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COMMENT: COMPENSATION FOR THE FRUIT OF THE FUND'S USE: THE TAKINGS CLAUSE AND TAX REFUNDS

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SUMMARY:

... By recognizing an abstract property right to interest "actually "earned"" by a party's principal, ... does the Court not raise the possibility of takings challenges whenever the government holds and makes use of the principal of private parties, as it frequently does? When, for example, the National Government, or a State, has engaged in excessive tax withholding, it does not refund the interest earned between the time of withholding and the issuance of a refund. ... If more income has been withheld than is owed in taxes, the taxpayer is entitled to a tax refund. ... For the Takings Clause to apply to this practice, (1) money must constitute "private property," (2) overwithheld income must have been "taken" from the taxpayer by the withholding system, and (3) the government's use during the year of such overwithheld income must constitute "public use." This Comment argues that these conditions are met for many taxpayers, and, with respect to such taxpayers, the federal government violates the Takings Clause by not paying "just compensation" for using the overwithheld income during the year. ... First, this practice implicates a Takings Clause property interest because money constitutes Takings Clause "private property," and taxpayers have a property interest in overwithheld income because the government must refund it at the end of the year. ... When such adjustment is made after income withheld exceeds a taxpayer's ultimate tax liability, the taxpayer has no recourse but to wait for a refund the following spring. ...

TEXT:

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I. Introduction

One may wonder ... how far today's holding may unsettle accepted governmental practice elsewhere. By recognizing an abstract property right to interest "actually "earned"" by a party's principal, ... does the Court not raise the possibility of takings challenges whenever the government holds and makes use of the principal of private parties, as it frequently does? When, for example, the National Government, or a State, has engaged in excessive tax withholding, it does not refund the interest earned between the time of withholding and the issuance of a refund. n1

By holding that interest earned on principal constitutes "private property" for purposes of the Takings Clause, n2 the majority in *Phillips v. Washington Legal Foundation* may have encouraged Takings Clause challenges to the tax withholding system. n3 If successful, such challenges could potentially require the federal government to pay interest on all tax refunds in order to compensate taxpayers for the "fruit of the fund's use." n4 Nevertheless, Justice Souter

concluded, without any analysis, that it is "unlikely that such withholding practices would violate the Fifth Amendment." n5 The previous passage indicates Justice Souter's concern that the majority's holding would "unsettle accepted governmental practice elsewhere." However, a taking is [*658] a taking is a taking. If "governmental practice elsewhere" effects a taking, then such practice must be "unsettled." n6

In the United States, the federal government collects the majority of federal income taxes at the source of earnings in a pay-as-you-go system, n7 which requires employers to withhold a portion of their employees' income and turn it over to the government during the year. n8 This practice is intended to satisfy the employees' federal income tax liability. n9 After the end of the year, taxpayers calculate their federal income tax liability and file income tax returns with the Internal Revenue Service. n10 If more income has been withheld than is owed in taxes, the taxpayer is entitled to a tax refund. n11 Under the Internal Revenue Code, n12 if the federal government pays a tax refund within 45 days of either the due date of the return or the date it is filed, whichever is later, it does not pay interest on the refund. n13 Because the government does not compensate the taxpayer for use of such overwithheld income during the year, tax refunds are essentially repayments of interest-free loans. n14

One main reason for the disparity between withheld income and income tax liability is that the federal income tax system imposes tax liability [*659] based upon an end-of-year determination of taxpayers' income. n15 Consequently, it is impossible to know a taxpayer's exact tax liability until the tax year in question has ended. Nevertheless, the federal income tax withholding system appropriates income during the year, before there is any guarantee of tax liability. n16 In this way, the tax withholding system stands fundamentally opposed to the end-of-year accounting concept prevalent in federal income tax law. n17 Income tax withholding virtually never matches taxpayers' tax liability because there are several contingencies affecting tax liability that must be determined at the end of the year, such as computation of income, determination of filing status, eligibility for exemptions, and calculation of deductions and credits. n18 Consider the following:

If a taxpayer earns \$ 30,000 in the first six months of a taxable year and in the second six months suffers \$ 30,000 in deductible expenses, the taxpayer will have no tax liability. Nevertheless, if the taxpayer pays withholding during the first six months of income, his only recourse will be to file for a refund following the termination of the tax year. Since the IRS normally computes overwithholding refunds without interest, the system causes taxpayers to forego the use of their funds during the year without compensation. n19

[*660] The Takings Clause of the Fifth Amendment of the United States Constitution makes this lack of compensation significant. It provides that "private property [shall not] be taken for public use, without just compensation." n20 As stated in the previous passage, the federal government enjoys the use of overwithheld income until refunding it without interest n21 the following year. n22 For the Takings Clause to apply to this practice, (1) money must constitute "private property," (2) overwithheld income must have been "taken" from the taxpayer by the withholding system, and (3) the government's use during the year of such overwithheld income must constitute "public use." n23 This Comment argues that these conditions are met for many taxpayers, n24 and, with respect to such taxpayers, the federal government violates the Takings Clause by not paying "just compensation" for using the overwithheld income during the year.

In Part II of this Comment, I discuss the history and current workings of the federal income tax withholding system. Specifically, I (1) discuss judicial challenges to the system, (2) review the system's statutory framework, (3) discuss how withholding is calculated, and (4) suggest that the system has fatal flaws for Takings Clause purposes.

In Part III, I discuss the history and current jurisprudence of the Takings Clause. My historical discussion focuses on the original meanings of the terms "property" and "taken" as used in the Takings Clause. My discussion of current Takings Clause jurisprudence outlines the analytical framework applied by courts - the per se and ad hoc dichotomy.

In Part IV, I discuss, as a doctrinal matter, why the government violates the Takings Clause when it fails to pay interest on tax refunds. First, this practice implicates a Takings Clause property interest because money constitutes Takings Clause "private property," and taxpayers have a property interest in overwithheld income because the government must refund it [*661] at the end of the year. Second, this property interest has been "taken" under the per se takings approach, which is the appropriate analytical approach to employ because the government appropriates overwithheld income instead of merely regulating its use. Third, the taking is for a "public use" because an increase in general government revenues benefits the general public. Finally, I conclude that just compensation equals the fair market value of use of the funds during the year (interest), which returns the taxpayer to the position the taxpayer would have been in but for the taking.

II. Tax Withholding System

A. History

After several attempts to withhold income at the source, n25 Congress instituted the modern federal income tax withholding system during World War II, n26 under the authority of the Sixteenth Amendment to the United States Constitution n27 and the Necessary and Proper Clause. n28 Since ratification of the Sixteenth Amendment in 1913, n29 courts have generally interpreted the Sixteenth Amendment together with the Necessary and Proper Clause to grant broad congressional authority to pass all laws necessary and proper for collecting the income tax. n30 As discussed in the following paragraphs, [*662] this broad understanding of congressional authority has allowed the federal income tax withholding system to withstand several challenges. n31

In the landmark case of *Brushaber v. Union Pacific Railroad Co.*, n32 the Supreme Court stated that the Due Process Clause of the Fifth Amendment "is not a limitation upon the taxing power conferred upon Congress by the Constitution" n33 As previously mentioned, some courts have extended this language to conclude that federal income tax withholding constitutes a "legitimate exercise of Congress' power to make all laws necessary and proper for the taxing of income." n34 With this broad conception of Congress's taxation power in mind, several cases have accepted, with little or no analysis, the proposition that the federal income tax withholding system does not violate the Constitution. n35

[*663] In *Jacobs v. Gromatsky*, n36 the Court of Appeals for the Fifth Circuit directly addressed the constitutionality of the government's failure to pay interest on tax refunds. n37 Instead of arguing that the federal income tax withholding system was unconstitutional per se, the taxpayer argued that it violated the Constitution because the failure to pay interest on tax refunds was "so arbitrary as to amount to a taking of property - a substantive violation of the fifth amendment." n38 Without citing any cases, the court rejected this substantive due process claim as "without merit," concluding that the taxation authority of Congress included the power to prescribe "the means and methods for making refunds - with or without interest, which must be viewed realistically as no more than one function of the overall rate of such exaction." n39

In *Van Sant v. United States*, n40 the court applied similar analysis to hold that the government's confiscation of wrongly withheld income did not violate the Takings Clause. Because Congress clearly has the power to lay and [*664] collect income taxes under Article I, section 8 of the United States Constitution, as well as the Sixteenth Amendment, the court drew the unremarkable conclusion that "the federal income tax ... is specifically authorized by the Constitution and does not violate the Takings Clause." n41 Because Congress therefore "has the power to set forth the means and methods for making refunds," the court held that the plaintiff's takings claim failed "even if it is true that the ... tax withholding was wrongful." n42 This analysis appears to rest on a shaky foundation. Although there is no question that Congress has the power to lay and collect taxes, it does not necessarily follow that the Sixteenth Amendment grants Congress the power to appropriate private property from citizens beyond the taxes it has constitutionally imposed. n43

In *Washton v. United States*, n44 the plaintiffs sought a refund for overpayment of federal income taxes, notwithstanding the fact that the plaintiffs filed an untimely request for such refund. n45 Although the plaintiffs did not raise a Takings Clause argument, the court stated in dicta:

The court notes for the record that it raised, sua sponte, the possibility of whether the disallowance of a refund owed a taxpayer by the IRS pursuant to statute violated the just compensation clause of the Fifth Amendment. To that end, the court requested supplementary briefs as to whether the IRS' failure to refund overpayment of income taxes because of the untimely filing of a refund claim constituted a takings [sic] under the Fifth Amendment. A review of the parties [sic] briefs, however, proved inconclusive. Because it could not locate any relevant case law on the issue and because the submissions of both parties provided the court with little guidance on this issue, the court believes it best to leave this issue for another day. n46

Although it did not address the merits of a takings claim, *Washton* stands for the proposition that a governmental failure to refund overpayments of income taxes may implicate the Takings Clause. n47 Thus, despite the implication of *Gromatsky*, and although *Van Sant* holds otherwise, the federal [*665] government's taxation power does not necessarily exempt governmental holdings of overwithheld income from Takings Clause scrutiny. n48

From the foregoing discussion, it is apparent that several cases have upheld the general constitutionality of the federal income tax withholding system. Nevertheless, no case has directly addressed the specific question of whether

the government's failure to pay interest on tax refunds violates the Takings Clause, n49 and contrary authority n50 exists regarding whether tax withholding is immune from the Taking Clause altogether.

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B. Current Mechanism

In fiscal year 2002, the federal government collected approximately 91 percent of its net individual income tax revenues through the withholding system, amounting to just over \$ 750 billion. n51 Although theoretically designed to withhold an individual's federal income tax liability, the system leads to overwithholding "for the vast majority of taxpayers." n52

The federal income tax withholding system is embodied in Code Sections 3401 through 3406 and the Treasury Regulations promulgated thereunder. n53 In general, "every employer making payment of wages [must] deduct and withhold upon such wages a tax determined in accordance with tables or computational procedures prescribed by the Secretary [of the Treasury]." n54 The amount withheld from an employee's paychecks depends [*667] upon two variables: (1) how much income the employee earns on each paycheck; and (2) the information provided by the employee to the employer on Form W-4. n55 On the Form W-4, employees indicate their filing status (e.g., married or single), the number of withholding allowances they are claiming (the more allowances claimed, the less income withheld), n56 and any additional amount of income they would like withheld from each paycheck. n57 The Internal Revenue Service prescribes the specific amount of income that the employer must withhold from each employee's paycheck based solely on these variables. n58 "On or before the date of the commencement of employment with an employer," the employee must furnish a signed Form W-4 relating the number of withholding allowances he claims, "which shall in no event exceed the number to which [the employee] is entitled." n59 If an employee does not complete a Form W-4, the employer must [*668] withhold income from the employee's paycheck at the highest rate, as if the taxpayer is single and claimed zero withholding allowances. n60

The federal tax withholding system allows substantial flexibility to taxpayers to equalize their withholding with their ultimate tax liability. n61 For instance, Form W-4 allows taxpayers to take into account expected deductions and adjustments in determining the proper number of withholding allowances they can claim. n62 In addition, a taxpayer may turn in a new Form W-4 when any of these contingencies change to prospectively adjust the number of withholding allowances. n63 Finally, taxpayers may follow alternate withholding methods to better match their withholding with their tax liability. n64

Despite this apparent flexibility, there are two insurmountable hurdles to exact matching. First, all of the information contained in Form W-4 is based upon expected tax liability. n65 Unless they are psychics, taxpayers cannot know what events will occur during the year that will affect tax liability (e.g., marriage, divorce, birth or adoption of child, loss of an exemption, purchase of a new home, retirement, payment of medical expenses, [*669] contributions to charity, etc.), until such events actually occur. n66 Thus, taxpayers cannot ensure ex ante that the correct quantity will be withheld from their paychecks.

Second, a taxpayer cannot file a retroactive Form W-4. n67 Thus, if circumstances change during the year, a taxpayer may only adjust withholding prospectively by completing a new Form W-4. n68 When such adjustment is made after income withheld exceeds a taxpayer's ultimate tax liability, the taxpayer has no recourse but to wait for a refund the following spring. n69 Thus, taxpayers are precluded both ex ante and ex post from ensuring accurate income tax withholding. n70

In any event, taxpayers can regain possession of overwithheld income after the end of the year by filing their tax returns. n71 The federal government generally pays interest on tax refunds, n72 with the exception of refunds made within forty-five days of the later of the due date of the return or the date of filing. n73 Thus, taxpayers usually lose the use of overwithheld income during the year and then receive it at the end of the year without interest to account for the time value of money. n74

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III. Takings Clause

A. History

The Takings Clause provides that "private property [shall not] be taken for public use without just compensation." n75 Unfortunately, there is "little direct evidence about the Framers' reasons for adopting the Takings Clause." n76 Consequently, as the following paragraphs illustrate, scholars disagree on the "original understanding" of the Takings Clause.

Some commentators have traced the Takings Clause to the Magna Carta and subsequent development of "the law of Englishmen." n77 That is, the Takings Clause echoed "the concerns of Coke, Blackstone, and Locke that the government should at least compensate law-abiding persons who are deprived of their property." n78 If this interpretation of the Takings Clause [*671] is correct, there is little doubt that the Framers intended to vigorously protect private property rights. n79

On the other hand, the Takings Clause was not among the over 80 amendments the states proposed to the Constitution following the Philadelphia Convention of the summer of 1787. n80 Instead, it was solely the "brainchild of James Madison." n81 Despite this fact, n82 the Takings Clause was ultimately adopted "with no significant opposition." n83 Thus, the Takings Clause was likely a codification of "the common law rule that government can acquire property for public use from a nonconsenting owner only by paying for it." n84 In addition, the Takings Clause served the practical purpose [*672] of preserving the police power and the power of eminent domain. n85

Because Madison drafted the Takings Clause single-handedly, n86 his understanding of its terms has special significance. n87 For instance, Madison believed that the term "property" had an extremely broad meaning, including "not only rights with respect to material things (such as land and cattle) and intangibles (such as debts and intellectual property) but also things that fall within the philosophical concept of 'objects' such as our bodies and minds (i.e., our talents, opinions, religion, speech, etc.)." n88 Madison's belief [*673] supports broadly interpreting the term "private property" in the Takings Clause. n89

The original understanding of the Takings Clause also provides meaning to the term "taken." Although it appears that "physical appropriation was the paradigm case in which compensation was regarded as appropriate," there is also "no affirmative evidence suggesting that the Framers regarded the Takings Clause as being limited to physical appropriations." n90 While there are plausible historical arguments for interpreting the term "taken" strictly (actual appropriation), n91 history also provides some support for a liberal interpretation (mere interference with property rights). n92

[*674] In sum, much disagreement exists regarding the history of the Takings Clause. For purposes of this Comment, however, the crucial point is that history provides arguments in favor of broad interpretations of the terms "property" and "taken" as used in the Takings Clause. n93

B. Overview of Current Jurisprudence

"Takings law has been criticized as lacking in doctrinal rigor and predictability." n94 Although such criticism is not unfounded, the following discussion illustrates that the courts have constructed an analytical framework that is followed in most cases. In this framework, courts first determine whether a per se taking or a regulatory taking is alleged. n95 The per se (or [*675] categorical) taking analysis applies in two situations: (1) when the government physically appropriates or occupies a citizen's private property for a public use without just compensation; n96 or (2) when a regulation deprives a citizen of all or most of the economic value of the citizen's private property. n97 Under the per se analysis applied to physical appropriations, a taking occurs without regard to the extent of the economic impact upon the citizen or the weight of the public purpose justifying the taking. n98

The regulatory takings analysis applies when a government regulation "goes too far," amounting to a taking by prohibiting citizens from making certain uses of their private property. n99 Such interference with private property rights typically "arises from some public program adjusting the benefits [*676] and burdens of economic life to promote the common good," n100 where "the government does not take property outright but, rather, limits the owner's use of the property for a regulatory purpose." n101 Justice Holmes's opinion in *Pennsylvania Coal v. Mahon* marked the birth n102 of regulatory takings doctrine, and courts have struggled ever since to define the boundaries of this "difficult and vexing corner of takings law." n103 Regulatory takings jurisprudence is characterized by essentially ad hoc, factual inquiries designed to allow careful examination and weighing of all the relevant circumstances to determine whether a taking has occurred. n104 In this balancing [*677] process, courts emphasize the following factors: (1) the economic impact of the regulation on the citizen; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. n105 The underlying principle of regulatory

takings jurisprudence is that the Takings Clause "was designed to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole." n106

IV. When Overwithholding Constitutes a Taking

Under either the per se or ad hoc approach, there are four elements to a takings claim: (1) private property; (2) must be taken; (3) for public use; (4) without just compensation. n107 The definitions of "private property" and "taken" present the most complicated questions. n108 In the end, I conclude that the federal government's failure to pay interest on tax refunds violates the Takings Clause. n109

A. Private Property

"The institution of property, it hardly need be said, has rivaled love, war, and the nature of right and wrong as a favorite topic of legal philosophers." n110 Nevertheless, the first element of a takings claim is the identification of a private property interest. The plain language of the Takings Clause simply refers to "private property" and does not define the term. n111 This has caused some difficulties in takings jurisprudence as "private property" [*678] includes both physical things and, "as a matter of empirical fact, ... a seemingly bewildering variety of rights" relating to those physical things. n112 In addition, "property interests ... are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law" n113 Importantly, "at least as to confiscatory regulations (as opposed to those regulating the use of property), a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law." n114 Based upon these principles, the Takings Clause clearly applies to real property (e.g., land), n115 tangible personal property, n116 and intangible property (including intellectual property). n117

[*679] In *United States v. General Motors Corp.*, n118 the Court discussed the meaning of "property" for purposes of the Takings Clause:

It is conceivable that the [term "property"] was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense 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. In point of fact, the construction given the phrase has been the latter... . In other words, it deals with what lawyers term the individual's "interest" in the thing in question... . The constitutional provision is addressed to every sort of interest the citizen may possess. n119

Thus, the courts are to look to the "bundle of sticks" that constitute property - the right to possess, use, and dispose - instead of merely the physical manifestation of property. n120

Whether money constitutes Takings Clause property has, surprisingly, presented a difficult question for the courts. Money arguably constitutes the quintessential form of property and seemingly should be protected as vigorously as other forms of property by the Takings Clause. n121 At first glance, some cases seemingly have stated that money does not constitute a property interest within the meaning of the Takings Clause. n122 However, the [*680] following discussion will illustrate that such cases merely stand for the proposition that a government appropriation of money to satisfy a citizen's monetary obligation to the government (or a third party) does not, in and of itself, constitute a taking.

