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Supreme Court's IOLTA Decision: Of Dogs, Mangers, and the Ghost of Mrs. Frothingham, 30 Seton Hall L. Rev. 846 (2000)

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INTRODUCTION

In recent years, the United States Supreme Court has handed down a number of decisions that have intrigued commentators by suggesting a stronger role for several constitutional provisions in challenging acts of the political branches of government. These cases, which invoke the Tenth[1] and Eleventh[2] Amendments, and the Privileges and Immunities Clause of the Fourteenth Amendment,[3] have sparked widespread discussion. This discussion has centered upon the question of whether these cases should be seen as no more than curious exceptions that do not seriously infringe on legislative power, or as the first moves of active intervention by the Supreme Court to protect interests previously given little protection from legislative discretion.

In 1998, the United States Supreme Court issued its opinion in

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[1] U.S. CONST. amend. X; *see also* Printz v. United States, 521 U.S. 898, 933-34 (1997) (overturning federal statutory requirement that local officials conduct background checks of prospective firearms purchasers); New York v. United States, 505 U.S. 144, 174-75 (1992) (overturning federal statute requiring states to regulate waste disposal in a particular manner).

[2] U.S. CONST. amend. XI; *see also* Alden v. Maine, 119 S. Ct. 2240, 2246 (1999) (holding that federal statute cannot abrogate state sovereign immunity in state court with respect to alleged violations of Fair Labor Standards Act); College Sav. Bank v. Florida Prepaid PostSecondary Educ. Expense Bd., 119 S. Ct. 2219, 2233 (1999) (holding that states may invoke sovereign immunity in state-court proceeding against state agency for violation of the Lanham Act).

[3] U.S. CONST. amend. XIV, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ."); *see also* Saenz v. Roe, 119 S. Ct. 1518, 1526, 1530 (1999) (holding that state statute limiting welfare payments to new residents to the amount received in former state of residence violates Privileges and Immunities Clause).

Phillips v. Washington Legal Foundation,[4] which addressed a challenge to a state program that helped fund legal services for low-income clients through the use of interest earned on attorney-maintained bank accounts aggregating small amounts of clients' money.[5] A five-Justice majority held that such a program impacted clients' property interests and required courts to decide whether the Takings Clause of the Fifth and Fourteenth Amendments was violated.[6] The decision in *Phillips*, quite unsurprisingly, drew much attention from bar associations and other supporters of legal service providers.[7] Although it is by no means clear that upon remand the court will find the program to be an uncompensated taking, the possibility of such a holding and its consequences for the funding of legal services cannot be taken lightly. Moreover, as the organized bar and other supporters of such programs pay justifiable attention to the particular impact of *Phillips* on legal service providers, some potentially broader implications of the decision may be overlooked.

By taking an expansive view of the meaning of the term "property," *Phillips* enlarges the scope of the Takings Clause to permit parties to overcome normal standing requirements and to use the clause not for its intended purpose of guaranteeing compensation when the government engages in an admittedly legitimate activity, but instead to attack, in a fundamental way, the government program itself. Unlike almost all prior Takings Clause cases, *Phillips* appears to involve only the right to exclude others from one's property; there is no loss in value or physical occupation of property.

This invocation of the Takings Clause raises several compelling questions. The first is whether this "dog in a manger"[8] activity—preventing others from benefiting from something that is of no value to the owner—is what the Takings Clause should protect. The second is whether the recognition of this as a distinct property right is merely a quirky response to a particular set of facts, or whether it

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[4] 524 U.S. 156 (1998).

[5] *See id.* at 161-63.

[6] *See id.* at 172; *see also infra* notes 27-45 and accompanying text.

[7] *See, e.g.*, Erwin Chemerinsky, *Will IOLTA Survive?*, 35 TRIAL 80 (1999) (suggesting responses to *Phillips* to ensure the survival of IOLTA programs); Leon D. Lazer, *IOLTA and* Daubert, 15 TOURO L. REV. 995 (1999); Jason Lacey, Note, *IOLTA Programs and Professional Responsibility: Dealing with the Aftermath of* Phillips v. Washington Legal Foundation, 47 U. KANSAS L. REV. 911 (1999).

[8] A "dog in the manger" is "a person who selfishly withholds from others something that he himself cannot use or does not need." WEBSTER'S THIRD INTERNATIONAL DICTIONARY 688 (Philip Babcock Gove ed., 1981). The phrase is derived "from the fable of the dog who would not allow a horse or ox to eat the hay in a manger, even though he did not want it himself." *Id.*

foreshadows an expanded use of the Takings Clause to permit property owners to attack programs that they oppose on ideological grounds with a stronger weapon than the usually unsuccessful invocation of substantive due process. *Phillips*, in fact, is not alone among recent Supreme Court decisions in suggesting that the Takings Clause may be invoked in the future, in some new and surprising ways, to elevate "property rights" above community interests. Thus, regardless of the final disposition of the specific takings question presented, *Phillips* may be of lasting importance.

This Article will explore the significance of *Phillips* beyond the boundaries of its impact on legal services. Part I will give a brief overview of Interest on Lawyer's Trust Accounts (IOLTA) programs. This will be followed, in Part II, by a discussion of *Phillips*. Part III will give a brief overview of the Supreme Court's Takings Clause jurisprudence and *Phillips*'s place within that jurisprudence. Finally, Part IV will explore the ways in which *Phillips* may be a significant indication of things to come, especially in light of some related Supreme Court cases and developments.

I. A BRIEF OVERVIEW OF IOLTA

IOLTA accounts grew out of an insight, first recognized in Australia,[9] that quirks in the banking system would allow for the generation of funds for a worthy social cause, specifically legal assistance for the poor, without noticeable financial sacrifice by anyone. Attorneys commonly hold their clients' funds in bank accounts, which, in theory, might bear interest. However, often the sums held for an individual client are so small, or are held for so short a time, that the interest earned is less than the transaction costs of establishing and administering the account. Thus, in reality, the client's net interest is zero.[10]

If these small sums, however, were aggregated into a single account, and the costs of allocating interest to each individual client were eliminated, that account would generate some net interest. The attorneys would have no legitimate claim to this interest because it would be generated by clients' funds. Also, the administrative costs

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[9] *See* Taylor S. Boone, *Comments: A Source of Revenue for the Improvement of Legal Services, Part I: An Analysis of the Plans in Foreign Countries and Florida Allowing the Use of Clients' Funds Held by Attorneys in Non-Interest-Bearing Trust Accounts to Support Programs of the Organized Bar*, 10 ST. MARY'S L.J. 539, 542-43 (1979). Australia, like the United States, has a federal structure, and IOLTA programs were adopted on a state-by-state basis. *See id.* at 542-43.

[10] *See* W. Frank Newton & James W. Paulsen, *Constitutional Challenges to IOLTA Revisited*, 101 DICK. L. REV. 549, 553-56 (1997).

of carving the interest up among clients would exceed the value of the interest itself. The obvious alternative course of action would be to have the bank pay no interest at all or, to put it another way, to retain the interest itself. The creators of the IOLTA concept, however, realized that another option existed; the interest could be diverted toward a program to help fund legal assistance for low-income clients. In this modern version of alchemy, a public good could be funded without depriving individuals of anything that they had or reasonably expected to obtain.[11]

Prior to 1981, United States banking regulations prohibited the payment of interest-on-demand deposits held by for-profit entities, including law firms.[12] Thus, the Australian innovation was of only academic interest.[13] In that year, however, the regulations were modified to permit interest-bearing demand deposits in cases in which a charitable organization would receive "the entire beneficial interest."[14] Following these modifications, states began to implement IOLTA programs.[15]

By the late 1990s, every state except Indiana had adopted such a program.[16] IOLTA funds have been employed, to some extent, to compensate for recent reductions in federal funding for legal assistance programs.[17] During the last decade, these federally funded

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[11] *See id.* Client funds that, as a practical matter, can earn interest are not subject to IOLTA; those funds are placed in an interest-bearing account. *See id.* at 555. In *Phillips*, the Fifth Circuit made the analogy to alchemy, the medieval attempt to create gold from worthless metals, to disparage the IOLTA program. *See* Washington Legal Found. v. Texas Equal Access to Justice Found., 94 F.3d 996, 1000 (5th Cir. 1996).

[12] *See* Peter M. Siegel, *Interest on Lawyers' Trust Account Programs: Do They "Take" "Property" of the Client?*, 36 U. FLA. L. REV. 674, 688-91 (1984).

[13] During the 1970s, Canada and the Republic of South Africa, two other nations with a common-law history, followed Australia's example and established IOLTA programs. *See* Boone, *supra* note 9, at 545, 549-50. The South African plan, however, was limited to voluntary participation. *See id.* at 549.

[14] *See* 12 U.S.C. § 1832(a)(2) (1989); *see also* Siegel, *supra* note 12, at 688-90 & nn.96-97.

[15] Florida was the first state to adopt an IOLTA program. *See* Boone, *supra* note 9, at 551. At that time, federal regulations still prohibited the payment of interest on demand deposits. *See id.* at 552. In 1981, Congress made clear that interest-bearing demand deposits would be allowed nationwide. *See* Siegel, *supra* note 12, at 690 nn.96-97.

[16] Indiana finally decided, in principle, to establish an IOLTA program in 1995. *See* Brennan J. Torregrossa, Note, Washington Legal Foundation v. Texas Equal Access to Justice Foundation: *Is There an Iota of Property Interest in IOLTA?*, 42 VILL. L. REV. 189, 191-92. Not all programs are mandatory, however. A significant minority allow clients to opt out, and a handful are fully voluntary. *See id.* at 193 n.9.

[17] *See* Chemerinsky, *supra* note 7, at 80. Chemerinsky notes that

> [a]lternative sources of money have become imperative, and by far the

legal assistance programs have come under steady attack by conservatives, who perceive that such programs have negative effects on the legal system and culture.[18]

In light of political opposition to government-funded legal services in general, the conservative opposition to IOLTA programs is not surprising. In fact, judicial challenges to IOLTA programs have taken two different forms. The first line of attack openly has taken issue with the causes supported by IOLTA-funded legal services programs, claiming that the First Amendment rights of lawyers and clients involved in IOLTA programs are infringed upon when those individuals are compelled to financially support the advocacy of positions contrary to their own beliefs.[19] The second theory has avoided explicit consideration of the content of IOLTA-funded programs, or the challenger's ideological quarrels with the goals pursued by those programs, by invoking the Takings Clause of the Fifth and Fourteenth Amendments.[20] This theory claims that the

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> most important supplement to federal funds is state Interest on Lawyers' Trust Account (IOLTA) programs. Nationally, it is estimated that IOLTAs provide more than $100 million annually for legal services. The significance of this is evident from the fact that the entire budget for the federal Legal Services Corp. for the last fiscal year was just $270 million.

Id.

[18] *See, e.g.*, 141 CONG. REC. S14524 (1995) (statement of Sen. Inhofe) (stating that Legal Services Corporation "has turned into an agency that is trying to reshape the political and legal and social fabric of America"). Senator Inhofe claimed that the Legal Services Corporation has contributed "extensive class action suits and frivolous litigation." *Id.* Moreover, the Senator stated that the "negative effects of the LSC's attempts to reorder society permeate our culture, from the business community to government to churches." *Id.* Thus, not only has the funding for federal legal services been cut severely in recent years, but restrictions have been placed on the types of clients and matters to which legal service attorneys may attend. *See generally* Alan W. Houseman, *Restrictions by Funders and the Ethical Practice of Law*, 67 FORDHAM L. REV. 2187 (1999).

[19] *See, e.g.*, Washington Legal Found. v. Mass. Bar Found., 993 F.2d 962, 976 (1st Cir. 1993). The most prominent academic argument in favor of the position that IOLTA constitutes a "political exploitation" of a trust, which violates, among other things, First Amendment rights, was put forward by Charles E. Rounds, Jr. *See* Charles E. Rounds, Jr., *Social Investing, IOLTA, and the Law of Trusts: The Settlor's Case Against the Political Use of Charitable and Client Funds*, 22 LOY. U. CHI. L.J. 163, 192 (1990).

[20] U.S. CONST. amend. V. (stating, "[N]or shall private property be taken for public use, without just compensation"). Prior to the adoption of the Fourteenth Amendment, this restriction limited only the federal government. *See* Barron v. Baltimore, 32 U.S. 243, 250-51 (1833). This requirement, however, has been incorporated into the Fourteenth Amendment's guarantee that no state "shall . . . deprive any person of life liberty or property, without due process of law." U.S. CONST. amend. XIV; *see also* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

government could not "take" the interest generated by clients' funds without compensation.[21] Of course, compensation in these cases would destroy the program because presumably the government would have to pay exactly what it received, leaving it with no net interest to devote to legal services.

