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Please Don't Stop the Music: Using the Takings Clause to Protect Inmates' Digital Music

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Please Don't Stop the Music: Using the Takings Clause to Protect Inmates' Digital Music

ABSTRACT

In prisons across the country, inmates are encouraged to participate in digital media programs. One in ten correctional facilities in the US has digital media programs in which inmates purchase both a device—such as an MP3 player or tablet—and content or services for the device—such as digital music—from a third-party vendor. Although fee structures vary, the facility or the state corrections department usually receives a commission on the revenue generated from inmates' purchases, thereby profiting off of each purchase that an inmate makes. As their contracts with third-party vendors end, state correctional departments may change vendors, either in search of a better program, a more profitable contract, or other benefits. A change in vendor may prompt a new policy that strips inmates of their previously purchased devices and digital purchases, forcing them to repurchase the same content from the new vendor.

Because their property has been taken by state actors who earn commissions off of every repurchased file, those commissions are used by the state to fund various state or prison functions, and the prisons do not fully compensate inmates for the value of their property, some inmates are considering challenges under the Takings Clause of the Fifth Amendment. While the Takings Clause has rarely been used in the context of digital property, it may offer inmates an opportunity to be compensated for the millions of dollars they have spent on digital media. In an increasingly digital world, courts will have to grapple with the application of the Takings Clause to digital property, and this situation offers an opportunity for them to do just that.

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Scott Larsen's brother was a musician.¹ Now that his brother is an inmate, Scott is his sole provider.² For seven years, the Florida Department of Corrections (FDOC or the "Department of Corrections") had a contract with Access Corrections, allowing inmates like Scott's brother to purchase MP3 players and digital downloads of music.³ The costs—around \$100 for the device and \$1.70 for each song—generally fall on family members like Scott.⁴ Families of incarcerated people tend to be low income, so this can be a financial strain.⁵ Despite the costs,

1. Ben Conarck, *Florida Inmates Spent \$11.3 Million on MP3s. Now Prisons Are Taking the Players.*, FLA. TIMES-UNION (Aug. 18, 2018, 5:14 PM), <https://www.jacksonville.com/news/20180808/florida-inmates-spent-113-million-on-mp3s-now-prisons-are-taking-players> [<https://perma.cc/2YPA-KJP6>].

2. *Id.*

3. *Id.*

4. *Id.*

5. ADAM LOONEY & NICHOLAS TURNER, THE BROOKINGS INST., WORK AND OPPORTUNITY BEFORE AND AFTER INCARCERATION 2 (2018), https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf [<https://perma.cc/6C3D-5D93>] ("Boys who grew up in families in the bottom 10 percent of the income distribution (families earning less than about \$14,000) are 20 times more likely to be in prison on a given day in their early 30s than children born in top-decile families (where parents earn more than \$143,000)."); Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*,

the program has been hugely popular.⁶ Over the seven years of the Access Corrections contract, Florida inmates and their families purchased more than 30,299 players and 6.7 million song downloads—more than \$11 million of music.⁷ For Scott, music is a comfort he can provide his brother in prison.⁸ For Florida, it is a source of income: \$1.4 million in commissions over the past seven years, with the residual money not used to run the program going into the state's general fund, which is controlled by the legislature.⁹ As the contract with Access Corrections ends, Florida has a new vendor in mind: JPay, an “aspiring iTunes of the prison world,”¹⁰ which currently operates prisoner bank accounts and phone calls and has expanded into offering tablets.¹¹ The tablets offer music purchases and other services (including emails and educational materials) that represent increasing opportunities for communication by inmates and for commissions for the state.¹² Because Florida Department of Corrections policy limits inmates to one electronic device, the change in vendors means that all of the Access Corrections MP3 players must be relinquished.¹³ As of January 23, 2019, inmates, including Scott's brother, are not allowed to keep the MP3 players they purchased, nor can they transfer the music they purchased onto their new JPay tablets.¹⁴ Scott will have to

PRISON POLY INITIATIVE (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html> [<https://perma.cc/GW54-JM3E>] (“Not only are the median incomes of incarcerated people prior to incarceration lower than non-incarcerated people, but incarcerated people are dramatically concentrated at the lowest ends of the national income distribution[.]”).

6. Conarck, *supra* note 1.

7. David M. Reutter, *Florida Prisoners Get Tablets, Lose \$11.3 Million in Digital Music*, PRISON LEGAL NEWS (Feb. 4, 2019), <https://www.prisonlegalnews.org/news/2019/feb/4/florida-prisoners-get-tablets-lose-113-million-digital-music/> [<https://perma.cc/SNT2-7KSY>].

8. Conarck, *supra* note 1 (“My brother was a musician, and music is very important to him,” said Scott Larsen. “The MP3 player was a good source of entertainment and peace of mind for him.”).

9. *Id.*

10. Adi Robertson, *Florida Prisons Are Getting Sued for Erasing \$11 Million Worth of Prisoner Music Purchases*, VERGE (Feb. 20, 2019, 1:39 PM), <https://www.the-verge.com/2019/2/20/18233317/florida-department-of-corrections-class-action-lawsuit-william-demler-jpay-mp3-song-access> [<https://perma.cc/CS3E-67YF>].

11. Conarck, *supra* note 1.

12. *Id.* (“With the introduction of tablets, JPay will add a wide swath of new spending incentives for its incarcerated customers, offering purchases of music, emailing and other virtual fare. The resulting download spree will funnel more dollars back to the Department of Corrections, which . . . has already been bringing in record commissions from JPay money transfers, even before the introduction of the tablets. The agency received \$3.9 million in commissions from JPay account transfers between April 2017 and March 2018.”).

13. Reutter, *supra* note 7.

14. Conarck, *supra* note 1; Reutter, *supra* note 7.

repurchase the music library that he helped his brother build before JPay.¹⁵

Inmates have filed hundreds of grievances, including grievances accusing the Department of Corrections of refusing to facilitate transfers of the purchased music because it wants to increase its own profits.¹⁶ It is “not feasible to download content from one vendor’s device to another, not only due to incompatibility reasons, but the download of content purchased from one vendor to another vendor’s device would negate the new vendor’s ability to be compensated for their services,” wrote the assistant warden, denying a grievance from an inmate who purchased \$2,200 worth of music from Access Corrections.¹⁷

The Department of Corrections allows inmates to trade their Access Corrections MP3 player for a mini JPay tablet and a fifty-dollar credit to buy new music.¹⁸ Inmates have the option of paying twenty-five dollars to have their MP3 player unlocked and shipped to a nonprison address, or to have the music on the device transferred to a CD and shipped to a nonprison address.¹⁹ For inmates and their families who have spent hundreds or thousands of dollars to have access to music in prison, and who may be serving life sentences or who are years or decades away from the possibility of release, this is not an adequate solution.²⁰ The MP3 program was allegedly promoted with a promise that “[o]nce music is purchased, you’ll always own it!”²¹ One inmate wrote that he purchased 335 songs “under the understanding that these purchases would belong to me forever.”²² Another wrote, “I did purchase my MP3 player in order to keep it, and use it until I go home, not to send it to my family [M]y family does not have a use

15. Conarck, *supra* note 1.

16. *Id.*; Reutter, *supra* note 7.

17. Conarck, *supra* note 1.

18. Timothy B. Lee, *Florida Inmate Says Prison Sold Him \$569 of Music, Then Took It Away*, ARS TECHNICA (Feb. 20, 2019, 4:48 PM), <https://arstechnica.com/tech-policy/2019/02/florida-inmate-says-prison-sold-him-569-of-music-then-took-it-away/> [<https://perma.cc/T547-9VY2>]; Zach Schlein, *Miami Attorney Reps Florida Prisoners in Class Action over Impounded Music*, LAW.COM: DAILY BUS. REV. (Feb. 20, 2019, 3:31 PM), <https://www.law.com/dailybusinessreview/2019/02/20/miami-attorney-reps-florida-prisoners-in-class-action-over-impounded-music/> [<https://perma.cc/4ANT-RBDC>].

19. Conarck, *supra* note 1.

20. *Id.*; Lee, *supra* note 18 (“[B]etween 2011 and 2017, FDOC sold nearly 6.7 million digital media files, at a cost of roughly \$11.3 million to prisoners and their families.”); Schlein, *supra* note 18 (“[The MP3 program] was a way for these prisoners who had life sentences or [*sic*] 25 years or more . . . to have a little slice of normalcy. And to just have it ripped away from them is completely unacceptable.”).

21. Schlein, *supra* note 18.

22. Conarck, *supra* note 1.

for such obsolete device, nor do I want it upon my release.”²³ The department’s boilerplate reply: it is “aware that family members over the years have provided funds to their loved ones to add music to their current MP3 player” and “hope[s] that overtime [*sic*] the family and the inmate will see the added value of the new program.”²⁴

In February 2019, William Demler filed the first case challenging the taking of MP3 players and associated digital content in the US District Court for the Northern District of Florida.²⁵ The case is currently in the pretrial stage²⁶ and is the first to raise Fifth Amendment rights of inmates to own digital devices and downloads that they purchase through the state’s contract with private companies.²⁷ This Note addresses the digital property rights of prisoners and the likelihood of a successful takings claim when property they have been encouraged to purchase is taken by the state. Part I examines prisoners’ property rights, the emerging legal status and treatment of digital property, and the frameworks that courts use to decide takings claims. Part II discusses how courts treat inmates’ constitutional claims in general and how courts treat takings claims by inmates in particular. Part III proposes how inmates could construct a takings claim to challenge the deprivation of their digital property in circumstances such as those in Florida to have the best chance of success in the courts.