On the question of whether money generally constitutes Takings Clause "private property," the Supreme Court has unequivocally answered "yes." n123 In *Brown v. Legal Foundation of Washington*, *Phillips v. Washington Legal Foundation*, and *Webb's Fabulous Pharmacies Inc. v. Beckwith*, the Court found money to be "private property" within the meaning of the Takings Clause. n124 Even Justice Kennedy, who has been reluctant to apply the Takings Clause to monetary takings, n125 has conceded that "a bank account or accrued interest" constitutes "an identified property interest" [*681] for purposes of the Takings Clause. n126 Therefore, notwithstanding the fact that a citizen's payment of money to the government to satisfy an obligation to the government n127 generally does not constitute a taking, money clearly constitutes Takings Clause "private property."

However, some cases have limited Takings Clause applicability to "a specific property right or interest." n128 This limitation may explain why courts have typically not found takings where the government appropriates money to satisfy a citizen's obligation to the government. n129 Because money is fungible, it is perhaps deemed that the sum taken was to satisfy that obligation. n130 In other words, the Takings Clause is inapplicable because the citizen cannot identify a specific sum of money to which the government did not have the right to appropriation. In short, for a taking of money

to occur, the "monetary interest at issue [must arise] out of the operation of a specific, separately identifiable fund of money" n131

When income is withheld at the source, the government (through its agent, the employer) is purportedly appropriating money from the taxpayer to satisfy the taxpayer's tax obligation. n132 To the extent that the withheld sum ultimately constitutes the taxpayer's tax obligation, the government has not taken private property within the meaning of the Takings Clause, because, as previously discussed, the government appropriation of money for the purpose of satisfying a monetary obligation to the government is exempt [*682] from takings analysis. n133 However, to the extent that tax withholding results in appropriation of money beyond the taxpayer's tax obligation, it is potentially a taking of "private property" subject to takings analysis. n134 In *Webb's*, finding that the claimants in an interpleader action had a property interest in the principal and interest of the interpleader fund, the Court stated:

[The claimants] had more than a unilateral expectation. The deposited fund was ... held only for the ultimate benefit of [the claimants], not for the benefit of the court and not for the benefit of the county. And it was held only for the purpose of making a fair distribution among those [claimants]. Eventually, and inevitably, that fund, less proper charges authorized by the court, would be distributed among the creditors as their claims were recognized by the court. The [claimants] thus had a state-created property right to their respective portions of the fund.

It is true, of course, that none of the creditor claimants had any right to the deposited fund until their claims were recognized and distribution was ordered. That lack of immediate right, however, does not automatically bar a claimant ultimately determined to be entitled to all or a share of the fund from claiming a proper share of the interest, the fruit of the fund's use, that is realized in the interim. n135

The *Webb's* Court went on to hold that "the earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property." n136 When the federal government uses overwithheld income during the year and then refunds it without interest, the government interferes with a property interest highly analogous to that described in *Webb's*. First, the government must refund overwithheld income at the end of the year; n137 the funds are essentially held during the year "for the ultimate benefit of" the taxpayers. n138 Thus, there is more than a mere "unilateral expectation" that the money must be returned. n139 As in *Webb's*, the lack of an immediate right to distribution of tax refunds does not give the government [*683] license to appropriate the "fruit of the fund's use ... realized in the interim." n140 Second, like the *res* in *Webb's*, the funds overwithheld from a taxpayer's income constitute a specific sum of money. That is, there is a specific amount of money that is withheld and turned over to the government, and both the employer and the government must keep records reflecting such withheld amount. n141

In *United States Shoe Corp. v. United States*, n142 the Court of Appeals for the Federal Circuit discussed whether or not a taxpayer had a private property right in the interest generated on taxes the taxpayer paid to the government pursuant to a harbor maintenance tax that was declared unconstitutional following the taxpayer's payment to the government:

U.S. Shoe also contends that the government's retention of the interest income earned on the tax revenue is a continuing taking. But U.S. Shoe has not established a private property right in the interest generated by the payment of the tax... . For the accrued interest to rise to the level of private property, the principal must be held in an identified private account. And then any interest accrued belongs to the owner of the principal. The tax revenue here was not held by the government as property of U.S. Shoe. It became the property of the Treasury upon payment, and was appropriated to the Harbor Maintenance Trust Fund along with user fees on imports, passenger cruise ships, and domestic shipments, and other statutory fees. Accordingly, the interest earned on the tax payments is also the property of the government. And its use for harbor maintenance expenditures cannot be a taking. n143

In contrast with the tax revenues discussed in *United States Shoe*, overwithheld federal income taxes do not truly become the "property" of the Treasury upon receipt. n144 Like the property held in the court registry in *Webb's*, such sums will "eventually, and inevitably" be returned to the taxpayers. n145 Furthermore, nothing in *Webb's* or *Phillips* requires that interest be held in a private account for it to constitute the "private property" of [*684] the owner of the principal. To the contrary, both cases hold that an owner of a principal fund necessarily owns the interest earned thereon n146 - "the fruit of the fund's use." n147

In sum, the meaning of "private property" for purposes of the Takings Clause is very broad. n148 It includes real property, personal property, intellectual property, and money. Obviously, income withheld at the source under the federal income tax withholding system falls under the "money" category. Alternatively, any interest earned on the principal fund during the time it is out of the taxpayer's possession also constitutes a cognizable private property interest under the Takings Clause. Whether the property interest focused upon is the overwithheld income (principal) or the "fruit of the fund's use" during the year (interest), overwithholding in the federal income tax withholding system implicates a private property interest within the meaning of the Takings Clause.

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B. Taken

1. Appropriate Analytical Approach - Per Se or Ad Hoc. - The next step in Takings Clause analysis is determining whether private property has been "taken," n149 which requires determining whether to apply the per se or ad hoc (regulatory) analytical approach. n150 Where money constitutes the private property at stake, this determination has proven to be difficult for the courts. n151

In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, n152 as previously discussed, the Supreme Court unanimously held that a taking occurred when a Florida court appropriated interest earned on a principal sum deposited in the registry of the court as the res in an interpleader action. n153 The Court stated that "the exaction [was] a forced contribution to general governmental revenues, and it [was] not reasonably related to the costs of using the courts." n154 The Court went on to say:

The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property. The state statute has the practical effect of appropriating for the county the value of the use of the fund for the period in which it is held in the registry.

To put it another way: a State, by ipse dixit, may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Takings Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power. n155

[*686] *Webb's* stands for the proposition that government appropriation of money may, under certain circumstances, violate the Takings Clause. However, in reaching its conclusion, the Court did not explicitly identify which mode of takings analysis it employed - per se or ad hoc. In fact, the Court in *Webb's* arguably applied "a distinct analysis - separate from per se or ad hoc, or any other method used for real and tangible personal property." n156 Instead, the analytical focus was "the reasonableness of the relationship between the appropriated amount and the reasons for the appropriation, suggesting that, in the context of money, the Supreme Court does not apply the same per se analysis it uses in the context of real and tangible personal property." n157

In *United States v. Sperry Corp.*, n158 the Court held that the deduction of a percentage of a monetary award did not constitute a taking where the deduction represented a reasonable "user fee" assessed against all claimants before the Iran-United States Claims Tribunal, and the fee was intended to reimburse the Government for its costs in connection with the Tribunal. n159 In a footnote, the Court stated:

It is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible. No special constitutional importance attaches to the fact that the Government deducted its charge directly from the award rather than requiring Sperry to pay it separately. If the deduction in this case were a physical occupation requiring just compensation, so would be any fee for services, including a filing fee that must be paid in advance. n160

Thus, in *Sperry*, as in *Webb's*, the Court arguably applied neither a per se nor ad hoc analytical approach, but instead assessed whether the monetary exaction had a reasonable relation to the government services for which it was paid.

Other courts have also been reluctant to apply a per se analysis to monetary takings. n161 Despite these concerns, in *Brown v. Legal Foundation* [*687] of Washington, n162 the Court applied the per se approach in its analysis of

whether or not the government's confiscation of interest earned on clients' principal in their attorneys' trust accounts n163 violated the Takings Clause. n164 Given its minimal explanation for applying the per se approach, n165 it is too soon to determine if this case means the Court will generally apply the per se approach to all monetary takings cases, or whether it will only do so in the context of such IOLTA programs. However, the following paragraphs provide several reasons why the Penn Central ad hoc, regulatory takings approach generally should not be applied in monetary takings cases. n166

First, the Penn Central approach only applies to cases involving government regulation "where the government does not take property outright [*688] but, rather, limits the owner's use of the property for a regulatory purpose," n167 not "where the government actually takes and uses the property in question." n168 The Court in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency made it clear that the ad hoc approach should not be applied to physical appropriations and vice versa: "For the same reason that we do not ask whether a physical appropriation advances a substantial government interest or whether it deprives the owner of all economically valuable use, we do not apply our precedent from the physical takings context to regulatory takings claims." n169 In essence, because of the theoretical incoherence that would result, the principles underlying each analytical approach are not to be applied outside of their context. Thus, in cases in which the government removes money from the possession of its owner, the per se approach should be applied because the principles of the ad hoc approach only are relevant when a property owner maintains possession of the subject property.

Second, because the ad hoc approach takes into account the economic impact of the regulation, and "a property owner will always get some benefit, real or theoretical, from a taking of his property," n170 monetary exactions would virtually never constitute takings under an ad hoc approach. n171 For [*689] instance, when the government appropriates the interest earned on an interpleader fund, the owners of the principal arguably benefit from the appropriation in the form of government services (e.g., police and fire protection) that are financed by the interest appropriated. This argument could apply to any case in which money is appropriated and included in general government revenues. Thus, under an ad hoc approach, there would be a heightened danger of "government officials ... eagerly looking to bank accounts and other places where money is kept, with an eye to snatching a few dollars here and there, and justifying it with some sort of 'ad hoc' analysis." n172

Third, in the context of the Takings Clause, there is no reason to distinguish between physical appropriation of money and other types of property. Judge Kozinski explained it best:

The majority finds it "particularly inappropriate" to apply a per se analysis when the property in question is money. But money is property and the majority gives no logical explanation for treating it differently. The majority argues that money is different because it is fungible. But this makes no sense at all. If the government comes into your house and takes that Renoir off your wall, you will suffer a compensable loss. You suffer the same loss if the government comes into your house and seizes an equal value in cash - the two events are indistinguishable for purposes of takings analysis.

For purposes of the takings clause, then, real and personal property are reduced to their cash equivalents. n173

The fungibility of money, which Judge Kozinski noted, has been offered as a justification for treating money differently from other private property in the takings context ever since Sperry. n174 However, "Sperry [*690] merely confirms that the state may charge fees to those who use its services, and may deduct those fees directly from any amount due to the user." n175 That is, because money is fungible, the government can offset a citizen's monetary obligation to the government against a sum that the government owes to the citizen without causing a taking. This does not negate the fact that a taking occurs when a government transforms private property into public property without just compensation. n176

Fourth, because of the nature of certain monetary exactions, the per se approach is necessary to truly provide the private property protection intended by the Takings Clause. Specifically, in the context of tax withholding, money is appropriated from taxpayers before it ever comes into their possession. n177 In typical cases involving appropriation of private property (e.g., the condemnation of land), the property owner has clear notice of the appropriation, as there is an obvious physical manifestation of the appropriation. n178 In contrast, when money is withheld from a taxpayer's income, the appropriation is much less obvious. "The right not to have the government take private property without just compensation" constitutes "one of the cherished protections of the Bill of Rights." n179 Because a monetary exaction

may be difficult for a private property owner to discern, n180 especially in situations when the money is held in an intangible form (e.g., bank account, securities, etc.), and the ad hoc approach results in a taking less frequently, the per se approach should apply to monetary exactions to ensure that the government does not surreptitiously appropriate private property for public use. n181 If physical invasions of land are "perhaps the most serious form of invasion of an owner's property interests," n182 then appropriation [*691] of money that may escape the owner's attention is at least as serious. n183

Fifth, the ad hoc approach is unnecessary to determine whether a taking of money has occurred. In cases applying the ad hoc approach, the courts have repeatedly contended that the approach is needed to determine whether a taking has occurred since the private property has not actually been removed from the possession of the property owner.

When the government condemns or physically appropriates the property, the fact of a taking is typically obvious and undisputed. When, however, the owner contends a taking has occurred because a law or regulation imposes restrictions so severe that they are tantamount to a condemnation or appropriation, the predicate of a taking is not self-evident, and the analysis is more complex. n184

The per se approach is premised on the fact that physical appropriation of property is "relatively rare and easily identifiable without making any economic analysis," unlike regulations affecting property use that "constantly affect property values in countless ways." n185 Therefore, because "only the most extreme regulations can constitute takings," a complex balancing of factors must take place to determine whether a regulation constitutes a taking. n186 However, in cases involving monetary takings, it is objectively obvious whether or not money has been removed from the possession of its owner. n187

For all of the foregoing reasons, the per se, physical appropriation takings approach should generally be applied to monetary takings cases. n188 Importantly, for reasons previously discussed, this general rule would not apply when the government appropriates money as a user fee for government services, as in Sperry or Webb's, n189 or as payment of an obligation [*692] owed to the government (e.g., taxes) or a third party (e.g., as a pension plan liability). n190 Because the government's failure to pay interest on tax refunds does not constitute a user fee, n191 and overwithheld income, by definition, does not constitute a payment satisfying an outstanding obligation to the government, the per se approach represents the proper approach for determining whether such failure to pay interest constitutes a taking. n192

2. Applicable Property Interest - Two Sides of the Same Coin. - There are two potential property interests that are "taken" within the meaning of the Takings Clause when the government fails to pay interest on overwithheld income. On the one hand, there may be a temporary taking of the overwithheld income until the government refunds it (without interest as just compensation) following the taxpayer's filing of a tax return. n193 Alternatively, based upon Washington Legal Foundation and Webb's, a taking [*693] may occur because the government appropriates the interest earned during the year on the overwithheld income. n194 In either case, under the per se approach, there is a taking because the government transforms private property into public property, either temporarily (if the taken property is the withheld income) n195 or permanently (if the taken property is the interest earned thereon), without paying just compensation.

3. Consent. - For there to be a taking (even under the per se approach), private property must be appropriated by the government without the owner's consent (or against the owner's will). n196 This makes intuitive sense, as it would be difficult to argue that property has been wrongly appropriated from a citizen who voluntarily turns the property over to the government. n197 In this regard, it should be noted that taxpayers (and their employers) cannot avoid the federal income tax withholding system. n198 As employees, taxpayers are required to complete Form W-4 n199 and submit it to their employer for use in determining the required withholding. n200 As discussed [*694] in Part II.B, the government prescribes the exact quantity of income that employers must withhold from their employees, based upon the information in the Form W-4. n201 Importantly, if a taxpayer refuses to complete a Form W-4, the taxpayer is deemed to have zero withholding allowances, thereby guaranteeing that the taxpayer will be subject to overwithholding of income. n202

For several reasons, taxpayers do not consent to the government's appropriation of property in the context of the federal income tax withholding system. The act of completing the Form W-4 does not constitute consent to overwithholding at the source. Like the property owners in Washington Legal Foundation, n203 taxpayers have no choice but to participate in the governmental program at issue (tax withholding in this case, the IOLTA program in Washington Legal Foundation). n204 That is, although taxpayers voluntarily complete Form W-4, they have no choice but to do so. n205 Moreover, the taxpayer has done nothing more than provide information to the employer to facilitate the employer's compliance with withholding obligations. n206

In this regard, the language of the Form W-4 is critical. n207 The first [*695] sentence of the Form instructs employees to "complete Form W-4 so that [their] employers can withhold the correct Federal income tax from [their] pay." n208 The Form then requires employees to sign the Form to affirm "under penalties of perjury, [that the employees are] entitled to the number of withholding allowances claimed on [their] certificates, or [that they are] entitled to claim exempt status." n209 On its face, therefore, the Form W-4 constitutes merely a compulsory disclosure of information to the employer, to which the employee must attest subject to penalties of perjury. For the foregoing reasons, the Form does not memorialize consent to overwithholding that may occur because of the information in the Form. n210 That is, because of the first sentence of the Form W-4, it only constitutes consent to the extent that the information it contains leads to accurate withholding.

