a five-percent royalty, the State of California must reimburse the seller for this expense unless the artist’s royalty inhered in the seller’s title.

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101. *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910).

102. *See, e.g., United States v. 564.54 Acres of Land*, 441 U.S. 506 (1979).

103. *See Kirby Forrester Indus., Inc. v. United States*, 467 U.S. 1 (1984).

#### **IV. Suggested Changes**

This need to reimburse the seller can be avoided if California rewrites the statute such that it falls under the rubric of a tax. Taxes are takings, but as explained above, they do not require explicit compensation because this would render the taxing power useless, as upon collection, a government would immediately have to repay the taxed amount. If this Resale Royalty Act were written instead as an amendment to the tax code, the legislature's goals could be achieved without the necessity of paying compensation for the taking and could likely effectuate their intent more successfully.

The statute should be amended such that it takes only a percentage of the profit, not a percentage of the sale price. This will omit the current possibility of the 100% "Bill Gates tax" described previously. Secondly, the statute should be written in a way that rationally relates to the legislature's stated goals. If the true goal of this statute is to protect the starving artist, perhaps the tax should be used to fund grants for new artists. A sales tax on fine art that went to a state fund designated for promotion of the arts would assuredly satisfy the requirements for a valid tax and alleviate the need to reimburse the sellers.

#### **Conclusion**

The California Resale Royalty Act mandates that a seller give five-percent of the sale price of a work of art to its artist, whenever a work of art is sold in California or by a California resident. As the Resale Royalty Act applies to all transactions, without regard for the likelihood that the mandatory five-percent royalty never inhered in the owner's title, the statute effects a taking under the Fifth Amendment, as applied in the majority of cases, and the government must pay just compensation. It is possible that compensation alone may not be enough to bring this statute in line with the Constitution, because the taking is arguably not for public use as it seems to bear no rational relationship to the legislature's stated goals. In that case, just compensation will not cure the statute's constitutional deficiencies, and the property must be returned to the owner. Irrespective of its constitutionality, the Resale Royalty Act does not appear to be helping most artists and may in fact be hurting them by decreasing the likelihood of secondary market sellers carrying their pieces. Thus for both constitutional and policy reasons, the California Resale Royalty Act should be repealed or rewritten in such a way

that it would comply with the Constitution and achieve the legislature's goals.