I. PROPERTY RIGHTS UNDER THE LAW

JPay offers prison services in thirty-five states, with the fee structure varying by state.²⁸ In 2016, Colorado became the first state to provide inmates with tablets, and prison officials now estimate that one in ten US correctional facilities offers inmates tablets²⁹ in states

23. *Id.*

24. *Id.*

25. Class Action Complaint for Injunctive & Declaratory Relief at 1–2, Demler v. Inch, No. 4:19-cv-00094 (N.D. Fla. filed Feb. 19, 2019) [hereinafter Complaint].

26. *Demler v. Inch*, PACERMONITOR, https://www.pacermonitor.com/public/case/27141776/Demler_v_INCH [<https://perma.cc/XDJ5-6WGK>] (last updated Oct. 14, 2019).

27. A previous challenge to a different aspect of a prison MP3 program in Michigan, which was dismissed, made an antitrust claim. Robertson, *supra* note 10.

28. Ben Conarck, *Florida Prisons Roll Out More For-Profit Services While Weighing Visitation Cuts*, FLA. TIMES-UNION (June 2, 2018, 5:49 PM), <https://www.jacksonville.com/news/20180601/florida-prisons-roll-out-more-for-profit-services-while-weighing-visitation-cuts> [<https://perma.cc/A8LZ-RUNZ>].

29. *Colorado Inmates’ Tablets Taken Away for Security Reasons*, DENV. CHANNEL (Aug. 2, 2018, 1:42 PM), <https://www.thedenverchannel.com/news/crime/colorado-inmates-tablets-taken-away-for-security-reasons> [<https://perma.cc/E9Y7-F9UN>] [hereinafter DENV. CHANNEL].

including New York, Florida, Missouri, Indiana, Connecticut, and Georgia.³⁰ Inmates either purchase or are given devices, such as MP3 players or tablets, and then pay for the services.³¹ The cost to download a song, send an email, or video chat with family goes to the private company the state contracted with.³² The programs often market themselves as providing free educational resources and access to law libraries,³³ promising to improve behavior at no cost to the state.³⁴ In fact, states profit enormously from the programs.³⁵ State prison systems sign exclusive contracts with prison telecommunications companies such as JPay and Global Tel Link (GTL), giving inmates only one option for digital devices and purchases.³⁶ Many states earn between 10–50 percent of the revenue generated from the inmates’ purchases.³⁷ The more money spent by inmates sending emails, downloading songs, or video chatting with their spouse, the more money that goes to the

30. Michael Waters, *The Outrageous Scam of “Free” Tablets for the Incarcerated*, OUTLINE (Aug. 10, 2018, 9:49 AM), <https://theoutline.com/post/5760/free-tablets-in-prison-night-mare?zd=2&zi=tyjtro6l> [<https://perma.cc/4MHY-VG9A>].

31. Conarck, *supra* note 1 (“For around \$100, Access sold various models of MP3 players that inmates could then use to download songs.”); Tonya Riley, *“Free” Tablets Are Costing Prison Inmates a Fortune*, MOTHER JONES (Oct. 5, 2018), <https://www.motherjones.com/politics/2018/10/tablets-prisons-inmates-jpay-securus-global-tel-link/> [<https://perma.cc/B5QM-KKFFH>] (“For \$140, prisoners would be able to purchase a clear, 7-inch Android device from JPay. The tablets wouldn’t be connected to the internet, but for a fee, Snitzky and his fellow inmates at Marion can access emails, games, and music from their prison cells.”); Waters, *supra* note 30 (“In New York, for example, JPay—which aspires to be the ‘Apple of prisons’—gave out 52,000 free tablets in February 2018.”).

32. Waters, *supra* note 30.

33. Both educational materials and legal databases have been criticized for content and access issues. *See id.* (“Even the truly free services offered by the prisons, including online libraries and education programs, have come under fire. Many prisons have scrapped their physical law libraries, but the online libraries that have replaced them often lack the legal resources inmates need, according to an investigation by *The Crime Report*. The legal services offered through the tablets have also malfunctioned so frequently that countless incarcerated people have been left without proper legal aid. And those education programs are getting similarly negative reviews.”).

34. *See* Conarck, *supra* note 28; *see, e.g., GTL Tablet Solutions*, GTL, <https://www.gtl.net/gtl-tablet-solutions/> [<https://perma.cc/Z6AV-WPAP>] (last visited Oct. 14, 2019).

35. Waters, *supra* note 30 (“GTL introduced free tablets in Indiana last year, from which it expects to make \$6.5 million—including a sizable cut, \$750,000 per year, for the state. Securus, meanwhile, has paid out \$1.3 billion in commissions to prisons over the last 10 years (a number that includes commissions for non-tablet programs, including phone calls).”).

36. Conarck, *supra* note 1; Waters, *supra* note 30.

37. These commissions can lead to perverse incentives. *See* Waters, *supra* note 30 (“Many states earn a portion of the revenue generated from prisoners using the tablets, so the incentive is to pick the company with the highest prices: the more that a telecommunications company makes off the inmates, the more the prison makes. Prisons earn back anywhere from 10 to 50 percent of the revenue generated from emails sent by the people they incarcerate.”).

corrections department or state general fund.³⁸ Although inmates are encouraged to purchase these devices and digital downloads, it is unclear what rights they have when prisons revoke the programs and confiscate their devices because of a security threat³⁹ or change in vendor.⁴⁰

A. Limits to Property Rights in Prison

While incarcerated for criminal convictions, inmates retain some, but not all, of their constitutional protections.⁴¹ The rights they retain are subject to certain restrictions justified by the “legitimate goals and policies of the penal institution.”⁴² Limitations to inmates’ constitutional liberties may be necessary in some cases for the security and safety of other inmates, officers, and the institution.⁴³ Courts grant “wide ranging deference” to the judgment of prison administrators when it comes to determining which policies are necessary to maintain order and security.⁴⁴ However, prisoners retain constitutional rights that are “compatible with the objectives of incarceration.”⁴⁵

The US Supreme Court has recognized property rights of prisoners⁴⁶ and the existence of Fifth and Fourteenth Amendment protections that “prohibit the government from depriving an inmate of life, liberty, or property without due process of law.”⁴⁷ However, given reduced expectations of privacy in prison, the Court also held that the Fourth Amendment does not apply to prison cells and to property seized within them.⁴⁸ As with other constitutional rights, courts balance the inmate’s interest in their property with the “interest of society in the

38. Conarck, *supra* note 1 (“In the Access Corrections contract, revenue left over after paying to run the program went back in a general fund controlled by the Legislature. But in the JPay contract, the Department retains any excess revenue in its Administrative Trust Fund.”).

39. See, e.g., Reutter, *supra* note 7; DENV. CHANNEL, *supra* note 29.

40. See, e.g., Conarck, *supra* note 1.

41. Bell v. Wolfish, 441 U.S. 520, 545 (1979) (“[C]onvicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison.”).

42. *Id.* at 546.

43. *Id.* at 546–47.

44. *Id.* at 547.

45. *VI. Prisoners’ Rights*, 47 GEO. L.J. ANN. REV. CRIM. PROC. 1131, 1131 (2018).

46. Hudson v. Palmer, 468 U.S. 517, 530 (1984) (“Nor does it mean that prison attendants can ride roughshod over inmates’ property rights with impunity.”).

47. *VI. Prisoners’ Rights*, *supra* note 45, at 1163.

48. Hudson, 468 U.S. at 527–28, 528 n.8, 536 (“A right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order.”).

security of its penal institutions.”⁴⁹ Broad deference is granted to prison administrators in the execution of policies and practices that may infringe on inmates’ rights in the pursuit of order and safety.⁵⁰

B. Is Digital Music Property?

While many people may think about property rights in terms of real property or personal property with a tangible, physical form, it is increasingly likely that intangible digital downloads or cloud files are now types of property as well.⁵¹ This digital property has financial value from revenue streams to resales: the average US citizen believes their digital assets are worth \$55,000.⁵² In many ways, the digital assets people purchase are similar to physical objects.⁵³ For example, e-books and digital magazines—in addition to providing the same content as a physical copy—are displayed on screens with features that mimic their tangible versions, including the ability to dog-ear or bookmark a page.⁵⁴ However, the purchasers of digital assets may not understand that they are usually only purchasing a license to use the item on a specific device.⁵⁵ Many people may not appreciate the difference between owning a discrete, physical object and having the license to use the content on a device, but there are many examples of how these differences give digital media providers more power than vendors in traditional marketplaces.⁵⁶

49. *Id.* at 527; *see also Bell*, 441 U.S. at 547 (“Accordingly, we have held that even when an institutional restriction infringes a specific constitutional guarantee, such as the First Amendment, the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security.”).

50. *Bell*, 441 U.S. at 546–47.

51. Ashley F. Watkins, Comment, *Digital Properties and Death: What Will Your Heirs Have Access to After You Die?*, 62 BUFF. L. REV. 193, 194 (2014).

52. *Id.* at 194–95 (“[P]ersonal websites and YouTube accounts can bring in ad revenue and . . . a World of Warcraft character could be sold for thousands of dollars. Even MP3s may have financial value—especially now that Amazon has been granted a patent that covers a secondary market for used digital goods. All these assets can really add up. In fact, a recent McAfee survey found that the average American believed his or her digital assets to be worth about \$55,000.”).

53. Caitlin J. Akins, Note, *Conversion of Digital Property: Protecting Consumers in the Age of Technology*, 23 LOY. CONSUMER L. REV. 215, 219–20 (2010).

54. *Id.*

55. *Id.* at 220; Farhad Manjoo, *Why 2024 Will Be Like Nineteen Eighty-Four*, SLATE (July 20, 2009, 5:53 PM), http://www.slate.com/articles/technology/technology/2009/07/why_2024_will_be_like_nineteen_eightyfour.html [https://perma.cc/5YSR-SYT6] (“Most of the e-books, videos, video games, and mobile apps that we buy these days day [sic] aren’t really ours. They come to us with digital strings that stretch back to a single decider—Amazon, Apple, Microsoft, or whomever else.”).