Moreover, after income has been overwithheld, a taxpayer has no ability to obtain it until the government distributes tax refunds the following year. n211 Although the system provides taxpayers several opportunities to adjust withholding prospectively to reflect changes in their personal circumstances, n212 there is no similar ability to adjust withholding retroactively (at least until refunds are issued). n213 Thus, when income has been withheld pursuant to a Form W-4 that becomes inapplicable due to changed circumstances, such income may be withheld against the taxpayer's will for the rest of the year. In short, even if a taxpayer withdraws consent arguably given initially by completion of the Form W-4, the government may ignore such withdrawal of consent and continue to hold the taxpayer's money.

For the foregoing reasons, taxpayers do not consent to government appropriation of overwithheld income by filling out the Form W-4. In short, (1) they have no choice but to complete the Form, (2) the Form itself is an informational document, not a memorialization of consent (except to the extent it results in accurate withholding of tax liability), and (3) because taxpayers cannot file retroactive Forms W-4, the government has the ability to [*696] continue to hold taxpayers' private property against their will until tax refunds are issued. n214

4. Permanent or Temporary - Analysis Unaffected. - "When the government takes property for a limited period of time, after which it restores full possession and control to the owner, this is referred to as a temporary taking." n215 If the interest earned on overwithheld income is the applicable property interest, it is permanently appropriated by the government since it will never be paid to the taxpayer. On the other hand, if the applicable property interest is the overwithheld income itself, the taking is temporary, because the government returns such income when it issues tax refunds. n216

In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, n217 the Court stated that temporary takings which "deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." n218 Importantly, the fact that a taking turns out to be temporary instead of permanent bears only on the calculation of just compensation, not whether a taking has occurred in the first place. n219 Accordingly, under the per se approach, there is no doubt that a taking may occur even though the taking is temporary. n220

C. Public Use

The "public use" requirement of the Takings Clause "currently is almost irrelevant in takings jurisprudence." n221 "Under a narrow reading, it [*697] means 'use by the public.' Under a broad reading, it means 'public benefit.'" n222 The Court has adopted the latter interpretation. Consequently, for the Takings Clause to apply, the purported taking merely has to be "rationally related to a conceivable public purpose" n223 With this in mind, "nearly all courts have settled on a broad[] understanding [of 'public use'] that requires only that the taking yield some public benefit or advantage." n224 In addition, most courts have deferred to legislative judgment of what constitutes a public use. n225

There is no question that the government's failure to pay interest on tax refunds is for "public use." The practice amounts to a "forced contribution to general governmental revenues," n226 above and beyond any tax obligation owed to the government. The general public benefits to the tune of hundreds of billions of dollars every year. n227 Because of the broad understanding of "public use" and the fact that unpaid interest increases governmental revenues that support public programs, the taking effected under these circumstances satisfies the "public use" requirement of the Takings Clause. n228

D. Just Compensation

"Of all the terms used in the Takings Clause, 'just compensation' has the strictest meaning." n229 Under the Takings Clause, the government must pay the objective fair market value of the private property taken, n230 to put [*698] the

owner "in the same position monetarily as he would have occupied if his property had not been taken." n231 In the case of temporary appropriation of private property, the government must pay the market rental value of the property. n232 This is required for temporary takings because otherwise "there might frequently be situations in which the owner would receive no compensation whatever because the market value of the property had not decreased during the period of the taker's occupancy." n233

In the case of the overpayment of taxes through withholding, just compensation means the payment of interest on tax refunds. n234 If the taking is framed as a permanent taking of the interest earned by the government during the year on overwithheld taxes, then it constitutes a per se taking, and the government must return such interest to taxpayers in order to put them in the same pecuniary position they would have been in had the taking not occurred. n235 Similarly, if the taking is framed as a temporary taking of overwithheld income (from the time of withholding to the time of a refund), the government must pay the fair market value of the use of the appropriated funds. n236 Interest constitutes such market "rental" value. n237 In short, [*699] whether a permanent or temporary taking, the Takings Clause dictates that the government must pay interest on tax refunds to satisfy the just compensation requirement. n238

V. Conclusion

Although the federal government has extensive authority to impose income taxes, there are constitutional limits on how the government collects those taxes. When the federal government requires taxpayers to participate in an income withholding system that often forces them to forego the use of private property above and beyond their tax liabilities, it implicates the Takings Clause.

First, there can be little doubt that money constitutes Takings Clause "private property." Although appropriation of money to satisfy an obligation to the government does not implicate the Takings Clause, it does not follow that appropriation of money can never be a taking. When no such obligation exists, and the government appropriates money and converts it into public property, there is clearly a Takings Clause private property interest at stake.

Second, under the federal income tax withholding system, this private property is "taken" within the meaning of the Takings Clause. Because the government appropriates private property instead of merely regulating its use, the proper takings analysis is the per se approach. Because taxpayers must fill out the Form W-4 before knowing how contingencies will affect their tax liability, and taxpayers cannot file retroactive Forms W-4 after contingencies arise, they often must forego the use of private property until tax refunds are issued the year after earning income. n239 Moreover, when taxpayers complete the compulsory Form W-4, they do not truly consent to an appropriation of private property beyond their correct tax liability. Under the per se approach, because taxpayers do not truly consent to overwithholding, [*700] and the federal government actually appropriates income, such property has been "taken" within the meaning of the Takings Clause.

Third, this appropriation is for a "public use" within the broad Takings Clause meaning of that term. That is, the Takings Clause "public use" requirement is satisfied because including withheld income in general government revenues benefits the public (through spending on public programs). n240

Finally, because private property has been taken for public use, the government must pay just compensation. In this case, just compensation requires payment for the "fruit of the fund's use" n241 during the tax year.

The simplest solution to the Takings Clause problem outlined in this Comment is the payment of interest on tax refunds. n242 The downside to this approach, however, would be that such a practice would overcompensate taxpayers overall, because some taxpayers intentionally cause overwithholding. n243 On the other hand, if the federal government would rather not pay interest on tax refunds, it could instead abolish the withholding system altogether and require taxpayers to pay their exact tax liability at the end of [*701] the year. n244 Arguably, the tax collection process could continue to function without withholding if taxpayers paid taxes at the end of the year subject to Internal Revenue Service matching with filings by employers. n245 Regardless, this Comment leaves arguments regarding the best solution for another day. n246

I regret "unsettling established government practice," n247 but the Constitution made me do it. One way or another, the federal government's forced annual interest-free loans from the taxpayers must come to an end.

FOOTNOTES:

n1. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 178-79 (1998) (Souter, J., dissenting).

n2. *Id.* at 172.

n3. *Id.* at 179 (Souter, J., dissenting) ("It seems unlikely that such withholding practices would violate the Fifth Amendment. Nevertheless, the Court's abstract ruling may encourage claims of just this sort.").

n4. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980). The phrase "fruit of the fund's use" refers to the interest earned upon a fund of money before it becomes payable to the owner of the fund. *Id.* In *Webb's*, the Court was referring to the interest earned upon an interpleader fund deposited in the court registry during the progress of the case. *Id.* at 155.

n5. *Phillips*, 524 U.S. at 179 (Souter, J., dissenting).

n6. To this author's knowledge, there is no legal commentary regarding whether tax withholding violates the Takings Clause. Thus, in writing this Comment, I have sought to "attack where they are unprepared." Sun-tzu, *The Art of War* 168 (Ralph D. Sawyer trans., MetroBooks 1994) (n.d.). That is, if no such commentary exists because commentators have simply assumed that withholding raises no Takings Clause issues (as Justice Souter did in *Phillips*), I hope to marshal arguments in this Comment that will attack such "unprepared" commentators before they see such an attack coming.

n7. For instance, in fiscal year 2002, approximately 91 percent of net individual income tax collections (\$ 750 billion) were made through tax withholding by employers. Internal Revenue Service, Publication 55B: Data Book 2002, at 8 tbl.1 (2003) [hereinafter IRS Data Book], available at <http://www.irs.gov/pub/irs-soi/02databk.pdf>.

n8. See *I.R.C. 3402* (2000). Any person who has worked as an employee should be aware of the income withholding regime. Typically, each paycheck stub summarizes the quantity of income withheld for each type of tax (e.g., federal income, state income, and FICA (Federal Insurance Contributions Act)).

n9. See, e.g., *United States v. Roberts*, 425 F. Supp. 1281, 1283 (D. Del. 1977) ("The amount of tax periodically withheld is based on calculations of the assessable year-end tax liability and, after it is turned over to the Treasury, is credited to the income tax account of the person from whom it is withheld.").

n10. See *I.R.C. 6072(a)*.

n11. This refund is equal to the amount calculated on the taxpayer's tax return. See, e.g., Internal Revenue Service, Form 1040: U.S. Individual Income Tax Return 2 1.70a (2003) [hereinafter IRS Form 1040], available at <http://www.irs.gov/pub/irs-pdf/f1040.pdf>.

n12. All references hereafter in the main and footnote text to the "Code" refer to the Internal Revenue Code as it is currently codified in Title 26 of the United States Code.

n13. *I.R.C. 6611(e)*.

n14. See, e.g., Michelle Singletary, *Is Your Paycheck a Little Bigger?*, Wash. Post, July 24, 2003, at E3 ("A big, fat refund check is a big, fat interest-free loan to the government."); Caryn Bilotta, *Preparing for Tax Time*, Pittsburgh Post-Gazette, Jan. 27, 2003, at D1 ("Getting a tax refund is not necessarily a good thing because what you're doing is extending an interest-free loan to the federal government.").

n15. *I.R.C. 441(a)* ("Taxable income shall be computed on the basis of the taxpayer's taxable year.").

n16. See *id.* 3402. Importantly, a significant percentage of Americans typically do not owe federal income taxes. See, e.g., Editorial, *The Non-Taxpaying Class*, Wall St. J., Nov. 20, 2002, at A20.

n17. Richard L. Doernberg, *The Case Against Withholding*, 61 *Tex. L. Rev.* 595, 622 (1982) (arguing that "withholding is contrary to the annual accounting concept that is central to the Internal Revenue Code").

n18. See, e.g., *I.R.C. 1(a)-(d)* (setting forth different rates of taxation for taxpayers with different filing statuses); *id.* 2(a)-(b) (defining filing status based upon circumstances present at end of taxable year); *id.* 21 (providing credit for expenses for household and dependent care services necessary for gainful employment); *id.* 22 (providing credit for the elderly and the permanently and totally disabled); *id.* 23 (providing credit for adoption expenses); *id.* 24 (providing credit based on number of children); *id.* 25 (providing credit for interest on certain home mortgages); *id.* 25A (providing credit for certain post-secondary education expenses); *id.* 151 (providing deduction for personal exemptions); *id.* 162 (providing deduction for certain expenses related to trade or business); *id.* 163 (providing deduction for interest paid on indebtedness); *id.* 164 (providing deduction for state and local taxes paid); *id.* 165 (providing deduction for certain losses, including those incurred in trade or business or any transaction entered into for profit or due to casualties or disasters); *id.* 166 (providing deduction for debts that become uncollectible); *id.* 170 (providing deduction for charitable contributions and gifts); *id.* 212 (providing deduction for expenses incurred in activities undertaken for the production of income); *id.* 213 (providing deduction for certain medical expenses); *id.* 217 (providing deduction for certain moving expenses); *id.* 221 (providing deduction for interest paid on education loans); *id.* 222 (providing deduction for certain tuition and other education-related expenses); *id.* 441(a) (providing that taxable income shall be computed on basis of the taxpayer's taxable year); *id.* 451 (providing that gross income generally shall include items of gross income received during the taxable year); *id.* 461 (providing that deductions and credits shall be taken in the proper taxable year pursuant to the taxpayer's method of accounting); *id.* 7703(a) (providing that the determination of a taxpayer's married status shall generally be made as of the close of the taxpayer's taxable year); see also Doernberg, *supra* note 17, at 623 (stating that "the [annual accounting] concept is pervasive in the Code").

n19. Doernberg, *supra* note 17, at 623.

n20. Importantly, sovereign immunity does not present a bar to the recovery of interest from the government as "just compensation" for a taking. E.g., *United States Shoe Corp. v. United States*, 296 F.3d 1378, 1383 (*Fed. Cir.* 2002).

n21. As previously mentioned, the federal government pays no interest on tax refunds made within forty-five days of the later of the due date of the taxpayer's return or the date of filing. *I.R.C. 6611(e)*.

n22. The federal government pays refunds after taxpayers file their income tax returns, which are typically due April 15 for individuals. See *id.* 6072(a); e.g., IRS Form 1040, *supra* note 11, at 2 l.70a.

n23. These doctrinal requirements must be met according to the meanings of the terms "private property," "taken," and "public use," as they are used in the Takings Clause. I discuss these terms in more detail in Part IV of this Comment. Furthermore, my discussion of the history of the Takings Clause in Part History of this Comment provides some guidance on the meaning of these terms.

n24. Specifically, these conditions are satisfied for those taxpayers who do not intentionally cause overwithholding, such as for "forced savings." See discussion *infra* note 52. As far as this author knows, no one has quantified what portion of tax refunds results from individuals who receive tax refunds because of intentional overwithholding as opposed to those who simply fail to understand the tax withholding system. In any event, in an economy with higher unemployment and extensive stock market losses, it is more likely that overwithholding occurs because of unforeseen circumstances (e.g., loss of job) than because of poor tax planning. See discussion *infra* note 70.

n25. See Doernberg, *supra* note 17, at 599-600. Congress made the first of these attempts during the Civil War. *Id.* at 599.

n26. See *id.* at 600-01. When Congress implemented the modern tax withholding system, it expressed three major purposes for collection of income at the source: (1) it allowed collection of tax revenue as quickly as possible for the war effort; (2) it could be used by Congress to offset inflation by adjusting the rates of withholding; and (3) it "protected" taxpayers unfamiliar with the income tax from being short of funds when their tax bills became due at the end of the year. *Id.* at 601-02. Although the war ended soon after implementation of the modern withholding system, thereby undermining the rationale for its existence, income withholding at the source continues today. See *I.R.C. 3402*.

n27. The Sixteenth Amendment to the United States Constitution provides that "Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

n28. The Necessary and Proper Clause provides: "The Congress shall have Power ... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, 8, cl. 18.

n29. E.g., *South Carolina v. Regan*, 465 U.S. 367, 406 (1984) (Stevens, J., concurring in part, dissenting in part) ("The Sixteenth Amendment [was] ratified in 1913 ...").

n30. See, e.g., *United States v. Smith*, 484 F.2d 8, 11 (10th Cir. 1973) ("As a legitimate exercise of Congress' power to make all laws 'necessary and proper' for the taxing of income, the withholding provisions present no constitutional infirmity."); *United States v. Shimek*, 445 F. Supp. 884, 889 (M.D. Penn. 1978) ("Federal income tax withholding ... is a legitimate exercise of Congress' power to make all laws necessary and proper for the taxing of income pursuant to the Sixteenth Amendment to the United States Constitution."). In fact, "at times, judges and legal commentators have declared that Congress' power to tax is beyond constitutional review." Eric Kades, *Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle, and Its Broader Application*, 97 Nw. U. L. Rev. 189, 192 (2002). Finally, courts have also explicitly warned taxpayers

raising challenges to the withholding system that they may be subject to awards of attorneys' fees. See, e.g., *Betlyon v. Shy*, 573 F. Supp. 1402, 1407 (D. Del. 1983).

n31. The "analysis" of courts rejecting these challenges has typically taken the form of a statement such as "the federal income tax withholding system is not unconstitutional." E.g., *Reese v. Bayview Elec. Co.*, No. 00-1487, 2001 WL 474651 (6th Cir. Mar. 9, 2001); *United States v. Price*, 798 F.2d 111, 113 (5th Cir. 1986); *Beatty v. Comm'r*, 667 F.2d 501, 502 (5th Cir. 1982); *Amoco Prod. Co. v. Aspen Group*, 25 F. Supp. 2d 1162, 1165 (D. Colo. 1998). One major reason that such arguments have never succeeded is that they are often forwarded by members of the "Tax Protest" movement. See generally Christopher S. Jackson, Comment, The Inane Gospel of Tax Protest: Resist Rendering Unto Caesar - Whatever His Demands, 32 *Gonz. L. Rev.* 291 (1996). Tax protesters "are generally conservative, middle-aged, white, Christian males who possess an above average education, an above average salary, a past history of tax compliance, and a growing dissatisfaction with government policies. Distrustful of government, new members often band together with other protesters to form quasi-militia, cult-like groups for "protection." *Id.* at 295 (footnotes omitted). Courts have not been amused with the arguments of tax protesters. For instance, one tax protester argued that he was not subject to federal income tax withholding because Texas enjoys a "special status" among the "fifty-nine" states, and "his STATUS [was] different than most of the automatons inhabiting our lands today." *Price*, 798 F.2d at 112-13. In support of this special status argument, the tax protester cited "the General Laws of Massachusetts of 1672, the Federalist Papers, Marbury v. Madison, concurring opinions in the Dred Scott decision, the Northwest Ordinance of 1787, the Articles of Confederation, Thomas Paine, and Jesus Christ." *Id.* at 113. In response to the tax protester's rather dubious array of legal authorities supporting his position, the court responded: "However the qualities of its people, land, and history may differentiate them from those of other states and their citizens, Texas is a state like the other forty-nine, under the same national constitution and laws. The citizens of Texas are subject to the Federal Tax Code." *Id.* For a more complete discussion of common tax protester arguments, see Jackson, *supra*, at 301-21.