All of these challenges were unsuccessful[22] until the Washington Legal Foundation, a conservative public interest group, and a Texas attorney and his client challenged the Texas IOLTA program[23] on both First Amendment and Takings Clause grounds.[24] In that case, the district court granted summary judgment for the defendants, holding that, with respect to the Takings Clause claim, no property of the client was involved, thus making the usual balancing tests employed in takings cases inapplicable.[25] The Court of Appeals for the Fifth Circuit, however, reversed the district court holding,[26] and the Supreme Court, in a five-to-four decision, affirmed the Fifth Circuit decision.[27] While the Supreme Court's opinion might, in the long run, have little lasting effect on IOLTA programs, the decision may contain the seeds of a Takings Clause jurisprudence extending far beyond that which the Court has previously endorsed.

II. *PHILLIPS V. WASHINGTON LEGAL FOUNDATION*

In 1984, the Texas Supreme Court promulgated a rule requiring Texas attorneys who receive client funds "nominal in amount or [that] are reasonably anticipated to be held for a short period of time" to place those funds in an interest-bearing account.[28] According to the rule, the interest earned on those accounts is to be

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[21] *See, e.g., Washington Legal Found.*, 993 F.2d at 973-76; Cone v. State Bar of Fla., 819 F.2d 1002, 1004 (11th Cir.) (1987).

[22] *Washington Legal Found.*, 993 F.2d at 974; *Cone*, 819 F.2d at 1006. In addition to the federal court decisions in *Washington Legal Foundation* and *Cone*, several state courts have reached similar decisions. *See In re* Arkansas Bar Ass'n, 675 S.W.2d 355, 357-58 (Ark. 1984); Carroll v. State Bar of Cal., 213 Cal. Rptr. 305, 311 (Ct. App. 1985); *In re* Minnesota State Bar Ass'n, 332 N.W.2d 151, 158 (Minn. 1982); *In re* New Hampshire Bar Ass'n, 453 A.2d 1258, 1261 (N.H. 1983); *In re* Interest on Lawyers' Trust Accounts, 672 P.2d 406, 407 (Utah 1983).

[23] TEXAS STATE BAR RULES Art. XI (1984).

[24] *See* Washington Legal Found. v. Texas Equal Access to Justice Found., 873 F. Supp. 1, 5-10 (W.D. Tex. 1999), *rev'd*, 94 F.3d 996, 1005 (5th Cir. 1996), *reh'g denied* 106 F.3d 640 (1997), *cert. granted*, Phillips v. Washington Legal Found., 521 U.S. 1117 (1997), *affirmed sub nom.* Phillips v. Washington Legal Found., 524 U.S. 156, 172 (1998).

[25] *See Washington Legal Found.*, 873 F. Supp. at 8.

[26] *See Washington Legal Found.*, 94 F.3d at 1004.

[27] *See Phillips*, 524 U.S. at 172.

[28] *Id.* at 161 (quoting TEXAS STATE BAR RULES Art. XI, § 5(a) (1984)).

paid to a court-established nonprofit foundation, which would distribute the money to nonprofit legal service organizations whose "primary purpose" is to provide "legal services to low income persons."[29] Additional rules clarify the meaning of "nominal in amount" or "held for a short period of time" as follows:

> Such funds, considered without regard to funds of other clients which may be held by the attorney, law firm or professional corporation, could not reasonably be expected to earn interest for the client or if the interest which might be earned on such funds is not likely to be sufficient to offset the cost of establishing and maintaining the account, service charges, accounting costs and tax reporting costs which would be incurred in attempting to obtain the interest on such funds for the client.[30]

In response to the promulgation of the Texas IOLTA program, the Washington Legal Foundation, "a public-interest law and policy center with members in the State of Texas,"[31] along with a Texas attorney and a Texas businessman who frequently uses attorney services, sued the justices of the Supreme Court of Texas and the foundation that receives and distributes Texas's IOLTA funds.[32] The plaintiffs claimed, among other things,[33] that the program took property without just compensation in violation of the Fifth and Fourteenth Amendments.[34] The district court granted summary judgment to the defendants,[35] but the Court of Appeals for the Fifth Circuit reversed.[36] The Fifth Circuit held that interest was the property of the owner of the principal "independent of the amount or value of interest at issue."[37] This "plain rule," the court concluded, supported the plaintiffs' claims.[38]

The United States Supreme Court granted certiorari to consider the Takings Clause issue.[39] In an opinion by Chief Justice Rehnquist, the Supreme Court began its analysis by defining the question presented in the defendants' summary judgment motion as "whether

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[29] *Id.* at 162 (quoting TEXAS IOLTA RULES R. 10 (1984)).

[30] *Id.* (quoting TEXAS IOLTA RULES R. 6 (1984)).

[31] *Id.*

[32] *See id.* at 163.

[33] The lawsuit included First Amendment claims. *See* Washington Legal Found. v. Texas Equal Access to Justice Found., 873 F. Supp. 1, 9-10 (W.D. Tex. 1995). Those claims were not part of the case at the Supreme Court level.

[34] U.S. CONST. amend. V.

[35] *See Washington Legal Found.*, 873 F. Supp. at 8.

[36] *See Washington Legal Found.*, 94 F.3d at 1004.

[37] *Id.* at 1002.

[38] *See id.* at 1003.

[39] *See Phillips*, 524 U.S. at 163.

the interest income generated by funds held in IOLTA accounts is private property" subject to the Takings Clause.[40] The question, explained the Court, had to be answered primarily by looking to state law because "the [United States] Constitution protects rather than creates property interests."[41] The Chief Justice noted initially that all the parties agreed that the principal held in the trust account was the client's property.[42] After articulating this uncontroversial point, the Court stated simply that Texas law had long recognized the black-letter rule that "interest follows principal,"[43] and, therefore, the State could not disavow its existence in this case.[44] The Court also brushed aside a few exceptions to the general rule as not relevant to the IOLTA situation.[45]

Most significantly, the Court addressed the contention that, because the IOLTA funds could not generate net interest for the owners of the principal, the program could not constitute a taking. The Court stated:

> We have never held that a physical item is not "property" simply because it lacks a positive economic or market value. . . . Our conclusion in this regard was premised on our long-standing recognition that property is more than economic value; it also consists of "the group of rights which the so-called owner exercises in his dominion of the physical thing," such "as the right to possess, use and dispose of it."[46]

Thus, the Supreme Court affirmed the Fifth Circuit's determination that the interest earned on the client funds placed in IOLTA accounts constituted private property.[47] The Court, however, declined to rule on the ultimate questions of "whether [those] funds have been 'taken' by the State," or "the amount of 'just

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[40] *Id.*

[41] *Id.* at 164.

[42] *See id.*

[43] *See id.* at 166 (citing Sellers v. Harris County, 483 S.W.2d 242, 243 (Tex. 1972) ("The interest earned by deposit of money owed by the parties to the lawsuit is an increment that accrues to that money and to its owner.")).

[44] *See id.* at 167. For a critique of the Fifth Circuit's analysis of the "interest follows principal" rule as a matter of Texas state law, see Newton & Paulsen, *supra* note 10, at 566-77.

[45] *See Phillips*, 524 U.S. at 167-68. The Court found these exceptions, including "income-only trusts and certain marital property," to have "a firm basis in traditional property law principles" and thus distinguishable from the IOLTA situation. *Id.* at 167.

[46] *Id.* at 169-70 (quoting United States v. General Motors Corp., 323 U.S. 373, 380 (1945)).

[47] *See id.* at 172.

compensation,' if any, due respondents."[48]

In disagreeing with the majority's position, the four dissenting Justices, in two separate dissenting opinions by Justice Souter and Justice Breyer, put forward two principal arguments. First, both Justice Souter and Justice Breyer contended that the Court could not address properly the question of whether any property interest existed without also considering the ultimate question of whether a compensable taking had taken place.[49] Second, if such a separate inquiry must be made, Justice Breyer argued that the majority's ultimate answer was incorrect.[50]

With respect to the first point, Justice Souter pointed out that the majority had chosen "to announce an essentially abstract proposition" that "may ultimately turn out to have no significance in resolving the real issue raised in th[e] case."[51] While stating that the Court should not resolve the ultimate takings question, but rather remand it, the Justice outlined the "serious" issues reducing the respondents' likelihood of success.[52] Among these obstacles, Justice Souter noted the absence of economic loss, of any reasonable expectation of economic gain, and of any physical intrusion on tangible property,[53] as well as the likelihood that, even if a taking could be found in the abstract, just compensation would be zero.[54] These four factors, he opined, not only presented serious obstacles to recovery, but were so intertwined with the initial question of the existence or nonexistence of "property" that separate analysis of that question without consideration of these four factors was ill-advised, if not impossible.[55]

Justice Breyer agreed that the question of the existence of private property should not have been addressed apart from the ultimate question of the existence of a Takings Clause violation. Nevertheless, he attacked the majority's resolution of the former question. The Justice explained that prior cases invariably applied the rule that "principal follows interest," which the majority relied upon heavily, only when "principal is capable of producing interest

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[48] *Id.*

[49] *See id.* at 173 (Souter, J., dissenting); *see also id.* at 180 (Breyer, J., dissenting).

[50] *See id.* at 180 (Breyer, J., dissenting).

[51] *Phillips*, 524 U.S. at 172 (Souter, J., dissenting).

[52] *See id.* at 176 (Souter, J., dissenting).

[53] *See id.*

[54] *See id.* at 176-77 (Souter, J., dissenting).

[55] *See id.* at 181.

for whoever holds it."[56] Justice Breyer clarified that "[t]he most that Texas law could have taken from the client is . . . the client's right to keep the client's principal sterile, a right to prevent the principal from being put to productive use by others."[57] It is not entirely clear that this is a conclusion with which the majority would disagree, as the majority's reference to the right to dispose of property suggests.[58] At this point in his discussion, Justice Breyer identifies the crucial point of disagreement in *Phillips*. The majority seems to endorse the position that the power to keep others away from one's property, entirely unconnected to any arguable loss of value or impairment of the owner's right to use that property, is nonetheless an interest that must be respected by the Constitution.[59] Justice Breyer and the other dissenters, of course, disagree.[60]

The immediate reaction to *Phillips* was strong, particularly among those closely involved with IOLTA programs and the legal assistance lawyers whom those programs supported.[61] The decision, however, by avoiding resolution of the ultimate question of whether a compensable taking has occurred, does not doom IOLTA. Indeed, the odds are good that, upon remand, application of the balancing test commonly employed in Takings Clause cases[62] will result in a finding that no taking has occurred.[63] Beyond the admittedly important question of the future funding of legal services for low-

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[56] *Id.* at 180 (Breyer, J., dissenting).

[57] *Phillips*, 524 U.S. at 181 (Breyer, J., dissenting). Justice Breyer also noted:

> And whatever this Court's cases may have said about the constitutional status of such a right, they have *not* said that the Constitution forces a State to confer, upon the owner of property that cannot produce anything of value for him, ownership of the fruits of that property should that property be rendered fertile through the government's lawful intervention.

Id.

[58] *See id.* at 170 ("While the interest income at issue here may have no economically realizable value to its owner, possession, control, and disposition are nonetheless valuable rights that inhere in the property.").

[59] *See id.*

[60] *See id.* at 182 (Breyer, J., dissenting) ("Land valuation cases, for example, make clear that the value of what is taken is bounded by that which is 'lost,' not that which the 'taker gained.'") (citing Boston Chamber of Commerce v. Boston, 217 U.S. 189, 195 (1910)). Justice Breyer also notes that "[s]pecial value to the condemnor . . . must be excluded as an element of market value." *Id.* (quoting United States v. Miller, 317 U.S. 369, 375 (1943)).

[61] *See, e.g.*, Chemerinsky, *supra* note 7; Lazer, *supra* note 7; Lacey, *supra* note 7.

[62] *See infra* notes 78-81 and accompanying text (providing examples of the balancing test employed in Takings Clause cases).

[63] *See infra* notes 145-58 and accompanying text (discussing the factors employed by the Court in applying the balancing test).

income clients, additional reasons to pay particular attention to the *Phillips* decision exist.

Perhaps the most immediately interesting element of *Phillips* is what the dissenters describe as the "abstract" nature of the entire inquiry.[64] Moreover, this abstract quality goes beyond the mere metaphysical nature of the inquiry into the meaning of "property." The Supreme Court's entire decision proceeds without mentioning a word about what any perceptive outside viewer would see as the whole point of the lawsuit. The parties challenging IOLTA are not aggrieved by any loss of money; quite obviously, they object to the existence of the program itself, and quite possibly, to the entire concept of publicly funded legal assistance. Of course, openly framing the challenge in this way likely would lead to defeat, owing to the inability to articulate an individual right that had been infringed.[65] Framing the challenge as one based upon the Takings Clause provides a possible solution to this problem.

What, then, is the significance of the Court's decision in *Phillips*, which, while falling short of fully endorsing the Takings Clause challenge, surely encourages it? Even if it ultimately fails to invalidate IOLTA programs, might *Phillips* become a weapon to frustrate government action in cases ranging far beyond its own facts? In order to fully address these questions, I first outline some recent Supreme Court Takings Clause cases, and then speculate as to whether *Phillips* signals the Court's increasing openness to the expansion of the scope of that clause, perhaps far beyond its present boundaries.