56. Manjoo, *supra* note 55.

When Amazon found out that illegal copies of books were being published on its platform, it removed the digital copies from users' devices and refunded them what they had paid.⁵⁷ Critics pointed out that if a bookstore realized that it had sold bootleg copies of a book, they could not come into the buyers' homes and remove the books.⁵⁸ Amazon was sued for this action, and a settlement indicated that they would no longer delete digital assets from Kindles.⁵⁹ However, this incident highlighted one of the many ways in which digital property, and the purchasing or licensing of these assets on digital devices such as tablets and music players, is a subject of emerging laws governing property. While legal theorists and state courts advance different theories, many state laws are moving toward recognition of digital assets as property.⁶⁰

1. Legal Theories

It is unclear whether digital property legally exists and, if it does, what the bounds of that existence are.⁶¹ Some scholars have suggested that property interests can be disassociated from the physical object and concern themselves with the information actually transmitted.⁶² The “property-as-information” theory avoids the impractical distinction between tangible and intangible property, and thus avoids the problem of a physical dollar bill being treated differently than a dollar in a bank account.⁶³ Other scholars define property as “relations among people with respect to resources.”⁶⁴ This rights-based theory asks “whether the person who wants protection of his or her rights in a resource or asset has rights in that resource or asset that are superior to the rights of others.”⁶⁵ This conception also bypasses the

57. *Id.*

58. Akins, *supra* note 53, at 216 (“One victim noted, ‘it’s like Barnes & Noble sneaking into our homes in the middle of the night, taking some books that we’ve been reading off our nightstands, and leaving us a check on the coffee table.’”); Manjoo, *supra* note 55 (“When you walk into your local Barnes & Noble to pick up a paperback of *Animal Farm*, the store doesn’t force you to sign a contract limiting your rights. If the Barnes & Noble later realizes that it accidentally sold you a bootlegged copy, it can’t compel you to give up the book—after all, it’s your property.”).

59. Akins, *supra* note 53, at 215–17.

60. *See infra* Section I.B.2.

61. Daniel Martin, Note, *Dispersing the Cloud: Reaffirming the Right to Destroy in a New Era of Digital Property*, 74 WASH. & LEE L. REV. 467, 486–87 (2017).

62. Joshua A.T. Fairfield, *Bitproperty*, 88 S. CAL. L. REV. 805, 811 (2015).

63. *Id.* at 812.

64. Juliet M. Moringiello, *False Categories in Commercial Law: The (Ir)relevance of (In)tangibility*, 35 FLA. ST. U. L. REV. 119, 134 (2007).

65. *Id.*

tangible-intangible distinctions and the confusion with contracts that convey rights to intangible assets.⁶⁶

There are also scholars who dispute the idea of digital or cyber property as property.⁶⁷ One criticism is that digital property, such as digital code, is not “easily analogized to a form of property.”⁶⁸ For example, unlike a physical location, “the ‘placeness’ of cyberspace is a matter of ongoing social construction,” and the law cannot simply apply property law governing real property to cyberspace.⁶⁹ Another critique is that “digital property is not included in crimes such as larceny because it is not a ‘material object or movement of power’ and thus [does] not fulfill the rigid definition of property.”⁷⁰ As a result, someone who types out a work will “own only the intangible copyright associated with that work of authorship and have no common law property rights in the digital file,” while a person who writes that same work on a piece of paper owns both the copyright and the paper itself.⁷¹

2. Statutory and Case Law

States have begun to recognize digital assets as property in estate law.⁷² In some states, statutes governing digital assets in estate law apply to emails, in other states it includes documents and information, and in still others, the law includes access to and control over social networking profiles.⁷³ It remains to be seen how some of these laws will fare against the terms-of-service agreements and privacy policies of digital life.⁷⁴ In an attempt to address the issue of digital assets in estate law, the Uniform Law Commission created model legislation, the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA).⁷⁵ RUFADAA has been enacted in forty-one

66. *Id.* at 137–38. Moringiello notes that people are often confused by the terms of service that impose forfeiture of digital assets for noncompliance with the terms, but there is not similar confusion when the seller of real property imposes restrictions through covenants and conditions subsequent. *Id.* at 135–36.

67. See Greg Lastowka, *Decoding Cyberproperty*, 40 *IND. L. REV.* 23, 43–44 (2007).

68. *Id.* at 44–45.

69. *Id.* at 45.

70. Michael S. Richardson, Comment, *The Monopoly on Digital Distribution*, 27 *PAC. MCGEORGE GLOBAL BUS. & DEV. L.J.* 153, 157 (2014).

71. *Id.* at 158–59.

72. See Katy Steinmetz, *Your Digital Legacy: States Grapple with Protecting Our Data After We Die*, *TIME* (Nov. 29, 2012), <http://techland.time.com/2012/11/29/digital-legacy-law/> [<https://perma.cc/KAL6-ZY3U>].

73. *Id.*

74. *Id.*

75. REVISED UNIF. FIDUCIARY ACCESS TO DIG. ASSETS ACT (UNIF. LAW COMM’N 2015)

states and the US Virgin Islands, and in 2018 it was introduced and is currently pending in four states and the District of Columbia.⁷⁶ It defines a digital asset as “an electronic record in which an individual has a right or interest.”⁷⁷ In the prefatory note, this definition is described as “ranging from online gaming items to photos, to digital music, to client lists.”⁷⁸ RUFADAA also notes that the location of the digital asset “includes any type of electronically-stored information, such as: 1) information stored on a user’s computer and other digital devices; 2) content uploaded onto websites; and 3) rights in digital property.”⁷⁹

Although state legislatures are beginning to recognize digital property, judges and courts have not settled what effect, if any, the tangibility of property has on its legal status.⁸⁰ In *Dorer v. Arel*, the plaintiff wanted to seize an infringing domain under the law of debt collection.⁸¹ The Eastern District of Virginia ultimately used an alternative method to award control of the domain name to the plaintiff and did not reach its decision on whether a domain name constituted property that could be seized under Virginia’s law of judgment liens.⁸² The court was suspicious about the applicability of judgment liens, which apply to intangible property, to domain names.⁸³ The statute “reaches the debtor’s intangible personal property, which includes a wide range of rights and debts held by the judgment debtor, including bonds, notes, stocks, debts of all kind, including a debt payable in the future,” and provides for the sale of the intangible property to pay the creditor.⁸⁴ In the *Dorer* case, however, the debtor wanted the intangible property to be transferred to them, not sold to pay the debt, and the court was concerned that the intangible property could not be directly

[hereinafter RUFADAA]; *Fiduciary Access to Digital Assets Act, Revised*, UNIFORM L. COMMISSION, <https://www.uniformlaws.org/committees/community-home?CommunityKey=f7237fc4-74c2-4728-81c6-b39a91ecdf22> [<https://perma.cc/P7KW-AJ36>] (last visited Oct. 14, 2019) (“This act extends the traditional power of a fiduciary to manage tangible property to include management of a person’s digital assets. The act allows fiduciaries to manage digital property like computer files, web domains, and virtual currency, but restricts a fiduciary’s access to electronic communications such as email, text messages, and social media accounts unless the original user consented in a will, trust, power of attorney, or other record.”).

76. *Fiduciary Access to Digital Assets Act, Revised*, *supra* note 75.

77. RUFADAA § 2(10).

78. *Id.* Prefatory Note.

79. *Id.* § 2 cmt.

80. *See supra* notes 69–79; *infra* notes 81–83.

81. *Dorer v. Arel*, 60 F. Supp. 2d 558, 558–59 (E.D. Va. 1999).

82. *Id.* at 561.

83. *Id.* at 560–61.

84. *Id.* at 559 (internal quotations omitted).

transferred to the creditor under the law⁸⁵ and that the intangible property—the domain name—was controlled by a third-party company, which compelled a different procedure.⁸⁶

Dorer stands in contrast to *Kreman v. Cohen*, where the US Court of Appeals for the Ninth Circuit considered whether the plaintiff had property rights in a domain name under California law.⁸⁷ The court applied a three-part test evaluating whether (1) the interest was well-defined, (2) there could be possession or control, and (3) ownership was exclusive, and it established that ownership of a domain name was an intangible property right.⁸⁸ The court went further and applied the tort of conversion to domain names, although conversion had traditionally been reserved for tangible property.⁸⁹ The court offered an example of why the distinction between tangible and intangible property could lead to absurd results: “It would be a curious jurisprudence that turned on the existence of a paper document rather than an electronic one. Torching a company’s file room would then be conversion while hacking into its mainframe and deleting its data would not.”⁹⁰

The tort of conversion was also applied to electronic records and data in *Thyroff v. Nationwide Mutual Insurance Co.*⁹¹ In *Thyroff*, the property at issue was business and personal information stored on a computer system; the system was repossessed by the employer, who terminated its agreement with the employee.⁹² As a result, the employee was “unable to retrieve his customer information and other personal information that was stored on the computers.”⁹³ The employer argued that, under New York state law, a conversion claim could not be “based on the misappropriation of electronic records and data” because electronic records and data were intangible property.⁹⁴ After examining the history of conversion, the court expanded conversion to cover digital information, writing, “We cannot conceive of any reason in law or logic why this process of virtual creation should be

85. *Id.* (“Yet significantly, there appears to be no statutory provision for direct transfer of the judgment debtor’s property to the judgment creditor in satisfaction of the judgment. And where a third party controls the property subject to the writ, a judgment creditor typically must follow garnishment procedures under Virginia law.”).

86. *Id.* at 559 n.8 (discussing practical concerns).

87. *Kreman v. Cohen*, 337 F.3d 1024, 1029 (9th Cir. 2003).

88. *Id.* at 1030.