n32. 240 U.S. 1 (1916).

n33. *Id.* at 24. Importantly, this doctrine would be inapplicable in cases where "a seeming exercise of the taxing power" in reality constituted "a confiscation of property." *Id.*

n34. E.g., *Smith*, 484 F.2d at 11 (internal quotations omitted); *Shimek*, 445 F. Supp. at 889.

n35. Some of these cases have upheld income tax withholding under the Fifth Amendment due process clause, while others have merely referred to the Constitution in general without specifying a particular provision. See, e.g., *Reese*, 2001 WL 474651 ("The withholding of income taxes from wages is not unconstitutional."); *Price*, 798 F.2d at 113 ("The withholding provisions of the Tax Code are constitutional."); *Robinson v. A&M Elec., Inc.*, 713 F.2d 608, 609 (10th Cir. 1983) ("Federal income tax withholding does not result in the taking of property without due process of law."); *Beatty*, 667 F.2d at 502 ("It is ... clear that Congress has the power to require withholding on wages."); *Campbell v. Amax Coal Co.*, 610 F.2d 701, 702 (10th Cir. 1979) ("Federal income tax withholding does not result in the taking of property without due process."); *Smith*, 484 F.2d at 11 ("The withholding provisions present no constitutional infirmity."); *Amoco Prod. Co.*, 25 F. Supp. 2d at 1165 ("The constitutionality of the income tax laws and tax collection procedures have been consistently upheld by the federal courts."); *Betlyon*, 573 F. Supp. at 1406 ("Numerous recent court decisions have upheld the constitutionality of the federal income tax withholding system ..."); *Shimek*, 445 F. Supp. at 889 ("Federal income tax withholding does not result in a taking of property without due process and is a legitimate exercise of Congress' power to make all laws necessary and proper for the taxing of income pursuant to the Sixteenth Amendment to the United States Constitution."); *Pestar v. Remington Arms Co.*, 443 N.Y.S.2d 987, 988 (N.Y. Sup. Ct. 1981) ("Federal income tax withholding does not constitute a taking of property without due process of

law."). But see *United States v. Roberts*, 425 F. Supp. 1281, 1283 (D. Del. 1977). Roberts upheld the federal income tax withholding system with the following analysis:

The amount of tax periodically withheld is based on calculations of the assessable year-end tax liability and, after it is turned over to the Treasury, is credited to the income tax account of the person from whom it is withheld. Since no tax is withheld from an employee for which he is not liable and to which the government is not entitled, defendants' argument that [the tax withholding system] authorizes extortion can be charitably characterized as chimerical.

Id. However, if "no tax is [ever] withheld from an employee for which he is not liable," why does the government refund billions of tax dollars every year? See IRS Data Book, supra note 7, at 8 tbl.1 (reflecting that the federal government refunded over \$ 210 billion in individual income taxes in fiscal year 2002). If courts upholding the tax withholding system have implicitly applied the Roberts logic, it is possible that the tax withholding system has been upheld based upon a misunderstanding of how the system actually works.

n36. 494 F.2d 513 (5th Cir. 1974).

n37. Although the federal government generally pays interest on tax refunds, *I.R.C. 6611(a)* (2000) ("Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the overpayment rate established under section 6621."), *section 6611(e) of the Internal Revenue Code* provides that the government need not pay interest on refunds that are made to the taxpayer within 45 days of the due date of the return or the date of filing (if the taxpayer files the return late).

n38. *Jacobs*, 494 F.2d at 514.

n39. Id. Although the federal government under the Sixteenth Amendment surely could impose a tax equal to the amount of value lost to taxpayers because refunds are made without interest, the government has chosen not to do so. Instead, it has chosen rates of tax and then collected more than taxpayers are obligated to pay. As this Comment argues, such appropriation of private property for public use implicates (and violates) the Takings Clause.

n40. *No. 97-363*, 2001 U.S. Dist. LEXIS 21871 (D.D.C. Dec. 31, 2001).

n41. Id. at 19.

n42. Id. at 19-20.

n43. That is, Congress cannot use its taxation power to indirectly accomplish what would constitute a taking under the Fifth Amendment. See, e.g., *Coleman v. Comm'r*, 791 F.2d 68, 70 (7th Cir. 1986) (implying that while "the general tax levied by the Internal Revenue Code does not offend the Fifth Amendment," the government may not use its taxation power "to achieve ... what the Takings Clause of the Fifth Amendment forbids if done directly"); see also infra note 48 (setting forth Professor Richard Epstein's discussion of how several courts, consistent with *Van Sant*, have erroneously assumed that congressional actions relating to its taxation power cannot be questioned under the Takings Clause).

n44. *No. 2:91CV00121*, 1993 U.S. Dist. LEXIS 2863 (D. Conn. Feb. 12, 1993).

n45. *Id.* at 1.

n46. *Id.* at 12 n.2.

n47. Even though the Washton court pondered the outcome of a takings claim in regard to refunds that were ultimately never refunded by the government, it seems that the same takings logic should extend to amounts ultimately refunded.

n48. It is fair to say that Professor Richard Epstein serves as the leading commentator arguing that the Takings Clause imposes a significant limitation on Congress's income taxation authority. See Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 295-303 (1985) (concluding that the Takings Clause requires a flat (proportionate) tax structure instead of the system's current progressive structure). Professor Epstein ponders:

To what extent can the takings clause and parallel constitutional provisions limit the government's power to tax? It is a truism that the United States and the several states may impose some taxes upon individual activities within their jurisdiction. The modern view of the subject, repeatedly emphasized in the decided cases, is that in general the power of taxation is plenary. Indeed, the only limitations imposed upon it are found in other constitutional provisions that limit governmental power generally. A general taxation scheme that imposes differential taxburdens upon blacks and whites, or upon men and women, will be struck down under the equal protection clause, but a uniform, higher-level tax upon both blacks and whites is invulnerable to attack. A special tax upon newspapers will be struck down as a limitation upon the freedom of speech. The proposition that all taxes are subject to scrutiny under the eminent domain clause receives not a whisper of current support. The taxing power is placed in one compartment; the takings power in another... .

Nonetheless the current distinction rests upon a sleight of hand.

Id. at 283-84 (footnotes omitted). Although Professor Epstein attacks income taxation in general, and this Comment attacks merely the government's failure to pay interest on tax refunds, his arguments still provide strong support for the proposition that Congress's constitutional taxation power does not dispositively insulate Congress's imposition and collection of taxes from scrutiny under the Takings Clause.

n49. *Jacobs v. Gromatsky* came close, but its holding only determined that the failure to pay interest was not so arbitrary that it violated Fifth Amendment substantive due process. *494 F.2d 513, 514 (5th Cir. 1974)*. Although substantive due process and takings claims are closely related, they have fundamental differences. First, "due process sweeps in many more rights under the rubric of 'property' than does the Takings Clause." Robert Meltz et al., *The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation* 17 (1999). Second, the Takings Clause typically is concerned with economic results - the impact or intrusiveness of the government action. *Id.* On the other hand, due process is primarily concerned with "the fit between the government's chosen means and its desired end; it is rationality based." *Id.* at 18 (footnote omitted). Third, a due process claim seeks invalidation of the offending law, but a takings claim seeks "just compensation." *Id.* at 243; *Unity Real Estate Co. v. Hudson, 178 F.3d 649, 658-59 (3d Cir. 1999)* ("If the government pays just compensation, it may take property for public use under the Takings Clause. Due process protections, by contrast, define what the government may not require of a private party at all."). Finally, under the Takings Clause, the arbitrariness of the government action depriving the citizen of property is not necessarily relevant. For instance, under per se takings doctrine, certain government appropriations of private property constitute takings without regard to the extent of the impact upon the property owner or the public policy reasons in favor of the appropriation. See discussion *infra* Part III.B.

n50. In addition, as the foregoing discussion illustrates, the logic of authorities declaring tax withholding to be beyond constitutional review is suspect. See discussion *supra* notes 35-43, 47 and accompanying text.

n51. IRS Data Book, *supra* note 7, at 8 tbl.1.

n52. Doernberg, *supra* note 17, at 624. For instance, of approximately \$ 1.037 trillion of tax revenues collected during fiscal year 2002, the federal government ultimately refunded over \$ 210 billion to taxpayers after those taxpayers filed their tax returns. IRS Data Book, *supra* note 7, at 8 tbl.1.

Perhaps surprisingly, some taxpayers intentionally cause excessive income to be withheld from their paychecks. See, e.g., Shannon Buggs, Planning a Refund is Tactical Mistake, *Houston Chronicle*, April 26, 2001, at Business 1 (observing that people "love tax refunds" and use them as forced savings "to fund ... spring break excursions, to buy new summer wardrobes, [and] to make down payments on new cars or trucks"); Humberto Cruz, Happy About Getting a Tax Refund?; If You're Ecstatic Now, Think About Having that Average \$ 2,050 Last Year, *Milwaukee J. Sentinel*, Apr. 19, 2003, at 2D (citing the "tired old argument that some people view a tax refund as "forced savings"); Noam Neusner, Spend Those Refund Checks: The IRS Paybacks Can Boost the Economy Faster Than Any Tax Cut, *U.S. News & World Rep.*, Apr. 23, 2001, at 39 (citing loss aversion (people would rather be owed than owe), self-control (people do not believe they can save on their own), and fear (people do not want the IRS to come after them) as three reasons people may intentionally cause overwithholding of income). This Comment applies instead to taxpayers who would rather not extend interest-free loans to the federal government: individuals who experience unforeseen circumstances that affect tax liability (e.g., massive medical expenses, loss of job, unforeseen losses in the stock market, etc.) and are consequently subject to compulsory overwithholding of income by the system. To this author's knowledge, there is no study which quantifies the portion of tax refunds attributable to such unforeseen circumstances. In any event, this quantity is larger in a struggling economy, like that of the current United States, due to increased unemployment and greater stock market losses. See discussion *infra* note 70.

n53. See *I.R.C. 3401-3406* (2000); *Treas. Reg. 31.3401(a)-1 to .3406(j)-1* (as amended in 2000).

n54. *I.R.C. 3402*. "Wages" are defined as "all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration (including benefits) paid in any medium other than cash" *Id.* 3401(a). The Code excludes remuneration paid under certain circumstances from the definition of "wages" in order to exempt certain types of remuneration from the general withholding requirement, but those exc lusions are moot for the purposes of this Comment. See *id.* 3401(a)(1)-(21). Under the Code, the employer is liable "for the payment of the tax required to be deducted and withheld ... and shall not be liable to any person for the amount of any such payment." *Id.* 3403.

An employee is exempt from withholding if both of the following conditions are true: (1) the employee had a right to a refund of all federal income tax withheld during the previous tax year because the employee had zero tax liability; and (2) the employee expects a refund of all federal income tax withheld during the current year because the employee expects to have zero tax liability for the current year. *Id.* 3402(n); see also Internal Revenue Service, Publication 505: Tax Withholding and Estimated Tax 10 (2002) [hereinafter IRS Publication 505], available at <http://www.irs.gov/pub/irs-pdf/p505.pdf>.

n55. IRS Publication 505, *supra* note 54, at 3. Section 3402(f)(2)(A) of the Code requires employees to "furnish the employer with a signed withholding exemption certificate relating to the number of withholding exemptions he claims, which in no event shall exceed the number to which he is entitled." Section 3402(f)(3)(5) provides that "withholding exemption certificates shall be in such form and contain such information as the Secretary may by regulations prescribe." Under this broad grant of authority, *Treasury Regulation 31.3402(f)(5)-*

I provides that "Form W-4 is the form prescribed for the withholding exemption certificate required to be filed under section 3402(f)(2)." In order to receive the benefit of withholding exemptions or allowances, taxpayers must complete the Form W-4. Treas. Reg. 3402(f)(1)-1(a) (as amended in 1987); Treas. Reg. 3402(m)-1(a) (as amended in 1983).

Under the Code, "the amount of tax ... collected or withheld [by the employer] shall be held to be a special fund in trust for the United States." *I.R.C. 7501(a)*. The Internal Revenue Service prescribes specific guidance regarding the means and deadlines for depositing these "trust fund taxes" in financial institutions. Internal Revenue Service, Publication 15: Circular E, Employer's Tax Guide (Including 2004 Wage Withholding and Advance Earned Income Credit Payment Tables) 17-22 (2004) [hereinafter IRS Publication 15], available at <http://www.irs.gov/pub/irs-pdf/p15.pdf>. See generally Doernberg, *supra* note 17, at 603, 617-20 (discussing trust relationship). These withheld sums are commonly referred to as "trust fund taxes" because of Code 7501(a).

There is no general requirement that the withheld sums be segregated from the employer's general funds, however, or that they be deposited in a separate bank account until required to be paid to the Treasury. Because the Code requires the employer to collect taxes as wages are paid, 3102(a), while requiring payment of such taxes only quarterly, the funds accumulated during the quarter can be a tempting source of ready cash to a failing corporation beleaguered by creditors.

Slodov v. United States, 436 U.S. 238, 243 (1978) (footnotes omitted).

n56. See *I.R.C. 3402(f)(1)* (setting forth employee withholding exemptions); *id.* 3402(m) (setting forth additional withholding allowances and reductions in withholding).

n57. Internal Revenue Service, Form W-4: Employee's Withholding Allowance Certificate (2004) [hereinafter IRS Form W-4], available at <http://www.irs.gov/pub/irs-pdf/fw4.pdf>.

n58. See IRS Publication 15, *supra* note 55, at 37-56 (providing tables reflecting required withholding for employees based upon marital status, number of withholding allowances, and amount of income per paycheck).

n59. *I.R.C. 3402(f)(2)(A)*. An employee may have to pay a penalty of \$ 500 if: (1) the employee makes statements or claims withholding allowances on the Form W-4 that reduce the amount of withholding; and (2) the employee has no reasonable basis for those statements or allowances at the time the employee prepares the Form W-4. *I.R.C. 6682(a)*; see also IRS Publication 505, *supra* note 54, at 11. A criminal penalty (\$ 1,000, imprisonment of up to one year, or both) also exists for willfully supplying false or fraudulent on the Form W-4 or for willfully failing to supply information that would increase the amount withheld. *Id.* Finally, under certain circumstances, taxpayers must pay a penalty for withholding too little. *I.R.C. 6654*; see also IRS Publication 505, *supra* note 54, at 36-37. A taxpayer may have to pay this underpayment penalty if the taxpayer's total withholding and estimated tax payments do not equal the smaller of: (1) 90% of the taxpayer's current year tax liability; or (2) 100% of the taxpayer's prior year tax liability. *Id.* at 36. However, this underpayment penalty does not apply to taxpayers who have less than \$ 1,000 taxes due after withholding is taken into account or did not have a tax liability for the prior year. *Id.* at 37.

n60. See *I.R.C. 3401(e)* ("If no [Form W-4] is in effect, the number of withholding exemptions claimed shall be considered to be zero."); *id.* 3402(l)(1) ("The employer shall treat the employee as a single person unless there is in effect with respect to such payment of wages a [Form W-4] furnished to the employer by the employee after the date of the enactment of this subsection indicating that the employee is married."); see also IRS Publication 505, *supra* note 54, at 10.

n61. That is, the system allows equalization in theory. As a practical matter, however, equalization virtually never occurs. See *infra* text accompanying notes 65-70.

n62. IRS Form W-4, *supra* note 57, at 2. Taxpayers may adjust claimed withholding allowances to reflect (1) expected itemized deductions, including qualifying home mortgage interest, charitable contributions, state and local taxes, medical expenses in excess of 7.5% of income, and miscellaneous deductions; (2) expected adjustments to income, including alimony, deductible IRA contributions, and student loan interest; (3) expected tax credits, including the credit for child and dependent care expenses, the credit for the elderly or disabled, the child tax credits, the adoption credit, the foreign tax credit, the education credits, and certain other tax credits; and (4) expected non-wage income (such as dividends or interest). *Id.*

n63. See *I.R.C. 3402(f)(2)(B)*, 3402(f)(3)(B).

n64. See *id.* 3402(h) (describing alternative methods of computing withholding, including withholding on basis of average wages, withholding on basis of annualized wages, withholding on basis of cumulative wages, or "any other method which will require the employer to deduct and withhold ... substantially the same amount" as would be required by applying 3402(a) or 3402(c) of the Code); Internal Revenue Service, Publication 15-A: Employer's Supplemental Tax Guide (Supplement to Circular E, Employer's Tax Guide (Publication 15)) 21-54 (2004), available at <http://www.irs.gov/pub/irs-pdf/p15a.pdf> (discussing alternate methods for computing withholding).

n65. See *I.R.C. 3402(f)*, (m) (relating to contingencies that taxpayers must estimate in order to claim withholding exemptions and allowances); *Treas. Reg. 31.3402(f)(1)-1* (as amended in 1987) (same); *Treas. Reg. 31.3402(m)-1* (as amended in 1983) (same).