III. TAKINGS CLAUSE LAW—SOME BACKGROUND FOR *PHILLIPS*

The Takings Clause of the Fifth Amendment[66] has been incorporated into the Due Process Clause of the Fourteenth Amendment and thus applies to the states as well as to the federal government.[67] The clause requires that when the government exercises the power of eminent domain to transfer title to property

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[64] *Phillips*, 524 U.S. at 172 (Souter, J., dissenting).

[65] For an elaboration on this assertion, see the discussion of standing, *infra* notes 174-83 and accompanying text.

[66] U.S. CONST. amend. V.

[67] *See* Chicago, Burlington & Quincy R. Co v. Chicago, 166 U.S. 226, 241 (1897) ("In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken by the State or under its direction for public use, without compensation made or secured to the owner is, upon principle and authority, wanting in the due process of law required by the [F]ourteenth [A]mendment . . . ."); *see also supra* note 20.

from an individual to itself, "just compensation" to the owner is required.[68] This principle is so firmly established that one might think that the Fifth Amendment was merely codifying a universally held rule respecting the inviolability of private property. Yet, in the eighteenth century, it was not uncommon for states to invoke their police power to exercise eminent domain without compensation.[69] Although the just compensation requirement was a constitutional innovation, it is now so sufficiently established that, in cases in which title is actually transferred, little controversy arises over its applicability, even if there is a dispute concerning the precise sum that will serve as just compensation.[70]

Despite the clarity of the clause's application to situations in which title transfers, a series of cases in the twentieth century sought to determine the point at which a government act that regulates property, but falls short of divesting the owner of title to that property, will qualify as a taking and require compensation. This is hardly surprising because the scope of government regulation of property, particularly real property, has expanded significantly in recent decades.[71] While the Takings Clause is applicable to both personal and real property,[72] virtually all of the standards that the Supreme Court has established for applying the clause have been

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[68] *See Chicago, Burlington & Quincy R. Co.*, 116 U.S. at 241.

[69] *See* William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 694, 699-700 (1984). Treanor states that "[t]he principle that the state necessarily owes compensation when it takes private property was not generally accepted in either colonial or revolutionary America. Uncompensated takings were frequent, and found justification first in appeals to the Crown, and later in republicanism, the ideology of the Revolution." *Id.* at 694. Treanor adds that "a major strand of republican thought held that the state could abridge the property right in order to promote common interests." *Id.* at 699-700.

[70] *See* Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1184 (1967) ("The modern significance of physical occupation is that courts, while they sometimes do hold nontresspassory injuries compensable, *never* deny compensation for a physical takeover."); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 9-2, 590 (2d ed. 1988) (stating that "nothing could be clearer . . . than that a sufficiently unambiguous government seizure of private property for public use . . . is unconstitutional unless followed by payment to the former owner of the fair market value of what was taken").

[71] *See* RICHARD F. BABCOCK, THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES 3-18 (1966) (providing an overview of the birth and expansion of zoning and comprehensive land-use controls in the twentieth century).

[72] *See, e.g.*, City of Oakland v. Oakland Raiders, 646 P.2d 835, 840 (Cal. 1982) (applying the Takings Clause to a city's attempt to exercise eminent domain to acquire professional football team in order to prevent the team from moving to another city).

forged in cases involving the latter.[73]

Early cases established that something less than fully divesting an owner of title to property could constitute a taking,[74] while demonstrating that even regulation that seriously reduced property value might not.[75] In short, the Court established a balancing test[76] so indeterminate that, in later cases, both the Court's majority and dissenting opinions could cite the same cases as authority for their conclusions.[77] This inconsistency is possibly due to the fact that a single opinion might articulate several relevant factors that a subsequent opinion might address differently without declaring which, if any, is determinative. Supreme Court opinions establish that the extent to which government regulation diminishes the value of the property clearly is important.[78] Also, according to those cases, the extent and nature of the benefit that the regulation provides to the community are important.[79] Moreover, the closer the regulation

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[73] *See infra* notes 74-112 and accompanying text (illustrating examples of cases applying the standards of the clause).

[74] *See* Nectow v. City of Cambridge, 277 U.S. 183, 188-89 (1928) (holding zoning ordinance unconstitutional as applied to plaintiff's property); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (holding that a regulation, as opposed to a transfer of an actual property interest, was a taking).

[75] *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 356, 365, 396-97 (1926) (holding that zoning ordinance does not unconstitutionally take property by limiting its use in residential zones); Hadacheck v. Sebastien, 239 U.S. 344, 411-12 (1915) (holding that ordinance prohibiting the use of property as a factory for making bricks is not an unconstitutional taking); Mugler v. Kansas, 123 U.S. 623, 669 (1887) (holding that state prohibition statute that forced a brewery to shut down does not call for compensation under the Takings Clause). The Court in *Mugler* stated:

> The power which the States have of prohibiting such use by individuals of their property, as will be prejudicial to the health, the morals, or the safety of the public is not, and, consistently with the existence and the safety of organized society, cannot be, burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict an injury upon the community.

Id. at 669.

[76] *See infra* notes 78-81 and 147-57 and accompanying text.

[77] Thus, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), is cited with approval by both the majority and the dissent in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 473-74 (1987); *see also id.* at 506 (Rehnquist, J., dissenting). Also, both the majority and the dissent in *Penn Central Transportation Co. v. City of New York* cite to the *Pennsylvania Coal* decision. *See Penn Central*, 438 U.S. at 127-28; *see also id.* at 147-50 (Rehnquist, J., dissenting).

[78] *See Keystone Bituminous*, 480 U.S. at 497 (stating that the Court's "test for regulatory taking requires [the Court] to compare the value that has been taken from the property with the value that remains in the property").

[79] *See id.* at 488 ("Many cases before and since *Pennsylvania Coal* have recognized

comes to resembling a common-law action to remove a nuisance, the less likely that it will be found to be a taking.[80] Finally, Supreme Court takings cases inquire into the equitable distribution of benefits stemming from the regulation by asking if the property owner who loses value also shares in the benefits that the regulation bestows on the community.[81]

Not only is it unclear which, if any, of these factors is the most important, it also is often difficult to assess a single factor without considerable ambiguity. For example, in *Penn Central Transportation Co. v. City of New York*,[82] New York City's prevention of the construction of a tower that would rise above Grand Central Terminal raised the question of whether the city "took" 100% of the owner's airspace or some far lower percentage of the owner's overall right to use the parcel as a whole.[83] Furthermore, Supreme Court cases over the past twenty years have failed to introduce a great degree of clarity to the analysis of these issues. In 1987, in *Keystone Bituminous Coal Ass'n v. DeBenedictis*,[84] the Court upheld a Pennsylvania statute requiring coal companies to leave a small percentage of the coal to which they had mining rights in the ground in order to protect the owners of the surface property rights from subsidence of their land.[85]

The statute in *Keystone Bituminous*, and the Takings Clause issues it presented, were remarkably similar to those before the Court six decades earlier in *Pennsylvania Coal Co. v. Mahon*.[86] In that case, which was one of the first significant Supreme Court cases to consider the question of when a regulation would rise to the level of a taking, the Court invalidated the legislation.[87] The Court viewed this early legislation as a total taking of the support estate.[88] In 1987, however,

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that the nature of the state's action is critical in takings analysis.").

[80] *See id.* at 491-92 ("Long ago it was recognized that 'all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.'" (quoting *Mugler*, 123 U.S. at 665)).

[81] *See id.* at 491 ("Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others.").

[82] 438 U.S. 104 (1978).

[83] *See Penn Cent.*, 438 U.S. at 136 (holding historic preservation statute that limits use of airspace is not a taking).

[84] 480 U.S. 470 (1987).

[85] *See Keystone Bituminous*, 480 U.S. at 493.

[86] 260 U.S. 393 (1922).

[87] *See id.* at 415-16.

[88] *See id.* at 414.

the Court interpreted substantially similar legislation as a relatively minor interference with the entire "bundle" of rights that belonged to the coal operator.[89] While in the 1922 *Pennsylvania Coal* case the Court saw the statute as conferring benefits on only a handful of private homeowners,[90] in *Keystone Bituminous* the new statute was seen as providing a benefit to the community at large.[91] Moreover, just as the Court had been divided in the earlier case,[92] four dissenters in *Keystone Bituminous* took issue with the majority's characterization, viewing the effect of the legislation as the "complete extinction of the value of a parcel of property."[93] Essentially, *Keystone Bituminous* illustrates the almost metaphysical questions posed by a takings claim that is based upon a government regulation that falls short of the classic situation involving eminent domain.[94]

Despite the result in *Keystone Bituminous*, the Supreme Court, over the past two decades, generally has been more receptive to claims based upon regulations that diminish the value of property.[95] Several decisions during these decades did not deal directly with the substantive question of what constitutes a taking, but rather with various procedural issues that accompany takings claims.[96] Those decisions are a mixed bag, with at least one having the effect of making the entire litigation process more favorable to claimants. These procedural decisions may have fostered greater government

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[89] *See Keystone Bituminous*, 480 U.S. at 498-502.

[90] *See Pennsylvania Coal*, 260 U.S. at 413. The Court, in *Pennsylvania Coal*, stated that "[t]his is the case of a single private house. . . . A source of damage to such a house is not a public nuisance even if similar damage is inflicted on others in different places. The damage is not common or public." *Id.*

[91] *See Keystone Bituminous*, 480 U.S. at 488 ("Here, by contrast, the Commonwealth is acting to protect the public interest in health, the environment, and the fiscal integrity of the area.").

[92] *See Pennsylvania Coal*, 260 U.S. at 416-22 (Brandeis, J., dissenting).

[93] *Keystone Bituminous*, 480 U.S. at 506-21 (Rehnquist, C.J., dissenting).

[94] *See generally id.*

[95] *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); First English Evangelical Lutheran Church v. County of L.A., 482 U.S. 304 (1987); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

[96] *See, e.g.*, MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 352 (1986) (stating that developer must complete negotiations with municipality before challenging ordinance); Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 189, 190 (1985) (stating that developer must seek variance before challenging constitutionality of zoning ordinance); Agins v. Tiburon, 447 U.S. 255, 260 (1980) (holding that developer must submit specific plan before challenging zoning restriction).

caution in regulating property, particularly real property,[97] but they do not aid in the recognition of a taking in the first place.

The most recent significant decision on the substantive question of when a regulation becomes a taking is *Lucas v. South Carolina Coastal Council*.[98] In *Lucas*, the Supreme Court held that a regulation of property that renders the property essentially "valueless"—one that denies an owner any "economically viable use of the land"—will always require compensation, regardless of other factors, such as the degree to which the regulation clearly pursues the common good.[99]

Lucas and other cases involving serious loss of value are of great significance and have spurred much commentary.[100] Aside from providing evidence of a general pro-property owner attitude on the part of the current Court, however, they provide little help in addressing the IOLTA situation. By definition, the IOLTA plans at issue do not reduce the value of the owner's property at all. This raises the question of whether there is any precedent to support the counterintuitive notion that a regulation that neither transfers title nor reduces value can constitute a taking.

The case that comes closest to supporting such a proposition is *Loretto v. Teleprompter Manhattan CATV Corp.*,[101] upon which, unsurprisingly, the *Phillips* majority relied.[102] In *Loretto*, a New York statute required landlords to permit the installation of cable television in their buildings and prohibited them from demanding payment from the cable company in excess of one dollar.[103] The

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[97] In *First English Evangelical Lutheran Church v. County of Los Angeles*, the Supreme Court held that a successful Takings Clause claimant could obtain damages for the period of time that his property was restricted by an unconstitutional statute, as well as an injunction requiring the government either to abandon the ordinance or pay just compensation. *See* 482 U.S. at 320-21. This significantly raised the stakes for local governments whose regulations were threatened with lawsuits and would likely lead to greater hesitancy in adopting or enforcing land-use restrictions.

[98] 505 U.S. 1003 (1992).

[99] *See id.* at 1027.

[100] *See, e.g.*, Douglas W. Kmiec, *Inserting the Last Remaining Pieces into the Takings Puzzle*, 38 WM. & MARY L. REV. 995 (1997); Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 RUTGERS L.J. 663 (1996); Joseph Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 STAN L. REV. 1433 (1993). For an interesting discussion of the proposition that the *Lucas* decision is not very significant, see generally Ronald H. Rosenberg, *The Non-Impact of the United States Supreme Court Regulatory Takings Cases on the State Courts: Does the Supreme Court Really Matter?*, 6 FORDHAM ENVTL. L.J. 523 (1995).

[101] 458 U.S. 419 (1982).

[102] *See* Phillips v. Washington Legal Found., 524 U.S. 156, 169-70 (1998) (citing *Loretto*, 458 U.S. at 435, 437).

