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BALANCING THE FRICTION: HOW A CONSTITUTIONAL CHALLENGE
TO COPYRIGHT LAW COULD REALIGN THE TAKINGS CLAUSE OF
THE FIFTH AMENDMENT[†]

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With the shift in the focus of the American economy from an agrarian economy to a manufacturing economy to a technology economy, there has been a corresponding shift in the socioeconomic importance of differing types of property from real property to personal property to digital property. Unfortunately, the legal response to this shift has unwisely tipped the balance of property rights in favor of society and away from the individual.

In order to support the otherwise laudable intellectual property goal of advancing the arts and sciences, the federal government has moved incrementally down a path that has resulted in the complete devaluation of large swaths of

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privately owned property simply because that property is digital. A very significant point on this path has been crossed.

In spite of the increasing importance of digital property to the American economy, the United States Supreme Court has interpreted the Takings Clause of the Fifth Amendment to provide substantially less protection for digital property than for real property. These rulings have created a constitutional misalignment of economic realities, public policy, and law.

*Copyright law provides a focused lens for the examination of the resulting misalignment. Through administrative regulations, statutory provisions, and court rulings, the federal government has vested copyright owners with the legal authority to exercise dominion over others' property in an unprecedented way. We are now at a point where it is illegal for the consumer to alter or sell even lawfully-obtained property. The Digital Millennium Copyright Act authorizes copyright owners to place digital locks onto both digital content and within tangible property such as cellphones and video game consoles. Correspondingly, as we have seen in the Librarian of Congress's recent ruling that removed the rights of consumers to jailbreak their cellphones and the *Capitol Records, LLC v. ReDigi Inc.* civil case that ruled that consumers cannot sell their digital music files, the other branches of government are complicit in this unprecedented shift in property rights.*

While these actions by the federal government were intended to undergird the public good of advancing the arts and sciences, in reality, they have strengthened the copyright monopoly in an unwarranted manner by eviscerating one of the most important limitations to that monopoly's power: the first sale doctrine.

This Article demonstrates how a Fifth Amendment Takings Clause challenge to narrow provisions of copyright law would present the judiciary with a set of facts that are well suited to allow the judiciary to realign the policy of the Takings Clause with the economic and legal realities of our day.

I. Introduction	325
II. The Analytical Framework.....	331
A. Law, Policy, and Principles.....	331
B. Regulatory Takings	334
C. Copyright as a Public Use.....	337
D. A Policy-Driven Approach	340
1. Background: A Two-Prong Test.....	341
2. The First Prong: The Disproportionate Burden	342
3. The Second Prong: Natural Equity	343
E. Establishing the Endpoints	347
III. Application of the Framework	351
A. The Scope of Copyright’s Regulatory Inference on Private Property Interests.....	352
B. Digital Millennium Copyright Act.....	354
1. The Disproportionate Burden Analysis	361
2. The Natural Equity Analysis.....	362
C. Capital Records, LLC v. ReDigi Inc.....	363
1. The Disproportionate Burden Analysis	366
2. The Natural Equity Analysis.....	367
IV. Conclusion	369
Appendix.....	370
A. Policy, Principles, and Law	370

I. INTRODUCTION

Kevin Hughes has decided to call it a night. For two weeks, he has been working fourteen-hour days preparing a marketing campaign for a potential client his firm has been courting for over a year. Exhausted, but still wound up from work, he decides to unwind by walking the mile that separates his office from his townhome.

Upon arriving home, Kevin discovers that he left his keys at the office—his locked office. In frustration at his forgetfulness and in need of sleep, Kevin uses a rock to break one of the small windowpanes on the front door. After breaking the glass, he reaches in and unlocks the deadbolt.

While cleaning up the broken glass, Kevin sees two police officers approaching his door. The officers inform Kevin that they are responding to a report of the sound of broken glass and suspicious activity at his location. Once they notice the broken glass, they place Kevin under arrest. Shocked, Kevin tries to explain that he is the owner of the townhome and attempts to produce his driver's license. The police are unfazed by his assertions and respond that his ownership of the townhome is of little consequence because, under the current criminal code, it is illegal to break into a residential dwelling even if you are the owner.

After making bail the following morning, Kevin consults with several attorneys, all of whom inform him that he has been charged with a felony. Each attorney also informs him that he will need to pay a substantial retainer fee, prior to his arraignment, if he would like any one of them to defend him against these charges.

In order to pay a retainer fee, Kevin realizes that he will have to liquidate some of his investments. Kevin's financial planner, however, has more bad news. Upon receiving Kevin's sell order, she calls to inform him that it is no longer possible to sell individual stocks. She explains that in order to rein in something called "high frequency trading,"¹ the Securities and Exchange Commission has implemented a rule that eliminates the ability of investors to sell individual shares of stock; investors must now sell the entire portfolio in a single transaction to a single buyer. The secondary markets are in turmoil, and it has become nearly impossible to connect sellers of whole portfolios with suitable buyers. She says that Kevin should not expect an easy or quick transaction.

If you were to find this scenario unbelievable, you would not be to blame. It does not take a nuanced understanding of

1. See generally Michael J. McGowan, *The Rise of Computerized High Frequency Trading: Use and Controversy*, 2010 DUKE L. & TECH. REV. 016 (2010) (providing a detailed explanation of the technological, ethical, and legal aspects of high frequency trading—which are trades that happen in microseconds in an attempt to take advantage of the communication limits of information in the securities market); see also Tara Bhupathi, *Technology's Latest Market Manipulator? High Frequency Trading: The Strategies, Tools, Risks, and Responses*, 11 N.C. J.L. & TECH. 377 (2010) (providing a brief overview of the two main risks of high frequency trading—market instability and the undermining of market fundamentals—and advocating for immediate regulatory responses).

criminal law or a sophisticated knowledge of financial regulation to see through the above scenario for what it is: a ridiculous and unbelievable fiction. Yet if you make a few edits to Kevin's story—if you were to change townhome to cellphone, stocks to digital music, Securities and Exchange Commission to federal courts, and high frequency trading to copyright infringement—this becomes a plausible, albeit still ridiculous, story.

In order to rein in copyright infringement of digital works, and thereby support the public good of advancing the arts and sciences, the federal government has embarked on a regulatory path that has made it illegal to break into your own property if the property or locks are digital instead of tangible.² A recent federal court ruling has moved the law further down this path by making it illegal to sell some types of legally-obtained personal property if the property is digital instead of tangible.³ These laws are intended to support copyright law in spite of the fact that unlocking or selling your legally-obtained digital property in no way infringes upon another's copyrights.⁴

2. See Digital Millennium Copyright Act (“DMCA”), Chapter 12—Copyright Protection and Management Systems, 17 U.S.C §§ 1201-1205 (2012).

3. Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640, 651 (S.D.N.Y. 2013).

4. See 17 U.S.C § 109(a) (2012). The Copyright Act's first sale doctrine, codified at 17 U.S.C. § 109 (2012), provides that “the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.” Regardless of the format of the original, the courts have never found the potential for infringing activities to be sufficient justification to disregard the protections codified in the Copyright Act's first sale doctrine regarding the resale of the originally purchased work. See *generally* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 442-56 (1984) (finding that the mere potential of infringement is not enough to block a technology).

“As long as there have been artistic, literary, and musical works produced, there have been unscrupulous persons who copied others' creative works and appropriated it as his or her own.” Laura N. Gasaway, *Copyright Basics: From the Earliest Times to the Digital Age*, 10 WAKE FOREST INTELL. PROP. L.J. 241, 241 (2010). Indeed, consumers have been “ripping” and “burning” music from compact discs (CDs) and then selling or giving away the CDs since the end of the 1990s. See STEVE KNOPPER, *APPETITE FOR SELF-DESTRUCTION: THE SPECTACULAR CRASH OF THE RECORD INDUSTRY IN THE DIGITAL AGE* 78-79 (2009). Well before the adoption of the CD as the music medium of choice, dual cassette dubbing offered a way for consumers to violate copyright law by making copies of the music cassette—one genus of which was fondly referred to as the “mixtape.” But in none of these scenarios does the potential for copyright infringement serve as a justification for the courts to deprive consumers of the protections enumerated in the first sale doctrine as they relate to the original.

This regulatory destruction of property's economic value has the unintended and counterintuitive consequence of actually undermining, not supporting, copyright law by rendering significantly large swaths of private property unsellable on secondary markets and, therefore, economically worthless.⁵

Conversely, the Takings Clause of the Fifth Amendment of the United States Constitution states: "nor shall private property be taken for public use, without just compensation."⁶ In the annals of legal writing, this clause stands out in both its brevity and clarity. Nevertheless, this clearly stated constitutional constraint on the government's power of eminent domain has caused great difficulty for policymakers and jurists alike. Addressing these difficulties in a Supreme Court opinion, Justice Breyer once wrote that the application of the Takings Clause "bristles with conceptual difficulties."⁷ To illustrate his point, Justice Breyer continued by asking why the Takings Clause does not apply when the government orders a citizen to pay taxes.⁸

While there are some conceptual difficulties created by the

Because the first sale doctrine offers no protection to consumers who make unauthorized reproductions, a person can still be held liable for keeping a digital copy and selling or giving away the digital original that they purchased.

In all of these cases—the digital file, the CD, or the cassette—to keep a copy when you sell the original is a violation of the copyright owner's exclusive right of reproduction under 17 U.S.C § 106(1) (2012) and the exclusive right to distribute found in 17 U.S.C § 106(3) (2012).

5. See R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. REV. 577, 587 (2003) (arguing that consumers are more likely to buy new units of a good when they can resell the good once they no longer wish to retain it. The secondary market for the resale of such goods, therefore, lowers the price of the good for the consumer by offsetting the original purchase price by the amount received for the good upon resale. Correspondingly, people will be less likely to purchase copyrighted digital works if those digital works lose their economic value and are unable to be liquidated); see also William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 327 (1989) (arguing that the European principle of an author having inalienable moral rights in their creative work will "reduce the incentive to create by preventing the author or artist from shifting risk to the publisher or dealer" because publishers' or dealers' rights will always be subordinate to the moral rights of the author and, therefore, less economically valuable. This is one of the central arguments that the content industries have relied upon to thwart the codifying of moral rights in American law. Yet the content industries reject this same argument when it is used to argue against the strengthening of their control over digital property).

6. U.S. CONST. amend. V, cl. 4.

7. *E. Enters. v. Apfel*, 524 U.S. 498, 556 (1998) (Breyer, J., dissenting).

8. *Id.*

twelve words of the Fifth Amendment's Takings Clause, most of the difficulties encountered in the Court's Takings Clause jurisprudence—including Justice Breyer's tax quandary—are judicially self-inflicted and completely unnecessary. In spite of repeatedly citing the policy goals of the Takings Clause,⁹ the Court has, more often than not, ignored such ends and instead vacillated between natural law and positive law constructs to support desired economic outcomes, which has created a confusing array of case-by-case results aimed more at serving a slim majority of the justices' economic and political views than at carrying out the policy of the Takings Clause itself.¹⁰ This abandonment of the judicial constraints of the doctrine of *stare decisis* in favor of an unconstrained and inconsistent *ad hoc* approach to interpreting the Takings Clause has undermined the predictive value of the Court's rulings and destabilized the legal system in this area of constitutional law. The result has led to unpredictable, inconsistent, and often unjust results that call into question the legitimacy of the Takings Clause and copyright law.¹¹

9. See *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 336 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001); *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1071 (1992); *Christy v. Lujan*, 490 U.S. 1114, 1116 (1989) (White, J., dissenting); *Pennell v. City of San Jose*, 485 U.S. 1, 9 (1988); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 836 (1987); *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 318-19 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 512-13 (1987); *Dames & Moore v. Regan*, 453 U.S. 654, 691 (1981) (Powell, J., concurring and dissenting in part); *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 163 (1980); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *Nat'l Bd. of YMCA v. United States*, 395 U.S. 85, 89 (1969).

10. See Eric R. Claeys, *The Penn Central Test and Tensions in Liberal Property Theory*, 30 HARV. ENVTL. L. REV. 339, 356-66 (2006) (analyzing the classical normative support for some Takings Clause rulings as opposed to the more modern positive law or socioeconomic support for other Takings Clause rulings); see also *Kelo v. City of New London*, 545 U.S. 469, 477-83 (2005); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

11. Compare *Andrus v. Allard*, 444 U.S. 51, 65-68 (1979) (holding that government regulation of property for public use that deprived citizens of the market value of *personal* property was not a government taking), with *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992) (finding that regulations of property for public use that deprived citizens of the market value of *real* property constituted a government taking). See, e.g., Lynda J. Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis*, 70 WASH. L. REV. 91, 94 (1995) (highlighting the numerous ambiguities in the Court's Takings Clause *per se* rules and stating that

This Article proposes a realignment of the policy ends and the legal means of the Takings Clause through a Fifth Amendment regulatory takings challenge to narrow segments of our current copyright laws as they apply to digital technology. While there is robust criticism of the Court's Takings Clause jurisprudence and many offered solutions, the literature lacks analysis of the impact this jurisprudence has had on digital technology and the law upon which it is governed. This is partly due to the absence of cases brought before the federal appellate courts on a Fifth Amendment takings theory aimed at strengthening the first sale doctrine¹² through a challenge to the ever-expanding monopoly rights offered by federal copyright law.¹³

Yet before exploring such an approach, it is important to first understand the analytical framework. Therefore, Section II, *infra*, begins by developing, through descriptive analysis, an analytical framework of the principles, policies, and laws of both the Takings Clause and copyright law. This section then transitions into the Article's prescriptive analysis by proposing a two-prong test that aligns the policy and the law of the Takings Clause. The juxtaposition of principles, policy, and the current law of the Takings Clause will help us understand the costs involved with the misalignment of the current constitutional framework and the proposed solutions to realign the ends and means.