n66. See, e.g., Internal Revenue Service, Publication 919: How Do I Adjust My Tax Withholding? 3 (2002), available at <http://www.irs.gov/pub/irs-pdf/p919.pdf>.

n67. See *I.R.C. 3402(f)(3)(B)*.

n68. See *I.R.C. 3402(f)(2)(B)*; IRS Publication 505, *supra* note 54, at 10 ("If [an employee] fills out a new Form W-4, [the] employer can put it into effect as soon as possible. The deadline for putting it into effect is the start of the first payroll period ending 30 or more days after [the employee] turns it in."). If an employee's claimed exemptions are less than what the employee is entitled to, the employee may submit a new Form W-4 to prospectively reduce withholding. However, "if, on any day during the calendar year, the number of withholding exemptions to which the employee is entitled is less than the number of withholding exemptions claimed by the employee" on the Form W-4, the employee must furnish a new Form W-4 reflecting the changed circumstances within 10 days. *I.R.C. 3402(f)(2)(B)*, 3402(f)(3)(B); IRS Publication 505, *supra* note 54, at 3.

n69. IRS Publication 505, *supra* note 54, at 10 ("If you find you are having too much income withheld because you did not claim all the withholding allowances you are entitled to, you should give your employer a new Form W-4. Your employer cannot repay any of the tax previously withheld.").

n70. A struggling economy exasperates this *ex post*, *ex ante* difficulty. It leads to increased investment losses (and decreased investment gains), increased layoffs, pay cuts, and declining returns on money deposited in banks or money market funds. See Kathy M. Kristof, Tax Refund Average Increases 12%; Finances: Federal

Checks Climb to \$ 2,091. But for Many Bigger Return is Result of Lower Income Due to Job and Investment Losses, L.A. Times, Mar. 8, 2002, at Business 1; Kristina Stefanova, Average Tax Refund Almost \$ 2,000; IRS Cites Rate Cuts, New Deductions, Stock Market Losses, Wash. Times, Apr. 26, 2002, at C8. Another factor cited in the increase in tax refunds in the current economy is the increase in charitable giving (which reduces tax liability) after September 11, 2001. Id.

n71. To do so, taxpayers generally must file their tax returns on or before the 15th day of fourth month following the close of the taxable year, *I.R.C. 6072(a)*, on which they may make claims for a refund of overwithheld income. See, e.g., IRS Form 1040, *supra* note 11, at 2 l.70a.

n72. *I.R.C. 6611(a)*, 6621(a)(1).

n73. Id. 6611(e).

n74. Whether such circumstance constitutes a taking depends on the meaning of the terms used in the Takings Clause. Most importantly, such overwithheld income must constitute "private property," and it must be "taken" from taxpayers. See discussion *infra* Parts IV.A-B.

It should be noted that, if the federal government were to compensate taxpayers for the time value of money, it would amount to approximately \$ 8.4 billion. See discussion *infra* note 242.

n75. U.S. Const. amend. V. James Madison, the author of the Takings Clause, proposed it in a slightly different form: "No person shall ... be obliged to relinquish his property, where it may be necessary for public use, without a just compensation." Bernard H. Siegan, *Property Rights: From Magna Carta to the Fourteenth Amendment* 110 (2001) (quoting 1 *Annals of Congress* 431-32 (J. Gales ed., 1834)).

n76. David A. Dana & Thomas W. Merrill, *Property: Takings* 9 (2002); see also Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes Too Far"*, 49 *Am. U. L. Rev.* 181, 182 (1999) ("Due to a scant and ambiguous historical record, the original intent of the Fifth Amendment Takings Clause cannot be known."). For an argument that the Takings Clause was intended to protect propertied classes from political process failure, see William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 *Colum. L. Rev.* 782 (1995).

n77. Siegan, *supra* note 75, at 5-120 (2001); see Gold, *supra* note 76, at 208. Chapter 28 of King John's Magna Carta, executed in 1215, "forbade the king's constable or bailiff to "take corn, or other provisions from anyone without immediately tendering money therefore, unless he can have postponement thereof by permission on the seller." Siegan, *supra* note 75, at 8. King Henry's Magna Carta of 1225 "also contained provisions that foreshadowed the Takings Clause," Chapter 19 dealing with "corn or other chattels" and Chapter 21 dealing with "horses or carts." Id. at 11.

It is likely that "the Framers of the U.S. Constitution thought that private property was essential to human liberty, or they would not have given it such extraordinary protection." Jeanne L. Schroeder, *Never Jam To-Day: On the Impossibility of Takings Jurisprudence*, 84 *Geo. L.J.* 1531, 1544 (1996); see also, e.g., Gold, *supra* note 76, at 195 ("There is significant documentation that suggests the majority of the Framers thought the protection of property was a high priority. For many of the Framers, protection of property was the most important, or one of the most important purposes of the Constitution."). The significance attached to protection of private property rights is consistent with the English legal tradition.

n78. Siegan, *supra* note 75, at 112. On a related point, the Framers most likely were also concerned by "the threat of seizure [of property] posed by factions in an untrammelled majoritarian system of democracy." Charles K. Rowley, *The Supreme Court and Takings Judgments: Constitutional Political Economy Versus Public Choice*, in *Taking Property and Just Compensation: Law and Economics Perspectives of the Takings Issue* 84 (Nicholas Mercuro ed., 1992).

n79. This seemingly provides ammunition for those who would argue for broad application of the Takings Clause in order to fulfill its purpose.

n80. Dana & Merrill, *supra* note 76, at 9-10; see William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 *Yale L.J.* 694, 708 (1985) ("While at least two states had requested every other provision contained in the ratified Bill of Rights, none had sought the imposition of a just compensation requirement."). This seemingly indicates that the Framers were not terribly concerned with the protection of private property.

n81. Dana & Merrill, *supra* note 76, at 13. However, "although they had not sought its inclusion as an amendment, some federalists thought that there was a natural right to compensation. It would appear likely that, for some Anti-federalists suspicious of the power of the central government, any limitation was desirable." Treanor, *supra* note 76, at 835. Evidence indicates that support for the Takings Clause also existed because it would ensure compensation when the military impressed personal property during times of war (as was done during the Revolution). See Epstein, *supra* note 48, at 27 ("The dominant motivation for the [Takings Clause] may have been the taking of food and supplies during time of war for the support of government troops."); Dana & Merrill, *supra* note 76, at 12; Treanor, *supra* note 76, at 835-36.

n82. There was, however, slight modification of Madison's original language. For Madison's original language, see *supra* note 75.

n83. Dana & Merrill, *supra* note 76, at 14. This most likely reflects that the Takings Clause was seen as an "affirmation of the [legal] status quo." *Id.* at 16; see *id.* at 15. This may explain why the Takings Clause was not proposed by any of the states - they may have assumed the law already provided equivalent protection. See discussion *supra* note 81.

n84. Siegan, *supra* note 75, at 108; see *id.* at 116 (providing that Blackstone's influential Commentaries "included a favorable reference to the need to provide full indemnification for takings of property"); *id.* at 192; Dana & Merrill, *supra* note 76, at 16 (providing that, in general, "in England and the colonies at the time of the American Revolution, [the government] provided compensation when title or possession of property was transferred to the government by force of law"). But see *id.* at 24 ("There is nothing in the historical record that specifically links the views of [Blackstone or other natural law commentators] with the participants in the framing of the Bill of Rights.").

However, there is also some evidence that "the principle that the state necessarily owes compensation when it takes private property was not generally accepted" Treanor, *supra* note 80, at 694; see *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1056 (1992) (Blackmun, J., dissenting) ("The principle that the State should compensate individuals for property taken for public use was not widely established in America at the time of the Revolution."); Treanor, *supra* note 76, at 785 ("Even with respect to physical seizures of property by the government, the compensation requirement was not generally recognized at the time of the framing of the Fifth Amendment."). There is evidence that "eighteenth-century colonial legislatures regularly took private property without compensating the owner," most commonly when private land was taken for public roads. Treanor, *supra* note 80, at 695.

Staking out a compromise position, Professor Hart argued that sometimes private land was taken for public use without compensation - generally for highways - but just compensation was generally paid when "substantial parcels of land were taken for public facilities" or when "government took temporary possession of private property, as in the compulsory lodging of troops." John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 *Harv. L. Rev.* 1252, 1283-84 (1996).

In any event, just compensation provisions were adopted in two state constitutions (Vermont and Massachusetts) and the Northwest Ordinance prior to Madison's drafting of the Takings Clause. Dana & Merrill, *supra* note 76, at 13-14; see Treanor, *supra* note 80, at 701 ("Adoption of these clauses evidenced a growing rejection of traditional republican ideology, a decline of faith in legislatures, and a new concern for individual rights - particularly property rights."). But see George Skouras, *Takings Law and the Supreme Court: Judicial Oversight of the Regulatory State's Acquisition, Use and Control of Private Property* 12 (1998) (questioning Treanor's conclusion that the adoption of these compensation clauses resulted from an ideological shift). The just compensation provisions of these documents were similar. See Treanor, *supra* note 76, at 790 (quoting Vt. Const. of 1777, ch. I, art. II, reprinted in 6 *The Federal and State Constitutions, Colonial Charters, and other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America* 3737, 3740 (Francis N. Thorpe ed., 1909)); *id.* at 790-91 (quoting Mass. Const. of 1780, part I, art. X, reprinted in 3 *The Federal and State Constitutions, Colonial Charters, and other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America*, *supra*, at 1888, 1891); *id.* at 791 (quoting Northwest Ordinance of 1787, art. 2, reprinted in *Sources of Our Liberties: Documentary Origins of Individual Liberties in the United States Constitution and Bill of Rights* 392, 395 (Richard L. Perry & John C. Cooper eds., 1952)). The existence of these provisions provides strong support for the proposition that the just compensation principle existed when the Takings Clause was framed.

n85. Siegan, *supra* note 75, at 109-10 (stating that "In the absence of the takings clause, the due process clause might have been interpreted as denying government the power of eminent domain" and that "the First Congress ... might also have feared that the due process clause eliminated the power of Congress to impose any regulations on property rights"). The Fifth Amendment Due Process Clause provides: "nor shall any person ... be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

n86. See *supra* note 75.

n87. Treanor, *supra* note 76, at 791 ("There are apparently no records of discussion about the meaning of the [Takings Clause] in either Congress or, after its proposal, in the states. Madison's statements thus provide unusually significant evidence about what the clause was originally understood to mean ...").

n88. Schroeder, *supra* note 77, at 1545; see also Gold, *supra* note 76, at 203-04 (discussing "Madison's view that property extended beyond physical objects"). This broad interpretation of the meaning of "property" for purposes of the Takings Clause is consistent with "Madison's strong desire to protect private property." *Id.* at 204. However, it should be noted that "the Framers disagreed on the exact meaning of the word 'property' as well as on how to protect those property rights." *Id.* at 195.

The text of the Takings Clause is ambiguous because the original understanding of the word "property" is uncertain. In all likelihood, there was no consensus by the Founders as to what "property" meant. If one accepts the meaning of "property" as understood by its author, James Madison, the Takings Clause would apply to regulatory takings in addition to physical takings. One must remember, however, that the Constitution was ratified by the states.

Id. at 240. But see Treanor, *supra* note 80, at 710-11 (arguing, based upon the original language proposed by Madison, that Madison intended the Takings Clause to apply only to the federal government and only to physical takings); Treanor, *supra* note 76, at 782 ("The original understanding of the Takings Clause of the Fifth Amendment was clear on two points. The clause required compensation when the federal government physically

took private property, but not when government regulations limited the ways in which property could be used."). With authorities that so confidently assert contrary propositions, the only reasonable conclusion is that the true "original understanding" of the Takings Clause will never be known. See Harry N. Scheiber, *The Jurisprudence - and Mythology - of Eminent Domain in American Legal History*, in *Liberty, Property, and Government: Constitutional Interpretation Before the New Deal* 219 (Ellen Frankel Paul & Howard Dickman eds., 1989) ("It is difficult enough to read people's thoughts and motives, even ... [in] the here-and-now; it is even more parlous to speculate on views that were held ... at the nation's founding in that perilous terrain in which we regularly search for that Bigfoot of American law: "original intent.""). No matter what the "original understanding" was, it should be noted that "as intangible property replaced land as the dominant form of property in the economy [during the late 1800s], ... legal thinkers [including Justice Holmes] concluded that the reach of takings law had to be expanded" beyond solely physical seizures of property. Treanor, *supra* note 76, at 799.

n89. Textually, the word "taken" in the Takings Clause "is not confined and applies to all property (that is taken for public use)." Siegan, *supra* note 75, at 112. The importance of this broad interpretation of property will become more apparent in this Comment's discussion of whether or not overwithheld income constitutes "private property" within the meaning of the Takings Clause. See discussion *infra* Part IV.A.

n90. Dana & Merrill, *supra* note 76, at 19.

n91. Even if "taken" is interpreted to be limited to physical appropriations, it arguably includes the federal government's practice of tax overwithholding without payment of interest on refunds. That is, the government has done more than merely regulate the taxpayer's use of money - it has actually removed it from the owner's possession. See *infra* notes 166-69 and accompanying text.

n92. See Gold, *supra* note 76, at 187-88. That is, while it is plausible to interpret "taken" in accordance with its generally understood meaning (actual appropriation), "the passive tense of the verb 'to take' in the Takings Clause ('nor shall property be taken') emphasizes the property's removal from its original owner, his dispossession, and not the mode of that removal, such as a physical seizure." *Id.* at 188. If the term "property" extends "beyond physical objects to [intangible] appurtenant rights," an owner may be dispossessed of such intangible rights within the meaning of the Takings Clause without an actual "physical seizure" of the intangible rights. *Id.* at 188-89. Thus, a broad definition of "property" within the context of the Takings Clause provides support for a broad interpretation of the term "taken." See *id.* at 189. For these reasons, "the fact that direct, physical takings come to mind most naturally does not lead logically to the conclusion that other types of takings are not well within the textual limits [of the Takings Clause]." *Id.* at 190. "At a minimum, the writings of influential legal philosophers at the time the Fifth Amendment Takings Clause was drafted suggest that a broad interpretation of the takings that merit just compensation is reasonable." *Id.* at 221.

Blackstone was frequently cited by early American courts in relation to the requirement of just compensation for a deprivation of property both by reason of occupation and regulation. He was the most important interpreter of the common law when the Bill of Rights was framed. It is not unlikely that the First Congress applied a common law interpretation to the meaning of "deprivation" and "taken," and if so, this would require a very broad definition of these words.

Siegan, *supra* note 75, at 116; see also *id.* at 112.

It should be noted that early judicial holdings tended to agree with a strict interpretation of "taken," which often led to compensation for physical seizures of property, "but not if [the government] merely regulated the owner's use of property." Treanor, *supra* note 76, at 792. Early court decisions also consistently held that government regulation as a function of the police power did not give rise to a taking. *Id.* at 792-97. See, e.g., *Mugler v. Kansas*, 123 U.S. 623, 662-63 (1887) (upholding Kansas statute that directed liquor manufacturers to be closed because they were common nuisances). Of course, this changed with the Court's famous decision in

Pennsylvania Coal Co. v. Mahon, which held that regulations under the police power could constitute compensable takings. 260 U.S. 393, 415 (1922).

n93. The importance of these arguments will become clearer in Parts IV.A and IV.B of this Comment.

n94. *Branch v. United States*, 69 F.3d 1571, 1583 (Fed. Cir. 1995). Modern takings jurisprudence has also endured a beating in academia. See, e.g., Skouras, supra note 84, at 122 ("Takings law overall remains in a muddle. Various cases have been handed down by the Supreme Court in an attempt to solve these property issues. Most Supreme Court observers remain unsatisfied with the results."); Ronald J. Krotoszynski, Jr., Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause, 80 N.C. L. Rev. 713, 738 (2002) ("The ad hoc nature of the Supreme Court's current regulatory takings doctrine is profoundly embarrassing."); Schroeder, supra note 77, at 1531 ("The jurisprudence that has developed under the takings provision[] of the Fifth ... Amendment[] to the U.S. Constitution is a top contender for the dubious title of 'most incoherent area of American law.'"); Treanor, supra note 76, at 880 ("Modern Supreme Court takings jurisprudence is famous for its incoherence.").

n95. See, e.g., *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322-23 (2002); *Meriden Trust & Safe Deposit Co. v. Fed. Deposit Ins. Corp.*, 62 F.3d 449, 454 (2d Cir. 1995) ("Unconstitutional takings can occur in two ways. First, a property owner may suffer a physical invasion or permanent occupation of property... . Second, a regulatory scheme may result in a compensable taking ... where the regulatory scheme goes 'too far.'" (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922))).