[103] *See Loretto*, 458 U.S. at 423-24. Before passage of the statute, the cable company "routinely obtained authorization for its installations from property owners along the

installation required a half-inch wire running to the building's roof and two boxes placed on the roof.[104] Although the availability of cable television could be expected to increase the value of the apartments, the Supreme Court found that a taking had occurred.[105] The Court concluded that a "permanent physical occupation" of property, however minor, would always constitute a taking.[106] The Court further explained that "constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied."[107] For New York landlords, the victory was somewhat Pyrrhic; on remand, the lower court held that just compensation was one dollar.[108] Despite the ultimate conclusion, property owners can invoke the language of *Loretto* to rebut arguments that a de minimis taking is no taking at all.[109]

Loretto, however, creates a clear bright-line test only in situations in which there is a "permanent physical" occupation of real property. Essentially, the New York statute granted the cable companies what is easily recognizable in traditional property law terms as an easement.[110] Easements are, for the most part, somewhat tangible, obvious, and do not present the legal system with serious metaphysical problems. The right to sue that is the essence of an easement, however, quickly can blur into a limitation on the owner's traditional right to exclude. If all of the former are takings, when ordered by government, are all of the latter takings as well?

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cable's route, compensating the owners at the standard rate of 5% of the gross revenues . . . realized from that property." *Id.* at 423.

[104] *See id.* at 443 (Blackmun, J., dissenting) ("Jointly, the cable and boxes occupy only about one-eighth of a cubic foot of space on the roof of appellant's Manhattan apartment building.")

[105] *See id.* at 434-35.

[106] *See id.*

[107] *Id.* at 436.

[108] *See* Loretto v. Teleprompter Manhattan CATV Corp., 446 N.E.2d 428, 432 (N.Y. 1983). Clearly, plaintiff's goal was to obtain something resembling the five percent of Teleprompter's revenue that traditionally had been negotiated by apartment owners prior to enactment of the statute. *See Loretto*, 458 U.S. at 423.

[109] For example, property owners could support de minimis takings with the following language: "[C]onstitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied." *Id.* at 436-37. *Phillips*, moreover, cited *Loretto* for the proposition that the absence of a "positive economic or market value" would not necessarily make property subject to taking without compensation. *See Phillips*, 524 U.S. at 169-70 (citing *Loretto*, 524 U.S. at 437).

[110] The Court, in *Loretto*, noted that in many earlier cases, easements for the construction and maintenance of "telegraph and telephone lines, rails, and underground pipes or wires [were] takings even if they occup[ied] only relatively insubstantial amounts of space and [did] not seriously interfere with the landowner's use of the rest of his land." *See Loretto*, 458 U.S. at 430.

Much of the inconsistency of the "taking by regulation" cases arises from the ways in which the two recurring and central questions can possibly be answered. The first of these questions asks what it is that has been "taken," while the second asks how much of the property has been taken. Cases generally agree that depriving an owner of "all" (or perhaps even "most") of something will likely constitute a taking, while depriving an owner of only "some" of something is far less troublesome.[111] This statement, however, raises the fundamental question: What is the relevant "something" used to determine if there has been a taking? For example, in *Keystone Bituminous* and *Pennsylvania Coal*, the issue is whether Pennsylvania, by requiring coal companies to support a surface estate, takes only a small percentage of the owner's coal, or 100% of the coal that cannot be mined.[112] In *Penn Central*, the relevant inquiry is whether building height restrictions take only a small percentage of a parcel's overall value or 100% of the owner's air rights.[113] In *Loretto*, the case turns on whether New York took 100% of the owner's easement or merely some infinitesimal percentage of the owner's property rights package.[114] In all of these cases, each alternative seems equally defensible.

The importance of this inquiry is due largely to the long-standing "bundle of sticks" metaphor employed to describe the legal notion of property. While property, in everyday parlance, is thought of as something tangible, to the lawyer it is instead a set of legal relations and rights.[115] These rights can be visualized as a "bundle," a

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[111] *Compare* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (holding that a regulation that takes away all practical use is a taking) *with* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978) (holding that a regulation that takes only a limited part of a parcel's value is not a taking).

[112] *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 498-502 (1987); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922); *see also supra* notes 86-89 and accompanying text (contrasting views on whether statute takes all or only a small percentage of property right).

[113] *See Penn Cent.*, 438 U.S. at 136; *see also supra* note 83 (holding a restriction on building height was not a taking).

[114] *See Loretto*, 458 U.S. at 427; *see also supra* notes 101-10 and accompanying text. For a discussion of the problem of calculating percentages of diminution in value, see generally Lisker, *supra* note 100.

[115] *See* 2 WILLIAM BLACKSTONE, COMMENTARIES *2. Blackstone declares:

> There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in this universe.

Id. at 2; *see also* Thomas C. Grey, *The Disintegration of Property*, *in* NOMOS XXII: PROPERTY 69 (J. Roland Pennock & John W. Chapman eds., 1980). Grey states:

visualization that acts as a reminder of the plurality of legal rights that ownership entails. This metaphor raises the question of whether the owner owns one thing or many separate things. This question, in turn, leads to the larger inquiry: If one portion of the bundle is taken away or severely limited, is this a deprivation of 100% of that which is taken or a minor portion of the whole?

At least since the time of William Blackstone, a key element of the concept of property has been the right not merely to possess and use something, but the right to exclude others.[116] Although not entirely easy to justify,[117] a separate right to exclude has been consistently asserted.[118] Still, the affirmation of a right is not a declaration that the right is unlimited; even Blackstone, in his

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> Most people . . . conceive of property as *things* that are *owned by persons.* To own property is to have exclusive control of something—to be able to use it as one wishes, to sell it, give it away, leave it idle, or destroy it . . . .
>
> By contrast the theory of property rights held by the modern specialist . . . . fragments the robust unitary conception of ownership into a more shadowy "bundle of rights" . . . . [This] suggests that you might sell of *particular aspects* of your control—the rights to certain uses, to profits from the thing, and so on.

Id. at 69.

[116] *See* Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Legal Reasoning*, 26 YALE L.J. 710, 746 (1917) (asserting that an owner has "legal rights, or claims, that *others*, respectively, shall *not* enter on the land, that they shall not cause physical harm to the land, etc., such others being under respective correlative legal duties"); *See* 2 BLACKSTONE, *supra* note 115, at 208-15 (discussing trespass).

[117] The right to exclude is usually defended by contrasting its social implications with the treatment of property as a commons, which would lead to far less motivation for individual productivity. *See generally* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 32-45 (4th ed. 1992); Richard Epstein, *Property and Necessity*, 13 HARV. J.L. & PUB. POL'Y 2 (1990). Even John Locke, however, often regarded as a patron saint of individual property rights, was sure that such rights were not absolute:

> God the Lord and Father of all, has given no one of his Children such a Property, in his peculiar Portion of the things of this World, but that he has given his needy Brothers a Right to the Surplusage of his Goods: so that it cannot justly be denied him, when his pressing Wants call for it.

JOHN LOCKE, TWO TREATISES ON GOVERNMENT 188 (Peter Laslett ed., 2d ed. 1967) (1690). Professor Carol Rose criticized the "in-your-face rhetoric of property rights . . . suggesting that anything goes, and that the property owner need not care in the least for his fellow." Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 365 (1996). Rose contends that an effective and productive property system must combine independence and cooperation. *See id.* at 363.

[118] *See, e.g.*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87-88 (1980) (stating that a shopping center may exclude protestors despite the First Amendment); International News Serv. v. Associated Press, 248 U.S. 215, 250 (1918) (affirming "right to exclude others" from property).

sweeping endorsement of the right to exclude,[119] noted exceptions in "some very particular cases."[120] Legal historians, in fact, have discovered that the traditional understanding of the right to exclude may be far too broad.[121] For example, well into the nineteenth century, many states permitted entry onto the land of another when the landowner suffered little harm and the intruder received a great benefit.[122] These historical limitations on the right to exclude, however, have tended to be so overwhelmed in the legal and general public consciousness by the notion of exclusivity that, when contemporary limitations reappear, they often are regarded as quite novel.

A prominent example is *State v. Shack*,[123] a New Jersey case that has found its way into some of the most frequently used law school casebooks on property law.[124] In *Shack*, a farmer employed migrant workers whom were housed for the season on the farmer's property.[125] The farmer attempted to deny access to his property to legal service attorneys and health service workers who sought to visit and provide services to the migrants.[126] When the service providers refused to leave, the farmer brought trespass charges.[127] After being convicted of trespassing, the service providers appealed to the New Jersey Supreme Court.[128]

While the Takings Clause was not discussed by the New Jersey Supreme Court, the court's analysis of the nature of the property right protected by trespass statutes is relevant in attempting to

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[119] *See* 2 BLACKSTONE, *supra* note 115, at *2.

[120] 3 BLACKSTONE, COMMENTARIES, *supra* note 115, *209 (asserting that "the law of England . . . has treated every entry upon another's lands (unless by the owner's leave, or in some very particular cases), as an injury or wrong"). Yet the exceptions to the absolute right to exclude were numerous. *See* Robert P. Burns, *Blackstone's Theory of the "Absolute" Rights of Property*, 54 U. CIN. L. REV. 67, 67 (1985) (describing the wide gap between Blackstone's absolutist language and the property system that he actually described).

[121] *See, e.g.*, Terry L. Anderson & P.J. Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J.L. & ECON. 163 (1975); Burns, *supra* note 120; Treanor, *supra* note 69.

[122] *See* Anderson & Hill, *supra* note 121, at 170 (showing that only when scarcity of resources made enforcement of exclusivity economically significant were state governments pressed to restrict entry on another's land).

[123] 58 N.J. 297 (1971).

[124] *See, e.g.*, JOHN E. CRIBBET ET AL., PROPERTY: CASES AND MATERIALS 14 (7th ed. 1996); JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 87 (4th ed. 1998).

[125] *See Shack*, 58 N.J. at 300.

[126] *See id.*

[127] *See id.* at 301

[128] *See id.*

determine just what a property owner does and does not actually own. The court articulated that "[p]roperty rights serve human values. They are recognized to that end and are limited by it."[129] The court further explained that "[i]t was a maxim of the common law that one should so use his property as not to injure the rights of others. . . . [h]ence it has long been true that necessity, private or public, may justify entry upon the lands of another."[130] The court also stressed that the farmer had voluntarily allowed the migrants to camp upon his land, for both his and their mutual benefit.[131] At the same time, the court quoted the following passage from Professor Richard R. Powell's classic treatise on property law to support the assertion that social needs, as well as particular relationships, are relevant in defining property rights:

> "[A]n owner must expect to find the absoluteness of his property rights curtailed by the organs of society, for the promotion of the best interests of others . . . . The current balance between individualism and dominance of the social interest depends not only upon political and social ideologies, but also upon the physical and social facts of the time and place under discussion."[132]

Shack is by no means the only example of a court-imposed limitation on the right to exclude, nor is it unique in that it imposes such a limitation without serious discussion of whether such a limitation might implicate the Takings Clause. In addition to such common-law exceptions to normal trespass rules,[133] legislative limitations have arisen, such as antidiscrimination statutes and landlord-tenant restrictions, that have not presented Takings Clause issues, despite the fact that such regulations trim the owner's traditional freedom of "absolute" control of his property. These examples also illustrate that the right to exclude is often intertwined with other elements of the traditional "bundle" of property rights, such as the right to use or alienate one's property.

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[129] *Id.* at 303.

[130] *Id.* at 305.

[131] *See Shack*, 58 N.J. at 299.

[132] *Id.* at 305 (quoting 5 RICHARD R. POWELL, REAL PROPERTY § 746 (Patrick J. Rohan ed., 1970).

[133] *See* RESTATEMENT (SECOND) OF TORTS §§ 167-211 (1965) (listing common-law exceptions to the normal trespass rules). Although some of these exceptions are based on the consent of the owner, 20 exceptions arise regardless of the owners' consent. *See id.* §§ 191-211. These exceptions arise from various reasons relating to the public good, such as the abatement of a nuisance and the reclamation of goods on another's land; a broad exception exists for public necessity. *See id.* §§ 196, 199 & 201-03 (1965).

In contrast, *Phillips*, perhaps uniquely among takings cases, presented a situation in which the right to exclude was utterly independent of other property rights and was also independent of any decline in the value of the private property, either actual or potential. In *Phillips*, what is being "taken" is the right to exclude in its purest form—that is, the psychological satisfaction of denying a benefit to another. This is the legal equivalent of the legendary "dog in the manger," a metaphor in which a dog aggressively prevents other animals from access to something—hay in the manger—that is of no practical use to the dog itself.[134]

Over the years, scholars have attempted to define what gives property its true value—in other words, exactly what the law seeks to protect when it protects ownership. Most jurisprudence on this question regards property primarily in terms of market value.[135] Property's value, then, is the extent to which it can be translated into a dollar amount, which, in turn, can be exchanged for other property. To regard property in this way surely is understandable. The constitutional requirement of just compensation for a taking seems to support the notion that, at least as far as the law is concerned, the essence of property is its market value. While the Takings Clause is a limitation on government action, it can also be seen as an implicit assertion that there is no inherent unfairness to a forced exchange of property if the property owner receives market value in return.[136]

Property, however, may have meaning beyond market value. Some commentators have written of property as, in many cases, being primarily a matter of "personhood."[137] According to this view,

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[134] *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 668 (Philip Babcock Gove ed., 1981).