89. *Id.*

90. *Id.* at 1034.

91. *Thyroff v. Nationwide Mut. Ins. Co.*, 864 N.E.2d 1272, 1272–73 (N.Y. 2007).

92. *Id.* at 1273.

93. *Id.*

94. *Id.*

treated any differently from production by pen on paper or quill on parchment.”⁹⁵ The court explained that “it generally is not the physical nature of a document that determines its worth, it is the information memorialized in the document that has intrinsic value,” and concluded that, unless there was a significant difference in the value or worth of the information based on its form, “the protections of the law should apply equally to both forms—physical and virtual.”⁹⁶

C. Takings Clause Frameworks

The Takings Clause of the Fifth Amendment states, “private property [shall not] be taken for public use, without just compensation.”⁹⁷ A takings inquiry consists of four considerations: (1) whether the claimant had a property interest, (2) whether the government’s action “effect[ed] a taking of that property interest,” (3) whether the taking was for public use, and (4) whether there is an adequate provision for just compensation.⁹⁸

The second inquiry—whether there was a taking—does not have a set formula but attempts to determine “when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government.”⁹⁹ The determination of whether the government’s action was just and fair is an “ad hoc and fact intensive” process, and different cases have analyzed the claims in slightly different ways.¹⁰⁰ The Court has identified three significant factors: (1) the economic impact of the action on the individual, (2) how the regulation has interfered with their “investment-backed expectations,” and (3) the character of the government’s action.¹⁰¹ When looking at the character of the action, the Court has explained that it is more likely to find a taking when there was a physical intrusion by the government, versus a change in property value as the result of a change in the general law.¹⁰² The Court also noted that economic harm is not enough on its own to constitute a taking; the government’s actions must “interfere with interests that were sufficiently bound up with the reasonable

95. *Id.* at 1274–78.

96. *Id.* at 1278.

97. U.S. CONST. amend. V.

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

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

100. *E. Enters. v. Apfel*, 524 U.S. 498, 523 (1998).

101. *Penn Cent.*, 438 U.S. at 124.

102. *Id.*

expectations of the claimant to constitute ‘property’ for Fifth Amendment purposes.”¹⁰³

II. DIGITAL PROPERTY, PRISONERS’ RIGHTS, AND THE TAKINGS CLAUSE

Both the unique nature of incarceration and the unsettled questions around digital property affect the scope of constitutional rights, particularly when it comes to property rights. The following Sections examine these interactions.

A. Permissible Limitations on the Constitutional Rights of Inmates

Prison regulations that infringe on the constitutional rights of inmates are valid if they are “reasonably related to legitimate penological interests.”¹⁰⁴ The courts grant “substantial deference to the professional judgment of prison administrators” to decide which restrictions are necessary to the institution, and the burden of proof falls on the inmate to prove that certain regulations are invalid.¹⁰⁵ The four factors courts use to determine the validity of prison regulations affecting inmates’ constitutional rights are (1) whether there is a “valid, rational connection” between the regulation and the state interest; (2) whether inmates have “alternative means of exercising the right”; (3) what impact any accommodation would have on prison guards, other inmates, and prison resources; and (4) whether there is any alternative “that fully accommodates the prisoner’s rights at *de minimis* cost to valid penological interests.”¹⁰⁶ Thus, to assert a due process challenge to the Florida prison policy—which effectively deprives inmates’ digital files and devices by changing digital music vendors—inmates would need to assert that the policy is not rationally related to a valid penological interest.¹⁰⁷

The Court has upheld regulations that are rationally related to legitimate security concerns, including a ban on inmate-to-inmate correspondence at different corrections institutions.¹⁰⁸ Other rationally related restrictions have included limiting visitation of inmates by children or by former inmates and curtailing contact visits for inmates

103. *Id.* at 124–25.

104. *Turner v. Safley*, 482 U.S. 78, 89 (1987).

105. *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003).

106. *Turner*, 482 U.S. at 89–91 (citing *Block v. Rutherford*, 468 U.S. 576, 586 (1984)).

107. U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law.”).

108. *Turner*, 482 U.S. at 91.

with multiple substance-abuse violations within the past two years.¹⁰⁹ In contrast, a Missouri regulation that almost completely barred inmates from getting married was struck down because it was an “exaggerated response” to valid security concerns about inmate marriages and because there were “obvious, easy alternatives to the Missouri regulation that accommodate the right to marry while imposing a *de minimis* burden on the pursuit of security objectives.”¹¹⁰

Florida created the right to purchase, own, and use digital devices, but the deprivation of the program is not being used as a punishment against individuals;¹¹¹ the devices are being taken away from all inmates as a result of the Department of Corrections change in vendors for the program.¹¹² Because courts grant broad deference to prison administrators to decide which regulations are reasonable,¹¹³ the Department of Corrections has the presumption of reasonability in its regulation limiting inmates to one MP3 player¹¹⁴ and in its assertion that inmates cannot keep the devices they purchased “because the contract is ending and there would be no way to service them.”¹¹⁵ When a court looks at the four factors established by *Turner*, the MP3 regulation will survive the first three factors because (1) a regulation limiting the number of electronic devices is validly and rationally connected with the state interest in prison safety; (2) the new tablet program is an “alternative means of exercising the right”; and (3) courts give deference to the Department of Corrections’s assessment of the impact of having multiple types of devices on the guards, other inmates, and “the allocation of prison resources.”¹¹⁶ However, inmates may argue that the program fails the fourth factor because the alternative does not “fully accommodate the prisoner’s rights” due to the potential loss of up to thousands of dollars of digital property,¹¹⁷ though inmates will have to show that keeping their current device or transferring the downloaded content to the new device would have “a *de minimis* cost to valid penological interests.”¹¹⁸

109. *Overton*, 539 U.S. at 133–34.

110. *Turner*, 482 U.S. at 98.

111. This is in contrast to the state-created right in *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974).

112. Conarck, *supra* note 1.

113. *Overton*, 539 U.S. at 132.

114. FLA. ADMIN. CODE ANN. r. 33–602.201 (2016).

115. Conarck, *supra* note 1.

116. *Turner v. Safley*, 482 U.S. 78, 89–90 (1987).

117. *Id.* at 91; Conarck, *supra* note 1.

118. *Turner*, 482 U.S. at 91.

B. Prisoners' Property Rights and the Takings Clause

While penological interests may justify a deprivation of property without violating the Due Process Clause, the Takings Clause may offer an alternative remedy. Inmates have substantially litigated takings claims on the interest earned on inmate trust accounts.¹¹⁹ There is currently a circuit split, with the majority of circuits holding that “inmates lack the requisite protected property interest for the purposes of a takings claim” on their inmate accounts.¹²⁰ Only the Ninth Circuit recognizes a property right for inmate accounts.¹²¹

In *Schneider v. California Department of Correction*, a state statute implicitly denied inmates a property right to interest earned on their inmate accounts.¹²² Because a statutory grant is only one way to establish a property interest, the court looked to common law.¹²³ The Ninth Circuit recognized a property right that could trigger the Takings Clause via the general common law rule, “interest follows principal.”¹²⁴

Most circuits have declined to follow this approach.¹²⁵ Instead of looking at the interest follows principal rule, the First, Fourth, and Eleventh Circuits refer back to the property rights of inmates at common law.¹²⁶ At common law, inmates “could be forced to forfeit all rights to personal property.”¹²⁷ Finding no basis in common law, those courts then look to statute and to prison policies.¹²⁸ In *Givens*, the Eleventh Circuit found no property interest when the statute was silent about the ultimate owner of the interest and that, under prison policies,

119. See *infra* note 120.

120. Isaac Colunga, *An Alternative Look at the Takings Clause and Inmate Trust Accounts*, 39 U. TOL. L. REV. 791, 794 (2008); see *Young v. Wall*, 642 F.3d 49, 51, 55 (1st Cir. 2011); *Givens v. Ala. Dep't of Corr.*, 381 F.3d 1064, 1070 (11th Cir. 2004); *Washlefske v. Winston*, 234 F.3d 179, 180–81 (4th Cir. 2000); *Jennings v. Lombardi*, 70 F.3d 994, 997 (8th Cir. 1995).

121. *Schneider v. Cal. Dep't of Corr.*, 151 F.3d 1194, 1199 (9th Cir. 1998); *Tellis v. Godinez*, 5 F.3d 1314, 1317 (9th Cir. 1993).

122. *Schneider*, 151 F.3d at 1199.

123. *Id.* at 1199–1200 (“Although an explicit statutory provision may indeed be a *sufficient* condition to the creation of a constitutionally cognizable property interest, it assuredly is not a *necessary* one. Notwithstanding the State’s protestations to the contrary, property rights can—and often do—exist wholly independently of statutes recognizing them as such.” (citation omitted)).

124. *Id.* at 1199–1201. Interest follows principal “recognizes that interest earned on a deposit of principal belongs to the owner of the principal.” *Wash. Legal Found. v. Tex. Equal Access to Justice Found.*, 94 F.3d 996, 1000 (5th Cir. 1996).

125. *Young*, 642 F.3d at 54; *Givens*, 381 F.3d at 1070; *Washlefske*, 234 F.3d at 180–81; *Jennings*, 70 F.3d at 997.

126. *Young*, 642 F.3d at 53; *Givens*, 381 F.3d at 1068; *Washlefske*, 234 F.3d at 185.

127. *Givens*, 381 F.3d at 1068; see also *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682 (1974).