Section III begins by developing the factual context of the regulatory environment provided by copyright law as it applies to the digital economy in the United States. It is upon this factual regulatory context that the Takings Clause framework, developed in Section II, will be applied. This analysis provides a realigned jurisprudence, where the law carries out the policy in a way that would create greater predictive value and acceptance that legitimizes the law in the public's mind.¹⁴ It will also strengthen the

the Court's regulatory Takings Clause jurisprudence fails to consistently apply these *per se* rules and has, therefore, created a line of cases that "defies rational or coherent classification or analysis"); Eduardo Moisés Peñalver, *Regulatory Takings*, 104 COLUM. L. REV. 2182, 2186 (2004) (referring to the Court's Takings Clause jurisprudence as "disjointed and weakly theorized" and in "disarray").

12. See *supra* note 4 and accompanying text.

13. 17 U.S.C §§ 101-1332 (2012).

14. Ben Depoorter et al., *Copyright Backlash*, 84 S. CAL. L. REV. 1251, 1256-57, 1264 (2011) (reporting the results of two empirical studies on norms and copyright law focusing on the "dwindling public support" for the content industries specifically and copyright law in general that has resulted from the recent trend of zealous enforcement and stringent sanctions for copyright infringement and citing William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV.

claim that a challenge to copyright law would present the judiciary with a unique set of facts that are well suited to realign the law as interpreted and enforced in the United States with the public policy supporting the Takings Clause and copyright law.

Section IV ends the analysis by providing a conclusion and brief summary of the Article.

II. THE ANALYTICAL FRAMEWORK

This section begins by providing the analytical foundation for my analysis. Before exploring how to fix the law, it is crucial to first understand both the problem and the analytical framework upon which I will build my solutions. This section assists the examination by deconstructing the principles, policies, and law of the Takings Clause. This section then transitions into the Article's prescriptive analysis by reconstructing the Takings Clause and proposing a solution comprised of a two-prong test that aligns the policy and the law of the Takings Clause.

A. *Law, Policy, and Principles*¹⁵

The *law* of the Takings Clause can easily be summed up as requiring the government to meet three conditions for a government taking of privately owned property to be lawful: (1) there must be a government taking of private property; (2) the government taking of private property must be for public use; and (3) the government must pay the owner of the taken private

1871, 1872 (2000) (providing support for the general proposition that injudicious or overzealous enforcement efforts may inadvertently sway public support against the underlying law)).

15. See Appendix. These three terms are important to the development of the analytical framework employed within the body of this Article. In the fields of public policy compliance theory and legal and public policy implementation, there has been a great deal of discussion regarding the importance of defining the terminology used within an article; yet “[b]ecause no widely accepted general theory of policy analysis exists, a standard terminology is not available.” KENNETH J. VANDELDELDE, *THINKING LIKE A LAWYER: AN INTRODUCTION TO LEGAL REASONING* 309 (2d ed. 2010). As one set of researchers has put it, these matters of definition are “of more than linguistic relevance. . . . The question at stake here is one of logic.” MICHAEL HILL & PETER HUPE, *IMPLEMENTING PUBLIC POLICY* 3-4 (2d ed. 2009); see generally RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* (2001). Therefore, the Appendix devotes several pages to defining the terminology used within this Article and presenting a detailed example to illustrate the particular usage of these terms herein.

property just compensation.¹⁶

The United States Supreme Court, however, seems to view these requirements as insurmountable obstacles to the creation of a consistent jurisprudence in this area of constitutional law. The Court often paints the frustrated picture of a law that “bristles with conceptual difficulties”¹⁷ to buoy their aversion to rules and tests in favor of an *ad hoc* approach in this area of the law. This favored *ad hoc* approach has effectively abandoned the doctrine of *stare decisis*, disregarded the policy and the law of the Takings Clause, and created several unfair and unjust results.¹⁸

Arguing in support of this approach, the Court has stated that “no magic formula enables a court to judge, in every case, whether a given government interference with property is a taking,”¹⁹ that takings cases “should be assessed with reference to the ‘particular circumstances of each case,’ and not by resorting to blanket exclusionary rules,”²⁰ and that the “Court, quite simply, has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated.”²¹

These arguments, however, are formed on a foundation of false dilemmas and red herrings where the Court has either focused on a peripheral²² or irrelevant issue²³ or presented only

16. U.S. CONST. amend. V, cl. 4; see *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 414-16 (1922); *Chi., B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 240-41 (1897).

17. *E. Enters. v. Apfel*, 524 U.S. 498, 556 (1998) (Breyer, J., dissenting).

18. See *supra* note 11 and accompanying text.

19. *Ark. Game & Fish Comm’n v. United States*, 133 S. Ct. 511, 518 (2012).

20. *Id.* at 521 (quoting *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155, 168 (1958) (citing *Mahon*, 260 U.S. at 416)).

21. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); see also Chris J. Williams, *Do Smart Growth Policies Invite Regulatory Takings Challenges? A Survey of Smart Growth and Regulatory Takings in the Southeastern United States*, 55 ALA. L. REV. 895, 905 (2004).

22. One example of the Court focusing on peripheral issues is their preoccupation with issues of economics. The economic value of regulatory interference, which may be material to issues of compensation, is truly peripheral when discussing the threshold issue of whether there is a compensable taking. See *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (establishing the economically viable use test, which states that for there to be a compensable taking all economically viable uses must be thwarted by the governmental regulation); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (holding that whether a regulatory act constitutes a taking that would trigger the payment of just compensation to a claimant depends on the extent of diminution in the value of the property); see also *Apfel*, 524 U.S. at 537 (holding that a federal statute that required companies and former coal companies to pay into

two alternatives for consideration²⁴ when other realistic possibilities exist that would not require a “magic formula,” as Justice Ginsburg lamented,²⁵ or a rigid “set formula,” as Justice Brennan bemoaned.²⁶ This *ad hoc* approach has created an unsettled and

the pension fund to benefit the industries’ retirees constituted an unconstitutional regulatory taking of property that invalidated the Act. This is the first Takings Clause decision addressing a purely economic regulation).

23. *Compare* *Andrus v. Allard*, 444 U.S. 51, 65-68 (1979) (holding that government regulation of property for public use that deprived citizens of the market value of *personal* property—bald eagle feathers contained in Native American artifacts—was not a government taking), *with* *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992) (ruling that such regulations of property for public use that deprived citizens of the market value of *real* property—beachfront property—constituted a government taking). In these two cases the Court became distracted with the irrelevant issue of whether the property is personal property or real property. This distinction creates *ex-ante* problems moving forward when dealing with regulatory takings because it suggests that owners of real property have rights under the Takings Clause that owners of personal property do not. Nowhere in the wording of the Takings Clause is there support for such an interpretation.

24. *See generally* *Mugler v. Kansas*, 123 U.S. 623 (1887). *Mugler* was a case brought by beer manufacturers who challenged a Kansas statute that banned the manufacture of intoxicating beverages. This case is emblematic of the difficulties created by the Court’s jurisprudence in this area. *Mugler* set in motion the formal dichotomous distinction between the non-compensable exercise by the government of its police power to protect or promote public health, safety, or welfare and the acts of the government that create compensable takings under the Takings Clause. While this either/or distinction seems helpful at first glance, it becomes increasingly problematic in practice as some exercises of the government’s police power have been seen as clear takings that should be compensated. *See also* *Mahon*, 260 U.S. at 415 (holding “that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking”); D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIAMI L. REV. 471, 506 (2004) (discussing the historical nature of the police power, positivist regulation, and the development of the regulatory takings doctrine). The amorphous and undefined nature of the police power and its importance in the either/or distinction, which often morphs into a continuum model between the two choices, has created a false dilemma for the Court that manifests itself in the Court’s *ad hoc* reasoning in each successive regulatory taking opinion. *Accord* Lynda J. Oswald, *Property Rights Legislation and the Police Power*, 37 AM. BUS. L. J. 527, 550 (2000) (stating that “[u]nlike the eminent domain power, the police power is not defined in the Constitution and is, in fact, a deliberately amorphous and flexible concept”).

25. *Ark. Game & Fish Comm’n v. United States*, 133 S. Ct. 511, 518 (2012) (explaining her reasoning of the use of an *ad hoc* factual analysis in regulatory takings cases, Justice Ginsburg makes the claim that it would take “magic” to come up with a standard test that would be useful in all regulatory takings cases).

26. *Penn Cent. Transp. Co.*, 438 U.S. at 123-24 (involving the City of New York’s designation of Grand Central Station Terminal Building as a landmark

unpredictable body of law. Instead of focusing on solving the issues created by this *ad hoc* approach, the Court has thrown up its collective hands and instead focused on its descriptive analysis of the terms “property,” “taking,” and “public use.” These interpretations are clearly important to the development of a stable Takings Clause jurisprudence. Yet the Court’s preoccupation with defining and redefining these terms, and creating unsupported distinctions and classifications within these terms,²⁷ has hindered the development of a useful analytical framework that supports stability and predictability. This caustic approach has undermined the legitimacy of the Takings Clause and the Court itself.

B. Regulatory Takings

One such damaging preoccupation that the Court has become mired in is the regulatory taking issue. Section II.D, *infra*, develops a two-prong Takings Clause test, and Section III, *infra*, applies this two-prong test to several narrow regulatory areas of copyright law as they pertain to the technology sectors of the U.S. economy. This analysis would be seen in the current Court’s jurisprudence as a regulatory taking analysis.²⁸ Therefore, before

which kept its owner, Penn Central Transportation Company, from adding on a fifty-five-story office building on top of the iconic building. Justice Brennan, writing for the six-member majority, provides a comprehensive review of the regulatory takings problem, demonstrating that the Court’s *ad hoc* approach is the only way to approach the varying and complex issues the Court must address in regulatory takings cases. He describes the takings problem as one of “considerable difficulty” and concludes that “this Court, quite simply, has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.”).

27. See generally Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 BYU L. REV. 899, 939 (2007) (providing one example of this issue by discussing *Penn Cent. Transp. Co.*, which states, “[i]n deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole” 438 U.S. at 130-31. Then just nine years later, in *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 517 n.5 (1987), the Court commented that *Penn Central* “gave no guidance on how one is to distinguish a ‘discrete segment’ from a ‘single parcel[,]’” an issue the Court is still grappling with today).

28. See *Mahon*, 260 U.S. at 415 (holding “that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking”); see also Barros, *supra* note 24, at 506 (discussing the historical nature of the police power, positivist regulation, and the development of the regulatory takings doctrine).

discussing the prescriptive application of the following two-prong test, it will be helpful to take a moment and briefly examine the current law of regulatory takings.

According to the Court's current jurisprudence, there are two types of takings for the purpose of the Fifth Amendment's Taking Clause: a physical taking (sometimes referred to as a *per se* taking) and a regulatory taking.²⁹ The traditional notion of a physical taking of real property has a long judicial history and occupies one endpoint of the Takings Clause spectrum.³⁰ The physical taking of personalty would come next on the Takings Clause spectrum. Most physical takings of personalty would also trigger a just compensation claim, although there is not as long of a judicial history supporting a Takings Clause just compensation analysis of personal property as there is of real property.

In Takings Clause jurisprudence, the application of the regulatory takings doctrine is a relatively recent development.³¹ Prior to 1922, governmental regulation of property was not viewed by the judiciary as a taking and was instead viewed as the exercise of the sovereign's police power that in no way triggered just compensation under the Takings Clause. In 1922, however, the

29. See *Ark. Game & Fish Comm'n*, 133 S. Ct. at 518.

30. *Kelo v. City of New London*, 545 U.S. 469 (2005), has created a problem with the community endpoint of my analysis. This case destabilized the balance between the individual and the community through a drastic expansion of the definition of what constitutes a public use that favors the community over the individual in an unprecedented manner. The *Kelo* outcome has, however, been examined in great detail by numerous authors (see Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491 (2006); John Dwight Ingram, *Eminent Domain After Kelo*, 36 CAP. U.L. REV. 55 (2007)) and has also been softened by the enactment of many state laws that have provided a state counterbalance to offset the clear tipping of the playing field toward the community (see Andrew P. Morriss, *Supreme Court Economic Review Symposium on Post-Kelo Reform: Symbol or Substance? An Empirical Assessment of State Responses to Kelo*, 17 S. CT. ECON. REV. 237 (2009) (examining and evaluating the state responses to *Kelo*); see, e.g., Eminent Domain Act, 735 ILL. COMP. STAT. ANN. 30/1-1-1 to 30/99-5-5 (2007); ALA. CODE § 18-1B (2006); MICH. CONST. art. X, § 2, as amended by S.J.R. E, 93d Leg., 2005 Reg. Sess. (Mich. 2005) (approved 2006). Therefore, an analysis of what constitutes public good in regards to the *Kelo* ruling is beyond the scope of this Article and is unnecessary in the defense of the analytical framework used herein.

31. See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782 (1995); cf. Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes Too Far,"* 49 AM. U. L. REV. 181, 181-84 (1999).