[135] Indeed, the Law and Economics School of thought regards most legal rules as ultimately reflecting some sort of actual or implied market. *See generally* POSNER, *supra* note 117, at 29-75 (discussing property rights).

[136] Thus, William Stoebuck, who regarded the compensation principle as established as early as the time of Magna Carta, noted that, into the eighteenth and nineteenth centuries, no compensation was paid for the taking of unimproved or unenclosed land, apparently on the theory that, at the time, such land "was generally of little worth." *See* William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 582, 583 (1972).

[137] *See, e.g.*, Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982). Professor Radin notes that "[m]ost people possess certain objects they feel are almost part of themselves. These objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world." *Id.* at 959. In contrast, Radin maintains that "[t]he opposite of holding an object that has become part of oneself is holding an object that is perfectly replaceable with other goods of equal market value." *Id.* at 959-60.

particular property is part of what defines an individual; its possession can be essential in allowing the individual to become who he or she is.[138] Property rights, certainly including the right to exclude, can therefore be essential in protecting the individual against the power of others or of the community at large.[139] In such cases, the question is whether market value actually is a sufficient compensation for the loss of property.

These types of cases are not difficult to imagine: a family home may be taken by eminent domain,[140] a small business may be forced to relocate.[141] On an instinctive level, such cases should make one uneasy. The courts, however, have uniformly answered the question of whether such losses can be reduced to market value; the Takings Clause does not distinguish between property that is essential to "personhood" and property that its owner regards as readily fungible in the marketplace.[142] To do otherwise would perhaps present courts with a hopelessly indeterminate task; therefore, the law allows the market to determine what property is worth, and even perhaps what qualifies as property.[143]

The right to exclude in its purest form, the "dog in the manger" situation presented in *Phillips*, however, reiterates that property has another aspect as well; that is, it gives the owner power over others. The personhood theories of property implicitly recognize this, but the power is seen as largely or entirely defensive and therefore is considered benign or even praiseworthy. In reality, though, the power over others created by property ownership can become a weapon not to defend personhood, but instead to withhold a social good from others for no reason beyond the property owner's desire

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[138] *See id.*

[139] This concept can be traced back at least to Thomas Jefferson. *See* Stanley N. Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J.L. & ECON. 467, 473-74 (1976). Perhaps the most influential argument in favor of property rights as bulwarks against government, however, is Charles Reich's argument in favor of expanded rights to government largess. *See generally* Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964). Professor Reich notes that "in a society that chiefly values material well-being, the power to control a particular portion of that well-being is the very foundation of individuality." *Id.* at 733.

[140] For a prominent example of this on a large scale, see generally *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981).

[141] *See, e.g.*, Mitchell v. United States, 267 U.S. 341, 343 (1925); City of Detroit v. Michael's Prescriptions, 373 N.W.2d 219, 811-12 (Mich. Ct. App. 1985).

[142] *See supra* notes 139-40 and accompanying text.

[143] *See, e.g.*, Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988) (holding that singer has a property interest in her vocal style and sound); Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 156-57 (Cal. 1990) (holding that patient has no property right in the cells of his surgically removed, diseased spleen).

to withhold it. *Phillips* appears to hold that property is not, in fact, invariably a function of market value. The case suggests that the power that property creates over others, even when the power cannot tangibly benefit the property owner beyond the satisfaction inherent in holding and exercising power, is constitutionally protected. Thus, the *Phillips* case brings Takings Clause jurisprudence into a new area. What this expansion holds for the future is uncertain at best.

IV. THE SIGNIFICANCE OF *PHILLIPS*—ALTERNATIVES

With all of the foregoing as background, the central question remains: What is the lasting significance of *Phillips*? This question can be addressed narrowly by confining the analysis to the specific question of the constitutionality of IOLTA and the future of funding for legal assistance programs. Perhaps, however, *Phillips* may indicate something that reaches far beyond its own facts. In recent years, the Supreme Court has issued several opinions applying constitutional provisions in ways that might signal significant constitutional changes, but might also prove to be no more than interesting oddities.[144] Thus, in examining *Phillips*, both alternatives must be given serious consideration.

A. *The Possibility That* Phillips *Is Much Ado About Nothing*

Phillips did not declare that the Texas IOLTA program was a taking calling for compensation; the case merely held that a property right was implicated in the program and that the case must return to the lower courts for consideration of the ultimate issue.[145] As the dissenters in *Phillips* pointed out, separating the question of whether there is any private property interest involved in a case from the question of whether that property has in fact been taken is extremely difficult, if not impossible.[146] The questions, however, can be dealt with separately; a positive answer to the first question will not necessarily lead to a positive answer to the second.

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[144] *See* Alden v. Maine, 119 S. Ct. 2240, 2246 (1999); College Sav. Bank v. Florida Prepaid PostSecondary Educ. Expense Bd., 119 S. Ct. 2219, 2233 (1999); Saenz v. Roe, 119 S. Ct. 1518, 1526, 1530 (1999); New York v. United States, 505 U.S. 144, 174-75 (1992); *see also supra* notes 1-3 and accompanying text (discussing recent cases expanding the reach of the Tenth and Eleventh Amendments and the Privileges and Immunities Clause of the Fourteenth Amendment).

[145] *See* Phillips v. Washington Legal Found., 524 U.S. 156, 172 (1998); *see also supra* notes 47-48 and accompanying text (discussing the holding in *Phillips*).

[146] *See Phillips*, 524 U.S. at 173 (Souter, J., dissenting); *see also id.* at 180 (Breyer, J., dissenting); *supra* notes 49-58 and accompanying text (discussing the dissenting opinions in *Phillips*).

A prominent example of this can be found in *Penn Central Transportation Co. v. City of New York*.[147] In *Penn Central*, New York's landmark preservation ordinance deprived the owner of Grand Central Terminal of the option of utilizing the airspace above the terminal to construct an office tower.[148] Thus, more clearly than in *Phillips*, the ordinance impaired a traditional element of the normal bundle of property rights—the right to use property—and, as a result, deprived the owners of a clear potential economic benefit.[149] Still, the Court held that no taking had occurred.[150] Central to the decision was the Court's analysis of "[t]he economic impact of the regulation to the claimant, and, particularly, the extent to which the regulation has interfered with distinct investment-based expectations."[151] Because the ordinance did no more than limit use of the property to its current, profitable use, and because the "primary expectation concerning the use of the parcel" did not include construction of an office tower,[152] the Court held that any interference with property rights was not so great as to outweigh the legitimate government interest in "improving the quality of life in the city as a whole."[153] The Court held, therefore, that compensation was not required.[154]

The Court also rejected the argument that the fact that the landmark ordinance limited a relatively small number of property owners made it impermissible.[155] The landowner argued that to avoid classification as a taking, a regulation must distribute benefits and burdens with at least rough equality.[156] The Court, however, noted that a very large percentage of land-use regulation could be said to impact different property owners to different degrees.[157] Thus, the

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[147] 438 U.S. 104 (1978).

[148] *See id.* at 119.

[149] The owners contended "that the Landmarks Law ha[d] deprived them of any gainful use of their 'air rights' above the Terminal." *Id.* at 130. Moreover, the owners cited *United States v. Causby* as authority for the proposition that interference with "air rights" may be sufficient to constitute a taking. *See id.* (citing United States v. Causby, 328 U.S. 256 (1946)).

[150] *See id.* at 138.

[151] *Id.* at 124.

[152] *Id.* at 136.

[153] *Penn Central*, 438 U.S. at 134.

[154] *See id.* at 138.

[155] *See id.* at 133.

[156] *See id.* (stating that plaintiffs argued that "the Landmarks Law does not impose identical or similar restrictions on all structures located in particular physical communities").

[157] *See id.*

Court reasoned, it would be improper to reject the legislative determination that the overall community, including the burdened property owners, would share in the benefits of landmark preservation.[158] This question of the extent to which a regulation must widely distribute benefits and burdens in order to avoid classification as a taking can be crucial in any takings analysis.[159]

It seems likely that if the court on remand employs a balancing test similar to that in *Penn Central*,[160] *Phillips* ultimately will be decided against the claim that the Texas IOLTA program is a taking. The "economic impact" of IOLTA on the clients whose funds are used is zero, and those individuals are being deprived of no investment-based expectations. Funding legal services for low-income clients must surely qualify as a legitimate government activity with the effect of "improving the quality of life" in the overall community.

If the claimants are to prevail on remand, then it would seem that they must convince the court to apply a per se test, such as that in *Loretto v. Teleprompter Manhattan CATV Corp.*,[161] upon which the *Phillips* majority relied. In *Loretto*, a restriction that caused a trivial, perhaps nonexistent, diminution in the value of property was nonetheless found to be a taking because it was "a permanent physical occupation" of that property.[162] This raises the question of whether the *Loretto* principle is applicable only to real property and to classic examples of "occupation," such as easements, or whether it can be extended to include the "permanent" diversion of interest from a IOLTA account or any other "occupation" of money. While the latter reading seems a stretch, it cannot be dismissed out of hand, especially in light of the Supreme Court's recent decision in *Eastern Enterprises v. Apfel*.[163] In *Loretto*, the plaintiff's victory was ultimately Pyrrhic; upon remand, the lower court held that payment of one dollar was sufficient compensation.[164] Thus, what the property owner

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[158] *See id.* at 133-35.

[159] *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825, 835 n.4 (1987) (noting that, even in the pursuance of a legitimate public benefit, the state may not call upon a single individual to bear the entire burden).

[160] *See supra* notes 78-81 and accompanying text (summarizing the factors to be balanced).

[161] 458 U.S. 419 (1982).

[162] *See id.* at 421.

[163] 524 U.S. 498 (1998); *see also infra* notes 199-242 and accompanying text (invoking the Takings Clause to strike down obligation to contribute to pension fund for former employees).

[164] Loretto v. Teleprompter Manhattan CATV Corp., 446 N.E.2d 428, 432 (N.Y. 1983), *reh'g denied*, 450 N.E.2d 254 (1983). This ruling supported the authority of the State Commission of Cable Television to determine that one dollar was a reasonable

most wanted—the leverage to negotiate a substantial payment from the cable company in return for granting an easement—was denied. Therefore, with the profits to be gained by the cable companies far exceeding the nominal damages imposed for the taking, the ultimate goal of the ordinance could still be achieved.

In contrast, even an award of nominal damages would surely mean the end of the Texas IOLTA program (and presumably those of other states), at least in its present form. By definition, the separate interest that would be allocated to each client, after administrative expenses, is zero. Thus, requiring payment of even a nominal amount would not only give the client more than he would have in the absence of the program, but also would exceed the value that the "taking" provided to the state. Thus, the impact of further proceedings on IOLTA programs is obvious. A final decision that IOLTA involves a taking requiring compensation would mean that IOLTA in its present form must end. Presumably, some sort of voluntary system, either allowing the client to "opt in" or giving the client the right to "opt out" would solve the Takings Clause problem; this, however, might seriously reduce the amount of interest IOTLA programs generate.[165] Of course, this shortfall could be recaptured through the allocation of tax dollars, but the political climate in recent years has hardly been receptive to increasing tax support for legal services.[166]

On the other hand, a decision against the Takings Clause claim will buoy IOLTA supporters because IOLTA, in its present form, will continue. This, however, will not necessarily mean that the Court's decision and reasoning in *Phillips* would become no more than a curiosity, with little or no importance for the future of the Takings Clause. Surely, if the *Phillips* plaintiffs ultimately win, the extent to which the case will have expanded the scope of the Takings Clause will be worth examining. Also, it is possible that if the plaintiffs ultimately lose, the lasting significance of *Phillips* will be minimal. It is also possible, however, that the initial holding, which required an

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fee for the installation of cable service. *See Loretto*, 423 N.E.2d at 323, *rev'd on other grounds*, 458 U.S. 419 (1982) (noting that the commissioner had previously ordered that landlords were not permitted to charge more than one dollar for the installation of cable service).

[165] For example, fewer than 20% of Americans currently check off the box on their federal income tax forms that indicates that they wish to contribute to the presidential campaign fund, despite the fact that it costs them nothing to do so. *See* Samuel L. Walker, Note, *Campaign Finance Reform in the 105th Congress: The Failure to Address Self-Financed Candidates*, 27 HOFSTRA L. REV. 181, 221 & n.292 (1998).

[166] *See generally* Chemerinsky, *supra* note 7; Lazer, *supra* note 7; Lacey, *supra* note 7.

extended examination of the takings question, is a significant step toward chipping away at long-established barriers to individual judicial challenges of social programs that offend those who must pay for them.