128. *Young*, 642 F.3d at 54; *Givens*, 381 F.3d at 1069–70; *Washlefske*, 234 F.3d at 185.

the inmate “lacks the full rights of ‘possession, control, and disposition’ a non-inmate would enjoy.”¹²⁹ Similarly, in *Young*, the First Circuit found no property interest where the statute was silent and the policy limited what the inmate was able to do with the principal funds in his account.¹³⁰ An earlier policy did give interest earned to the inmate, but the court said that the previous policy “reflected an act of administrative generosity It did not, however, obligate [the Department of Corrections] to follow that course indefinitely.”¹³¹

To determine whether an inmate has a property interest in an electronic entertainment device and in the digital files stored on the device, courts look to common law, statute, and prison policy.¹³² At common law, inmates could be stripped of all property rights, and so a court may find that inmates do not derive a property right from common law.¹³³ However, this applied to property owned *before* conviction; there is no common law right to or denial of property that is acquired *after* conviction.¹³⁴ State statutes vary; in Florida, the statute is silent about inmate property but grants broad authority to the Florida Department of Corrections to adopt rules regarding the rights of inmates.¹³⁵ Department rules limit inmates to one MP3 player,¹³⁶ and the Florida Department of Corrections has applied the rules by forcing inmates to relinquish one device in order to possess a new device.¹³⁷ The rules do not address digital downloads.¹³⁸

In *Young*, the First Circuit specifically addressed a situation where the policy previously granted inmates a property interest in the monetary interest from inmate accounts but no longer did.¹³⁹ The court wrote that the policy could be modified or abandoned, but the court only

129. *Givens*, 381 F.3d at 1069–70 (quoting *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 170 (1998)).

130. *Young*, 642 F.3d at 51, 54.

131. *Id.* at 55.

132. *See, e.g., Givens*, 381 F.3d at 1068–70.

133. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682 (1974) (“Forfeiture also resulted at common law from conviction for felonies and treason. The convicted felon forfeited his chattels to the Crown and his lands escheated to his lord; the convicted traitor forfeited all of his property, real and personal, to the Crown.”).

134. *See Givens*, 381 F.3d at 1068 (looking at statutory and policy-created property rights to monetary interest on prison earnings because there was no applicable common law).

135. FLA. STAT. ANN. § 944.09 (West 2018).

136. FLA. ADMIN. CODE ANN. r. 33–602.201 (2016).

137. Conarck, *supra* note 1.

138. ADMIN. r. 33–602.201.

139. *Young v. Wall*, 642 F.3d 49, 51, 55 (1st Cir. 2011).

addressed property that accumulated *after* the policy changed.¹⁴⁰ In *Young*, the inmate retained ownership of the interest that had accrued *before* the policy changed.¹⁴¹ In contrast, Florida requires inmates to give up the MP3 devices and the downloaded content they purchased under the previous policy.¹⁴² However, Florida does offer the inmates the opportunity to send the device to a nonprison address, presumably to a family member, so that at least some of the files will be available to the inmate after their release.¹⁴³

C. Digital Property and the Takings Clause

While the Court has not heard takings claims for purely digital property, it has explored the application of the Takings Clause to various forms of intangible property.¹⁴⁴ The takings inquiry in *Ruckelshaus v. Monsanto*, regarding the public disclosure of intangible trade secrets, asked four questions: (1) Did the claimant have a property interest? (2) Did the government's action "effect a taking of that property interest"? (3) Was the taking for public use? (4) Is there an adequate provision for just compensation?¹⁴⁵

Takings claims rely on the money made, or another public benefit, as a direct result of a deprivation of private property. The state receives millions from digital purchases by inmates—purchases that will now be repeated, for even more profit, since the original files were taken by the prison.¹⁴⁶ The profits are under governmental control for uses that may support the public good, and the compensation that the inmates received was only a fraction of both the value of their property and of the profits paid to the state.¹⁴⁷ A court conducting a takings inquiry into intangible digital downloads will likely consider the same four questions as it has used for other intangible property.¹⁴⁸

140. *Id.* ("RIDOC met its obligations under the Policy for as long as the Policy remained in effect. It accrued interest on inmate accounts until it abandoned the Policy and changed its preexisting practice. The plaintiff received that interest.")

141. *Id.*

142. Conarck, *supra* note 1.

143. *Id.*

144. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (citing *Armstrong v. United States*, 364 U.S. 40, 44, 46 (1960); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 596–602 (1935); *Lynch v. United States*, 292 U.S. 571, 579 (1934)).

145. *Id.* at 1000–01.

146. Conarck, *supra* note 1.

147. *Infra* Sections II.C.3, II.C.4.

148. See *Ruckelshaus*, 467 U.S. at 1000–01, 1003 (citing *Armstrong*, 364 U.S. at 44, 46; *Radford*, 295 U.S. at 596–602; *Lynch*, 292 U.S. at 579).

1. Property Interest

For the purposes of takings claims, the Court has held that property interests are not created by the Constitution but by independent sources such as state law.¹⁴⁹ In *Ruckelshaus*, the Court held that trade secrets, as an intangible form of property, were sufficient to form a property interest.¹⁵⁰ In making this decision, the Court considered whether the owner “protects his interest” from others, the ways in which trade secrets have “the characteristics of more tangible forms of property,” and the legislation and legislative history that established the interest.¹⁵¹ The Court also examined its precedent of recognizing a property interest in intangible property, such as liens and contracts.¹⁵² The Court found that “property” in the Takings Clause was not limited to a physical object but was used “to denote the group of rights inhering in the citizen’s relation to the physical thing, as the right to possess, use and dispose of it.”¹⁵³ There was also a statutory right to exclude, which is a central tenet of property interest.¹⁵⁴ The Court held that the claimant had a property right protected by the Fifth Amendment to the extent that the property right was recognized under state law.¹⁵⁵

To decide whether inmates’ digital files constitute a property interest, the Court examines any state or federal laws that recognize digital downloads as property.¹⁵⁶ State laws generally do not make it mandatory for digital property to be passed on after death in the same way that other property is.¹⁵⁷ However, states have enacted different laws that govern the transmission of email and social media accounts,

149. *Id.* at 1001.

150. *Id.* at 1002.

151. *Id.* (quoting H.R. REP. NO. 95–1560, pt. 5, at 29 (1978) (Conf. Rep.)) (“Even the manner in which Congress referred to trade secrets in the legislative history of FIFRA supports the general perception of their property-like nature. In discussing the 1978 amendments to FIFRA, Congress recognized that data developers like Monsanto have a ‘proprietary interest’ in their data. Further, Congress reasoned that submitters of data are ‘entitled’ to ‘compensation’ because they ‘have legal ownership of the data.’” (citation omitted)).

152. *Id.* at 1003 (citing *Armstrong*, 364 U.S. at 44, 46; *Radford*, 295 U.S. at 596–602; *Lynch*, 292 U.S. at 579).

153. *Id.* (quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377–78 (1945)).

154. *Id.* at 1011; see also Samuel Mallick, Note, *Augmenting Property Law: Applying the Right to Exclude in the Augmented Reality Universe*, 19 VAND. J. ENT. & TECH. L. 1057, 1066 (2017).

155. *Ruckelshaus*, 467 U.S. at 1003–04.

156. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682 (1974); *Givens v. Ala. Dep’t of Corr.*, 381 F.3d 1064, 1068 (11th Cir. 2004).

157. *Watkins*, *supra* note 51, at 197–98.

websites, and digital information after death.¹⁵⁸ Courts evaluating a takings claim also consider whether the owner “protects his interest” from others, the ways in which digital downloads have “the characteristics of more tangible forms of property,” and any legislation and legislative history that established the interest.¹⁵⁹

To the extent that they are able, an inmate may protect their interest in digital downloads by retaining possession of the device on which they are downloaded, backing up their data to protect against loss, and preventing others from deleting their files. Digital downloads, such as music files, share many of the characteristics of physical forms of property such as a CD or vinyl record, including storing music and enabling someone to play music with the associated device.¹⁶⁰ Courts may also look at precedent where other courts recognized a property interest, such as in liens and contracts.¹⁶¹ This area of law is not settled, with some courts expressing concern about intangible digital property, like domain names, being property against which a lien may apply.¹⁶² Other courts have recognized intangible digital property, such as information that is stored on a computer, as property to which the tort of conversion can apply.¹⁶³

Finally, courts will also consider if and how people possess, use, transfer, and exclude others from digital downloads.¹⁶⁴ While inmates are able to possess, use, and prevent other people from using their copy of a file, their ability to transfer is not as clear.¹⁶⁵ It is unlikely that inmates have the ability to transfer, given that terms of service agreements are often part of the purchase of the digital media file and tend to prohibit the transfer of the file.¹⁶⁶ Further, inmates are prohibited from selling their belongings to each other,¹⁶⁷ and the files

158. *Access to Digital Assets of Decedents*, NAT'L CONF. ST. LEGISLATORS, <http://www.ncsl.org/research/telecommunications-and-information-technology/access-to-digital-assets-of-decedents.aspx> [<https://perma.cc/HM6S-QQPS>] (last updated Oct. 14, 2019).

159. *Ruckelshaus*, 467 U.S. at 1002.

160. *Akins*, *supra* note 53, at 219–20 (comparing features of digital books to physical books).

161. *Ruckelshaus*, 467 U.S. at 1003 (citing *Armstrong v. United States*, 364 U.S. 40, 44, 46 (1960); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 596–602 (1935); *Lynch v. United States*, 292 U.S. 571, 579 (1934)).

162. *See supra* Section I.B.2.

163. *See supra* Section I.B.2; *see, e.g., Ruckelshaus*, 467 U.S. at 1003.

164. *Ruckelshaus*, 467 U.S. at 1003, 1011.

165. *Watkins*, *supra* note 51, at 217.

166. *Id.* Although they are generally contracts of adhesion, the Supreme Court has upheld such agreements unless they are substantively unconscionable. *Id.*

167. However, inmates who were released while the contract was still valid were allowed to take the device with them outside of the prison. *Lee*, *supra* note 18.

presumably cannot be easily transferred to devices used outside of the prison.¹⁶⁸ The biggest challenge to digital assets being recognized as property in prison may be the inability to transfer.