The distinction between these two types of takings is based upon the fact that "treating ... all [regulations] as per se takings would transform government regulation into a luxury few governments could afford. By contrast, physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights." *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 324; Meltz et al., supra note 49, at 117 ("In takings law, there can be no greater assault on private property rights than permanent physical invasion by the government. Physical invasion takings are an affront to one of the most revered incidents of ownership - the right to exclude others"); Thomas E. Roberts, Regulatory Takings: Setting Out the Basics and Unveiling the Differences, in *Taking Sides on Takings Issues: Public and Private Perspectives* 1.1(a) (Thomas E. Roberts ed., 2002) ("Physical invasions trigger special concern, since the Court treats the right to exclude as the paramount property right.").

n96. See, e.g., *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 322 ("Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of per se rules."); *E. Enters. v. Apfel*, 524 U.S. 498, 522 (1998) ("This case does not present the 'classic taking' in which the government directly appropriates private property for its own use."); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) ("[A] permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve."); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) ("A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government"); *Garneau v. City of Seattle*, 147 F.3d 802, 807 (9th Cir. 1998) ("Government regulation categorically violates the Takings Clause if it results in the physical invasion of property"); see also Skouras, supra note 84, at 21 ("Today, it is clear that the Supreme Court, through a long history of interpreting physical invasion cases, considers such invasions as takings of property. And the Court has never retreated from this position in takings law.").

n97. See, e.g., *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 330 ("Anything less than a 'complete elimination of value,' or a 'total loss,' ... would require the kind of analysis applied in *Penn Central*." (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019-20 n. 8 (1992))); *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) ("We have observed, with certain qualifications ... that a regulation which 'denies all economically

beneficial or productive use of land' will require compensation under the Takings Clause." (quoting *Lucas*, 505 U.S. at 1015)); *Lucas*, 505 U.S. at 1015 ("The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land."); *Garneau*, 147 F.3d at 807 ("Government regulation categorically violates the Takings Clause ... if it denies the owner all economically viable use of his property."); *Meriden Trust & Safe Deposit Co.*, 62 F.3d at 454 ("[A] paradigmatic regulatory taking occurs when a change in the law results in the immediate impairment of property rights, leaving the property owner no options to avoid the loss."); *Wash. Legal Found. v. Tex. Equal Access to Justice Found.*, 86 F. Supp. 2d 624, 643 (W.D. Tex. 2000) ("Government action that deprives property owners of all productive use of their property ... is often determined to be a per se or categorical taking.").

n98. See, e.g., *Lucas*, 505 U.S. at 1015 ("In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation."); *Loretto*, 458 U.S. at 426 ("[A] permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve."); *Wash. Legal Found. v. Tex. Equal Access to Justice Found.*, 270 F.3d 180, 187 (5th Cir. 2001) ("[A] government's permanent physical occupation of property constitutes a per se taking, regardless of the economic impact on the owner.").

n99. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); Skouras, supra note 84, at 21 ("Regulatory takings means the placing of limitations on the use of private property.").

n100. *Penn Cent. Transp. Co.*, 438 U.S. at 124.

n101. *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 865 (9th Cir. 2001) (en banc) (Kozinski, J., dissenting). Judge Kozinski goes on to state that "the consequences of regulation are [normally] not compensable, because we each must bear the burdens - just as we enjoy the benefits - of living in a regulated society." *Id.*

n102. The regulatory takings doctrine has been marked with a refusal to conform to any consistently applied guidelines set forth by traditional takings doctrines. See *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 322 ("Our jurisprudence involving condemnations and physical takings is as old as the Republic Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by "essentially ad hoc, factual inquiries'" (quoting *Penn Cent. Transp. Co.*, 438 U.S. at 124)); *E. Enters.*, 524 U.S. at 540-41 (Kennedy, J., concurring) ("Without denigrating the importance the regulatory takings concept has assumed in our law, it is fair to say it has proved difficult to explain in theory and to implement in practice."). But see Siegan, supra note 75, at 283 (stating that regulatory takings doctrine applies "rules articulated by Coke and Blackstone" and that such "long historical provenance of these rules should help still criticism that they are of recent vintage, not secured in the original U.S. Constitution or in its Bill of Rights").

n103. *Legal Found. of Wash.*, 271 F.3d at 865 (Kozinski, J., dissenting); see also *Lucas*, 505 U.S. at 1014-15; Treanor, supra note 76, at 782 ("The Supreme Court has been unable to define clearly what kind of regulations run afoul of Holmes's vague standard. Attempts to do so ... have created a body of law that more than one recent commentator has described as a "mess.""). Despite the criticism, "the Supreme Court seems to be inordinately proud of the ad hoc nature of its takings opinions and has reiterated its support of case-by-case balancing in the current crop of opinions." Susan Rose-Ackerman, *Regulatory Takings: Policy Analysis and Democratic Principles*, in *Taking Property and Just Compensation*, supra note 78, at 27.

n104. *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 326 (citations and quotations omitted) ("We still resist the temptation to adopt per se rules in our cases involving partial regulatory takings, preferring to examine "a

number of factors' rather than a simple "mathematically precise' formula."); see also *Lucas*, 505 U.S. at 1015 ("In 70-odd years of ... 'regulatory takings' jurisprudence, we have generally eschewed any 'set formula' for determining how far is too far, preferring to 'engage in ... essentially ad hoc, factual inquiries.'" (quoting *Penn Cent. Transp. Co.*, 438 U.S. at 123)); *Penn Cent. Transp. Co.*, 438 U.S. at 124 ("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."); id. ("We have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case."); *Garneau v. City of Seattle*, 147 F.3d 802, 807 (9th Cir. 1998) ("In non-categorical regulatory takings cases, the court must engage in an ad hoc, factual inquiry to determine whether the government regulation goes too far."); *Meriden Trust & Safe Deposit Co.*, 62 F.3d at 454 ("The court must take into account several factors, on a case-by-case basis, to determine "whether a governmental action has gone beyond 'regulation' and effects a 'taking.'" (quoting *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1005 (1984))).

n105. See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606, 633-34 (2001) (O'Connor, J., concurring); *E. Enters.*, 524 U.S. at 523-24; *Penn Central Transp. Co.*, 438 U.S. at 124; *Legal Found. of Wash.*, 271 F.3d at 857-64; *Tex. Equal Access to Justice Found.*, 86 F. Supp. 2d at 646-47.

n106. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). "Since *Armstrong*, the Court has repeated this principle verbatim in virtually every takings case; in fact, both the majority opinion and the dissenting opinion, in more than one case, have cited this very same language." Kades, *supra* note 30, at 206.

n107. As the following discussion will illustrate, "the history of judicial opinions and academic literature in [the Takings Clause] area ... suggest very strongly that [the definitions of these terms] are by no means settled or clear, that 'Truth' has not yet been discovered." Steven G. Medema, *Making Choices and Making Law: An Institutional Perspective on the Takings Issue*, in *Taking Property and Just Compensation*, *supra* note 78, at 46.

n108. Given the uncertainty inherent in these terms, the importance of their original understandings is accentuated. See discussion *supra* Part III.A.

n109. This is true in cases where unforeseen circumstances force a taxpayer to forego use of overwithheld income, but would most likely not be true where a taxpayer voluntarily chooses to overpay taxes during the year as "forced savings." See discussion *supra* note 52. Unfortunately, without surveying individual taxpayers, it is impossible to determine whether overwithholding results because of an intentional act of the taxpayer or because of unforeseen contingencies affecting tax liability. In any case, during years of increased unemployment and stock market losses, the proportion of tax refunds resulting from such unforeseen contingencies would be increased. See discussion *supra* note 70.

n110. Meltz et al., *supra* note 49, at 25.

n111. Without elaboration, the Takings Clause provides: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

n112. Schroeder, *supra* note 77, at 1548. For instance, an owner with a fee simple absolute estate in realty has rights of possession, enjoyment, and alienation. However, those rights are offset by inherent limitations, including the state's taxation power, nuisance restrictions, and antidiscrimination laws. *Id.* Thus, when property

is viewed as a bundle of rights, it is extremely difficult to balance the various rights implicated to derive a definition. For a general discussion of the various conceptions of property and how those conceptions have affected modern Takings Clause scholarship, see Leif Wenar, *The Concept of Property and the Takings Clause*, 97 *Colum. L. Rev.* 1923 (1997).

n113. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972); see also, e.g., *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980).

n114. *Phillips*, 524 U.S. at 167.

n115. See, e.g., *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) ("The clearest sort of taking occurs when the government encroaches upon or occupies private land for its own proposed use. Our cases establish that even a minimal 'permanent physical occupation of real property' requires compensation under the Clause." (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982))).

n116. See, e.g., *City of Cincinnati v. Louisville & Nashville R.R. Co.*, 223 U.S. 390, 400 (1912) ("Land and movables [are] within the sweep of [eminent domain]."); *Wash. Legal Found. v. Tex. Equal Access to Justice Found.*, 293 F.3d 242, 247 (5th Cir. 2002) (Wiener, J., dissenting); *City of Oakland v. Oakland Raiders*, 646 P.2d 835, 839 (Cal. 1982) (stating that the Constitution "makes no verbal distinction between real property and personal property with respect to the requirement of 'just compensation'").

n117. See, e.g., *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1003-04 (1984) (holding that property right in trade secrets is protected by Takings Clause); *Armstrong v. United States*, 364 U.S. 40, 48 (1960) (holding that property right in materialmen's liens is protected by Takings Clause); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 16 (1949) (holding Takings Clause applicable to government preemption of private business trade routes); *Lynch v. United States*, 292 U.S. 571, 579 (1934) (holding that valid contracts are property protected by Takings Clause); *Louisville & Nashville R.R. Co.*, 223 U.S. at 400 ("[The eminent domain] power extends to tangibles and intangibles alike. A chose in action, a charter, or any kind of contract, are, along with land and movables, within the sweep of this sovereign authority."); *James v. Campbell*, 104 U.S. 356, 357-58 (1881) ("When [the government] grants letters-patent for a new invention or discovery in the arts, [the government] confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation ..."); *Oakland Raiders*, 646 P.2d at 840 ("Numerous other decisions both federal and state have expressly acknowledged that intangible assets are subject to condemnation."). Importantly, "the application of the Takings Clause to intangible rights will probably become an increasingly important issue in the coming decades" as such assets become more and more important to the economy relative to "brick and mortar" assets. Dana & Merrill, *supra* note 76, at 228.

n118. 323 U.S. 373 (1945).

n119. *Id.* at 377-78.

n120. See, e.g., *United States v. Craft*, 535 U.S. 274, 278 (2002) ("A common idiom describes property as a 'bundle of sticks' - a collection of individual rights which, in certain combinations, constitute property.").

n121. As previously mentioned, a state may not simply define money as something other than "private property" to exempt it from the Takings Clause. It seems completely unreasonable to define money as something other than a form of private property. Such a re-definition resembles the Court's interpretation of the term "citizen" in *Dred Scott v. Sandford*, 60 U.S. 393 (1856). In that case, in order to avoid an outcome required by the Constitution that the Court found undesirable, the Court distorted the definition of "citizens" to find that slaves "were not intended to be included, under the word 'citizens' in the Constitution, and [could] therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States." *Id.* at 404. Similarly, in cases holding that money does not constitute Taking Clause "private property," courts distort the definition of private property to exclude money, the quintessential property, in order to avoid an outcome the court finds undesirable (e.g., a potent limitation of government regulation). Although the Court in *Dred Scott* played judicial word games to categorize slaves as property, while some modern courts have played judicial word games to categorize money as something other than private property, both outcomes are offensive to the Constitution.

n122. See, e.g., *E. Enters. v. Apfel*, 524 U.S. 498, 540 (1998) (Kennedy, J., concurring) ("Our cases do not support the plurality's conclusion that the Coal Act takes property. The Coal Act imposes a staggering financial burden on the petitioner, ... but it regulates the [petitioner] without regard to property."); *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1339 (Fed. Cir. 2001) ("Regulatory actions requiring the payment of money are not takings."); *Branch v. United States*, 69 F.3d 1571, 1576 (Fed. Cir. 1995) ("The principles of takings law that apply to real property do not apply in the same manner to statutes imposing monetary liability. Thus, even though taxes or special municipal assessments indisputably 'take' money from individuals or businesses, assessments of that kind are not treated as per se takings ..."); *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 674-78 (3d Cir. 1999) (rejecting the application of a takings analysis to the monetary obligation imposed by the Coal Act); *Commercial Builders of N. Cal. v. City of Sacramento*, 941 F.2d 872, 875 (9th Cir. 1991) ("Appellants contend that the fee represents a transfer of property, i.e., the money paid over to the city. In this respect, they argue, it most closely resembles a physical taking of property, which automatically falls within the purview of the fifth amendment, We see no valid basis for such a rule." (citation omitted)); *Atlas Corp. v. United States*, 895 F.2d 745, 756 (Fed. Cir. 1990) ("Requiring money to be spent is not a taking of property."); *Third & Catalina Assocs. v. City of Phoenix*, 895 P.2d 115, 120 (Ariz. Ct. App. 1995) ("Requiring money to be spent to comply with a regulation is not an unconstitutional taking of private property.").

n123. Interestingly, the Supreme Court has had "little difficulty" recognizing money as private property where such a characterization results in increased revenues for the government. See, e.g., *Dickman v. Comm'r*, 465 U.S. 330, 336 (1984) (stating that the Court "has little difficulty accepting the theory that the use of valuable property - in the case of money - is itself a legally protectible property interest" and holding, therefore, that a taxpayer's loan of money interest-free constitutes a taxable gift to the debtor to the extent of the interest excused).

n124. *Brown v. Legal Found. of Wash.*, 123 S. Ct. 1406, 1419 (2003) (finding that the per se approach applied to the governmental confiscation of interest generated by principal held in IOLTA accounts); *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 172 (1998) (holding that interest income generated by principal held in IOLTA accounts is the private property of the owner of the principal for purposes of the Takings Clause); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164-65 (1980) (holding that government appropriation of interest earned on an interpleader fund while the fund was held in the court registry violated the Takings Clause). Together, these cases confirm that a purely monetary appropriation is subject to Takings Clause analysis.

Some courts have cited *United States v. Sperry* for the contrary proposition that money is not subject to Takings Clause analysis because "unlike real or personal property, money is fungible." 493 U.S. 52, 62 n.9 (1989). See, e.g., *Atlas Corp.*, 895 F.2d at 756; *Washlefske v. Winston*, 60 F. Supp. 2d 534, 541 (E.D. Va. 1999) ("Because the present case does not involve tangible personal or real property, but involves a fungible item, such as money, the court will apply the Penn Central multi-factor balancing test."). However, the *Sperry* Court merely pointed out that no taking had occurred where the government offset a reasonable user fee against a monetary

obligation the government owed to the citizen. Because money is fungible, there was no taking where the government merely netted the offsetting obligations instead of paying the full award to the citizen and then demanding payment of the user fee. When courts cite the Sperry fungibility footnote as the basis for determining that money is not Takings Clause "private property," they unreasonably stretch the Sperry holding. See *Unity Real Estate Co. v. Hudson*, 889 F. Supp. 818, 845 (W.D. Pa. 1995) ("This is a rather broad reading ... of Sperry That portion of Sperry ... unsurprisingly turned back the claim that the deduction of a percentage of a monetary award as a fee for services could be analogized to the physical occupation of real property.").

n125. See *E. Enters.*, 524 U.S. at 540 (Kennedy, J., concurring).

n126. *Id.*

n127. For instance, obligations to the government arise in the form of user fees for services and income taxes. Governmental collection of money to satisfy these obligations would not constitute takings. See, e.g., *Sperry*, 493 U.S. at 62 n.9 (upholding deduction from monetary award as fee for government services); *United States Shoe Corp. v. United States*, 296 F.3d 1378, 1383 (Fed. Cir. 2002) (holding that taxation was neither per se nor regulatory taking); *Parker v. Barnhart*, 174 F. Supp. 2d 920, 936 (N.D. Iowa 2001) (distinguishing between cases involving appropriation of interest earned on principal and those involving government user fees).

n128. *E. Enters.*, 524 U.S. at 541 (Kennedy, J., concurring); see *Webb's*, 449 U.S. at 161 ("[A] mere unilateral expectation or an abstract need is not a property interest entitled to protection."); *Dana & Merrill*, supra note 76, at 69 ("Judges have ... long understood, at least implicitly, that the Takings Clause protects particular things or assets, rather than fungible wealth."). But see *Kades*, supra note 30, at 194 (noting that Justice Kennedy in *Eastern Enterprises* "offered [no] precedent or argument for this distinction" between specific and general property interests in the Takings Clause context); *id.* at 196 n.32 ("It is a taking to expropriate a specific bank account, but not to impose a tax for precisely the amount in the account... . Thus, in the end, one has a distinction without a difference.").

n129. See *Commonwealth Edison Co. v. United States*, 46 Fed. Cl. 29, 40 (2000) ("Courts have generally held that a government-imposed obligation to pay 'money' is not susceptible to a takings analysis."); *id.* at 40-41 (discussing same).

n130. See *Sperry*, 493 U.S. at 62 n.9 (1989) ("Unlike real or personal property, money is fungible. No special constitutional importance attaches to the fact that the Government deducted its charge directly from the award rather than requiring Sperry to pay it separately.").

n131. *E. Enters.*, 524 U.S. at 555 (Breyer, J., dissenting).

n132. See IRS Form W-4, supra note 57, at 1 ("Complete Form W-4 so that your employer can withhold the correct Federal income tax from your pay.").

n133. See, e.g., *Sperry*, 493 U.S. at 62 n.9 (1989) (upholding deduction from monetary award as reasonable fee for government services); *United States Shoe Corp. v. United States*, 296 F.3d 1378, 1383 (Fed. Cir. 2002) (holding that taxation was neither per se nor regulatory taking).

n134. Cf. *Webb's*, 449 U.S. at 163 (finding taking where the government appropriated interest earned on an interpleader fund beyond the amount "reasonably related to the costs of using the courts").

n135. *Id.* at 161-62 (citation omitted).

n136. *Id.* at 164.

n137. This assumes that the taxpayer files an income tax return claiming the right to a refund. See *I.R.C. 6072(a)* (2000); e.g., IRS Form 1040, supra note 11, at 2 l.70a.

n138. Of course, the federal government does not actually hold overwithheld income in an account solely for the purpose of returning it to the taxpayers at the end of the year. See Scott Moody, *The Cost of Tax Compliance*, Tax Foundation (Feb. 2002), at <http://www.taxfoundation.org/compliance2002.html> ("The federal government collects the withheld income tax payments and uses that money to fund current operations.").

n139. See *Webb's*, 449 U.S. at 161.

n140. *Id.* at 162. Although the federal government does not technically hold withheld taxes in an account and earn interest thereon, this should not be fatal to a Takings Clause challenge. See discussion infra note 146.

n141. See *I.R.C. 6051*.

n142. 296 F.3d 1378 (*Fed. Cir.* 2002).

n143. *Id.* at 1384 (citations omitted).

n144. Cf. *Cnty. Bank & Trust v. United States*, 54 Fed. Cl. 352, 358 (2002) ("Defendant's proposition [that deposits become the property of the bank] is true among depositors choosing to place their funds with a private bank. *Webb's* and *Phillips* indicate, however, that this is not the necessary rule where the law abrogates this choice, mandating the deposit or the use to which any interest is put."); *id.* at 359 ("For the limited purpose of this motion to dismiss, the court finds that plaintiff has a property interest in the principal of its reserve accounts [deposited in the Federal Reserve], cognizable under the Fifth Amendment. Precedent indicates such an interest and defendant does not adequately argue otherwise.").

n145. Of course, this assumes that the taxpayer files a tax return. See *I.R.C. 6072(a)*; e.g., IRS Form 1040, supra note 11, at 2 l.70a. For clarification, the "sums" referred to in the context of tax withholding are the amounts withheld in excess of tax liability, all of which are subject to refund.

n146. Importantly, since the government uses withheld income to fund current operations, it does not technically "earn interest" upon it. Moody, supra note 138. However, in the Takings Clause context, the analysis focuses upon the property the government has taken from the owner, not what it has done with it. See *United States v. W.G. Reynolds*, 397 U.S. 14, 16 (1970) ("'Just compensation' means the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property

had not been taken."). Moreover, it would seem perverse to argue that a taking occurs where the government takes possession of money and then appropriates interest it earns upon it in an account, but does not occur where the government simply appropriates the same money and spends it in current operations. The owner of the money has suffered identical deprivations in both cases. But see *Leider v. United States*, 301 F.3d 1290, 1296 (Fed. Cir. 2002).