Court recognized the existence of a regulatory taking for the first time in *Pennsylvania Coal Co. v. Mahon*.³² Throughout its existence, the doctrine of regulatory takings has been applied, at best, unevenly and, at worst, in a “deeply flawed” manner.³³

While many law review pages have been devoted to the analysis and criticism of the myriad of regulatory takings tests—including *Mahon*’s diminution in value test,³⁴ *Penn Central*’s three-prong balancing test,³⁵ *Lucas*’s total takings test,³⁶ and *Dolan*’s roughly proportional test³⁷—these often cited yet seldom applied tests provide little in the way of guidance due to the Court’s use of an *ad hoc* approach in the bulk of Takings Clause cases.³⁸ While an understanding of the precedent of the Takings Clause in regard to regulatory takings would seem to be important to my analysis and recommendations, the Court’s consistent abandonment of its own precedent limits the application of an established and well-settled body of Takings Clause precedent. As detailed above, the Supreme Court has stated time and again that there are “few invariable rules in this area”³⁹ and, instead, has favored “situation-specific factual inquiries.”⁴⁰ Therefore, this Article will forgo the historical recounting of this dysfunctional “muddle.”⁴¹

What rules the Court has established and followed consistently tend to create more problems than they solve. For

32. *Mahon*, 260 U.S. at 415.

33. Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 566 (1984).

34. *Mahon*, 260 U.S. at 413 (holding that whether a regulatory act constitutes a taking that would trigger the payment of just compensation to a claimant depends on the extent of diminution in the value of the property).

35. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124-25 (1978) (holding that whether a regulatory act constitutes a taking that would trigger the payment of just compensation to a claimant depends on three factors: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action).

36. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992) (holding that a regulatory act that deprives a property owner of all economically beneficial use of that property can constitute a taking that would trigger the payment of just compensation to the claimant).

37. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (finding that an exaction acts as a taking that would trigger the payment of just compensation to the claimant if the public benefit from the exaction is not roughly proportional to the burden imposed on the public by allowing the proposed land use).

38. See Oswald, *supra* note 24, at 532.

39. *Ark. Game & Fish Comm’n v. United States*, 133 S. Ct. 511, 518 (2012).

40. *Id.*

41. See Rose, *supra* note 33, at 561.

instance, in the nearly one-century long history of the doctrine of regulatory takings, the Court has never required a public use as a necessary component of a regulatory taking in spite of a public use being specifically required by the wording of the Takings Clause itself.⁴² My analysis will reinstate the requirement of a public use for regulatory takings.

In another example, the two economic tests the Court sporadically employs—the investment-backed expectations test⁴³ and the economically viable use test⁴⁴—are overly simplistic distractions that keep the Court from “focusing on the complex issue of the legitimacy of the governmental objective at stake, and the relationship between that objective and the challenged regulation”⁴⁵ and simply “provide the Court with a surrogate for a true takings analysis, a surrogate that allows the Court to avoid the more difficult questions associated with regulations alleged to be takings.”⁴⁶ Therefore, the following prescriptive analysis consists of a framework and resulting two-prong test that borrows from the Court’s jurisprudence what is valuable and abandons what is unworkable without the need to be procedurally or substantively bound by either. There will, however, be a clear focus on and fidelity to the actual policy and law of the Takings Clause itself.

C. *Copyright as a Public Use*

This section will provide a descriptive analysis of copyright law and why copyright law qualifies as a public use under the Takings Clause. This section is important to the overall analysis because one aspect of the Court’s Takings Clause jurisprudence that this Article rejects is not requiring a public use for regulatory takings. According to the wording of the Takings Clause itself, there must be a public use in order for a taking to be authorized under the Fifth Amendment.⁴⁷ The Constitution does not abandon such a requirement for regulatory takings and neither should any subsequent judicial analysis. Yet this requirement has unwisely been abandoned by the Supreme Court in regulatory takings

42. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 326 (2002) (“After *Mahon*, neither a physical appropriation *nor* a *public use* has ever been a necessary component of a ‘regulatory taking.’”).

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

44. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

45. Oswald, *supra* note 11, at 94.

46. *Id.*

47. U.S. CONST. amend. V, cl. 4.

cases.⁴⁸ In my analysis, however, it remains a requirement in any Takings Clause analysis. Reinstating this requirement of a public use in regulatory takings cases acts to limit the scope of the Takings Clause and thereby maintain the balance between society and the individual.⁴⁹

Looking back at the example in the Introduction, one might think that one of the most difficult hurdles to overcome for the present analysis would be the question of whether the provisions of the Copyright Act⁵⁰ that either keep a consumer from reselling their digital content on secondary markets or keep consumers from “jail breaking” their digital devices are regulations that are for public use.

Among the enumerated powers that the United States Constitution vests in the federal Congress is the power “[t]o promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁵¹ It is from this constitutional grant of authority—often referred to as “The Patent and Copyright Clause”—that Congress has promulgated numerous federal patent and copyright statutes.⁵²

There are two distinct and opposing public policy arguments that support the grant of intellectual property rights. The first comes from the French civil law tradition and views copyright as a natural law property right vested in authors who create original works and therefore should have sole right in how that work is used and dispersed.⁵³ This natural law policy argument is sometimes also referred to as an “authors’ rights” or “private property” justification.⁵⁴ Many commentators and scholars alike tend to focus on this natural rights theory of intellectual property to frame authors and inventors as the main, or sometimes

48. See, e.g., *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002).

49. See *supra* Section II.A and *infra* Section II.D.1 for further discussions of the policy of the Takings Clause as it pertains to balancing the needs of society with the rights of individual property owners.

50. Copyright Act, 17 U.S.C. §§ 101-1332 (2012).

51. U.S. CONST. art. I, § 8, cl. 8.

52. See, e.g., *Leahy-Smith America Invents Act*, Pub. L. No. 112-29, 125 Stat. 284 (2011) (codified in scattered sections of 35 U.S.C.); *Digital Millennium Copyright Act*, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.).

53. Minjeong Kim, *The Representation of Two Competing Visions on the Fundamentals of Copyright: A Content Analysis of Associated Press News Coverage on Copyright, 2004-2009*, 16 COMM. L. & POL’Y 49, 53-54 (2011).

54. *Id.*

even the sole, beneficiaries of The Patent and Copyright Clause and the subsequent statutory enactments.⁵⁵ American copyright law, however, derives its justification from English law and its utilitarian justification of intellectual property. This utilitarian policy argument is sometimes also referred to as a “users’ rights” or “public policy” justification.⁵⁶ Under this policy argument, there are actually two beneficiary classes created; the primary beneficiaries are not the authors and inventors (i.e., the creators of intellectual property), but the public at large (i.e., the users of intellectual property). The authors and inventors are actually secondary beneficiaries who are granted limited monopolies only as a means of correcting a market failure that is created by the intangible nature of intellectual property.

The utilitarian foundation of American intellectual property law (as opposed to the natural rights foundations of French intellectual property law) is seen in the myriad of limitations on copyright found in the Copyright Act, which include essential principles such as fair use,⁵⁷ the authorized reproduction by libraries and archives,⁵⁸ the first sale doctrine,⁵⁹ compulsory licensing,⁶⁰ and making archive copies for back-up purposes.⁶¹

The main thrust of The Patent and Copyright Clause of the United States Constitution, therefore, is to incentivize the creation of scientific advancement and innovation and artistic expression through limited monopolies to authors and inventors who benefit society as a whole. Indeed, both patent and copyright law function to protect a public good that benefits society at large. As one scholar eloquently stated in a recent law review article, “the primary purpose of copyright is to enrich society, not copyright

55. See generally Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993); see also Orit Fischman Afori, *Human Rights and Copyright: The Introduction of Natural Law Considerations into American Copyright Law*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 497 (2004); Paul D. Clement, Viet D. Dinh, & Jeffrey M. Harris, *The Constitutional and Historical Foundations of Copyright Protections*, CENTER FOR INDIVIDUAL FREEDOM (2012), available at <http://cfif.org/v/images/pdfs/constitutional-and-historical-foundations-of-copyright-protection.pdf>.

56. Kim, *supra* note 53, at 53-54.

57. 17 U.S.C. § 107 (2012).

58. 17 U.S.C. § 108 (2012).

59. 17 U.S.C. § 109(a) (2012).

60. 17 U.S.C. §§ 111, 114-115, 118-119, 1001-1010 (2012).

61. 17 U.S.C. §§ 107-108 (2012).

holders.”⁶² Therefore, copyright regulations that interfere with a citizen’s individual property ownership rights are, by constitutional acknowledgement, doing so for a public use.⁶³

D. A Policy-Driven Approach

While the scholarly literature is teeming with robust criticism and suggested solutions regarding the Takings Clause, the literature is lacking an analysis and suggested means of aligning the *policy* of the Takings Clause with the *law* of the Takings Clause as they relate to copyright law. More specifically, the literature is missing a Takings Clause analysis of the regulatory debate surrounding the Digital Millennium Copyright Act’s (DMCA’s) anti-circumvention provisions or the assault on copyright’s first sale doctrine.

Therefore, the following analysis of the policy foundations of the Takings Clause and the subsequent two-prong test are proposed as a solution to this problem. What differentiates this test from what has come before is that this test is specifically designed to realign the policy⁶⁴ with the law of the Takings Clause while the proposed application to copyright law would correspondingly improve the alignment of copyright policy with copyright law.

Also, this prescriptive approach is driven by research in the fields of public policy compliance theory and legal and public policy implementation. These fields indicate that one of the most reliable and stabilizing methods of promoting support for and compliance with the law is to have clearly-defined and easily-understood laws that are aligned with well-defined and broadly-accepted policies.⁶⁵ It is hoped, therefore, that this two-prong test will, if implemented, increase the legitimacy of both the Takings Clause and copyright law. This prescriptive approach is currently missing in the literature, and it is my hope that this Article will fill this void.

62. Clark D. Asay, *Kirtsaeng and the First-Sale Doctrine’s Digital Problem*, 66 STAN. L. REV. ONLINE 17, 22 (2013).

63. See U.S. CONST. art. I, § 8, cl. 8.

64. See *supra* Section II.A and *infra* Section II.D.2 for a complete analysis of the policy of the Takings Clause.

65. See ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), REDUCING THE RISK OF POLICY FAILURE: CHALLENGES FOR REGULATORY COMPLIANCE, 7, 11 (2000) [hereinafter OECD WHITE PAPER], available at <http://www.oecd.org/gov/regulatory-policy/46466287.pdf>.

1. Background: A Two-Prong Test

The nature of American law purposefully creates friction between competing policies as they push against one another. The classic example of this friction can be found in the fundamental American conflict between policies that favor the community and policies that favor the individual.⁶⁶ The passage of the Bill of Rights⁶⁷ was an acknowledgement of the counterintuitive need to maintain this friction.⁶⁸ Due to the fact that the Constitution, as originally written and ratified, erred too far on the side of the community, the Bill of Rights was passed as a counterweight to protect the competing interests of the individual.⁶⁹

Seeking such counterweights, at least two states requested every other provision contained in the Bill of Rights; however, not one state requested the inclusion of the Takings Clause.⁷⁰ The Takings Clause was, instead, championed by the primary architect of the Constitution itself, James Madison, and included upon his insistence.⁷¹ This is partially due to the fact that the Takings Clause is different from the other provisions found in the Bill of Rights. The Takings Clause is not a right bestowed upon the individual that increases the friction with the community. Instead it limits the rights of both the community *and* the individual. It acts as a limit on the government's power to take private property—a power that is traditionally vested in the sovereign and that is commonly referred to as the power of *eminent domain*.⁷² But it also limits the individual's rights to be free from governmental interference with his or her private property.

Thus, instead of increasing the friction between the individual and the community—that is, instead of granting power to the community as the first seven Articles of the Constitution do or granting rights to the individual as the rest of the Bill of Rights does—the Takings Clause reduces the particular friction created by the competing policies of advancing communal interests (as

66. VANDEVELDE, *supra* note 15, at 143.

67. U.S. CONST. amends. I-X.

68. See Treanor, *supra* note 31, at 818 (tracing the friction between community interests focused on the common good that were at the center of the colonial ideology of republicanism and individual liberties that were at the center of the colonial ideology of liberalism as it relates to the development of our ideas of property ownership).

69. *Id.*

70. *Id.* at 834-35.

71. *Id.*

72. *United States v. Jones*, 109 U.S. 513, 518-19 (1883).

manifested in the law of eminent domain) and protecting individual rights (as manifested in the laws that grant individuals the right to own property). This social contract allows the community to take property for public use (e.g., an individual may not stop progress that benefits the community as a whole simply by exerting his or her property rights). Yet the community must respect the individual's property rights by paying the individual just compensation for the taking of the individual's property that was put to a public use.

Any attempt to devise a test to improve outcomes based on the application of the Takings Clause must acknowledge this most basic policy understanding, for a failure to do so will create unnecessary difficulties and unjust outcomes.

2. The First Prong: The Disproportionate Burden

In 1960, the Supreme Court issued its opinion in the Takings Clause case of *Armstrong v. United States*.⁷³ Justice Black's majority opinion in *Armstrong* is widely cited by scholars and courts alike as the definitive interpretation and analysis of the policy of the Takings Clause. The *Armstrong* Court delivered a clearly articulated analysis that "[t]he *Fifth Amendment's* guarantee that private property shall not be taken for a public use without just compensation was designed to bar 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."⁷⁴ In other words, according to the *Armstrong* Court, the Takings Clause serves to spread the cost of public investments to the people as a whole so that some will not be disproportionately burdened for the benefit of the whole. The Supreme Court has repeated this policy analysis in almost every Takings Clause case since 1960.⁷⁵

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

74. *Id.* at 49; *see also* *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012); *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 318-19 (1987); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123-25 (1978).