2. Taking

The Court recognized two ways in which a governmental action constitutes a taking: (1) “governmental acquisition or destruction of the property of an individual,” and (2) “deprivation of the former owner.”¹⁶⁹ While the government’s taking ownership or occupancy over property is the traditional method of a taking, the Court has also held government actions whose “effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.”¹⁷⁰ To decide when a government action exceeds regulation and becomes a taking, the Court looks at the three *Penn Central* factors: “the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations.”¹⁷¹

All three factors need not apply; in *Ruckelshaus*, the Court found that the third factor, “interference with reasonable investment-backed expectations,” was so overwhelming as to decide the question.¹⁷² The Court held that there was no taking when the *Ruckelshaus* claimants were “aware of the conditions” under which their intangible property was shared with the government, those conditions were “rationally related to a legitimate government interest,” and they voluntarily chose to participate in order to receive “economic advantages.”¹⁷³ However, when claimants shared data during the years in which there were statutory protections of their data and requirements for reasonable compensation, the “explicit governmental guarantee formed the basis of a reasonable investment-backed expectation.”¹⁷⁴

A governmental action that constitutes a taking can be by “governmental acquisition or destruction” or by “deprivation.”¹⁷⁵ In the

168. Conarck, *supra* note 1 (detailing the only transfer option that inmates have during the change of service provider as an outside entity that saves the files to a disc to be delivered to a nonprison address).

169. *Ruckelshaus*, 467 U.S. at 1004–05 (quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945)).

170. *Id.* at 1005 (quoting *Gen. Motors Corp.*, 323 U.S. at 378).

171. *Id.* (quoting *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980)) (“[T]hose factors are: ‘the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations.’”).

172. *Id.* (quoting *PruneYard*, 447 U.S. at 83).

173. *Id.* at 1007.

174. *Id.* at 1010–11.

175. *Id.* at 1004–05 (quoting *Gen. Motors Corp.*, 323 U.S. at 378).

context of a digital download, a deprivation is more likely because the government can easily deprive a person of use of the file but would be unlikely to need possession of it for its own use instead of simply acquiring its own copy.¹⁷⁶ However, if the government acted in a way that “deprive[s] the owner of all or most of his interest,” the government would have effectuated a taking.¹⁷⁷ The Court looks to the three *Penn Central* factors to make this decision: “[T]he character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations.”¹⁷⁸

For Florida inmates, the government’s action completely deprives them of their digital assets for the remainder of their incarceration—possibly the rest of their lives.¹⁷⁹ The economic impact on inmates and their families could be considerable; some inmates spend hundreds or even thousands of dollars on digital files.¹⁸⁰ Inmate labor earns very little money—minimum daily wages average eighty-six cents—so most of the money in inmate accounts is provided by their families.¹⁸¹ Inmates tend to come from lower socioeconomic backgrounds, so the impact of “losing” hundreds or thousands of dollars can be substantial.¹⁸² As in *Ruckelshaus*, a court may find that there was no “interference with reasonable investment-backed expectations” when the parties were “aware of the conditions” under which they were purchasing the files, those conditions were “rationally related to a legitimate government interest”—prison safety and function—and they had voluntarily chosen to participate.¹⁸³ However, in contrast to the claimants in *Ruckelshaus*, inmates did not participate to receive

176. There may be a rare situation in which a recorded image, sound file, or video file is the only copy of something, but given the current technological ability to copy digital files, it is unlikely that the government would take complete possession of one.

177. *Ruckelshaus*, 467 U.S. at 1005 (quoting *Gen. Motors Corp.*, 323 U.S. at 378).

178. *Id.* (quoting *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980)).

179. Conarck, *supra* note 1. Inmates have the option of paying twenty-five dollars to have these files transferred to a disc and mailed to an address outside of the prison, so they will only have access to the files once they are released. *Id.*

180. *Id.*

181. Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POLY INITIATIVE (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages/> [<https://perma.cc/T7J4-NYM5>] (“The average of the minimum daily wages paid to incarcerated workers for non-industry prison jobs is now 86 cents, down from 93 cents reported in 2001. The average maximum daily wage for the same prison jobs has declined more significantly, from \$4.73 in 2001 to \$3.45 today.”); Waters, *supra* note 30 (“It’s prices that are way over market rates, and it just seems like predatory pricing, just pure profit-seeking That’s money that needs to come from family members, and usually there’s a fee associated with sending it to someone’s commissary account.”).

182. LOONEY & TURNER, *supra* note 5, at 19.

183. *Ruckelshaus*, 467 U.S. at 1005, 1007 (quoting *PruneYard*, 447 U.S. at 83).

“economic advantages” but because it was one of a limited number of entertainment opportunities in prison.¹⁸⁴ This inquiry is likely to be fact dependent and rest on the official prison policy when the purchases were made and any contract provisions that inmates agreed to when they purchased the files.¹⁸⁵

3. Public Use

A court will rarely question the legislature’s judgment regarding what represents public use.¹⁸⁶ Public use constitutes both a taking “put to use for the general public” and a taking that has a public purpose.¹⁸⁷ When the legislative history shows that the purpose of a statute is to provide a public benefit, as it did in *Ruckelshaus*, a taking under that statute is a taking for public use.¹⁸⁸

In Florida, the files and devices were taken away because the state determined that a new vendor would best suit its needs.¹⁸⁹ Any records about that decision may be helpful for a court to determine whether the taking was for public use or public purpose.¹⁹⁰ In the original program, which generated \$1.4 million, any profits remaining after expenses went into the state’s general fund under the legislature’s control.¹⁹¹ Under the new contract, the Department of Corrections “retains any excess revenue in its Administrative Trust Fund.”¹⁹² This fund is used for “management activities that are department-wide in nature.”¹⁹³ Unlike the state’s general fund, the parties may dispute whether the administrative trust fund is for a public use or a public

184. *Id.* at 1007.

185. *See id.* at 1010–11 (holding that participation when there was an “explicit governmental guarantee formed the basis of a reasonable investment-backed expectation”).

186. *Id.* at 1014; *see also* Cristin F. Hartzog, Note, *The “Public Use” of Private Sports Stadiums: Kelo Hits a Homerun for Private Developers*, 9 VAND. J. ENT. & TECH. L. 145, 154 (2006) (quoting *Kelo v. City of New London*, 545 U.S. 469, 490 (2005) (Kennedy, J., concurring)) (“[T]he Supreme Court declared that ‘a taking should be upheld as consistent with the Public Use Clause as long as it is “rationally related to a conceivable public purpose.””).

187. *Ruckelshaus*, 467 U.S. at 1014–15.

188. *Id.* (“Congress believed that the provisions would eliminate costly duplication of research and streamline the registration process, making new end-use products available to consumers more quickly [and] . . . would eliminate a significant barrier to entry into the pesticide market, thereby allowing greater competition among producers of end-use products. Such a procompetitive purpose is well within the police power of Congress.” (citations omitted)).

189. Conarck, *supra* note 1.

190. *See, e.g., Ruckelshaus*, 467 U.S. at 1014–15 (relying on legislative history that showed that the purpose of a statute was to provide a public benefit).

191. Conarck, *supra* note 1.

192. *Id.*

193. FLA. STAT. ANN. § 20.3151(2) (West 2018).

purpose. The legislative purpose of the Department of Corrections is “to protect the public through the incarceration and supervision of offenders and to rehabilitate offenders through the application of work, programs, and services,” so funds that help the department further that purpose may serve a public purpose.¹⁹⁴

However, a court may consider whether the commissions that go into the administrative trust fund are used primarily to fund the tablet program. The Supreme Court has previously considered whether “user fees” constitute a taking.¹⁹⁵ In *United States v. Sperry*, a corporation was charged a user fee relating to a settlement that it acquired through a US-run tribunal.¹⁹⁶ The government charged a reimbursement fee for the cost of running the tribunal and arbitrating the agreement.¹⁹⁷ The Court held that the user fee need not be “precisely calibrated” to the exact cost of the services provided to that party as long as it was a “fair approximation of the cost of benefits supplied.”¹⁹⁸ The *Sperry* Court declined to set an exact percentage that would be excessive, but stated that 1.5 percent was not excessive.¹⁹⁹ The Court also addressed the corporation’s claims that it was forced to use the tribunal and would not have chosen to do so, saying that the fee was for the service that was used and that the corporation “benefit[ed] directly” from that service.²⁰⁰

Although the exact commission to the Florida Department of Corrections is not public, a general range of 10–50 percent is common.²⁰¹ The percentage is taken out of the money that the inmates spend, and thus comes from the private contractor’s profits, not the inmate’s account.²⁰² However, inmates could argue that the prices and fees that they are charged are artificially inflated in order to pay the commission.²⁰³ A court may need to make specific factual findings to determine what the cost of administering the program was and how

194. FLA. STAT. ANN. § 20.315(1) (West 2018).

195. *United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989); *see also* *Slade v. Hampton Rds. Reg'l Jail*, 407 F.3d 243, 255 (4th Cir. 2005) (“[T]he imposition of a modest and non-punitive charge to defray costs cannot be said to transgress the state’s constitutional obligations.”).

196. *Sperry*, 493 U.S. at 60.

197. *Id.*

198. *Id.* (quoting *Massachusetts v. United States*, 435 U.S. 444, 463 n.19 (1978)).

199. *Id.* at 62.

200. *Id.* at 63.

201. Stephen Raher, *You’ve Got Mail: The Promise of Cyber Communication in Prisons and the Need for Regulation*, PRISON POL’Y INITIATIVE (Jan. 21, 2016), <https://www.prisonpolicy.org/messaging/report.html> [<https://perma.cc/5Y6U-5MTX>].