An unlocated creditor has a property right in his or her distributive share of the funds of a bankruptcy estate... . However, ... the "interest follows principal' rule [does not] ... establish ... a property right to interest on [such creditor's] distributive share of the funds from the ... bankruptcy. The reason is that interest was never earned on the funds. Hence, there was no interest to follow principal.

Id.

n147. The property interest in the "fruit of the fund's use" during the year is stronger in the case of tax withholding than in the context of IOLTA programs. See *infra* notes 163 and accompanying text (providing a brief description of IOLTA programs). Arguably, "in the ... case [of IOLTA programs] there is no money to confiscate outside the mechanisms which make IOLTA possible, therefore it cannot qualify as a confiscatory taking." *Wash. Legal Found. v. Tex. Equal Access to Justice Found.*, 86 F. Supp. 2d 624, 645 (W.D. Tex. 2000); see also *infra* note 238 (discussing how funds deposited in IOLTA accounts are required by law to be incapable of earning net interest in other accounts). In contrast, overwithheld income could earn interest without the government's intervention (for instance, by investment in a savings or money market account). Importantly, the Supreme Court has already held that the interest earned on IOLTA principal amounts constitutes property of the owner of the principal for purposes of the *Takings Clause*. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 172 (1998).

n148. A broad interpretation of "property" is not precluded by the text of the *Takings Clause*.

The dominant motivation for the clause may have been the taking of food and supplies during time of war for the support of government troops. Yet this case is only an illustration of the abuse to be avoided. The language itself is only an illustration of the abuse to be avoided.

Epstein, *supra* note 48, at 27. In addition, this broad conception of private property is consistent with the original understanding of that term. See discussion *supra* Part III.A.

n149. "In ordinary usage, to 'take' property means to acquire 'possession or control' of it. This most likely was also the original understanding of the term." Dana & Merrill, *supra* note 76, at 86.

n150. See, e.g., *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 857 (9th Cir. 2001) (en banc) (deciding threshold question of whether to apply per se or ad hoc analysis before determining whether taking occurred); *Tex. Equal Access to Justice Found.*, 270 F.3d at 186 (deciding threshold question of whether to apply per se or ad hoc analysis before determining whether taking occurred); *Garneau v. City of Seattle*, 147 F.3d 802, 807 (9th Cir. 1998) (distinguishing between per se and ad hoc approaches); *Meriden Trust & Safe Deposit Co. v. Fed. Deposit Ins. Corp.*, 62 F.3d 449, 454 (2d Cir. 1995) (drawing distinction between situations calling for per se and ad hoc approaches); *Tex. Equal Access to Justice Found.*, 86 F. Supp. 2d at 643 ("The United States Supreme Court has distinguished two general categories of takings: per se takings and regulatory takings... . If a government regulation is not considered a per se taking, this Court must still consider whether a regulatory taking has occurred"); *Commonwealth Edison Co. v. United States*, 46 Fed. Cl. 29, 40 (2000) ("Before a party can recover compensation under the Fifth Amendment for a taking, under either a physical invasion or regulatory taking theory, it must establish a compensable property interest").

n151. Compare *Tex. Equal Access to Justice Found.*, 270 F.3d 180 (concluding that per se analysis is proper approach to appropriations of money), with *Legal Found. of Wash.*, 271 F.3d 835 (concluding that ad hoc analysis is proper approach to appropriations of money).

n152. 449 U.S. 155 (1980).

n153. *Id.* at 164-65.

n154. *Id.* at 163.

n155. *Id.* at 164.

n156. *Tex. Equal Access to Justice Found.*, 293 F.3d at 249 (Wiener, J., dissenting).

n157. *Id.*

n158. 493 U.S. 52 (1989).

n159. *Id.* at 59-62.

n160. *Id.* at 62 n.9.

n161. See, e.g., *E. Enters. v. Apfel*, 524 U.S. 498, 529-38 (1998) (applying Penn Central regulatory takings factors to determine whether payments required by Coal Industry Retiree Health Benefit Act of 1992 violated the Takings Clause and stating, without analysis, that the "liability [was] not, of course, a permanent physical occupation of Eastern's property of the kind that we have viewed as a per se taking"); *United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989) (rejecting argument that deduction from monetary award as governmental user fee was "akin to a 'permanent physical occupation' of its property and therefore was a per se taking requiring just compensation"); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225 (1986) (rejecting takings challenge to statute requiring employers withdrawing from pension plans to pay unfunded liabilities despite contract provision to the contrary because "the Government [did] not physically invade or permanently appropriate any of the employer's assets for its own use"); *Tex. Equal Access to Justice Found.*, 293 F.3d at 248-49 (Wiener, J., dissenting) ("In this case, and possibly all others involving a monetizable interest, the per se doctrine ... is a blunderbuss approach to an issue that requires target-rifle accuracy."); *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 854 (9th Cir. 2001) (en banc) ("The per se analysis has not typically been employed outside the context of real property. It is a particularly inapt analysis when the property in question is money."); *Branch v. United States*, 69 F.3d 1571, 1576 (Fed. Cir. 1995) ("The principles of takings law that apply to real property do not apply in the same manner to statutes imposing monetary liability. Thus, even though taxes or special municipal assessments indisputably 'take' money from individuals or businesses, assessments of that kind are not treated as per se takings under the Fifth Amendment."); *Commercial Builders of N. Cal. v. City of Sacramento*, 941 F.2d 872, 876 (9th Cir. 1991) ("A purely financial exaction, then, will not constitute a taking if it is made for the purpose of paying a social cost that is reasonably related to the activity against which the fee is assessed."); *Atlas Corp. v. United States*, 895 F.2d 745, 756 (Fed. Cir. 1990) ("In this case, [the complainant] has not alleged a physical taking of any of its property. Its complaint alleges only that it will be required to spend sums of money [to comply with a regulation]. Requiring money to be spent is not a

taking of property."); *Wash. Legal Found. v. Tex. Equal Access to Justice Found.*, 86 F. Supp. 2d 624, 644 (W.D. Tex. 2000) (rejecting argument that per se analysis applied to monetary exactions and applying ad hoc analysis instead); *Commonwealth Edison Co. v. United States*, 46 Fed. Cl. 29, 40 (2000) ("The courts have generally held that a government-imposed obligation to pay 'money' is not susceptible to a takings analysis."); *Third & Catalina Assocs. v. City of Phoenix*, 895 P.2d 115, 120 (Ariz. Ct. App. 1995) ("Compliance with the ordinance merely requires the expenditure of money, not the giving up of land. There is no taking.").

n162. *123 S. Ct. 1406 (2003)*.

n163. Under such "IOLTA" programs, governments appropriate the interest earned on client funds while they are deposited in trust accounts by their attorneys to pay for legal services for the poor. Thus, through the government's intervention, IOLTA programs transfer interest earned on the private property of one class of citizens (clients) to a different class of citizens (those who cannot afford legal services). For a discussion of the history and operations of such programs, see Terence E. Doherty, *The Constitutionality of IOLTA Accounts*, 19 *Whittier L. Rev.* 487, 489-94 (1998).

n164. *123 S. Ct. at 1419*.

n165. The extent of the Court's analysis was as follows:

We agree that a per se approach is more consistent with the reasoning in our Phillips opinion than Penn Central's ad hoc analysis. As was made clear in Phillips, the interest earned in the IOLTA accounts "is the 'private property' of the owner of the principal." If this is so, the transfer of the interest to the Foundation here seems more akin to the occupation of a small amount of rooftop space in Loretto.

Id. (citation omitted).

n166. In the author's opinion, it seems arguable that such an approach allows for such unbridled and subjective law-making by the judiciary that it is not a proper approach in any case.

n167. *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 865 (9th Cir. 2001) (en banc) (Kozinski, J., dissenting). As an appendix to his dissenting opinion, Judge Kozinski set forth the opinion of Judge Kleinfeld, which was the decision of a three-judge panel of the Ninth Circuit that initially decided this case before the en banc rehearing was granted. Although the opinion was later withdrawn, Judge Kleinfeld echoed the analysis of Judge Kozinski:

Defendants seem to be arguing that the government can confiscate people's money without it being a taking compensable under the Fifth Amendment, based on cases where the government provided a service and charged a reasonable user fee for service. Taken out of the context of users' fees, the proposition is absurd. Unlike medieval England, most assets are now held in the form of fungible intangibles such as bank accounts, money market accounts, and securities. The Fifth Amendment protection of property would be eviscerated were we to construe confiscation of fungible intangibles as not amounting to a taking, as defendants urge.

... .

... The "economic impact" test is articulated in *Penn Central* in the context of regulation of the use of real estate, not deprivation in its entirety of any property. The point of the economic impact test in *Penn Central* is to distinguish government regulations of the owner's use of property permissible under its police power from those that go too far, requiring the government to compensate the owner for taking his property. That distinction is not necessary or appropriate where the government entirely appropriates a sum of money belonging to a private individual. The economic impact test would have relevance if the [regulation] merely regulated how the client used his interest, or where the interest was kept, or for how long. But that is not the case. The [regulation] entirely appropriates the interest on the client's principal in a trust account, so the distinction between regulation under the police power and a taking subject to Fifth Amendment protection is not affected by the economic impact.

Id. at 878-79.

n168. *Id.* at 865-66; *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 n.19 (2002) ("A regulatory taking ... does not give the government any right to use the property, nor does it dispossess the owner or affect her right to exclude others.").

n169. 535 U.S. at 323-24.

n170. *Legal Found. of Wash.*, 271 F.3d at 866 (Kozinski, J., dissenting).

n171. See, e.g., *Wash. Legal Found. v. Tex. Equal Access to Justice Found.*, 106 F.3d 640, 645 (5th Cir. 1997) (Benavides, J., dissenting). Judge Benavides pointed out that the constitutionality of the Texas IOLTA program depended on whether a per se or ad hoc approach were to be applied to the government's appropriation of interest earned on the principal of attorneys' clients' trust accounts. "Viewed as a regulatory takings case, IOLTA clearly passes muster because the clients have suffered no economic loss and the public has greatly benefited." *Id.* "Viewed as a per se takings case whereby the clients have a property interest that is literally appropriated by the state, IOLTA is almost certainly unconstitutional." *Id.*; see also *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 176 (1998) (Souter, J., dissenting) ("While a court would certainly consider any proposal that respondents might make for a departure from the *Penn Central* approach to vindicating the Fifth Amendment [when money is purportedly taken], application of *Penn Central* would not bode well for claimants like respondents."); Skouras, *supra* note 84, at 117 ("The balancing test in *Penn Central* is tilted in the government's favor.").

n172. *Legal Found. of Wash.*, 271 F.3d at 866 (Kozinski, J., dissenting).

n173. *Id.* (citation omitted).

n174. E.g., *Atlas Corp. v. United States*, 895 F.2d 745, 756 (Fed. Cir. 1990); *Wash. Legal Found. v. Tex. Equal Access to Justice Found.*, 86 F. Supp. 2d 624, 644 (W.D. Tex. 2000); *Washlefski v. Winston*, 60 F. Supp. 2d 534, 541 (E.D. Va. 1999). For the text of footnote 62 of the Sperry decision, which noted the fungibility of money as a justification for treating it differently under the Takings Clause than other forms of property, see the text *supra* accompanying note 160.

n175. *Wash. Legal Found. v. Tex. Equal Access to Justice Found.*, 94 F.3d 996, 1002 n.38 (5th Cir. 1996).

n176. See *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) ("[A] State, by ipse dixit, may not transform private property into public property without compensation This is the very kind of thing that the Takings Clause of the Fifth Amendment was meant to prevent.").

n177. *I.R.C. 3402* (2000).

n178. See, e.g., *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 n.17 (2002) ("When the government condemns or physically appropriates the property, the fact of a taking is typically obvious and undisputed.").

n179. *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 864 (9th Cir. 2001) (en banc) (Kozinski, J., dissenting).

n180. Of course, any person who has worked as an employee has received paychecks that disclose the amount of tax withheld by the employer. Although this provides notice to taxpayers of withholding from their paychecks, it arguably is less "obvious" than other governmental appropriation of property (e.g., building a public sidewalk through a person's front yard), because (1) mere numbers on a piece of paper may not resonate as clearly with taxpayers as construction equipment working in the front yard; and (2) withholding occurs before taxpayers ever possess the amounts withheld, which potentially reduces taxpayers' sense of ownership in the income.

n181. The Takings Clause purpose of vigorously protecting private property rights supports this argument. See discussion *supra* notes 77-79 and accompanying text.

n182. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). The Court explained that in such situations, "the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." *Id.*

n183. In this regard, for an argument that applying the ad hoc approach to IOLTA accounts is inconsistent with the original intent of the Framers of the Takings Clause, see James J. Holland, Comment, "Taking" Another Look at IOLTA: Applying Loretto's "Per Se" Test to Government Exactions of Money, 39 *Willamette L. Rev.* 219 (2003). The broad conceptions of "property" and "taken" arguably held by the Framers is consistent with this conclusion. See discussion *supra* Part III.A.

n184. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 n.17 (2002).

n185. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 329 (1987) (Stevens, J., dissenting).

n186. *Id.* at 330.

n187. See Krotoszynski, *supra* note 94, at 725-26 ("The cases involving interest on bank accounts prohibited direct government expropriations of the interest earned on the accounts, so that reliance on the three-part Penn Central test was unnecessary to the disposition of the case.").

n188. Importantly, history provides support for a broader interpretation of actual appropriation - therefore broadening the umbrella of appropriations within the per se approach. See discussion supra note 92. Moreover, the Court's recent application of the per se approach to the State of Washington's IOLTA program in *Brown v. Legal Foundation of Washington*, 123 S. Ct. 1406, 1419 (2003), provides additional support for general application of the per se approach to all monetary takings cases.

n189. In such cases, the court must assess whether the user fee is reasonably related to the government services provided. See *United States v. Sperry Corp.*, 493 U.S. 52, 60, 62 (1989) (rejecting takings challenge and accepting government's argument that deduction from monetary award was a "reasonable 'user fee' assessed ... and intended to reimburse the United States for its costs in connection with" obtaining the award through the Iran-United States Claims Tribunal because the user fee was "not so clearly excessive as to belie [its] purported character as [a] user fee"); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980) (finding taking because exaction of interest earned on interpleader fund was "not reasonably related to the costs of using the courts"); *Parker v. Barnhart*, 174 F. Supp. 2d 920, 940 (N.D. Iowa 2001) (finding that the "'user fee' at issue [was] indeed a 'fair approximation of the cost of the benefits supplied'"). The courts engage in a similar reasonableness analysis in the context of monetary exactions required as a condition for zoning permit approval. See, e.g., *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996). Because such monetary exactions are related to regulation of land use, they fall within the regulatory takings context. See *id.*

n190. That is, when the government imposes a financial obligation on a citizen as the result of a validly enacted law, the citizen's payment of money to the government to satisfy that obligation cannot constitute a taking. If it did, it would be impossible for the government to ever collect debts owed to it by citizens. As Professor Krotoszynski explains:

Although it is true that money, whether in the form of federal reserve notes, bank credits, gold ingots, or Euros, constitutes "property," it is quite silly to consider a general financial obligation to government "taking" of the funds or credits used to satisfy the obligation.