75. *Compare* *Ark. Game & Fish Comm'n*, 133 S. Ct. at 511; *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 336 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001); *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1071 (1992); *Christy v. Lujan*, 490 U.S. 1114, 1116 (1989) (White, J., dissenting); *Pennell v. City of San Jose*, 485 U.S. 1, 9 (1988); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 836 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 512-13 (1987); *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 318-19 (1987); *Dames & Moore v. Regan*,

Whereas the Court has cited *Armstrong* both in majority and dissenting opinions, it has seldom applied the *Armstrong* policy analysis as a test or even an element in a multi-pronged test. Instead, the Court has engaged the *Armstrong* policy analysis as boilerplate dicta cited along circuitous paths to *ad hoc* results.⁷⁶ However, in my analysis the policy articulated in *Armstrong* will serve to establish the first prong of the two-prong test. This prong will be referred to as the “disproportionate burden” prong.⁷⁷

3. The Second Prong: Natural Equity

Although the *Armstrong* policy analysis is the most frequently cited articulation of the policy of the Takings Clause, it is not the most comprehensive interpretation and analysis of Takings Clause policy. The 1893 case of *Monongahela Navigation Co. v. United States* remains the Court’s most complete and detailed interpretation and analysis of the principle policy of the Takings Clause.⁷⁸

The *Monongahela* Court began its analysis in the broad context of the friction between the community and the individual when it stated that the case before it regarded “the extent of the protection the individual has under the constitution against the demands of the government”⁷⁹ Writing for the Court, Justice Brewer continued to frame the Court’s analysis by stating that “the right to compensation is an incident to the exercise [of the power of eminent domain]; that the one is so inseparably connected with the other that they may be said to exist, not as separate and distinct

453 U.S. 654, 691 (1981); *Webb’s Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 163 (1980); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *Nat’l Bd. of YMCA v. United States*, 395 U.S. 85, 89 (1969), *with* *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *United States v. 564.54 Acres of Land*, 441 U.S. 506 (1979); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962).

76. *Cf. Penn Cent. Transp. Co.*, 438 U.S. at 148-49 (Rehnquist, J., dissenting) (noting that “[i]f the cost of preserving Grand Central Terminal were spread evenly across the entire population of the city of New York, the burden per person would be in cents per year” but the majority fails to consider *Armstrong* and imposes “the entire cost of several million dollars per year” solely upon the owners of said structure).

77. See Andrew W. Schwartz, *Reciprocity of Advantage: The Antidote to the Antidemocratic Trend in Regulatory Takings*, 22 UCLA J. ENVTL. L. & POL’Y 1, 50 (2004).

78. *Monongahela Nav. Co. v. United States*, 148 U.S. 312 (1893).

79. *Id.* at 324.

[policies], but as parts of one and the same [policy].”⁸⁰ The Court then transitioned from framing its analysis to directly interpreting the policy of the Takings Clause when it stated that:

[T]here is a natural equity which commends it to every one [sic]. It in no wise detracts from the power of the public to take whatever may be necessary for its uses; while, on the other hand, it prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.⁸¹

The *Monongahela* Court, therefore, clearly interpreted the policy of the Takings Clause as pursuing “a natural equity” (i.e., a balance) between the subordinate competing policies of the community, as manifested in government’s power of eminent domain, and the individual, as manifested in personal property ownership rights that are protected by the Due Process Clause of the Fifth Amendment.

This balance serves as the second of the two prongs of my Takings Clause test. This prong will be referred to as the “natural equity prong,” and is aimed at carrying out the principal policy of the Takings Clause—striking a balance to reduce the friction that is created between the subordinate competing policies of the community, as manifested in government’s power of eminent domain, and the individual, as manifested in private property ownership rights. In this prong, courts must analyze whether the alleged taking creates an unacceptable imbalance between the community and the individual that is unjust or unfair.⁸²

Some may argue that “[i]t is a widely known criticism of balancing tests that, when applied by courts, they lead to unpredictable results”⁸³ and, as such, this prong is no better than current Supreme Court jurisprudence. This argument could be

80. *Id.* at 324-25 (internal quotations marks omitted) (to avoid confusion and remain consistent with the terminology as defined in the Appendix the term “policy” has been substituted for Justice Brewer’s use of the term “principle”).

81. *Id.* at 325.

82. See *infra* note 91 and accompanying discussion.

83. Ryan Williams, Comment, *Reputation and the Rules: An Argument for a Balancing Approach under Rule 8.3 of the Model Rules of Professional Conduct*, 68 LA. L. REV. 931, 949 (2008) (citing Patrick M. McFadden, *The Balancing Test*, 29 B.C. L. REV. 585, 643 (1998)).

supported by pointing to the Court's current *ad hoc* approach. For instance, one could argue that the problem, as manifested in the *Penn Central* three-part judicial balancing test,⁸⁴ clearly "leads to inconsistent results."⁸⁵ One could also point to Justice Scalia's direction from *Lucas*,⁸⁶ suggesting that "judges . . . should objectively look to the balances already struck by state courts and legislatures,"⁸⁷ which has proven unsatisfactory.

The refutation of this critique lies in three factors. First, while balancing tests sometimes offer less predictive power than bright-line rules,⁸⁸ they offer much more predictability than the Court's current *ad hoc* approach.⁸⁹ Second, this balancing test is the second prong of a two-part test, and the existence of the first prong functions to counteract much of the unpredictable nature that a balancing test used alone would create. Third, balancing tests oftentimes rely heavily on the higher-plane analysis of principles such as justice and fairness⁹⁰ and, as a result, may seem to be inconsistent in their results; yet in reality, they serve to temper the rigidity of the rules-based lower-plane analysis of policies and law.

Focusing for a moment on this third factor, it is acknowledged that the issues of justice and fairness are complex and the fields of moral and political philosophy are low-consensus fields. In fact, one particular luminary in the fields of moral and political philosophy has suggested that "it's worth asking how philosophical arguments can proceed—especially in so contested a

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

85. Seth E. Zuckerman, Note, *Loveladies Harbor, Inc. v. United States: The Claims Court Takes a Wrong Turn—Toward a Higher Standard of Review*, 40 CATH. U. L. REV. 753, 786 (1991) (citing Patrick M. McFadden, *The Balancing Test*, 29 B.C. L. REV. 585, 643 (1998) (stating that "[w]hen the judge weighs the elements to be balanced, the weights will be assigned in accordance with the judge's view of what is important. Whether one interest or set of interest 'outweighs' another . . . depends on which of them the judge values more highly.")).

86. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1071 (1992).

87. See Katherine A. Bayne, *Lucas v. South Carolina Coastal Council: Drawing a Line in the Sand*, 42 CATH. U. L. REV. 1063, 1092 (1993).

88. See generally James G. Wilson, *Surveying the Forms of Doctrine on the Bright Line-Balancing Test Continuum*, 27 ARIZ. ST. L.J. 773, 806 (1995) (explaining how not all balancing tests are less predictive than bright line rules and providing the following example: "the 'rational purpose' [balancing] test in constitutional law virtually guarantees a victory for the government" and therefore has great predictive power).

89. *Id.*

90. See *infra* note 91 and accompanying discussion.

domain as moral and political philosophy.⁹¹ This Article will not attempt to remedy this situation by fashioning a unified theory of moral and political philosophy for the purposes of Takings Clause jurisprudence. Such a task would clearly exceed the scope of this Article. Instead, this Article highlights the importance of these concepts as they relate to the analysis herein.

It is further acknowledged that jurists may reach radically different results by employing radically different definitions of fairness and justice within the proposed two-prong test advocated for within this analysis; for instance, one jurist may apply utilitarian theories of distributive justice, another may favor the libertarian maximization of individual freedom, and yet another may employ a classical theory of virtue. Each of these approaches, however, is superior to the Court's current *ad hoc* approach because each approach is externalized.⁹² In other words, jurists would, at the very least, be functioning within an identifiable moral framework that others can discern and analyze. Furthermore, many jurists will articulate such frameworks within their written opinions as support for their decision. This written articulation of an externalized moral framework gives the public even greater ability to understand the law and predict its outcomes in this area. One jurist's moral framework, even if different than others' frameworks, constrains that particular jurist somewhat and makes his or her individual decisions more predictable than an *ad hoc* approach ever would.

One constitutional scholar, in analyzing judicial tests, stated the benefits of balancing tests well when he wrote:

The Supreme Court always needs to be careful in creating constitutional legal doctrine, which is relatively immutable law created by unelected officials in a democracy. Aside from everything else, it is difficult to reverse most of the Court's decisions. Thus, formal constitutional doctrine, which is designed to bind the future more completely, is more risky than balancing tests, which can easily be adjusted. Nevertheless, most Americans want the Court to finalize some constitutional issues, even though they will disagree over which issues should receive such treatment; they favor resolution of major issues, even though those settlements will not last forever. As a result, the Supreme

91. MICHAEL J. SANDEL, JUSTICE: WHAT'S THE RIGHT THING TO DO? 20 (2009).

92. See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 962 (1987).

Court will be perpetually torn between creating rules to enhance predictability and formulating standards to allow future generations to adapt to unforeseeable problems and to introduce different perspectives based upon their different experiences.⁹³

The Court's current *ad hoc* Takings Clause jurisprudence errs too far on the side of unpredictability. Yet a bright line rule is unworkable in this area due to the stated policy goals of the Takings Clause. Therefore, a balancing test that is constrained by externalized notions of fairness and justice and is further constrained by the fact that it comprises only one prong of a two-prong test is a superior compromise that will create a greater degree of predictability while remaining true to the policy goals of the Takings Clause.

E. Establishing the Endpoints

To define the endpoint of non-compensable takings on the Takings Clause spectrum, this analysis now returns to the conceptual difficulty Justice Breyer created with his query of why the Takings Clause does not apply when the government orders a citizen to pay taxes.⁹⁴ When viewed directly, the law of the Takings Clause seems to support the catch-22 Justice Breyer pointed out with his tax example.⁹⁵ The levying of taxes is indeed a taking that requires citizens to surrender private property, in the form of money, to the government. This physical taking of property is for public use in that it provides funds that the government then uses to pay for its functions. Yet there is no just compensation paid in return. To Justice Breyer this seemed inconsistent and conceptually difficult to reconcile with the fact that the *per se* taking of real property requires just compensation.⁹⁶

In attempting to reconcile this conceptual difficulty, one might make a purely pragmatic argument that the payment of just compensation would require the government to refund all of the tax revenue it collects, thereby destroying any benefit of taxing in the first place and making it impossible for the government to function.⁹⁷ This pragmatic argument, however, fails to

93. Wilson, *supra* note 88, at 790.

94. *E. Enters. v. Apfel*, 524 U.S. 498, 556 (1998) (Breyer, J., dissenting).

95. *Id.*

96. *Id.*

97. One very prominent scholar, however, has zealously embraced that argument as a grand reason to curtail the growth and power of government. See

acknowledge the conceptual difficulty and simply dismisses it without further consideration. This is clearly an unsatisfactory resolution of this conundrum.

The more satisfying solution to this conceptual difficulty lies in the application of the Takings Clause policy analysis and the resulting two-prong test. When applying the first prong of this test, the disproportionate burden prong, we see that there is a significant difference between the government taking a citizen's acre of land for a new post office and the government assessing a broad-based tax on citizens. A tax does not qualify as a compensable taking under the first prong because it does not force "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."⁹⁸ Because the vast majority of the population is theoretically obligated to pay taxes, it simply fails to create a disproportionate burden on the affected parties.

We then move on to the natural equity prong of the test. In this prong, courts must analyze whether the tax creates an unacceptable imbalance between the community and the individual. A government levy of a reasonable broad-based tax on its citizens to provide funding for government operations would not create an unacceptable imbalance between the community and the individual. This is, of course, dependent on the broad-based nature and the reasonableness of the amount of the tax. In no way would a taking of one-hundred-percent of all earnings of all citizens maintain the balance between the government and the individual. Such a tax would clearly fail the natural equity prong of the test. If, on the other hand, the government passed a law taxing one individual citizen an exorbitant amount, what is often called the "Bill Gates Tax," then that would clearly undermine the policy of the Takings Clause and trigger the law of the Takings Clause requiring just compensation be paid to the one individual who was being forced to bear more than his or her just share of the burdens of government.

The most important result of this exercise is that once the balancing test of the natural equity prong is applied to the analysis, it becomes clear that taxes establish one of the endpoints of the Takings Clause spectrum. Despite the fact that taxes are clearly a government taking and that they are put to public use, they do not trigger a just compensation claim on behalf of the taxed citizens

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

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

because the policies of the Takings Clause are not frustrated. Taxes clearly represent one endpoint, that of non-compensable takings, on the Takings Clause spectrum.

On the other endpoint of the Takings Clause spectrum, the endpoint of compensable takings, we return to the *per se* permanent physical taking of a parcel of real property, as discussed in Section II.B, *supra*. Real property gains much of its value as a result of its location, which only one piece of realty can occupy in the tangible world in which it exists. That is why the traditional property maxim that “each parcel of real property is unique” is so unquestioned.⁹⁹ Hence, when the government takes your land to build a school, post office, or road, that permanent physical government occupation of your private property undermines both the subordinate and the primary policies of the Takings Clause by forcing public burdens that should be borne by the public as a whole on one or a few owners of a unique parcel or parcels of realty in a way that, if allowed without just compensation, would create a category of non-compensable takings that creates a precedent that unjustly tips the balance in favor of the community.