B. The Possibility That Phillips *Is a Harbinger of a Surpisingly More Powerful Takings Clause*

1. The Return of Mrs. Frothingham?

Beyond the obvious importance of *Phillips* to the future of IOLTA programs, there is uncertainty as to the possible relevance of the case to the future course of Takings Clause jurisprudence. Analysis of this issue might begin by highlighting a point that seems quite obvious, but is not discussed explicitly in the Supreme Court's opinion. The goals of the Takings Clause claimants in *Phillips* are quite different from those of plaintiffs in the typical Takings Clause case. The typical Takings Clause claimant seeks either to keep the property in question or to receive monetary compensation.[167] The former goal, which would require a holding that the eminent domain or government regulation cannot be undertaken at all, will almost invariably fail. This is evident from the text of the Takings Clause itself. Except for the requirement that the taking be for "public use,"[168] the clause does not bar the government from acquiring property from owners who are unwilling to sell; it merely ensures that the government justly compensate the owner for such an acquisition. In recent decades, Supreme Court opinions have stated that the "public use" mandate does not require that the government continue to own and operate the acquired property, but rather merely that the acquisition be in pursuit of the public welfare.[169] Unsurprisingly, courts are quite reluctant to overrule a legislative determination that a particular government act furthers legitimate goals.[170] Thus, in all but extreme cases, the Takings Clause is not an instrument to prevent

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[167] *See infra* notes 77- 95, 168 & 170 (providing examples of typical Takings Clause cases).

[168] Supreme Court decisions have generally adopted a broad interpretation of this requirement, equating "public use" with public purpose. *See* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 231 (1984); Berman v. Parker, 346 U.S. 26, 35 (1954).

[169] *See, e.g., Midkiff*, 467 U.S. at 241 (stating that "the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'" (quoting United States v. Gettysburg Elec. R. Co., 160 U.S. 668, 680 (1896))).

[170] *See id.*; Poletown Neighborhood Council v. Parker, 304 N.W.2d 455, 481 (Mich. 1981).

the government from achieving its goals. Rather, it assures that those goals will not be achieved in a manner that unduly burdens particular individuals.

In *Phillips*, however, the plaintiffs' goal was neither to retain some particular piece of property for themselves nor to receive monetary compensation for the loss of property. Rather, the plaintiffs objected to the program itself and perhaps to the entire concept of funding legal services through IOLTA programs or, at the very least, to mandatory participation in that program. Earlier, unsuccessful attacks on IOLTA programs made this objection more obvious. These claims were based upon the First Amendment, alleging that IOLTA programs forced attorneys or their clients to fund speech that supported positions with which they disagreed.[171] While courts rejected these claims,[172] they at least had the virtue of honestly presenting the claimant's true motivation: an objection generally to public funding of legal services and, particularly, to public funding assisted by funds derived in any way from the claimant. Recasting the attack on IOLTA programs as a Takings Clause claim not only avoided the need to deal with these First Amendment holdings, it also served to shift the focus of the dispute away from a direct attack on the legal service programs themselves.

IOLTA programs obviously are not the only possible way to fund legal services for low-income clients. These services could be funded out of general tax revenues. Other alternatives could derive revenue only from those who utilize lawyers' services; instead of an IOLTA program, a state might place a small transaction tax on some or all legal services and earmark this revenue for legal service programs. Because this would take an actual sum, however small, out of the pocket of each client, such a program would be more burdensome and, therefore, more troubling than an IOLTA program. This alternative, however, would seem to be clearly beyond constitutional attack, on Takings Clause or any other grounds.

Apart from the absence of any constitutional basis for attacking the substance of such an alternative funding program, a challenger

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[171] *See, e.g.*, Washington Legal Found. v. Mass. Bar Found., 993 F.2d 962, 976 (1st Cir. 1993); *see also supra* note 19 and accompanying text (rejecting First Amendment challenge to IOLTA program).

[172] *See In re* Arkansas Bar Ass'n, 675 S.W.2d 355, 357-58 (Ark. 1984); Carroll v. State Bar of Cal., 213 Cal. Rptr. 305, 311 (Ct. App. 1985); Cone v. State Bar of Fla., 819 F.2d 1002, 1006 (11th Cir 1987); *Mass. Bar Found.*, 993 F.2d at 974; *In re* Minnesota State Bar Ass'n, 332 N.W.2d 151, 158 (Minn. 1982); *In re* New Hampshire Bar Ass'n, 453 A.2d 1258, 1261 (N.H. 1982); *In re* Interest on Lawyers' Trust Accounts, 672 P.2d 406, 407 (Utah 1983).

would face formidable procedural hurdles as well. With extremely narrow exceptions,[173] a taxpayer will lack standing in federal court to challenge a government program when the only individualized, concrete injury alleged by the taxpayer is the collection and use of a tax for that program. The Supreme Court first enunciated this rule in the 1923 case of *Frothingham v. Mellon.*[174]

In that case, Mrs. Frothingham had challenged an act that provided money to the states on the condition that the states would take steps to reduce infant and maternal mortality.[175] Her substantive claim was, essentially, that the Act exceeded the powers of Congress and invaded the reserved powers of the states.[176] The Supreme Court found it unnecessary to address the federalism issue because the Court held that Mrs. Frothingham could not claim the individualized injury necessary to establish standing to sue.[177] The use of some tiny portion of her taxes to fund the program, the Court explained, did not constitute a "direct injury," but only established that "[s]he suffers in some indefinite way in common with people generally."[178]

The easiest way to explain Mrs. Frothingham's lack of standing might be the very small amount of money involved, but that rationale would overlook much more significant concerns. The main purpose behind the general invocation of taxpayer standing, indeed of all standing requirements, would appear to be the need to maintain a distinction between the vindication of an individual right—a proper role for federal courts—and a challenge to a government program that one opposes for policy or ideological reasons—something beyond the proper scope of judicial concern. Thus, a taxpayer clearly may challenge the application of a taxing statute to him, or even the constitutionality of the tax itself, and claim standing on the basis of his tax bill.[179] When the objection, however, is to the manner in which the revenue is spent, the objection is essentially political and

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[173] *See* Bowen v. Kendrick, 487 U.S. 589, 621 (1988) (holding that plaintiff had standing to challenge spending program on Establishment Clause grounds); Flast v. Cohen, 392 U.S. 83, 86 (1968) (same). These exceptions have been created to permit taxpayers to challenge expenditures that violate the "specific" limitation on government spending imposed by the Establishment Clause of the First Amendment. U.S. CONST. amend I; *see also Bowen*, 487 U.S. at 590; *Flast*, 392 U.S. at 127.

[174] 262 U.S. 447 (1923).

[175] *See id.* at 479.

[176] *See id.*

[177] *See id.* at 480.

[178] *Id.* at 488.

[179] *See, e.g.*, Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984); Reagan v. Taxation With Representation, 461 U.S. 540, 542 (1983).

should be decided in the arena of the political branches.[180] Mrs. Frothingham can cast her vote for states' rights and against federal maternity aid, and she can convince others to do the same, but the federal courts will not provide the forum for her opposition.

Similarly, there would seem to be no viable objection to the imposition of a small tax on the transaction of legal services. Were the revenues from such a tax earmarked for legal service programs, any objection would in reality be an attack on the way that the funds were spent and, therefore, would be essentially a political, rather than a legal, question. *Phillips*, no less than *Frothingham*, presents an essentially ideological or policy-based attack on government spending, rather than a genuine concern that a discrete and substantial sum of money has been lost. Yet in *Phillips*, there is no suggestion that plaintiffs lack standing. The reason for this is revealed upon examination of the narrow exceptions to the bar on taxpayer standing that the Supreme Court has created. By far, the most prominent of these exceptions is the rule that a taxpayer may challenge a government program that provides funds to religious organizations in violation of the Establishment Clause.[181] Although these cases can be difficult to fully explain,[182] the exception seems to rest upon the idea that the Establishment Clause grants to individuals a personal right to be free of government-supported religion; that idea transforms these disputes from mere matters of policy into legitimate claims of individual rights.[183] In other words, while framed as taxpayer standing cases, they actually rest not so much on the injury to the individual's pocketbook, but rather on the personal rights granted by the Establishment Clause.[184]

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[180] *See* Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 475 (1982) ("[T]he Court has refrained from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches.") (quoting Warth v. Seldin, 422 U.S. 490, 499-500 (1975)).

[181] *See* Bowen v. Kendrick, 487 U.S. 589, 590 (1988) (holding that plaintiff had standing to challenge expenditures of tax funds on Establishment Clause grounds); Flast v. Cohen, 392 U.S. 83, 125 (1968) (same).

[182] The Supreme Court's decision in *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982), made explaining the Establishment Clause exception even more challenging. In that case, the Court denied taxpayers standing to challenge a government transfer of land, rather than to challenge a transfer of funds to a religiously affiliated college. *See id.* at 481-82.

[183] *See Flast*, 392 U.S. at 103-04 ("The concern of James Madison and his supporters [in opposing religious assessments] was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general.").

[184] *See id.* at 104. In *Flast*, the Court explained:

In the same way, framing *Phillips* as a Takings Clause case is a maneuver that, on its surface, avoids the standing problem. The objection, in theory, is to the appropriation of an individual's property, thus establishing an individualized injury. Yet the essential similarity remains, despite the formal differences between *Phillips* and *Frothingham*. Claiming that the actual "injury" here is a monetary loss, rather than the plaintiff's offense at the existence of (or the plaintiff's marginal participation in) a government spending program, stretches the imagination. *Phillips*, as with the Establishment Clause cases, can be distinguished from *Frothingham* by underscoring the existence of a constitutional provision creating a personal right, that is, the Takings Clause. In the Establishment Clause example, however, the constitutional command is that no such government program shall exist; if one is established, personal rights are violated. The *Phillips* example is quite different. As has been discussed, the Takings Clause does not prohibit the government from advancing any particular substantive goal, but limits only the means employed.[185] In the Establishment Clause standing cases, a searching inquiry into whether plaintiffs really lost any money is beside the point; the constitutional provision at issue is not about financial loss.[186] In contrast, in a Takings Clause case, such loss is the sole issue with which the Constitution is concerned.

Thus, the recognition of a property interest in *Phillips* essentially transforms an attack on a government program for ideological reasons into a defense of individual rights. As a result, the *Phillips* plaintiffs are able to avoid the standing problems posed by *Frothingham*. The question is whether this is of much concern beyond the facts of this case. Surely Mrs. Frothingham could not have gained standing simply by claiming that the fraction of her taxes devoted to aiding new mothers was "taken," at least under current constitutional standards. It is possible, however, that *Phillips* is an indication that the Court may be moving away from those standards. That notion

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> [O]ne of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general. . . . The Establishment Clause was designed as a specific bulwark against such potential abuses of governmental power, and that clause of the First Amendment operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by [Article] I.

Id. at 103-04.

[185] *See supra* text accompanying notes 168-68 (interpreting "public use" restriction broadly, giving government wide discretion in exercising eminent domain).

[186] *See supra* notes 183-82.

might seem extremely unlikely if *Phillips* stood alone, but it is not the only recent example of the Court's expansive use of the Takings Clause to avoid serious obstacles to invalidating government programs that present situations quite unlike the classic case of eminent domain.

2. *Eastern Enterprises*: A Plurality of the Court Stretches the Takings Clause Again

In *Phillips*, the Court extended the scope of the Takings Clause to permit an ideological attack on IOLTA programs despite the difficulty the standing doctrine normally poses to such an attack.[187] During the same term, in *Eastern Enterprises v. Apfel*,[188] a plurality of the Supreme Court once again extended the bounds of the Takings Clause. This time, the Court enlarged Takings Clause jurisprudence in order to apply a more stringent test than the easily satisfied substantive due process standard commonly applied to assess the validity of economic regulation.[189] Beginning in 1946, coal mine operators and the United Mine Workers (UMW) jointly maintained trust funds to provide payment for medical expenses incurred by coal miners, retirees, and their dependents.[190] Royalties assessed on coal production funded these trusts pursuant to a series of agreements between the union and the operators.[191] Prior to 1974, the trustees had wide authority to adjust benefit levels and did not guarantee lifetime benefits for retirees and their dependents.[192] After the enactment of ERISA[193] in 1974, an agreement amended the plan to provide for vested lifetime retiree benefits.[194] As health-care costs rose, coal production declined, and a sizable generation of miners retired, the employer contributions required to keep the trust fund solvent substantially increased.[195] Over the years, a number of employers withdrew from the agreement, either leaving the coal

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[187] *See* Phillips v. Washington Legal Found., 524 U.S. 156, 172 (1998).

[188] 524 U.S. 498 (1998).

[189] *See id.* at 528; *see* Nebbia v. New York, 291 U.S. 502, 537 (1934) ("So far as the requirement of due process is concerned . . . a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purposes.").

[190] *See id.* at 505.

[191] *See id.* at 505-06.

[192] *See id.* at 508, 509.