Krotoszynski, supra note 94, at 733.

n191. Under the Code, the federal government pays interest on tax refunds that are not paid within forty-five days of the later of the due date or date of filing of the return. *I.R.C. 6611(a), (e)* (2000). There is no indication in the statute that the disallowance of interest on refunds made within forty-five days constitutes a user fee for government services. See *id.* 6611(e). In fact, if the retention of interest were a user fee, it would seem that the government would pay interest on such rapidly-processed refunds and retain it for refunds that take more than forty-five days to process, because such refunds would presumably require more government services. Because the opposite is true, it is safe to conclude that the unpaid interest on tax refunds is not used to pay for processing.

n192. As discussed in Part III.B of this Comment, there are two potential scenarios where the per se, or categorical, approach applies. In the context of withheld income, the per se approach is appropriate because the government has actually appropriated the private property. The Lucas approach, under which a per se taking occurs when a regulation deprives a property owner of all or most of property's beneficial use, only applies when the property owner continues to possess the property. Thus, the Lucas approach is inapplicable to overwithheld income.

n193. Cf. *Kimball Laundry Co. v. United States*, 338 U.S. 1, 16 (1949) ("[The government] must pay compensation for whatever transferable value [the] temporary use [of the taken property] may have had.").

n194. See *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 172 (1998) (holding that interest earned on principal in trust accounts holding funds held by attorneys for their clients constituted private property of the clients); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980) (finding taking where government appropriated interest earned on interpleader fund during progress of case).

n195. Of course, this depends on what the meaning of "temporary" is. The taxpayer who cannot make use of his property during the tax year has lost that opportunity permanently. This illustrates what Chief Justice Rehnquist meant when he said "a distinction between 'temporary' and 'permanent' ... is tenuous." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 346-47 (2002) (Rehnquist, C.J., dissenting).

n196. See *Wash. Legal Found. v. Tex. Equal Access to Justice Found.*, 270 F.3d 180, 188 (5th Cir. 2001) ("Because the State has permanently appropriated [the appellant's] interest income against his will, instead of merely regulating its use, there is a per se taking."); *Wash. Legal Found. v. Tex. Equal Access to Justice Found.*, 106 F.3d 640, 645 (5th Cir. 1997) (Benavides, J., dissenting) ("[There is a] possibility that a per se taking did not occur in the subject case because clients voluntarily deposit their money with an attorney (who, in turn, deposits eligible funds into an IOLTA account)."). But see *Webb's*, 449 U.S. at 164-65 (holding that taking occurred when government appropriated interest earned on interpleader fund even though claimants voluntarily turned the principal over to the government).

n197. This is also consistent with the original understanding of the Takings Clause as a confirmation of the common law principle that the government may only appropriate private property from nonconsenting owners by paying just compensation for it. See discussion *supra* accompanying note 84.

n198. See *I.R.C. 3402* (2000). Importantly, there are some taxpayers who are not subject to tax withholding, but they are the exception rather than the rule. See discussion *supra* note 54 (regarding requirements for exception from withholding).

n199. Section 3402(f)(5) of the Code provides that "withholding exemption certificates shall be in such form and contain such information as the Secretary may by regulations prescribe." *Treasury Regulation sections 31.3402(f)(1)-1(a)(1)* and *31.3402(m)-1(a)* provide that employees must complete the Form W-4 to obtain the benefit of any withholding exemptions or allowances. Technically, an employee could fill out a different form in lieu of the Form W-4. *Treas. Reg. 31.3402(f)(5)-1(a)* (as amended in 1997). However, such form must contain provisions identical with those of Form W-4, and the employer must also provide all tables and instructions contained in the Form W-4 to any employee choosing to fill out such an alternative (but identical) form. *Id.*

n200. *I.R.C. 3402(f)(2)(A)*.

n201. See IRS Publication 15, *supra* note 55, at 37-56 (providing tables reflecting required withholding for employees based upon marital status, number of withholding allowances, and amount of income per paycheck).

n202. See *I.R.C. 3401(e)*; *id.* 3402(l)(1) ("The employer shall treat the employee as a single person unless there is in effect with respect to such payment of wages a [Form W-4] furnished to the employer by the employee after the date of the enactment of this subsection indicating that the employee is married."); see also IRS Publication 505, *supra* note 54, at 10 ("If you do not give your employer a completed Form W-4, your employer must withhold ... as if you were single ...").

n203. *Wash. Legal Found. v. Tex. Equal Access to Justice Found.*, 270 F.3d 180 (5th Cir. 2001).

n204. *Id.* at 188 ("Clients have no choice whether to participate because attorney participation in Texas' IOLTA program is mandatory. Therefore, a client cannot avoid the appropriation of his interest by selecting an attorney who elects not to participate."). Taxpayers are required to participate in withholding because they must complete the Form W-4 to reduce withholding from the maximum required by law, which is the default withholding in the absence of completion of the Form W-4. *I.R.C. 3401(e)*, 3402(l)(1).

n205. To the extent that employees have a "choice" to complete a Form W-4, there is no meaningful choice. That is, if an employee does not fill out the Form W-4, he is deemed to be a single taxpayer with zero allowances - leading to the maximum amount of withholding allowed by law. *I.R.C. 3401(e)*, 3402(l)(1). Thus, an employee has the option of either being subjected to the maximum amount of withholding or some lesser amount of withholding, which may still result in overwithholding of income tax.

n206. See *I.R.C. 3402*.

n207. It is important to point out that the deference provided to the Secretary of the Treasury to prescribe regulations interpreting congressional statutes under *Chevron, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), does not insulate the Form W-4 from scrutiny under the Takings Clause. Under *Chevron*, when a "statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. If an agency promulgates a regulation that is not a reasonable interpretation of the controlling statute, it is invalid under *Chevron*. Because section 3402(f)(5) of the Code leaves the form and contents of the withholding exemption certificate entirely up to the Secretary of the Treasury, the Form W-4 is protected by *Chevron* from an attack based on the argument that it is an unreasonable interpretation of the controlling statute.

However, even if Form W-4 is valid under *Chevron*, this does not bear on whether or not the Form W-4's role in the withholding system contributes to a violation of the Takings Clause. Essentially, it is quite possible that a perfectly reasonable interpretation of section 3402(f)(5) may violate the Constitution. In short, the *Chevron* doctrine does not defeat any Takings Clause argument based upon Form W-4.

n208. IRS Form W-4, *supra* note 57, at 1.

n209. *Id.*

n210. This assertion assumes that the employee correctly follows the instructions of the Form W-4 and any overwithholding, therefore, results from the *ex ante* and *ex post* shortcomings of the tax withholding system discussed in Part II.B. See *supra* text accompanying note 70.

n211. See *I.R.C. 6072(a)*; e.g., IRS Form 1040, *supra* note 11, at 2 l.70a.

n212. See discussion *supra* notes 61-64 and accompanying text.

n213. See *I.R.C. 3402(f)(3)(B)*.

n214. On a related point, when a taxpayer simply misunderstands the consequences of filling out the Form W-4, arguably, the taxpayer has not truly consented to overwithholding. Simply, it would seem that one cannot consent to something one cannot understand. Importantly, in order for a purported waiver of a constitutional right to be effective, "the record must reflect a basis for the conclusion of actual knowledge of the existence of the [constitutional] right or privilege, full understanding of its meaning, and clear comprehension of the consequence of the waiver." *Hatfield v. Scott*, 306 F.3d 223, 230 (5th Cir. 2002). If a taxpayer fails to understand the consequences of the Form W-4, this strict standard would seemingly not be met.

n215. *Dana & Merrill*, supra note 76, at 183.

n216. On the other hand, this scenario arguably would also constitute a permanent taking. That is, what is permanently taken is not the overwithheld income, but the "rental value" - or use - of such income during the term of the taking. See *Hendler v. United States*, 952 F.2d 1364, 1376 (Fed. Cir. 1991) ("Permanent does not mean forever, or anything like it."); Meltz et al., supra note 49, at 125.

n217. 482 U.S. 304 (1987).

n218. *Id.* at 318.

n219. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 356 (2002) (Thomas, J., dissenting).

n220. See, e.g., *Kimball Laundry Co. v. United States*, 338 U.S. 1, 16 (1949) ("We conclude ... that since the Government for the period of its occupancy of petitioner's plan has for all practical purposes preempted the trade routes, it must pay compensation for whatever transferable value their temporary use may have had."); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 382 (1945) (holding that just compensation for temporary appropriation of property is market rental value).

n221. *Skouras*, supra note 84, at 44. That is, "the Supreme Court has read this clause out of the Constitution." *Id.*

n222. *Id.*

n223. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984).

n224. *Dana & Merrill*, supra note 76, at 196. Illustrating how broadly "public use" has been defined, the Court recently held in *Brown v. Legal Foundation of Washington*, 123 S. Ct. 1406 (2003), that the "public use" requirement was "unquestionably satisfied" where private property was confiscated and then used to pay for legal services for needy individuals. *Id.* at 1417. Justice Scalia explained:

The Court announces a new criterion for "public use": The requirement is "unquestionably satisfied" if the State could have raised funds for the same purpose through a "special tax" or a "system of user fees." This reduces the "public use" requirement to a negligible impediment indeed, since I am unaware of any use to which state taxes

cannot constitutionally be devoted. The money thus derived may be given to the poor, or to the rich, or (insofar as the Federal Constitution is concerned) to the girl-friend of the retiring governor. Taxes and user fees, since they are not "takings," are simply not subject to the "public use" requirement, and so their constitutional legitimacy is entirely irrelevant to the existence vel non of a public use.

Id. at 1422-23 n.2 (Scalia, J., dissenting) (citations omitted). Thus, it appears that any use by the government of confiscated property constitutes a "public use."

n225. See Skouras, *supra* note 84, at 44-45.

n226. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980).

n227. In fiscal year 2002, the federal government collected over \$ 750 billion in individual income taxes through withholding. IRS Data Book, *supra* note 7, at 8 tbl.1.

n228. This conclusion is bolstered by the broad conception of "public use" described in *Brown*, 123 S. Ct. at 1417. See discussion *supra* note 224.

n229. *Wash. Legal Found. v. Tex. Equal Access to Justice Found.*, 86 F. Supp. 2d 624, 637 (W.D. Tex. 2000).

n230. See, e.g., *Brown*, 123 S. Ct. at 1419 ("The 'just compensation' required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain."); *United States v. W.G. Reynolds*, 397 U.S. 14, 16 (1970) ("The Court at an early date adopted the concept of market value: the owner is entitled to the fair market value of the property at the time of taking."); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949) ("The value compensable under the Fifth Amendment ... is only that value which is capable of transfer from owner to owner and thus of exchange for some equivalent."); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 379, 382 (1945) ("The compensation to be paid is the value of the interest taken... . In the ordinary case, for want of a better standard, market value ... is the criterion of that value."); *Wash. Legal Found. v. Tex. Equal Access to Justice Found.*, 270 F.3d 180, 199 (5th Cir. 2001) (Wiener, J., dissenting) ("Payment of just compensation is an effort to put the claimant ... in as good a position pecuniarily as if his property had not been taken." (quotation omitted)); *Tex. Equal Access to Justice Found.*, 86 F. Supp. 2d at 638 ("The Court must calculate any loss objectively and independently of the claimant's subjective valuation.").

n231. *W.G. Reynolds*, 397 U.S. at 16; see also *Brown*, 123 S. Ct. at 1419 ("The private party "is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more." (quoting *Olson v. United States*, 292 U.S. 246, 255 (1934))).

n232. E.g., *Kimball Laundry*, 338 U.S. at 7 ("The proper measure of compensation is the rental that probably could have been obtained, and so this Court has held in ... recent cases dealing with temporary takings."); *Gen. Motors*, 323 U.S. at 382.

n233. *Kimball Laundry*, 338 U.S. at 7.

n234. Of course, for those taxpayers who intentionally use the withholding system for "forced savings," there has been no taking because the taxpayers have consented to the overwithholding. See discussion supra note 52.

n235. *W.G. Reynolds*, 397 U.S. at 16 ("The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken.").

n236. Cf. *Gen. Motors*, 323 U.S. at 382 ("The value of [the government's temporary] occupancy is ... what would be the market rental value of such a building on a lease by the long-term tenant to the temporary occupier.").

n237. As the Court has stated:

The right to the use of [money] without charge is a valuable interest in the money lent, as much so as the rent-free use of property consisting of land and buildings. In either case, there is a measurable economic value associated with the use of the property transferred. The value of the use of money is found in what it can produce; the measure of that value is interest - "rent" for the use of the funds.

Dickman v. Comm'r, 465 U.S. 330, 337 (1984).

n238. Once again, this statement is not true for those taxpayers who intentionally cause the system to overwithhold income. See discussion supra note 52.

In addition, it is important to distinguish the failure to pay interest on tax refunds from the government's appropriation of interest earned on IOLTA account principal in *Brown v. Legal Foundation of Washington*, 123 S. Ct. 1406 (2003). In that case, the Court emphasized that just compensation equaled zero because "if the funds were able to make any net return, they would not be subject to the IOLTA program." *Id.* at 1421. Thus, all principal deposited in such IOLTA accounts could not, by definition, have earned net interest for the owners of such principal. In contrast, when the government confiscates more income from taxpayers than they owe in taxes, taxpayers lose money that they could presumably invest in interest-bearing accounts during the year. For this reason, even though the Court in *Brown* found zero to constitute just compensation where the government confiscated interest earned on principal deposited in IOLTA accounts, it does not follow that just compensation for the overwithholding of income would also equal zero.

n239. Alternatively, if the property interest focused upon is the interest earned on the overwithheld income by the government during the year, the government appropriates this property by not paying such interest back to the taxpayers with tax refunds.

n240. Even under a narrower interpretation of "public use," this element of a taking claim probably would be satisfied.

n241. These are the magic words of the Court in *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 162 (1980).

n242. Of course, the government already pays interest on tax refunds that are not refunded within forty-five days of the later of the due date of the taxpayer's tax return or the date the return is filed. *I.R.C. 6611(a)*, (e) (2000).

At first blush, a requirement that the government pay interest on all tax refunds seems like it would significantly alter government finances. In reality, however, the financial consequences of such a requirement would be a "drop in the bucket" for the federal government. In fiscal year 2002, the federal government collected approximately \$ 1.037 trillion in individual income taxes. IRS Data Book, *supra* note 7, at 8 tbl.1. Of those taxes, approximately \$ 210 billion were refunded. *Id.* Thus, if the federal government paid a conservative 4 percent interest rate on all of these tax refunds, the amount of interest paid would be merely \$ 8.4 billion.

Under the Code, 4 percent is the rate of interest that the federal government paid during the fourth calendar quarter of 2003 on overpayments of tax that were not refunded within forty-five days of the tax return's due date or filing date, whichever was later. Section 6611(a) of the Code provides: "Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the overpayment rate established under section 6621." Section 6621(a)(1) of the Code defines the overpayment interest rate, for individual taxpayers, as the sum of (A) the Federal short-term rate determined under 6621(b) of the Code, plus (B) three percentage points. "The Federal short-term rate for any month shall be the Federal short-term rate determined during such month by the Secretary [of the Treasury] in accordance with section 1274(d). Any such rate shall be rounded to the nearest full percent (or, if a multiple of [1/2] of 1 percent, such rate shall be increased to the next highest full percent)." *I.R.C. 6621(b)(3)*. Under the most recent (and relatively low) Federal short-term rate, the interest rate paid on overpayments equals 4 percent. See *Rev. Rul. 2003-104, 2003-39 I.R.B. 636*. To be consistent with reality, this interest rate should probably only be applied to the average balance of overwithheld fund during the year. For instance, funds that are withheld in October are "taken" for a shorter amount of time than funds that are withheld in January. In any event, such a modest sum of interest on tax refunds clearly would not contribute to any runaway deficits.

n243. See discussion *supra* note 52.

n244. Under the current system, employers are already required to file information returns with the government indicating the amount of income paid to their employees and the amount of income withheld from such employees. *I.R.C. 6051(d)*. This information return is a duplicate of the information provided to the employee on the Form W-2, which is used by the employee to complete the employee's tax return. *Id.* 6051(a). The Internal Revenue Service matches this information return to the taxpayer's tax return "to detect underreporting of income or overreporting of withholding." Doernberg, *supra* note 17, at 636.

n245. Doernberg, *supra* note 17, at 644. On the other hand, the primary justification for maintaining the current withholding system is the fear that in the absence of withholding, taxpayer noncompliance with the tax laws would drastically increase. *Id.* at 629. Yet, arguably any noncompliance issues within a non-withholding regime could be dealt with through more aggressive IRS enforcement activities. *Id.* at 630.

In addition, the withholding system is often justified by the paternalistic idea that the government should protect those taxpayers who are not responsible enough to budget effectively for paying taxes at the end of the year. *Id.* at 631.

A third justification for the withholding system is that it satisfies the federal government's ongoing need for cash flow. *Id.* at 652. Of course, in the absence of withholding, the government could just as easily solve any cash flow problems by requiring tax payments to be made by different taxpayers on different dates throughout the year - for instance, each individual could file his tax return on his birthday. *Id.*

Although these justifications for the tax withholding system are not necessarily dispositive of the issue, they at least present colorable arguments against wholesale abolition of the tax withholding system. But see *id.* at 636-52 (arguing for abolition of federal income tax withholding system because information return and matching system represents a superior approach).

n246. I offer the potential alternatives of paying interest on all refunds or allowing payment of taxes at the end of the year to "get the ball rolling."

n247. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 178 (1998) (Souter, J., dissenting).