The importance of establishing these endpoints can best be understood by looking at some of the conceptual difficulties the Court has unnecessarily manufactured in its Takings Clause jurisprudence. By creating a misalignment in the policy and law of the Takings Clause, the Court’s Takings Clause jurisprudence has run aground over and over again. For instance, in *Andrus v. Allard*, the Court held that government regulation of personal property (i.e., chattel) that deprived a small number of citizens of the market value of a very unique and scarce type of property, bald eagle feathers used in Native American artifacts, was not a government taking.¹⁰⁰ Then, thirteen years later, the Court ruled in *Lucas v. South Carolina Coastal Council* that regulations of certain parcels of real property for public use that once again deprived very few citizens of the market value of a very unique type of property, oceanfront real property, constituted a government taking based on the property being real property instead of personal property.¹⁰¹

The more accurate analysis, however, would have placed both of these cases on the compensable end of the Takings Clause

99. See Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 STAN. L. REV. 591, 601 (2004) (citing 26 Am. Jur. 2d Eminent Domain § 277) (“[E]ach parcel of real property is unique”).

100. *Andrus v. Allard*, 444 U.S. 51, 63-68 (1979).

101. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027-32 (1992).

spectrum. In other words, these cases were easily in violation of the two-prong test. First, because both takings placed unjust burdens upon a small number of individuals, both takings violated the subordinate policy of the Takings Clause and thereby failed the disproportionate burden prong of the test. Second, both takings violated the primary policy of the Takings Clause and thereby failed the natural equity burden prong of the test because the actions of the government in both cases favored the interests of the community in a way that was unbalanced and inequitable.

In an analysis that aligns the law and the policy of the Takings Clause, the disproportionate burden placed on the plaintiffs and the imbalance between the interests of the community and the individual are material to the outcome in both of these cases, while the Court's preoccupation with the classification of the type of property that was taken in each case is clearly not.

The Court has recognized this itself, stating that:

[t]he term 'property' as used in the Taking Clause includes the entire 'group of rights inhering in the citizen's [ownership].' It is not used in the 'vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. . . . The constitutional provision is addressed to every sort of interest the citizen may possess.'¹⁰²

Yet the Court is unable to distinguish why real and personal property might receive differing treatment under the just compensation requirements of the Takings Clause.¹⁰³ The answer is based more on the burden placed on the regulated property owner and the resulting imbalance of interests than on the classification of the property itself.

But in these two cases, the type of property is irrelevant to the analysis.¹⁰⁴ The Court's distinction between real and personal

102. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 82 n.6 (1980) (citations omitted) (quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377-78 (1945)).

103. See *supra* note 23 and accompanying text.

104. The only reason real property occupies one endpoint of the Takings Clause spectrum in my analysis, as described above, is because by its very nature real property is unique. Short of a complete government seizure and redistribution of all real property, the seizure of limited parcels of real property

property created exactly the type of rigid “set formula” that Justice Brennan warns about without acknowledging it as such.¹⁰⁵ There is little in the way of predictive power to this rigid rule due to all the caveats the Court has espoused about their case-by-case approach and the inability of the Court to create “magic.”¹⁰⁶ Furthermore, this rule not only fails to serve the balancing policy of the Takings Clause, it completely undermines that policy. In doing so, it delegitimizes the law of the Takings Clause.

If, in either of *Lucas* or *Andrus*, the Court had acknowledged the endpoints of the policy framework of the Takings Clause that was established above, it would have seen that the “magic formula” it thought so elusive was simply the threshold issue of where to draw the line between those two endpoints (i.e., between a non-compensable taking and a compensable taking). That line would provide a precedent that would have predictive power and offer a much-needed legitimizing stability in this area of constitutional law. Furthermore, as with all law, that line could be softened from a rigid “set formula” by the application of the principles of fairness and justice when necessary to keep the Court from reaching an absurd or otherwise unacceptable result that would weaken the legitimacy of the Takings Clause.

The judiciary, therefore, is in need of a set of facts that would allow them to apply this framework and define where the line should be drawn in a way that would begin to create a jurisprudence of stability and predictability for the Takings Clause. Copyright law presents us with two very strong sets of facts to meet this need.

III. APPLICATION OF THE FRAMEWORK

The digitization of copyrighted material has created a great deal of difficulty for policymakers and the judiciary alike. Yet in difficulty, there is often opportunity. Two such areas of opportunity for applying the proposed Takings Clause framework are found in the anti-circumvention provisions of the DMCA¹⁰⁷ and the recent federal court ruling in *Capitol Records, LLC v. ReDigi Inc.*

would place disproportionate burdens on the land owners and create a serious imbalance of interests. Even a total government seizure of real property, however, would violate the natural equity prong of my test and therefore require the payment of just compensation.

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

106. *Ark. Game & Fish Comm’n v. United States*, 133 S. Ct. 511, 518 (2012).

107. 17 U.S.C. §§ 1201-1205 (2012).

restricting consumers from reselling their digital property in secondary markets.¹⁰⁸ But before applying the two-prong Takings Clause test to these areas of copyright law, it is important to first define the scope of the regulatory interference that copyright law is having on the individual.

A. The Scope of Copyright's Regulatory Inference on Private Property Interests

The scope of copyright's regulatory interference with private property interests can easily be demonstrated with a limited survey of statistical data generated by our digital economy. The compound annual growth rate (CAGR) of the smartphone industry in the United States, for example, has "been on a steady growth trajectory achieving a 23% CAGR in revenues since 2009."¹⁰⁹ In 2012 alone, there were 700 million smartphones sold.¹¹⁰ Furthermore, tablet sales are projected to reach parity with personal computer (PC) sales by 2015.¹¹¹

On September 26, 2012, Google announced that of the more than 675,000 apps available in its apps store, Google Play, there have been 25 billion app downloads.¹¹² According to a report appearing on the tech trade website PCWorld.com, Apple reached the 25 billion app download milestone seven months earlier, in March 2012.¹¹³ The tracking of Apple's payments to app developers shows that, as of 2012, "Apple [had] paid developers more than \$4 billion and offers about 600,000 apps in its store."¹¹⁴ The PCWorld story also reports that, as of 2012, customers had downloaded approximately sixty-one apps per iPhone sold.¹¹⁵

108. Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640 (S.D.N.Y. 2013).

109. *Developer Economics 2013, Developer Tools: The Foundations of the App Economy*, VISION MOBILE 1, 3 (Jan. 2013), PDF available for download at <http://www.visionmobile.com/product/developer-economics-2013-the-tools-report/>.

110. *Id.*

111. *Id.*

112. Sam Oliver, *Google Android Store Reaches 25 Billion Downloads, 675,000 Apps*, APPLE INSIDER (Sept. 26, 2012, 8:08 AM), <http://appleinsider.com/articles/12/09/26/google-android-reaches-25-billion-downloads-675000-apps>.

113. Christina DesMarais, *Apple Reaches 25 Billion Downloads From Its App Store*, PCWORLD (Mar. 3, 2012, 7:39 AM), http://www.pcworld.com/article/251216/apple_reaches_25_billion_downloads_from_its_app_store.

114. *Id.*

115. *Id.*

“[C]ustomers download apps,” according to statistics provided by Apple, “at a rate of more than 800 per second, with about 2 billion altogether each month.”¹¹⁶ On May 14, 2013, Brandon Ashmore of Mentor, Ohio downloaded the 50 billionth app from Apple’s App Store.¹¹⁷

The music industry reports that digital revenues for 2012 are up an estimated 9%, generating an estimated \$5.6 billion in total worldwide revenues.¹¹⁸ This report comes after a healthy 8% increase in digital revenues for 2011 that generated \$5.1 billion in total worldwide revenues.¹¹⁹ In the United States, digital sales were also robust. Digital music revenues in the United States were up 9.1% in 2012.¹²⁰ In the same year, digital album sales were up 14.1%, which represented a total of 117.7 million digital albums sold in the United States.¹²¹ The sales of digital tracks (digital singles) grew 5.1%, which represented a total of 1.34 billion units sold in 2012.¹²² The digital share of total recording industry business for 2012 was 55.9%.¹²³ Forty-one different digital songs had sales that exceeded two million units—compared to thirty-eight songs that reached that milestone in 2011, thirty-seven in 2010, thirty-one in 2009, nineteen in 2008, and nine songs in 2007.¹²⁴

Lastly, in the first two quarters of 2012, e-book revenues “topped out at \$282.3 million . . . while hardcovers hit \$229.6

116. Mike Waterhouse, *Brandon Ashmore of Mentor Downloads Apple’s 50 Billionth App, Wins \$10,000 App Store Gift Card*, NEWSNET5 (May 16, 2013), http://www.newsnet5.com/dpp/news/local_news/oh_lake/brandon-ashmore-of-mentor-downloads-apples-50-billionth-app-wins-10000-app-store-gift-card-ixzz2TVNtfylc.

117. *Apple’s App Store Marks Historic 50 Billionth Download*, BUSINESS WIRE, (May 16, 2013, 8:30 AM), <http://www.businesswire.com/news/home/20130516005403/en/Apple’s-App-Store-Marks-Historic-50-Billionth-Download>. The app that was downloaded was Space Inch, LLC’s *Say the Same Thing*, a word game from the music band OK Go (available at <https://itunes.apple.com/us/app/say-the-same-thing/id541491529?mt=8>).

118. *IFPI Digital Music Report 2013: Engine of a Digital World*, INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY 1, 6 <http://www.ifpi.org/content/library/dmr2013.pdf> (last visited June 30, 2013).

119. *Id.*

120. *The Nielsen Company & Billboard’s 2012 Music Industry Report*, BUSINESS WIRE (Jan. 4, 2013, 7:12 AM), <http://www.businesswire.com/news/home/20130104005149/en/Nielsen-Company-Billboard%E2%80%99s-2012-Music-Industry-Report>.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

[million].”¹²⁵ Although hardcover revenues wound up exceeding e-book revenues at year-end,¹²⁶ this milestone still represents a prime example of the dramatic growth in digital media for this sector of the economy.

It is easy to see, based on these statistics alone, the sheer magnitude of property potentially affected by the DMCA’s anti-circumvention provisions and the federal prohibition of digital secondary markets. Yet some want the government to go even further. Recently, a group named the Commission on the Theft of American Intellectual Property¹²⁷ issued a one hundred page report that recommends the passage of new laws to reconcile the law with the technical environment.¹²⁸ These new laws would authorize the use of what the report calls “offensive cyber,” which consists of such self-help actions as “photographing the hacker using his own system’s camera, implanting malware in the hacker’s network, or even physically disabling or destroying the hacker’s own computer or network.”¹²⁹ Such a law, which would allow some citizens to destroy other citizens’ property to protect their government-granted monopoly, raises serious concerns for the Takings Clause.

B. *Digital Millennium Copyright Act*

In 1998, in accordance with international intellectual property obligations, the United States government enacted the five titles that comprise the complex copyright law known as the

125. John Biggs, *EBook Revenues Beat Hardcovers For the First Time*, TECH CRUNCH (June 15, 2012), <http://techcrunch.com/2012/06/15/ebook-revenues-beat-hardcovers-for-the-first-time/>.

126. Carolyn Kellogg, *E-book sales almost doubled in 2012, rising to \$3.04 billion*, L.A. TIMES (May 15, 2013), <http://articles.latimes.com/2013/may/15/entertainment/la-et-jc-ebook-sales-20130515>.

127. See *About the Commission*, THE COMMISSION ON THE THEFT OF AMERICAN INTELLECTUAL PROPERTY, <http://www.ipcommission.org/mission/index.html> (last visited May 28, 2013). The Commission on the Theft of American Intellectual Property describes itself as “an independent and bipartisan initiative of leading Americans from the private sector, public service in national security and foreign affairs, academe, and politics.” *Id.*

128. See THE IP COMMISSION REPORT, THE COMMISSION ON THE THEFT OF AMERICAN INTELLECTUAL PROPERTY 2-7 (2013), available at http://www.ipcommission.org/report/IP_Commission_Report_052213.pdf.

129. *Id.* at 81.

DMCA.¹³⁰ Among its many far-reaching provisions, the DMCA provides copyright owners with anti-circumvention protections. The DMCA “contemplates two different types of technological protections: access controls and copy controls.”¹³¹ Section 1201(a) governs the circumvention of access controls while Section 1201(b) governs circumvention of copy controls.¹³²

Regarding access controls, the DMCA quite clearly and concisely states that “[n]o person shall circumvent a technological measure that effectively controls access to a work protected under this title.”¹³³ A “technological measure,” as defined by the DMCA, “‘effectively controls access to a work’ if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.”¹³⁴ And the DMCA defines “to circumvent a technological measure” as “to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner.”¹³⁵ Regarding copy controls, the DMCA prohibits the creation or distribution of any technological good or service that has as its primary purpose the circumvention of technological measures.¹³⁶

These anti-circumvention provisions of the DMCA provide copyright owners with the legal right to embed digital locks, which are commonly called digital rights management (DRM), into the programming of the digital content they create before selling the content on the open market.¹³⁷ The DMCA’s anti-circumvention provisions allow copyright owners to create these DRM locks to control “how end users can access, copy, or convert information goods, such as software, music, movies, or books” and restrict access to their works in order to protect those works from

130. The five titles of the DMCA are: Circumvention of Copyright Protection Systems, 17 U.S.C. § 1201 (2012); Integrity of Copyright Management Information, 17 U.S.C. § 1202 (2012); Civil Remedies, 17 U.S.C. § 1203 (2012); Criminal Offenses and Penalties, 17 U.S.C. § 1204 (2012); and Savings Clause, 17 U.S.C. § 1205 (2012).