[193] The Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1003 (1974), commonly known by the acronym ERISA, imposes requirements relating to funding and vesting of pension plans.

[194] *See Eastern Enter.*, 524 U.S. at 509.

[195] *See id.* at 510.

business entirely or choosing to continue with nonunion employees.[196] By 1990, the trust fund was in deep financial trouble.[197]

At that point, Congress intervened and enacted the Coal Industry Retiree Health Benefit Act of 1992,[198] which was intended "'to stabilize plan funding and allow for the provision of health care benefits to . . . retirees.'"[199] The fundamental approach of the legislation was to assign responsibility for miners' health-care benefits to the companies that had employed them, even in cases in which the employer had not signed a post-1974 agreement guaranteeing lifetime benefits.[200]

Under the Act, the Commissioner of Social Security was to assign responsibility for paying premiums for each retired miner according to an established order.[201] First, the Commissioner was to assign responsibility to the company that had employed the miner most recently and for at least two years, if the company had signed a post-1974 agreement.[202] Second, if no such employer existed, the Commissioner was to assign responsibility to the company that had signed a post-1974 agreement and was the most recent operator to employ the miner.[203] Finally, if the miner still had not been assigned, responsibility was to be assigned to the operator who had employed the miner for a longer period of time than any other signatory operator prior to any post-1974 agreements.[204]

Eastern Enterprises (Eastern) had been involved in the coal industry and had signed the industry-wide agreements created between 1947 and 1974.[205] In 1963, the company transferred its coal operations to a subsidiary and subsequently sold its interest in that subsidiary.[206] Pursuant to the 1992 Coal Act, the Commissioner assigned to Eastern payment responsibility for over 1000 retired miners who had worked for Eastern prior to its withdrawal from the coal industry and who could not be assigned to any other company.[207]

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196 *See id.* at 511.

197 *See id.*

198 26 U.S.C. §§ 9701-9722 (1994).

199 *Eastern Enter.*, 524 U.S. at 514 (quoting 26 U.S.C. § 9701 Historical and Statutory Notes, Statement of Policy (1994)).

200 *See id.* at 513, 514 (citation omitted).

201 *See id.* at 514-15 (citing 26 U.S.C. § 9706(a) (1994)).

202 *See id.* at 515.

203 *See id.*

204 *See id.*

205 *See Eastern Enter.*, 524 U.S. at 516.

206 *See id.*

207 *See id.* at 517.

The premium for these retirees exceeded $5 million for a twelve-month period.[208]

Eastern challenged the part of the 1992 Coal Act that subjected a company that had never signed an agreement vesting lifetime health benefits in its workers to liability for lifetime premiums for those workers.[209] This retroactive responsibility, Eastern claimed, violated both the Due Process Clause and the Takings Clause.[210] In a five-to-four decision, the Supreme Court held in favor of Eastern, although the majority did not agree on the grounds for doing so.[211] Specifically, four justices relied on the Takings Clause, and one exclusively on the Due Process Clause.[212]

The four-justice plurality found no need to address the due process claim and instead analyzed the case entirely as a Takings Clause question.[213] Initially, the plurality found "that the Coal Act has forced a considerable financial burden upon Eastern."[214] Unlike the typical takings claim, the financial burden was not linked to any specific physical asset or fund, but the Court found the requirement "to turn over a dollar amount" sufficient to trigger Takings Clause scrutiny.[215] The requirement to make payments, the plurality found, "substantially interferes with Eastern's reasonable investment-backed expectations."[216] This factor, which has been significant in recent takings cases involving the regulation of land development,[217] can be extremely problematic because it is unclear that the Takings Clause was ever meant to serve as protection for speculation. Arguably, if what is taken is merely the expectation (or hope) of future profit,

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[208] *See id.*

[209] *See id.*

[210] *See id.*

[211] *See Eastern Enter.*, 524 U.S. at 538.

[212] *See id.* at 538 (Thomas, J., concurring), 539 (Kennedy, J., concurring).

[213] *See id.* at 538-39.

[214] *Id.* at 529.

[215] *Id.*

[216] *Id.* at 532.

[217] Thus, in *Penn Central*, the Court found that "the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel." Penn Cent. Transp. Co. v. City of New York, 438 U.S. 103, 136 (1978). Likewise, in *Keystone Bituminous*, the Court found that the regulation did not significantly interfere with "investment-based expectations." *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 493-97 (1987). In contrast, Justice Kennedy, concurring in *Lucas*, found that it was crucial that a total prohibition on development would interfere with the developer's reasonable expectations. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1032-36 (Kennedy, J., concurring). For the first significant discussion of this test to be set forth, see Frank Michelman, *supra* note 70, at 1229-34.

there is no difference from the occurrence of events that cause any investment to be unprofitable.

If there is a convincing way to draw the line in these scenarios, it must depend largely on assessing what types of losses were reasonably foreseeable, and therefore do not call for compensation, and what types were completely unforeseeable to the property owner when he chose to make an initial investment. This latter type of loss, when caused by the government, presents a much more sympathetic case for compensation. In *Eastern Enterprises*, the plurality found that the retroactivity of the Coal Act, which "reaches back 30 to 50 years to impose liability,"[218] would destroy legitimate, settled expectations that Eastern would be free of obligations stemming from its past coal operations.[219] While conceding that congressional attention to "a grave problem in the funding of retired coal miners' health benefits" was legitimate, the plurality concluded that a solution that "singles out certain employers to bear a burden that is substantial in amount, based on the employers' conduct in the past, and unrelated to any commitment that the employers made or any injury they caused" would violate the Takings Clause.[220]

The decisive fifth vote to invalidate the challenged section of the Coal Act came from Justice Kennedy, who, along with the four dissenters, disagreed with the plurality's application of the Takings Clause.[221] Instead, he would have subjected this type of retroactive liability to scrutiny under the Due Process Clause.[222] Although the Coal Act "imposes a staggering financial burden,"[223] Justice Kennedy noted that it is a burden quite unlike those normally classified as takings:

> [I]t regulates the former mine owner without regard to property. It does not operate upon or alter an identified property interest, and it is not applicable to or measured by a property interest. The Coal Act does not appropriate, transfer or encumber an estate in land . . . or even a bank account or accrued interest. The law simply imposes an obligation to perform an act, the payment of benefits. . . . To the extent it affects property interests, it does so in a manner similar to many laws; but until today, none were thought to constitute takings.[224]

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[218] *Eastern Enter.*, 524 U.S. at 532.
[219] *See id.* at 532, 534.
[220] *Id.* at 537.
[221] *See id.* at 539 (Kennedy, J., concurring).
[222] *Id.*
[223] *Id.* at 540 (Kennedy, J., concurring).
[224] *Eastern Enter.*, 524 U.S. at 540 (Kennedy, J., dissenting).

By ignoring the usual Takings Clause requirement that the government target "a specific property interest,"[225] Justice Kennedy argued, the plurality potentially extended the "already difficult and uncertain" standards of the Takings Clause "to a vast category of cases" never before thought to present a Takings Clause issue.[226]

Justice Kennedy, as well as the four dissenters,[227] highlighted a significant distinction between the purposes of the Takings Clause and those of the Due Process Clause.[228] If a government program violates substantive due process rights, the Justice explained, it cannot continue.[229] The Takings Clause, in contrast, does not seek to prevent the government from pursuing any particular goal; the clause merely requires compensation when such a goal is approached through the taking of private property.[230] In *Eastern Enterprises*, unlike the typical takings case, the plaintiffs' success does not give the government the option of carrying out the statutory scheme while providing compensation. Instead, it invalidates the challenged statutory provision entirely.[231]

To invoke the Due Process Clause would clearly be to challenge the fundamental legitimacy of the legislation. Justice Kennedy, however, noted that the invocation of the Takings Clause does not allow the Court to avoid "making a normative judgment about the Coal Act."[232] Certainly, the critique of retroactivity that the plurality employed in assessing "reasonable investment-based expectations" for Takings Clause purposes would be central to any analysis under the Due Process Clause. In fact, Justice Kennedy, in his due process analysis, noted the severity and retroactivity of the statute and the fact that retroactive laws "can destroy the reasonable certainty and security which are the very objects of property ownership."[233] The Justice found these to be key factors in his conclusion that the statute

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[225] *See id.* at 542 (Kennedy, J., concurring).

[226] *Id.*

[227] Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, wrote a dissenting opinion, *see id.* at 550 (Stevens, J., dissenting), and Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, also authored a dissent, *see id.* at 553 (Breyer, J., dissenting).

[228] *See id.* at 544, 545 (Kennedy, J., concurring).

[229] *See id.*

[230] *See id.* at 545 (Kennedy, J. concurring).

[231] Justice Kennedy emphasized that the Takings Clause is not a "substantive or absolute limit" on government activity, but rather permits "Government to do what it wants so long as it pays the charge." *Id.* Justice Breyer made the same point in dissent. *See id.* at 554 (Breyer, J., dissenting).

[232] *See id.* at 544 (Kennedy, J., concurring).

[233] *See id.* at 548 (Kennedy, J., concurring).

was "one of the rare instances" involving "the most egregious of circumstances" that permit a court to invalidate economic legislation on substantive due process grounds.[234]

Though Justice Kennedy's arguments are strong, it is important to note that, of the five justices who analyzed the case under the Due Process Clause, four disagree with his conclusion.[235] The dissenters, examining the relations between the coal operators and the UMW, found that Eastern both benefited from the labor of the miners whom the Coal Act sought to protect and "helped to create conditions that led the miners to expect continued health care benefits for themselves and their families after they retired."[236] Thus, the Justices concluded, the imposition of liability, even retroactively, did not rise to the level of fundamental unfairness necessary to establish a due process violation.[237] Given the long history of the Court's reluctance to overturn economic regulation on substantive due process grounds,[238] the plurality may have felt more secure invoking a somewhat more robust constitutional provision.

Another possibility is that several members of the plurality, having strongly opposed vigorous due process challenges to legislation in areas such as reproductive rights and other autonomy claims,[239] found themselves as intimidated by the prospect of a vigorous Due Process Clause as they were enamored by a strong Takings Clause.[240] It is quite possible, however, that at least some in the plurality consciously desired that which Justice Kennedy feared—

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[234] *Eastern Enter.*, 524 U.S. at 550 (Kennedy, J., concurring).

[235] *See id.* at 550-53 (Stevens, J., dissenting); *id.* at 553-68 (Breyer, J., dissenting).

[236] *Id.* at 553 (Breyer, J., dissenting). Justice Breyer details the ways in which Eastern Enterprises, while not making binding promises, led its employees to believe that their pension benefits were secure. *See id.* at 559.

[237] *See id.* at 559 (Breyer, J., dissenting).

[238] *See, e.g.*, Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976); Williamson v. Lee Optical, 348 U.S. 483 (1955); United States v. Carolene Prods. Co., 304 U.S. 144 (1938); Nebbia v. New York, 291 U.S. 502 (1934).

[239] Chief Justice Rehnquist and Justices Scalia and Thomas have been strongly critical of the use of an expansive Due Process Clause to create abortion rights. *See, e.g.*, Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 944-79 (1992) (Rehnquist, C.J., concurring in part and dissenting in part); *Planned Parenthood*, 505 U.S. at 979-1002 (Scalia, J., concurring in part and dissenting in part). The Chief Justices and Justices Scalia and Thomas have also opposed the use of the clause to advocate a "right to die." *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702 (1997) (holding that the Fourteenth Amendment does not guarantee the right to assisted suicide).

[240] Justice Kennedy emphasized that employing the Due Process Clause in *Eastern Enterprises*, which involves "the most egregious of circumstances," would not threaten the general principle that legislation is to be given deference when challenged on due process grounds. *Eastern Enter.*, 524 U.S. at 550 (Kennedy, J., concurring).

the creation of a surprisingly broad range for invocation of the Takings Clause.[241] In other words, the plurality might have intended to reinvigorate the essence of substantive due process analysis as applied to economic regulation, while avoiding explicit reliance on the Due Process Clause, with its legacy of privacy and autonomy holdings that three members of the plurality have strongly and consistently opposed.[242]

Eastern Enterprises invokes the Takings Clause to bolster economic rights to an extent that the Due Process Clause arguably would fail to do. *Phillips* permits plaintiffs to employ the Takings Clause to avoid standing problems in launching what is essentially an attack on a government program that plaintiffs find ideologically repugnant. Before exploring the consequences of these cases to the Takings Clause, one must examine a few nontakings cases that also indicate the Supreme Court's trend toward protecting traditionally ill-guarded monetary or economic interests in a more vigorous fashion by recasting the claim as one resting upon a more strongly protected right.

3. *Lochner* by Other Means? Some Developments Outside of the Takings Clause

Phillips and *Eastern Enterprises* employ the Takings Clause to bolster arguments that otherwise would need to rest on much more uncertain constitutional grounds.[243] These cases, however, are not the only recent examples of the use of specific rights provisions in new guises to bolster either an attack on business regulation or an attack on government expenditure of its revenue.