202. *Id.*

203. Some of the grievances contended that the explicit reason for the change in vendors was to increase profits for the department. *Id.*

much of the commission goes to public use or public benefit via state-controlled accounts that are used for state functions.²⁰⁴

4. Just Compensation

For the final inquiry of a takings claim, courts consider whether there is an adequate provision for just compensation.²⁰⁵ In *Ruckelshaus*, the district court read the statute that allowed for public disclosure of trade secrets as implicitly preempting the claimant from seeking compensation under the Tucker Act, which waives sovereign immunity and provides jurisdiction for claims of monetary damages against the United States for constitutional violations, including takings claims.²⁰⁶ On review, the Court disagreed, requiring the statute under which the taking was justified to expressly withdraw the applicability of the Tucker Act in order to preempt it.²⁰⁷ Because the Tucker Act was available to the claimant to seek compensation, and had not yet been arbitrated, there was a possibility of just compensation, and the Court found that the claim was not ripe for resolution.²⁰⁸

In Florida, the state may argue that, for the relatively minor cost of twenty-five dollars, an inmate is able to retain ownership of the files equal to their ownership of any other property that they are not allowed to possess or use in the prison, but which will be available to them upon release.²⁰⁹ Inmates, however, may argue that they purchased the device for entertainment use while incarcerated and have no need of it after release or that they are serving a life sentence and will never be

204. See *Sperry*, 493 U.S. at 60 (quoting *Massachusetts v. United States*, 435 U.S. 444, 463 n.19 (1978)) (“This Court has never held that the amount of a user fee must be precisely calibrated to the use that a party makes of Government services. Nor does the Government need to record invoices and billable hours to justify the cost of its services. All that we have required is that the user fee be a ‘fair approximation of the cost of benefits supplied.’”); see also *Slade v. Hampton Rds. Reg'l Jail*, 407 F.3d 243, 255 (4th Cir. 2005) (“[T]he imposition of a modest and non-punitive charge to defray costs cannot be said to transgress the state’s constitutional obligations.”).

205. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984).

206. *Id.* at 1016–17; see also 14 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3657 (4th ed. 2019) (quoting 28 U.S.C. § 1346(a)(2) (2018)) (“The Tucker Act confers jurisdiction over claims against the United States for money damages ‘founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.’ In addition to conferring jurisdiction, the Tucker Act waives the Government’s immunity to suit for claims within the grant.”).

207. *Ruckelshaus*, 467 U.S. at 1017 (quoting *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 126 (1974)) (“[T]he proper inquiry is not whether the statute ‘expresses an affirmative showing of congressional intent to permit recourse to a Tucker Act remedy’ but ‘whether Congress has in the [statute] *withdrawn* the Tucker Act grant of jurisdiction.’”).

208. *Id.* at 1019–20.

209. *Conarck*, *supra* note 1.

released.²¹⁰ They may also argue that some of the files they purchased were permanently taken because they could not be sent to an outside address.²¹¹ Although the devices could only hold a limited amount of data, inmates “were permitted to delete and re-order digital media files that they had purchased from the cloud-based library, at any time and at no additional cost.”²¹² The digital device user guide “explicitly stated that prisoners would never have to purchase the same song or book twice,” as they could download previous purchases from the cloud at any time.²¹³ However, as part of the change from Access Corrections to JPay, access to the cloud was shut off in January 2018.²¹⁴ Inmates were given a January 23, 2019, deadline to relinquish their Access Corrections digital media players, at which point the device, or the files from the device that had been transferred to a CD, could be mailed to an outside address for a fee.²¹⁵ However, the device or CD could only include the files currently stored on the device; files in the cloud were permanently lost.²¹⁶

As in *Ruckelshaus*, the inmates may be able to recover under the Tucker Act, unless a law explicitly precludes inmates from making takings claims under the act.²¹⁷ Inmates are also subject to the Prison Litigation Reform Act (PLRA) and must exhaust their claims through the administrative grievance procedures set by the institution before bringing a suit in federal court.²¹⁸ Only after an inmate has exhausted their administrative remedies under the PLRA and any claims they may have under the Tucker Act will the court consider a takings claim on its merits.²¹⁹

210. See Complaint, *supra* note 25, at 13.

211. See *id.*

212. *Id.* at 9.

213. *Id.* at 10.

214. *Id.* at 12.

215. *Id.* at 12–13.

216. *Id.* at 13.

217. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016–20 (1984). If the Tucker Act applies, inmates must exhaust their claim under the Act before they can file a takings claim with the court. See *id.* at 1019.

218. Prison Litigation Reform Act of 1995 (PLRA) § 803, Pub. L. No. 104–134, 110 Stat. 1321 (1996) (codified as amended in scattered sections of 18, 28, and 42 U.S.C. (2018)); Philip White, Jr., Annotation, *Construction and Application of Prison Litigation Reform Act—Supreme Court Cases*, 51 A.L.R. Fed. 2d 143 (2010).

219. See, e.g., *Ruckelshaus*, 467 U.S. at 1020 (requiring a claimant to exhaust their claims under statutory provisions before the matter is ripe for review).

III. A TAKINGS CLAIM FOR PRISONERS' DIGITAL PROPERTY

Given the responses received by inmates who have filed grievances in Florida, it seems unlikely that the Department of Corrections will disturb its new contract with JPay or change its policies concerning the devices and downloads that inmates purchased from Access Corrections.²²⁰ One Florida inmate has filed suit and asked for class action status.²²¹ After exhausting their other options, other inmates should file their own takings claims as well.²²²

A. Benefits of a Takings Claim

A takings claim has a number of benefits to inmates whose devices and digital files have been confiscated as part of a change in vendors by the Department of Corrections. Given their unique status, inmates have fewer constitutional rights in prison than nonincarcerated people do outside of prison, and this can make most constitutional claims difficult to win.²²³ Additionally, at common law, inmates forfeit their rights to personal property,²²⁴ and prison policies limit the amount and types of personal property that inmates are able to have with them while incarcerated.²²⁵ Prison policies limit inmates' constitutional rights, as long as those limitations are reasonable, in order to meet prisons' institutional needs and purposes of incarceration, providing prison administrators substantial deference to decide what is necessary.²²⁶ While inmates retain due process rights, those rights function differently in the prison context.²²⁷ Inmates may have procedural due process claims if prison officials take away their digital devices as punishment, but due process rights are different in situations like Florida's in which the devices are taken from every inmate pursuant to changing prison policy.²²⁸ Courts have considered inmate takings claims before, and while there are some specific differences in the way that property interests are evaluated in the prison context, the

220. See Conarck, *supra* note 1.

221. Complaint, *supra* note 25, at 1–2.

222. As discussed in Section II.B, there are statutory requirements that must be exhausted before inmates may file suit.

223. See discussion *supra* Section II.A.

224. *Givens v. Ala. Dep't of Corr.*, 381 F.3d 1064, 1068 (11th Cir. 2004).

225. See, e.g., FLA. ADMIN. CODE ANN. r. 33–602.201(4)(a) (2016) (describing the prison regulations on inmate property).

226. See *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003); *VI. Prisoners' Rights*, *supra* note 45, at 1131.

227. *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974).

228. See *id.* at 557.

test for a takings claim is substantially the same for inmates as it is for nonincarcerated people.²²⁹

A takings claim is beneficial for ideological reasons because it will appeal to both liberal and conservative judges. While liberals tend to support a narrower view of the Takings Clause, the liberal view is not so narrow as to exclude the permanent loss of what is essentially personal property by the government.²³⁰ Liberals also are more likely to support a wide range of prisoners' rights, and as such may be open to novel constitutional claims by inmates.²³¹ In contrast to liberals, conservative judges tend to have a narrower vision of constitutional rights for prisoners,²³² but conservatives tend to strongly favor property interests and takings claims that protect those interests in the face of government appropriation.²³³ A takings claim would benefit from the ideological support of both liberal judges, who tend to support a broader interpretation of constitutional rights for incarcerated people, and conservative judges, who favor strong protections and compensation for people when the government takes their property.

B. Drawbacks of a Takings Claim

There are some weaknesses associated with a takings claim. Although there is a circuit split, the majority of circuits have taken a narrow view of the property interests held by inmates, relying on the common law principle that inmates forfeit all personal property at conviction.²³⁴ Any claim that rests on establishing a property interest will first have to convince a court that an inmate can acquire a valid property interest *after* conviction and while still incarcerated for their crime. This postconviction property interest can be shown through

229. See *supra* Section II.B.

230. See Christopher Serkin, *The New Politics of New Property and the Takings Clause*, 42 VT. L. REV. 1, 4 (2017) ("Liberals, on the other hand, favor a narrow view of the Takings Clause. They reject the category of regulatory takings altogether, or confine it only to those regulatory burdens that are tantamount to outright expropriation.").

231. See Christopher E. Smith, *The Changing Supreme Court and Prisoners' Rights*, 44 IND. L. REV. 853, 855 (2011) ("In essence, liberal votes and decisions are those that support claims of rights by prisoners, and conservative votes and decisions are those that endorse the authority of corrections officials.").

232. See, e.g., *id.* at 866 ("Justice Thomas has articulated a new vision of the role of constitutional rights in corrections, or stated more accurately, the near-absence of a role of constitutional rights in prisons and jails.").

233. See, e.g., Serkin, *supra* note 230, at 4 ("[C]ompeting attitudes toward property have also resulted in familiar and predictable clashes around the constitutional protection of property under the Takings Clause. Conservatives favor an expansive reading of the Takings Clause and would require the government to compensate for most, if not all, regulatory burdens.").