131. Krzysztof Bebenek, *Strong Wills, Weak Locks: Consumer Expectations and the DMCA Anticircumvention Regime*, 26 BERKELEY TECH. L.J. 1457, 1459 (2011).

132. *Id.*

133. 17 U.S.C. § 1201(a)(1)(A) (2012).

134. 17 U.S.C. § 1201(a)(3)(B) (2012).

135. 17 U.S.C. § 1201(a)(3)(A) (2012).

136. 17 U.S.C. § 1201(b)(1) (2012).

137. See Bebenek, *supra* note 131, at 1458-59.

infringement.¹³⁸ The anti-circumvention provisions of the DMCA make it unlawful to circumvent (also known as “jail break”) the DRM technology.¹³⁹

While these DRM technologies do not seem to greatly impact those who steal the digital property, they have had very serious consequences for individuals who legally purchased the digital property.¹⁴⁰ One of the most serious of these unintended consequences is the stifling of interoperability—which is defined as “the ability of two systems to exchange and use information”¹⁴¹ or “cross-platform compatibility”¹⁴²—among digital devices. These provisions have also been used regularly “not against pirates, but against consumers, scientists, and legitimate competitors.”¹⁴³ For instance, the DMCA has blocked consumers from watching their legally-obtained DVDs on their tablet computers,¹⁴⁴ security researchers from presenting findings regarding security vulnerabilities within the educational software *Blackboard*,¹⁴⁵ and blind or visually impaired consumers from using text-to-speech converters to listen to their legally-obtained e-books.¹⁴⁶

Another example has arisen just recently. In November 2013, Microsoft planned on releasing the latest version of its hugely popular Xbox video gaming console, the Xbox One, with DRM technology embedded into every aspect of the Xbox One gaming

138. Preyas S. Desai et al., *Music Downloads and the Flip Side of Digital Rights Management*, 30(6) *MARKETING SCIENCE* 1011, 1011 (2011).

139. 17 U.S.C. § 1201 (2012).

140. See generally Desai et al., *supra* note 138, at 1012 (reporting empirical evidence that because DRM-restricted products are, by definition, purchased only by legal users (i.e. non-infringing users), “only the legal users pay the price and suffer from the restrictions; illegal users will not be affected because the pirated product does not have DRM restrictions.”).

141. Aaron K. Perzanowski, *Rethinking Anticircumvention’s Interoperability Policy*, 42 *U.C. DAVIS L. REV.* 1549, 1551 (2009).

142. Letter from Lawrence E. Strickling, Assistant Sec’y of Commc’ns and Info., U.S. Dep’t of Commerce, Nat’l Telecomms. and Info. Admin., to Ms. Maria Pallante, Register of Copyrights, 10 (Sept. 21, 2012) (emphasis omitted), available at http://www.ntia.doc.gov/files/ntia/publications/ntia_2012_dmca_letter_final.pdf.

143. Fred Von Lohmann, *Unintended Consequences: Twelve Years under the DMCA*, *ELECTRONIC FRONTIER FOUND.* 1, 1 (Feb. 2010), available at https://www.eff.org/files/eff-unintended-consequences-12-years_0.pdf.

144. *Id.* at 2.

145. *Id.* at 4.

146. Blake E. Reid, *The Digital Millennium Copyright Act is Even Worse Than You Think*, *SLATE* (Mar. 20, 2013, 1:06 PM), http://www.slate.com/articles/technology/future_tense/2013/03/dmca_copyright_reform_u_s_law_makes_digital_media_inaccessible.html.

experience including the console, games, and the online “cloud” integration. These many layers of digital copyright protection would have been unprecedented.

Microsoft initially made online connectivity required for use of the console. In explaining this requirement, Microsoft stated that the “Xbox One is designed to verify if system, application or game updates are needed and to see if you have acquired new games, or resold, traded in, or given your game to a friend.”¹⁴⁷ Why does Microsoft care about such things? Two of the most obvious reasons are first, to protect its intellectual property from piracy and second, to improve the gaming experience. There is a third reason, however: profit. Microsoft wants to capture more value by monetizing more of their intellectual property.¹⁴⁸ Microsoft, by checking into their consumers’ particular uses, is attempting to create new revenue streams by using DRM to monetize their digital content.

The demand for Xbox One is fairly elastic because of the fierce competition in the videogame console sector.¹⁴⁹ A licensing-based stream of revenue, however, is less elastic once a consumer has committed to purchasing an Xbox One and is stuck within Microsoft’s digital ecosystem.¹⁵⁰ Those consumers will be much more prone to paying a series of licensing fees to access and resell their games. Microsoft planned on using DMCA-enforced DRM to extinguish traditional indicia of ownership and replace it with a complex multiple licensing regime.

The stream of licensing revenue is potentially much more lucrative than having only one stream of revenue that is dependent on selling game consoles or games, which also has much higher transaction costs in the form of production and distribution costs and is impacted by competition and supply—none of which are issues with licensing agreements.

147. *Xbox One: A Modern, Connected Device*, MICROSOFT XBOX WIRE, <http://news.xbox.com/2013/06/connected> (last updated June 19, 2013).

148. See generally Charlie Osborne, *Google engineer: DRM has Nothing to Do with Piracy*, ZDNET (Mar. 20, 2013, 11:30 GMT), <http://www.zdnet.com/google-engineer-drm-has-nothing-to-do-with-piracy-7000012886/> (stating that DRM “is actually used as a tool to give content providers power over playback device manufacturers, as distributors cannot legally distribute copyrighted material without permission from the content provider.”).

149. See Pradeep K. Chintagunta, Harikesh S. Nair & R. Sukumar, *Measuring Marketing-Mix Effects in the 32/64 Bit Video Game Console Market*, 24 J. APPL. ECON. 421, 437 (2009).

150. *Id.*

To illustrate, if you were sitting on your couch playing your new video game on your Xbox One console and a friend called and asked you to bring the new game over to his house to play on his new Xbox One console, you would have to pay Microsoft a licensing fee for multi-console use. In other words, the initial purchase of the game only provided a license to use the game on your particular console. To play the game on another console, you would have to pay another licensing fee, which Microsoft calls a “platform fee.”¹⁵¹ What about selling it or giving it away? Microsoft wanted to monetize that as well by exacting a “transfer fee” for transferring the game to anyone other than a retailer it has authorized.¹⁵² It also wanted to exact a transfer fee for selling or giving away the console itself.¹⁵³

By establishing a system that will charge licensing fees for differing types of use and even for transferring the game console itself, Microsoft can, in essence, charge a single consumer repeatedly for his or her use of the same product and even for liquidating the game console or videogames through sale on the secondary market.¹⁵⁴

While Microsoft abandoned this DRM-based plan due to media coverage and the subsequent consumer pushback,¹⁵⁵ the DMCA enables this type of business model by making it illegal to circumvent DRM technology. These DMCA-enforced DRM technologies have often severely restricted and interfered with consumers’ dominion over their lawfully-obtained property.

These abusive uses of DRM have a sordid history. Information about how, when, and for what purposes DRM is employed is often unavailable or untrustworthy. For instance, in March 2013, Frank Gibeau, the President of the \$9.02 billion¹⁵⁶

151. See *How Game Licensing Works on Xbox One*, MICROSOFT XBOX WIRE, <http://news.xbox.com/2013/06/license> (last updated June 19, 2013).

152. *Id.*

153. *Id.*

154. Due to extreme consumer pushback, Microsoft has softened this approach slightly. Now there are no fees charged as part of these transfers. There are, however, two restrictions. See *id.* (“There are two requirements: you can only give them to people who have been on your friends list for at least 30 days and each game can only be given once.” Also, Microsoft has stated that any third-party videogame manufacturer may opt out of such rules and continue to charge platform and transfer fees.)

155. See Don Matrick, *Your Feedback Matters—Update on Xbox One*, MICROSOFT XBOX WIRE (June 19, 2013, 2:00 PM), <http://news.xbox.com/2013/06/update>.

156. *E.g.*, YAHOO FINANCE (Mar. 31, 2014), <http://finance.yahoo.com/q?s=EA>. This valuation is the company’s market

videogame producer Electronic Arts (EA), stated in a public presentation to the press that “DRM is a failed dead-end strategy; it’s not a viable strategy for the gaming business.”¹⁵⁷ Mr. Gibeau was addressing his company’s difficulty with their recent failed launch of the latest version of the hugely popular *SimCity*. He was attempting to lay to rest many public comments that DRM technology had caused glitches that derailed the launch of *SimCity* by stating that his company rejects DRM technology and that the technology was not at fault for the difficult product launch.

Yet EA’s 2013 Annual Report¹⁵⁸ had this to say about DRM:

As with other forms of entertainment, our products are susceptible to unauthorized copying and piracy. We typically distribute our PC products using copy protection technology, digital rights management technology or other technological protection measures to prevent piracy and the use of unauthorized copies of our products. In addition, console manufacturers typically incorporate technological protections and other security measures in their consoles in an effort to prevent the use of unlicensed product. We are actively engaged in enforcement and other activities to protect against unauthorized copying and piracy, including monitoring online channels for distribution of pirated copies, and participating in various industry-wide enforcement initiatives, education programs and legislative activity around the world.¹⁵⁹

Recently, the importance of the DRM issue and the history of overreach in interfering with the lawful use of personal property was highlighted by a petition submitted to President Obama’s Administration to “Make Unlocking Cell Phones Legal” and the

capitalization which was calculated by multiplying the stock price by the number of outstanding shares as of March 31, 2014. For comparison, the largest publicly traded company in the United States based on market capitalization on March 31, 2014 was Apple Computer, with a market cap of \$479 billion. *E.g.*, YAHOO FINANCE (Mar. 31, 2014), <http://finance.yahoo.com/q?s=AAPL&ql=1>.

157. James Brightman, *EA: “DRM is a Failed Dead-End Strategy,”* GAMESINDUSTRY INT’L (Mar. 27, 2013, 12:44 PM), <http://www.gamesindustry.biz/articles/2013-03-27-ea-drm-is-a-failed-dead-end-strategy>.

158. Electronic Arts Form 10-K Annual Report was filed pursuant to the requirements of the Securities Exchange Act of 1934, 15 U.S.C. § 78 (2012).

159. ELECTRONIC ARTS, 2013 ANNUAL REPORT 7 (2013).

subsequent response from the White House.¹⁶⁰ This petition, which garnered over 114,000 signatures, was in response to the 2012 ruling from the Librarian of Congress that made jail-breaking the DRM technology embedded in smartphones illegal under the DMCA's anti-circumvention provisions.

The DMCA requires the Librarian of Congress to determine, once every three years, which categories of works will be exempted from the DMCA's anti-circumvention provisions.¹⁶¹ Such a requirement is an explicit congressional acknowledgement of the balance between content providers and users that Article 1, Section 8, Clause 8 of the U.S. Constitution requires of all copyright legislation (i.e., a balance between incentivizing the creation of original works and allowing the public access to such works). Smartphones had enjoyed exemption from the DMCA's anti-circumvention law for six years prior to this most recent ruling, which went into effect on January 26, 2013.¹⁶²

The Obama Administration responded to that petition positively by stating that:

The White House agrees with the 114,000+ of you who believe that consumers should be able to unlock their cell phones without risking criminal or other penalties

. . .

. . . Clearly the White House and Library of Congress agree that the DMCA exception process is a rigid and imperfect fit for this telecommunications issue, and we want to ensure this particular challenge for mobile competition is solved.¹⁶³

This is the second time that the Obama Administration has opposed the Librarian of Congress on this issue.¹⁶⁴

By applying the two-prong test to any one of these fact patterns, we will begin to see the test's ability to rigorously realign

160. Official White House Response to *Make Unlocking Cell Phones Legal*, R. David Edelman, White House Senior Advisor for Internet, Innovation and Privacy, *It's Time to Legalize Cell Phone Unlocking*, WE THE PEOPLE, <https://petitions.whitehouse.gov/petition/make-unlocking-cell-phones-legal/1g9KhZG7> (last visited Mar. 15, 2013) [hereinafter White House Response].

161. 17 U.S.C. § 1201(a)(1)(c) (2012).

162. Letter from Lawrence E. Strickling, *supra* note 142, at 10.

163. White House Response, *supra* note 160.

164. *Id.*

the policies and law of the Takings Clause, and to curtail abuses and overreaching of copyright law without creating overly rigid formulas that undermine the government's ability to govern.

1. The Disproportionate Burden Analysis

The first real hurdle for the application of the disproportionate burden analysis to the DMCA's anti-circumvention provisions and the subsequent use of DRM comes from the sheer scope of the type of property that is affected. As described above, most Americans are impacted in one way or another by DRM technology. Indeed, there is an extremely strong argument that the public burdens of "promot[ing] the Progress of Science and useful Arts"¹⁶⁵ are spread far and wide by DRM technology and, therefore, do not force "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."¹⁶⁶

The counterargument to this substantial hurdle would require the Court to accept that those with technologically unsophisticated tastes—in other words, those who prefer the analogue or tangible counterparts to digital smartphones, digital music, digital books, smartphone apps, and the like—are not similarly restricted in their ownership rights vis-à-vis their analogue or tangible property. And this disparate treatment of some individuals based solely on the type of property they gravitate toward creates a disproportionate burden. This counterargument is difficult at best and will become weaker over time as digital property overtakes tangible and analogue property in the areas of phones, music, books, and other mediums of creative expression.