234. See *supra* Section II.B.

common law, state law, or prison policies, but it is a threshold inquiry for a takings claim that must be proven.²³⁵

The ideological beliefs of liberal judges, who tend to favor a narrow reading of the Takings Clause, should not be too detrimental, because the actual confiscation of what is nearly physical property is almost squarely within the Takings Clause.²³⁶ However, the traditional conservative view on prisoners' constitutional rights cases could be very difficult to overcome.²³⁷ Some of the most conservative justices "reject nearly every constitutional claim by prisoners."²³⁸ This is not specific to takings claims and applies to any constitutional claim that a prisoner may wish to bring, but it forecasts a difficult battle in more conservative courts that inmates may not be able to win.

C. Establishing a Takings Claim

Although the courts have considered inmate takings claims in some circumstances, this situation is different, and certain factors should be considered.²³⁹ The *Demler* complaint against the Florida Department of Corrections includes many helpful facts and legal arguments that other inmates should emulate, but there are also opportunities for improvement in order to make an even stronger takings claim.²⁴⁰

1. Property Interest

First, the inmate must establish a property interest in the device and the digital files stored within it.²⁴¹ Although inmates can establish this interest through common law, state law, or prison policies, the common law is not particularly friendly to the property rights of prisoners.²⁴² If state law is silent on the issue, inmates will have to rely on prison policies.²⁴³ The exact policy that was in place at the time the

235. See *supra* Section II.B.

236. See Serkin, *supra* note 230, at 4.

237. See Smith, *supra* note 231, at 855.

238. *Id.* at 864.

239. See discussion *supra* Section II.B.

240. Complaint, *supra* note 25.

241. This is the first of the four factors that a court uses to analyze a takings claim. See *supra* Section II.B.

242. See *supra* Section II.B.

243. See *supra* Section II.B. Florida's current state law does not define the property rights of inmates. FLA. STAT. ANN. § 944.09 (West 2018). However, the Department of Corrections has policies in place about inmate property, including entertainment devices such as MP3 players. FLA. ADMIN. CODE ANN. r. 33-602.201 (2016).

inmate acquired the property could offer support on this factor, since the prisons were encouraging the inmates to purchase from the private company that the state was contracting with.²⁴⁴ According to the *Demler* complaint, the Florida Department of Corrections “explicitly promised that prisoners would own any purchased files forever”—a fact that will, if substantiated, lend support to a takings claim when the court evaluates if there is a property interest under the prison’s policy.²⁴⁵ The timing of the policy as compared with when the inmate purchased the device and the digital files may be significant, as courts have treated takings claims differently depending on what the policy was at the time the property was acquired.²⁴⁶ While a policy may be changed, and the associated rights lost moving forward, inmates may retain rights to property that they acquired under a previous policy.²⁴⁷

2. Taking

Inmates can bolster their claim that their property was taken by the government by highlighting the physical removal of the device from their possession, the amount of money they spent on the device and the digital downloads, and their reasonable expectations of the program based on the way it was marketed to them.²⁴⁸ In Florida, the Department of Corrections allegedly made explicit promises to promote the program, including: “Once music is purchased, you’ll always own it!”²⁴⁹ Inmates should stress, as Mr. Demler did, that they relied on this promise when purchasing the device and digital files.²⁵⁰ Inmates can highlight the lack of penological purpose to changing vendors and refuse to transfer the files to support their argument that this was a taking, not simply a change to facilitate prison safety and order.²⁵¹ In Florida, the previous vendor change to Access Corrections “explicitly stated that compatibility with the [Florida Department of Corrections]’s

244. Conarck, *supra* note 1.

245. Complaint, *supra* note 25, at 2.

246. *Young v. Wall*, 642 F.3d 49, 51, 55 (1st Cir. 2011) (citing *Bova v. City of Medford*, 564 F.3d 1093, 1097 (9th Cir. 2009); *Biggers v. Wittek Indus., Inc.*, 4 F.3d 291, 295 (4th Cir. 1993)).

247. *Id.*

248. See *supra* Section II.C; see also *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) (explaining the three factors that courts use to determine if the government has effectuated a taking).

249. Complaint, *supra* note 25, at 9.

250. *Id.* at 17.

251. See *supra* Section II.C. Demler alleges that “for the sole purpose of making its new vendor contract more profitable for both itself and its vendor, the FDOC instituted and implemented a formal, statewide policy,” but he did not explain why the policy did not support penological interests. Complaint, *supra* note 25, at 3.

prior vendor was a mandatory requirement of the contract, in order to ensure that prisoners would not bear the cost of the transition between vendors.”²⁵² If an inmate had knowledge of this previous behavior, especially if they were an inmate who experienced a change in vendor without losing their purchases in the past, this information would strengthen their reasonable expectation claim. If they did not know about the previous vendor change, inmates should argue that they reasonably relied on the Florida Department of Corrections’s advertising as Mr. Demler did.²⁵³

3. Public Use

To prove the third factor, that the taking was for a public use, inmates can highlight the amount of money from the program that had gone into the general fund of the state, how much money the state stands to make from reselling music that has already been purchased under the original program, and how the future funds in the prison administrative trust may be used.²⁵⁴ Mr. Demler alleges:

From 2011 to 2017, the [Florida Department of Corrections], through its prior vendor, sold nearly 6.7 million digital media files, at a cost of roughly \$11.3 million to prisoners and their families. The [Florida Department of Corrections] itself realized approximately \$1.4 million in commissions on these sales during the same time period.²⁵⁵

In order to prove the third factor, inmates will need to be prepared to show that the commissions the state receives are not simply a small user fee that is fairly correlated to the cost of administrating the program but a profit that was used for the public good.²⁵⁶ Mr. Demler’s complaint did not address this issue, nor did it make any reference to the cost of administering the program, but this additional allegation should be included to support the takings claim.

4. Just Compensation

To support their claim that there is not an adequate provision for compensation, inmates will need to explain why the option to send the MP3 player, or a CD with the files from their MP3 player, to a relative or friend outside of the prison is not sufficient to compensate

252. Complaint, *supra* note 25, at 6.

253. *Id.* at 17.

254. Conarck, *supra* note 1; see discussion *supra* Section II.C.3.

255. Complaint, *supra* note 25, at 2.

256. See *United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989); *Slade v. Hampton Rds. Reg'l Jail*, 407 F.3d 243, 255 (4th Cir. 2005) (“[T]he imposition of a modest and non-punitive charge to defray costs cannot be said to transgress the state’s constitutional obligations.”).

for the loss.²⁵⁷ An inmate who is serving a life sentence—and who will thus never be able to reclaim the device since they will never be released—will have the best argument that sending the device to an outside address is not compensation at all.²⁵⁸ However, any inmate can explain why waiting years for access to digital files that were purchased to be used for entertainment within the prison is not satisfactory.²⁵⁹ Inmates can also discuss the files that will not be sent to an outside address and are permanently lost.²⁶⁰ Mr. Demler used the life sentence argument in his complaint, but, because he had no one to send the files to, he did not address the specific loss of files that were stored in the cloud.²⁶¹ An inmate who was able to send a CD of files to an outside address, but who lost a valuable amount of files in the cloud that were not transferred to the CD, should make this argument.

Finally, in order to overcome potential ideological biases against inmates' constitutional claims, inmates should emphasize the legal importance of property and of just compensation when the government seizes that property.²⁶² Inmates should explicitly frame the government's taking of the property—for example, by describing it as “a direct government appropriation of private property”²⁶³—and should very clearly enumerate why the compensation offered is not just.²⁶⁴

IV. CONCLUSION

Property rights and the Takings Clause of the Fifth Amendment have traditionally applied to real property and to personal property that

257. Conarck, *supra* note 1.

258. See Complaint, *supra* note 25, at 13 (“As noted above, FDOC prisoners purchased the digital players and music to listen to them and enjoy them *while in prison*—not at some unspecified time in the future. Further, many FDOC prisoners are serving life sentences (or a term so long it is the functional equivalent of life), or have no family or friends on the outside to whom to send the player or CD. For these prisoners in particular, the option to mail out the player is completely illusory.”).

259. See *id.* They may also cite the Supreme Court's decision that temporary takings by the government still require compensation for the time period in which the taking occurred. Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 33 (2012).

260. See *supra* Section II.C.4.

261. Complaint, *supra* note 25, at 18.

262. See *supra* Section III.A; see, e.g., Complaint, *supra* note 25, at 22 (“Defendant's Multimedia Tablet Program has invaded and interfered with Plaintiff's and the putative class's legally protected property interests. . . . The Multimedia Tablet Program constituted a direct government appropriation of private property.”).

263. Complaint, *supra* note 25, at 22.

264. See *supra* Section III.C.4 (exploring the impact of the taking on inmates with long or life sentences and the permanent loss of files stored in the cloud).

has a tangible, physical form.²⁶⁵ However, as technology evolves and more things that used to be physical objects develop new forms as digital downloads or cloud files, the law will need to adapt what it means to deprive someone of property or take property. Because the distinctions between tangible property and digital property may cause some legal uncertainty,²⁶⁶ the courts and the law will need to evolve and adapt to the new technological world. By considering how digital property shares the characteristics of traditionally recognized tangible property, the law can recognize new forms of property.

Like the rest of society, prisons increasingly rely on different types of technology to promote prison safety and operations.²⁶⁷ Inmates have adapted to these changes, and many have spent hundreds or thousands of dollars on prison media programs.²⁶⁸ Although prisoners' constitutional rights are often limited, they are able to make a takings claim and should consider making a takings claim in situations like the one in Florida.²⁶⁹ Although no court has recognized a taking of inmates' digital property, by tailoring a claim to the takings claims factors and showing that prison policies created a property interest, they may be able to succeed. This could illuminate the prospects of digital property, and the takings claims that may emerge from them, in our increasingly digital world.

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265. See *supra* Section II.C.

266. See *supra* Section I.B.

267. Waters, *supra* note 30.

268. Conarck, *supra* note 1.

269. See *supra* Section II.A.

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