The sheer ubiquitous nature of digital property lends support to the argument that these regulations do not force "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."¹⁶⁷ Therefore, these regulations fail to qualify the affected citizens for just compensation under the disproportionate burden prong of the test. Because it is not required that both prongs be satisfied, we now turn to the second prong of the test, the natural equity prong.¹⁶⁸

165. U.S. CONST. art. I, § 8, cl. 8.

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

167. *Id.*

168. This is necessary because a total taking of all property—for instance, the seizure and nationalization of all residential real property in the country—would not be disproportionate in the burdens it places on the affected parties. Yet such a massive collectivization of property would certainly be classified as a

2. The Natural Equity Analysis

The analysis here is much stronger in favor of just compensation for a compensatory taking. In fact, the very same facts that weighed so heavily against a compensatory taking in the disproportionate burden analysis—the sheer scope of digital property that is severely regulated by the DMCA’s enforcement of DRM technology—weigh just as heavily in favor of a compensatory taking in the natural equity analysis.

The impact the DMCA’s anti-circumvention provisions have had on digital content is very analogous to the government placing regulations on *all* real property that would strip owners of substantial portions of their bundle of ownership rights and, thereby, substantially decrease the value of all real property. The simple fact that such a regulation would apply to all real property would in no way justify such regulations under the Takings Clause any more than it should justify the DMCA’s anti-circumvention provisions that make it unlawful to jailbreak all digital property when such actions are not infringing anyone’s copyright. Indeed, if the actions are not infringing copyright, the law is seriously misaligned with the policies of both the Takings Clause and copyright law.

Even supporters of the DMCA’s anti-circumvention provisions have acknowledged this fact through arguments favoring a more balanced application of the regulation. One of the more well-cited articles in this area is Reichman, Dinwoodie, and Samuelson’s 2007 article that supports anti-circumvention policies but advocates for the U.S. Congress to find a proper “balance of interests when establishing new rules forbidding circumvention of technical protection measures (TPMs) used by copyright owners to control access to their works and in regulating the manufacture and distribution of technologies primarily designed or produced to enable circumvention of copyright-protective TPMs.”¹⁶⁹

On the other end of the public policy debate is Aaron K. Perzanowski’s 2009 article *Rethinking Anticircumvention’s Interoperability Policy*, which argues that “the anti-circumvention

compensable taking in that it unjustly tips the balances toward society under the second prong of the test. Conversely, if there is a compensable taking under the first prong of the test, there is no need to proceed to the second prong of the test.

169. Jerome H. Reichman, Graeme B. Dinwoodie & Pamela Samuelson, *A Reverse Notice and Takedown Regime to Enable Public Interest Uses of Technically Protected Copyrighted Works*, 22 BERKELEY TECH. L.J. 981, 983-84 (2007).

provisions of the DMCA unnecessarily inhibit interoperability, and it calls for a legislative solution to reconcile the legitimate interests of copyright holders with the need for increased freedom to interoperate.”¹⁷⁰

Allowing such regulations to remain in place, as currently constructed and enforced, creates an unjust imbalance in favor of the community and away from the individual and thereby increases the friction between the two. This is in direct conflict with the policy of the Takings Clause.

Furthermore, such regulations undermine compliance with copyright law by making “reading, listening, and viewing more difficult.”¹⁷¹ The “sheer pointlessness of some of these restraints has undermined the perceived legitimacy of the U.S. copyright system.”¹⁷² One commentator has gone as far as to state that “[i]ntellectual property rights do not anymore enjoy the presumption either that they are justified or that they will endure.”¹⁷³

These regulations are in direct conflict with the balancing policy of the Takings Clause and, therefore, fail the natural equity prong of my two-part Takings Clause test. Having created an unjust imbalance between the community and the individual, the DMCA’s anti-circumvention provisions act as a compensable taking and thereby qualify the affected citizens under the parameters of the two-prong Takings Clause test for just compensation.

C. *Capitol Records, LLC v. ReDigi Inc.*

In *Capitol Records, LLC v. ReDigi Inc.*, the U.S. District Court for the Southern District of New York ruled that ReDigi’s online business model violated copyright law by providing consumers a secure and verified secondary marketplace where they could safely sell any music that they no longer wanted.¹⁷⁴ The

170. Perzanowski, *supra* note 141, at 1552.

171. Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 15 (2010).

172. *Id.* at 15-16 (citing WILLIAM PATRY, MORAL PANICS AND THE COPYRIGHT WARS 161-170 (2009)); Jane C. Ginsburg, *The Right To Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUS. L. REV. 263, 264 (2004); John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 548-49 (2007).

173. MARK HELPRIN, DIGITAL BARBARISM: A WRITER’S MANIFESTO xiii (2009).

174. *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 660 (S.D.N.Y. 2013).

service also verified that the consumer was not keeping a digital copy.¹⁷⁵

ReDigi pioneered the idea of an online used record store where users could:

sell their legally acquired digital music files, and buy used digital music from others at a fraction of the price currently available on iTunes. Thus, much like used record stores, ReDigi permits its users to recoup value on their unwanted music. Unlike used record stores, however, ReDigi's sales take place entirely in the digital domain.¹⁷⁶

At oral argument, the litigants analogized the ReDigi service to everything from a train to the “Star Trek transporter—‘Beam me up, Scotty’—and Willy Wonka’s teleportation device, Wonkavision.”¹⁷⁷ In a very colorful opinion, the district court ultimately chose to cite the pleadings of the parties to describe the technical aspects of ReDigi’s business:

To sell music on ReDigi’s website, a user must first download ReDigi’s “Media Manager” to his computer. Once installed, Media Manager analyzes the user’s computer to build a list of digital music files eligible for sale. A file is eligible only if it was purchased on iTunes or from another ReDigi user; music downloaded from a CD or other file-sharing website is ineligible for sale. After this validation process, Media Manager continually runs on the user’s computer and attached devices to ensure that the user has not retained music that has been sold or uploaded for sale. However, Media Manager cannot detect copies stored in other locations. If a copy is detected, Media Manager prompts the user to delete the file. The file is not deleted automatically or involuntarily, though ReDigi’s policy is to suspend the accounts of users who refuse to comply.

After the list is built, a user may upload any of his eligible files to ReDigi’s “Cloud Locker,” an ethereal moniker for what is, in fact, merely a remote server in Arizona. ReDigi’s

175. *Id.* at 645.

176. *Id.*

177. *Id.* at 645 n.2.

upload process is a source of contention between the parties. ReDigi asserts that the process involves “migrating” a user’s file, packet by packet—“analogous to a train”—from the user’s computer to the Cloud Locker so that data does not exist in two places at any one time. Capitol asserts that, semantics aside, ReDigi’s upload process “necessarily involves copying” a file from the user’s computer to the Cloud Locker. Regardless, at the end of the process, the digital music file is located in the Cloud Locker and not on the user’s computer. Moreover, Media Manager deletes any additional copies of the file on the user’s computer and connected devices.

Once uploaded, a digital music file undergoes a second analysis to verify eligibility. If ReDigi determines that the file has not been tampered with or offered for sale by another user, the file is stored in the Cloud Locker, and the user is given the option of simply storing and streaming the file for personal use or offering it for sale in ReDigi’s marketplace. If a user chooses to sell his digital music file, his access to the file is terminated and transferred to the new owner at the time of purchase. Thereafter, the new owner can store the file in the Cloud Locker, stream it, sell it, or download it to her computer and other devices. No money changes hands in these transactions. Instead, users buy music with credits they either purchased from ReDigi or acquired from other sales. ReDigi credits, once acquired, cannot be exchanged for money. Instead, they can only be used to purchase additional music.¹⁷⁸

ReDigi’s website resold the digital music files at prices ranging from \$0.59 to \$0.79 per song.¹⁷⁹ ReDigi charged a fee for each of these transactions¹⁸⁰ with the resulting revenue divided as follows: the user of the service who sold their music file received 20% of the revenue as a credit, 20% went into “an ‘escrow’ fund for the artist,” and ReDigi retained 60%.¹⁸¹

178. *Id.* at 645-46 (internal citations to the record omitted).

179. *Id.* at 646.

180. *Id.*

181. *Id.* The ReDigi system is workable because it essentially turns the songs into chattel. Purchasing a “new” song from iTunes then selling it “used” over ReDigi is only marginally different from purchasing a brand-new paperback book from Barnes & Noble, and then re-selling it used to a friend.

1. The Disproportionate Burden Analysis

The *ReDigi* set of facts experiences the same initial burden that was experienced when analyzing the DMCA in Section III.C, *supra*. Again, the sheer scope of ownership of digital music would seem to lend itself to an argument that the *ReDigi* ruling in no way makes “some people alone . . . bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”¹⁸²

The *ReDigi* facts are, however, distinguishable from the DMCA facts discussed in Section III.C, *supra*. The taking here is much more limited in scope due to its application solely to digital music. Though the ruling is still likely influential when analyzing digital books and apps, the ruling only addresses digital music. Also, while this interference with personal property ownership still encumbers a large swath of individuals, it applies to a much narrower segment of the population than the DMCA analysis dealt with. The real benefit of a Takings Clause challenge to such facts is that such a challenge would create a very arguable position on both sides. It is the proposition of this author, that while broad-ranging, the *ReDigi* ruling marks the demarcation line between a non-compensable and compensable taking on the Takings Clause spectrum. To mark a demarcation line, the argument must be close to either side of the issue.

Eliminating the ability of owners of a small segment of property to resell that property in a secondary market¹⁸³ for the purposes of “promot[ing] the Progress of Science and useful

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

183. Some might argue that an important difference between *ReDigi* and a used record store might be that used chattels depreciate/wear down, whereas “used” digital goods experience no such phenomena. So when a “used” song is sold on *ReDigi* for \$0.59, it effectively bars the sale of a “new” copy of that song at full price on iTunes, because the rational customer will have absolutely no preference between a “used” and “new” copy of a song and will choose to pay less for the so-called “used” song – while that very same customer might strongly prefer a new copy of a paperback.

This criticism, however, fails to completely take into account all secondary markets. There are many secondary markets where there is no wear-down effect. The first one that comes to mind is the stock market. Another example is the commercial paper market. Even in books, first editions of many books appreciate in value and outcompete new printings of the same book in spite of the original’s wear down. Baseball cards and other collectables also evade this wear-down issue. For that matter a good condition original vinyl of the Beatles White album would sell for much more than a brand new perfect-condition compact disk of the same album.

Arts”¹⁸⁴ creates a disproportionate burden on those who are affected. Although much broader in its scope, this analysis is comparable enough to the analysis provided above¹⁸⁵ regarding the regulatory taking of Native American artifacts that contained eagle feathers in *Andrus v. Allard*,¹⁸⁶ and would also result in a disproportionate burden that would, for the purposes of this prong of the test, qualify the affected citizens for just compensation.

2. The Natural Equity Analysis

If the Court were to disagree with the analysis provided above and thereby reject a finding of a disproportionate burden and a compensable taking, the Court would proceed with this prong of the test. To reiterate, in this prong courts must analyze whether the alleged taking creates an unacceptable imbalance between the community and the individual that is unjust or unfair. In applying this prong to the *ReDigi* case, we begin with a discussion of copyright law’s first sale doctrine. An understanding of the first sale doctrine is informative to the analysis herein because it operates as a statutory balance between society and the individual.¹⁸⁷

The first sale doctrine states specifically that “the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.”¹⁸⁸ Copyright law draws a distinction between the property interests that are manifest in the copyright¹⁸⁹ and the property interests that are manifest in the copy.¹⁹⁰ The first sale doctrine acts as a balance between the friction created by granting a monopoly to creators in the furtherance of “promot[ing] the Progress of Science and useful Arts”¹⁹¹ and granting individuals dominion over their personal property.¹⁹² The Court explained this statutory balance in its

184. U.S. CONST. art. I, § 8, cl. 8.

185. *See supra* Section II.E.

186. 444 U.S. 51, 67-68 (1979) (holding that the economic burden of regulations did not amount to a taking).

187. 17 U.S.C. § 109(a) (2012); *see also supra* note 4 and accompanying discussion.

188. 17 U.S.C. § 109(a) (2012).

189. 17 U.S.C. § 106 (2012).

190. 17 U.S.C. § 109(a) (2012).

191. U.S. CONST. art. I, § 8, cl. 8.

192. 17 U.S.C. § 109(a) (2012).

opening lines in the recent case of *Kirtsaeng v. John Wiley & Sons, Inc.*, when it stated:

Section 106 of the Copyright Act grants “the owner of copyright under this title” certain “exclusive rights,” including the right “to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership.” 17 U.S.C. §106(3). These rights are qualified, however, by the application of various limitations set forth in the next several sections of the Act, §§107 through 122. Those sections, typically entitled “Limitations on exclusive rights,” include, for example, the principle of “fair use” (§107), permission for limited library archival reproduction, (§108), and the doctrine at issue here, the “first sale” doctrine (§109).¹⁹³

When the lower court’s *ReDigi* holding is analyzed through the prism of whether the alleged taking creates an unacceptable imbalance between the community and the individual that is unjust or unfair, one must answer in the affirmative. This is because the holding interferes so substantially with an individual’s dominion over his or her lawfully obtained digital property—by eviscerating the first sale doctrine as it applies to this digital property—that it creates a confiscatory regulation that clearly violates not only the first sale doctrine but also the natural equity prong of the Takings Clause test. This taking results in an unjust imbalance between the competing policies of the community and the individual.

The arbitrary nature of the ruling is apparent in how it attempts to combat copyright infringement by shutting down a secondary market that has taken great pains to keep infringement from happening. The level of arbitrariness is striking and will drastically increase friction between the individual and the community and will result in a further erosion of the public’s faith in and need for copyright law. With such regulations, it is little wonder that “[c]opyright law’s legitimacy has suffered marked erosion in the public’s view.”¹⁹⁴

Therefore, these regulations are in direct conflict with the balancing policy of the Takings Clause. Having created an unjust imbalance between the community and the individual, the *ReDigi*

193. *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1354 (2013).

194. See Litman, *supra* note 171, at 15-16; see also Nicolas Suzor, *Access, Progress, and Fairness: Rethinking Exclusivity in Copyright*, 15 VAND. J. ENT. & TECH. L. 297, 302-06 (2013).

ruling acts as a compensable taking and thereby would qualify the affected citizens, under the parameters of my two-prong Takings Clause test, for just compensation.

IV. CONCLUSION

There are, no doubt, some conceptual difficulties in the twelve words of the Fifth Amendment's Takings Clause. But to approach this body of law with the view that it would take wizardry to establish a consistent and reliable set of standards that could guide policy makers and the lower courts is an abdication of the duties that the Constitution bestows upon the Supreme Court. This Article attempted to address many of these conceptual difficulties through crafting a two-prong Takings Clause test out of the policy ends that are at the foundation of the Takings Clause itself. This two-prong test seeks to strike a balance between the interests of the community and the interests of the individual while keeping some citizens from paying a disproportionate share of the burdens of government that should be the burden of the citizenry as a whole.

With the rapid evolution of digital technology and its integration into every facet of our lives, it is little wonder that scholarship addressing the regulation of this technology has played an increasingly prominent role in the professional and academic literature. The state of the current literature expands our understanding of a number of issues; yet it is missing a Takings Clause analysis of the regulatory debate surrounding the DMCA's anti-circumvention provisions or the judicial assault on copyright's balance between the author and the consumer.

Either one of the two copyright regulatory issues examined within this Article would present the judiciary with a set of facts that are extremely well-suited to allow them to realign the policy of the Takings Clause with the law as interpreted and enforced in the United States. What makes a Takings Clause challenge to the excesses of these copyright regulations so ideal is that these sets of facts mark the proposed demarcation line between the compensable and non-compensable endpoints of the Takings Clause Spectrum. Furthermore, the scope of the interference with individual property ownership presented by the ever-expanding copyright regulations makes these fact patterns even more important.

APPENDIX

It is important to clarify how certain terminology has been used within this Article. Three terms are important to the development of the analytical framework employed within the body of this Article: (1) policy, (2) principle, and (3) law. In the fields of public policy compliance theory and legal and public policy implementation, there has been a great deal of discussion regarding the importance of defining the terminology used within an article; yet “[b]ecause no widely accepted general theory of policy analysis exists, a standard terminology is not available.”¹⁹⁵ As one set of researchers has put it, these matters of definition are “of more than linguistic relevance The question at stake here is one of logic.”¹⁹⁶ Therefore, this Appendix has been included to define the terminology and present a detailed example illustrating the particular usage of these terms.

A. Policy, Principles, and Law

The term “policy” as used within this Article refers narrowly to what the literature sometimes labels the goal, purpose, rationale, or end that a particular law has been enacted to achieve.¹⁹⁷ This specific and narrow use of the term “policy” diverges from the broad and common legal understanding of the term as defined by BLACK’S LAW DICTIONARY: “[t]he general principles by which a government is guided in its management of public affairs.”¹⁹⁸ As used within the analysis *supra*, “general principles” are not being analyzed when the term “policy” is used. Instead, the term “policy” refers to the specific and narrow ends that the law being analyzed is meant to accomplish.

As a result, the use of the term “principle” is distinct from the use of the term “policy” within this Article. When the term “principle” is used, the reference is not to a specifically defined goal that a law aims to attain nor is it to the substantive or procedural elements of the body of law being discussed, but instead the reference is to the moral, philosophical, or ethical

195. VANDELDE, *supra* note 15, at 309.

196. HILL & HUPE, *supra* note 15, at 3; *see generally*, FALLON, JR., *supra* note 15.

197. *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 88 HARV. L. REV. 1685, 1688 (1976) (“At the opposite pole from a formally realizable rule is a standard or principle or policy.”).

198. BLACK’S LAW DICTIONARY 1276 (9th ed. 2009).

precepts that guide public servants in carrying out their duties.¹⁹⁹ Though this narrow usage is not entirely consistent with the common usage reflected by legal reference material,²⁰⁰ literature,²⁰¹ and case law,²⁰² this specific and nuanced use of these terms is consistent with the more specialized terminology found in the philosophy of law and legal theory fields of scholarship.²⁰³

To explain the importance of understanding the more narrow use of these terms, a simple example may be helpful. An oft-used example in this area is the *policy* of roadway safety. In furtherance of this *policy*, the government has enacted *laws* that set speed limits on the public roadways.²⁰⁴ It is the policy of roadway safety that legitimizes speed-limit laws that would otherwise be unacceptable restrictions of our freedom. This legitimizing relationship between policy and law can, however, be disturbed by

199. See *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) (providing an example of the more restrictive usage of the term “principle” when the Court stated that “[a] fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.”).

200. See Ann K. Wooster, Annotation, *What Constitutes Taking of Property Requiring Compensation Under Takings Clause of Fifth Amendment to United States Constitution – Supreme Court Cases*, 10 A.L.R. FED. 2d 231 (2014) (providing an example of the broader usage of the term “principle” by discussing the substantive Takings Clause “principles declared in the previous cases in the Court.”); BLACK’S LAW DICTIONARY 1276 (9th ed. 2009).

201. See Walter S. King, *The Fifth Amendment Takings Implications of Air Force Aircraft Overflights and the Air Installation Compatible Use Zone Program*, 43 A.F. L. REV. 197, 214 (1997) (discussing the principle of law that the airspace over 500 feet is not part of a landowner’s bundle of rights for Takings Clause purposes).

202. See *United States v. 50 Acres of Land*, 469 U.S. 24, 30 (1984) (discussing “the basic principles of indemnity embodied in the Just Compensation Clause.”); *Me. Educ. Ass’n Benefits Trust v. Cioppa*, 695 F.3d 145, 152 (2012) (using the term “principle” as a reference of the elements of substantive law).

203. See Cristie L. Ford, *New Governance, Compliance, and Principles-Based Securities Regulation*, 45 AM. BUS. L.J. 1, 6-8 (2008). The author discusses the distinctions between rules (e.g., laws) and principles and employs the classic example of speed limits as an illustration of this distinction. Yet she draws a distinction between her broader usage of the terms and “Ronald Dworkin’s rules-principles distinction, in which principles are reasons that a judge takes into consideration in deciding which all-or-nothing rule should apply.” *Id.* at 60 (citing RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 22-28, 71-80 (1977)). It is not necessary for the purposes of this Article to make such a nuanced distinction between these two authors’ terminologies; either usage is consistent with the terminology used herein excepting the replacement of the term “law” for “rule” within this analysis.

204. *Id.* at 6-7.

the arbitrary application of the laws, by a misalignment of the policy and the law, or by the unjust application of the law.

If, for instance, our speed limit laws were arbitrary (e.g., if the posted speed limits were “go slow” in school zones and “go fast, but not too fast” on the highways) or if they were misaligned with the policy (e.g., if we had seventy miles per hour speed limits in school zones and fifteen miles per hour speed limits on the highways), these laws would be seen as illegitimate by the citizens they are meant to govern. The lack of legitimacy would, eventually, create a corresponding lack of compliance.²⁰⁵

Compliance with a law may also be undermined as a result of the law attempting to meet the goals of more than one policy. For instance, the policy to conserve fuel as a result of price spikes and supply disruptions of oil caused by the OPEC oil embargo that lasted from October of 1973 to March of 1974 spurred the U.S. Congress into enacting the National Maximum Speed Law.²⁰⁶ This law required states to set the maximum speed limit within their borders to no more than fifty-five miles per hour or lose their Federal aid for highways. While speed limit laws are, in general, intended to create safe roadways, President Nixon, upon signing the act into law, clearly articulated another policy that was “aimed primarily at helping to reduce gasoline and diesel fuel consumption during the energy crisis.”²⁰⁷

In spite of its policy of helping the country through a short-lived energy crisis, this law lasted twenty-one years longer than the energy crisis that prompted the policy in the first place.²⁰⁸ Furthermore, the law extended into a time of abundant oil and low oil prices caused by major discoveries of domestic oil reserves in Texas and Alaska. Also, many citizens felt that fifty-five miles per hour speed limits did not enhance safety on large multi-lane highways that were designed to safely accommodate much higher speeds.²⁰⁹

205. See Daniel L. Vande Zande, *Coercive Power and the Demise of the Star Chamber*, 50 AM. J. LEGAL HIST. 326, 329 (2010).

206. 23 U.S.C. § 154 (1974) (repealed 1995) (signed into law as part of the 1974 Emergency Highway Energy Conservation Act).

207. Richard Nixon, Statement on Signing the Emergency Highway Energy Conservation Act, 3 PUB. PAPERS 2 (Jan. 2, 1974), available at The American Presidency Project, <http://www.presidency.ucsb.edu/ws/?pid=4332>.

208. National Highway System Designation Act of 1995, Pub. L. No. 104-59, Title II, § 205(d), 109 Stat. 568 (1995) (Title II, § 205(d)(1)(B) repealed the National Maximum Speed Law, 23 U.S.C. § 154).

209. See Paul Grimes, *Practical Traveler: The 55-M.P.H. Speed Limit*, N.Y. TIMES (Dec. 26, 1982), available at

Therefore, the legitimizing power that the policies would otherwise have upon the law was undermined. Indeed, the energy policy undermined the roadway safety policy. This can be seen in the fact that compliance with the fifty-five miles per hour speed limit fell drastically by 1982 among drivers nationwide, especially in Texas where seventy-two percent of drivers were breaking the law in a state that was, at the time, swimming in crude oil.²¹⁰ As the *New York Times* explained in a 1982 article, “[o]pponents have stressed that such highways were built to be safe at substantially higher speeds. They note that public and governmental pressure to save fuel has diminished as supplies have increased and prices have dipped.”²¹¹ Therefore, the energy policy was misaligned with the speed limit law and arbitrary in its application, causing higher and higher rates of noncompliance with the law over time.

This brings this example to the last of the three terms that are important to the analysis: *principles*. The policies of safe roadways and fuel conservation and the resultant speed limit law are distinct from the principles of fairness and justice.²¹² Principles exist on a higher plane than either policies or laws. Strict and rigid adherence to a law, regardless of whether the law’s ends are legitimate or not, will sometimes result in absurd or unacceptable outcomes that offend our sense of right and wrong.

If, for instance, a judge were to invoke the principles of fairness and desert (i.e., getting what one deserves)²¹³ as support for dismissing a speeding ticket issued to a father who was rushing his bleeding child to the emergency room, most would view that result as a reasonable outcome. As we can see from this example, principles such as fairness and desert further legitimate the law by keeping a rigid application of means and ends from creating absurd or unacceptable outcomes. Even well aligned policies and laws must sometimes yield to superseding principles or they will be

<http://www.nytimes.com/1982/12/26/travel/practical-traveler-the-55-mph-speed-limit.html>.

210. See Kenneth J. Meier & David R. Morgan, *Citizen Compliance with Public Policy: The National Maximum Speed Law*, 35(2) W. POL. Q. 258, 261 (1982).

211. Grimes, *supra* note 209.

212. See Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559-60 (1992) (“principles” are sometimes called “standards” in the literature, further highlighting the disarray of the terminology in this field of study).

213. See GEORGE P. FLETCHER, *BASIC CONCEPTS OF LEGAL THOUGHT* 79-104 (1996).

viewed as unfair or unjust in their rigidity and, therefore, as illegitimate. Once a law begins to lose legitimacy it suffers lower compliance.²¹⁴

In this analytical framework, the classic legal reasoning structure of moving from the general to the specific is clear. Policy goals are often either pronouncements of public policy or first-order general rules that are carried out by more specific lower-order laws and regulations. Principles, on the other hand, are even more general and function on a higher plane than both policy and law. The application of principles in this analysis can occur on either the macro or micro level of analysis. On the macro level, we can ask the more general question of “should we restrict liberty with speed limit laws in the first place?” or we could weigh the policy of safe roadways, which are intended to protect human life, against the father’s actions to protect his child’s welfare while possibly endangering others. These queries require us to undertake an analysis in which we apply principles to the policies supporting such laws. Yet we can also ask the more specific principle on the micro level of “should we apply this particular speed limit law to this particular father who was rushing this particular child to the hospital?” This query requires us to undertake an analysis in which we apply principles to specific facts. These types of analyses are where certain defenses to liability, such as the affirmative defense of necessity, were created.

214. See Vande Zande, *supra* note 205, at 329; Ben Depoorter, Alain Van Hiel & Sven Vanneste, *Copyright Backlash*, 84 S. CAL. L. REV. 1251, 1268 (2011) (discussing the social science literature that supports this claim).