Probably the most significant area in which individual rights concepts have been applied to what is traditionally seen as economic or business regulation is commercial speech. The Supreme Court's earliest analyses of advertising saw such activity merely as part of the act of conducting business, rather than as an independent act of communication. For example, in *Valentine v. Chrestensen*,[244] the Court characterized the distribution of advertising handbills as "pursu[ing]

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[241] *See generally id.*

[242] *See supra* note 239 and accompanying text (noting that Chief Justice Rehnquist and Justices Scalia and Thomas consistently oppose broad extensions of due process in the area of privacy rights).

[243] *See supra* notes 30-65 and accompanying text (discussing *Phillips*); *see also supra* notes 187-240 and accompanying text (discussing *Eastern Enterprises*).

[244] 316 U.S. 52 (1942).

a gainful occupation."[245] Regulation of that distribution, then, was the regulation of business activity.[246] Only a few years earlier, the Court had overruled the doctrine enunciated in *Lochner v. New York*,[247] which required heightened scrutiny for government regulation of business activity under the Due Process Clause.[248] That the Court would view *Valentine* as merely another step in the long-standing constitutional struggle over the freedom to contract instead of as primarily a case involving the right of free speech is unsurprising.[249]

By 1980, however, the Court viewed commercial speech, that is, speech that does "'no more than propose a commercial transaction,'"[250] primarily as speech, rather than merely as the act of selling, and therefore as being entitled to at least limited First Amendment protection.[251] Over the last two decades, although the trend has not been entirely smooth, the level of protection afforded to commercial speech has expanded to the point at which, so long as the speech is not untrue or misleading,[252] approaches that given to noncommercial speech.[253] Business activity, as such, receives only minimal Fourteenth Amendment protection, while recharacterizing advertising as something other than simply conducting business raises the constitutional bar. On a related front, Supreme Court decisions equating political contributions to speech effectively strengthen the power of businesses (as well as other moneyed interests) to further their political goals.[254] On the whole, the Court's willingness to view

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[245] *Id.* at 54 ("Whether, and to what extent, one may promote or pursue a gainful occupation in the streets . . . are matters for legislative judgment.").

[246] *See id.* at 55.

[247] 198 U.S. 45, 65 (1905) (holding that a state limitation on the working hours of bakers violated the Due Process Clause).

[248] The *Lochner* principle was overruled in a series of cases during the 1930s, most notably *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 414 (1937).

[249] The extension of First Amendment protection to advertising can be seen as a "renovation" of "the values of *Lochner v. New York*." Thomas H. Jacobson & John C. Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 31 (1979).

[250] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 762 (1976) (quoting Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 385 (1973)). A somewhat different definition is contained in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 561 (1980) (stating that commercial speech is "expression solely related to the economic interests of the speaker and its audience").

[251] *See Central Hudson*, 447 U.S. at 561-62.

[252] *See id.* at 566 ("For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading.").

[253] *See generally* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

[254] *See* Federal Election Comm'n v. National Conservative Political Action Comm'n, 470 U.S. 480, 493 (1985); First Nat'l Bank of Boston v. Bellotti, 435 U.S.

the pursuit of economic gain as the exercise of highly protected First Amendment rights has led some commentators to suggest that business and economic interests have found a way to secure constitutional protection comparable to that afforded in the days of *Lochner*.[255]

Phillips, of course, is not about the protection of business activity, but rather about objecting to the manner in which a government agency uses one's property. Analogous First Amendment cases are not hard to find; in several recent cases, students at public universities have challenged the use of student activity fees to subsidize student groups whose goals include the propagation of messages with which the objecting students disagree.[256] Those students have claimed the right to withhold some portion of their assessed fees on the grounds that a First Amendment violation occurs by forcing them to support, and thus be identified with, a program's message with which they disagree.[257] The university defendants responded that the fees do no more than create and sustain an open forum for the presentation of diverse views, and that, as long as the program is not operated in a viewpoint-discriminatory manner, no student is identified with, or forced to support, any particular view.[258] Lower courts have split on the question of whether the objecting students' rights have been violated;[259] the Supreme Court will hear the issue shortly.[260]

Regardless of the Supreme Court's final disposition of this issue, the claims seem analogous to that in *Phillips*.[261] Indeed, if one adds

765, 784 (1978); Buckley v. Valeo, 424 U.S. 1, 17 (1976).

[255] *See, e.g.*, Jackson & Jeffries, *supra* note 249, at 130-31. For examination of the hazy line between the regulation of commerce and the regulation of communication, see generally Ronald K.L. Collins and David M. Skover, *Commerce & Communication*, 71 TEX. L. REV. 697 (1993) (arguing for restrictions on commercial speech); Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747 (1993) (tracing the Court's shift in its understanding of whether these cases were primarily regulations of speech or conduct).

[256] *See* Southworth v. Grebe, 151 F.3d 717, 718-19 (7th Cir. 1998), *cert. granted sub. nom.*, Board of Regents v. Southworth, 119 S. Ct. 1332 (1999); Rounds v. Oregon State Bd. of Higher Educ., 166 F.3d 1032, 1034 (9th Cir. 1999); Carroll v. Blinken, 957 F.2d 991, 995 (2d Cir. 1992); Arrington v. Taylor, 380 F. Supp. 1348, 1360 (M.D.N.C. 1974).

[257] *See, e.g., Southworth*, 151 F.3d at 718-19.

[258] *See, e.g., Carroll*, 957 F.2d at 999-1001.

[259] *See supra* note 256 (providing examples of lower-court decisions reaching different conclusions on the issue).

[260] The Supreme Court has granted certiorari to review the Seventh Circuit's decision in *Southworth*. *See Southworth*, 119 S. Ct. at 1332.

[261] *See* Phillips v. Washington Legal Found., 524 U.S. 156, 163 (1998).

the suggestion of *Eastern Enterprises* that a government-ordered transfer of funds from *A* to *B* creates Takings Clause concerns,[262] it is difficult to see why these cases are not Takings Clause cases. Once again, a small, even trivial, sum is allocated to some program that the individual finds objectionable. The question is whether the First Amendment (or the Takings Clause) creates a justiciable claim when the government uses tax money to fund some communicative activity with which a taxpayer disagrees. *Frothingham* would seem to dispose of such a claim, but recasting what are essentially objections to the government-sponsored programs themselves as individual rights claims may be sufficient to overcome this long-standing precedent.

Standing alone, *Phillips* may have little significance outside of the specific area of IOLTA and the funding of legal services. Against a background that includes *Eastern Enterprises* and non-takings cases invoking individual rights provisions expansively to permit successful attacks on government programs and to bolster constitutional protection for economic or business interests, perhaps it is a harbinger of much more.

4. A Maximalist View: *Phillips* and *Eastern Enterprises* as Suggestions of Things to Come?

In recent years, several Supreme Court opinions involving federalism issues[263] and the Privileges and Immunities Clause of the Fourteenth Amendment[264] have led to serious discussion about whether the cases are mere curiosities, limited to their facts, or whether they signal a serious reworking of long-standing constitutional principles.[265] Similarly, *Phillips* may be interpreted in at least two ways. The case may have little significance outside of its own

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[262] *See, e.g.*, Eastern Enter. v. Apfel, 524 U.S. 498, 556 (Breyer, J., dissenting) (1998).

[263] *See, e.g.*, Alden v. Maine, 119 S. Ct. 2240 (1999); College Sav. Bank v. Florida Prepaid PostSecondary Educ. Expense Bd., 119 S. Ct. 2219 (1999); Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992); *see also supra* notes 1-2 and accompanying text (noting recent decisions expending state immunities under the Tenth and Eleventh Amendments).

[264] U.S. CONST. amend. XIV, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ."); *see also* Saenz v. Roe, 119 S. Ct. 1518 (1999); *see also supra* note 3 and accompanying text (stating that the right of interstate travel is among the privileges and immunities of United States citizenship).

[265] *See, e.g.*, Frank B. Gross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304 (1999); John Randolph Prince, *Forgetting the Lyrics and Challenging the Tune: The Eleventh Amendment and Textual Infidelity*, 104 DICK. L. REV. 1 (1999); Laurence H. Tribe, *Saenz Sans Prophecy: Does the Privileges and Immunities Revival Portend the Future—Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110 (1999).

facts and, especially if IOLTA programs are found upon remand not to constitute takings, may be largely forgotten in the near future. In contrast, when viewed in tandem with *Eastern Enterprises* and in light of the Supreme Court's general receptiveness to claims of economic rights, the case may indicate something far more sweeping.

In *Eastern Enterprises*, the dissent asked, "If the [Takings] Clause applies when the government simply orders A to pay B, why does it not apply when the government simply orders A to pay the government, *i.e.*, when it assesses a tax?"[266] While the rhetorical question was meant, of course, to highlight inconsistencies in the plurality's reasoning, the plurality might resolve those inconsistencies by declaring that the Takings Clause does apply in the situation involving the tax.

At least since *Frothingham*, federal courts have turned back attempts to oppose government programs on ideological grounds through judicial, rather than political, means.[267] *Phillips*, however, suggests that the Takings Clause potentially will serve to provide an effective counterargument to the long-accepted bar to taxpayer standing. If the loss of the power to exclude others from a productive use of property of no practical use to the owner is enough to support a Takings Clause claim, the commitment of some portion of one's tax liability to a constitutionally objectionable program must also be sufficient. Of course, there are obvious formal differences between the two situations, but Mrs. Frothingham seemingly lost no less than did the plaintiffs in *Phillips*.

In *Phillips*, the Takings Clause is used to circumvent the "actual injury" requirement of the doctrine of standing.[268] An ultimately favorable decision for the plaintiff's will, unlike the typical takings case, require the termination of the IOLTA program. Of course, the ultimate goal of government-funded legal services may be achieved through the use of tax revenues,[269] a type of funding that likely would be immune from any Takings Clause attack.

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[266] *Eastern Enter.*, 524 U.S. at 556 (Breyer, J., dissenting).

[267] *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (addressing a challenge to enforcement policies under the Endangered Species Act); United States v. Richardson, 418 U.S. 166 (1974) (involving a challenge to statute providing that the CIA budget would not be made public); Sierra Club v. Morton, 405 U.S. 727 (1972) (addressing a challenge to construction project in National Forest).

[268] *See* Phillips v. Washington Legal Found., 524 U.S. 156, 172 (1998) (permitting plaintiffs to challenge the legitimacy of a statutory program through the use of a takings claim challenge).

[269] *See supra* notes 174-79 and accompanying text (explaining that taxpayers generally lack standing to challenge, as taxpayers, government expenditure programs).

Eastern Enterprises, however, seems to cast at least a vague shadow upon even this conclusion. In *Eastern Enterprises*, the barrier to recovery was not a standing problem, but rather the difficulty of establishing a substantive due process claim against an economic regulation.[270] Once again, the Takings Clause rode to the plaintiff's rescue.[271] As in *Phillips*, the consequence of a decision for the plaintiff would end the government program, at least as it was originally structured. If the miners' health funds were to be preserved, they would have to be preserved from other sources, perhaps from general tax revenues. *Phillips* and *Eastern Enterprises*, taken together, may suggest the possibility of a new judicial action against government programs that seek to redistribute income. Some time ago, Professor Richard Epstein proposed a vigorous expansion of the scope of the Takings Clause.[272] Going far beyond the point that any court had gone, the professor argued that essentially all redistributive government programs, including such progressive taxation, should be considered illegitimate takings. In his view, the clause was not meant merely to ensure compensation when the government takes specific property for the welfare of the community, but in a broad sense was intended to protect all existing economic arrangements by preventing government attempts to have one subset of the population transfer wealth to another.[273] In such a view, the Takings Clause does not only regulate the manner in which government accomplishes its goals, it also declares at least some goals to be illegitimate.[274]

Phillips and *Eastern Enterprises* do not necessarily suggest that takings law is gradually beginning to grow into a much more potent restraint on government power over property. After all, only four justices endorsed the use of the Takings Clause in *Eastern Enterprises*. Moreover, within that plurality, it is difficult to imagine the usually cautious and incremental Justice O'Connor[275] as eager to employ the

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[270] *See supra* notes 235-36 and accompanying text (explaining that economic regulations are subjected to an easily satisfied rational basis test).

[271] *See Eastern Enter.*, 524 U.S. at 538 (holding that the challenged legislative act violated the Takings Clause); *see also supra* notes 210-16 and accompanying text (discussing the holding in *Eastern Enterprises*).

[272] *See generally* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

[273] *See id.* at 283-305 (arguing that taxation that aims at redistributing income is unconstitutional).

[274] *See id.*

[275] *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 9 (1999) ("[Justice O'Connor] tends to be a minimalist. I understand the term to refer to judges who seek to avoid broad rules and abstract

Takings Clause to radically limit government power.

Still, the seeds of such a radical step may well be present in these cases, regardless of whether, ultimately, *Phillips* is resolved in favor or against the Texas IOLTA program. The lasting significance of *Phillips* is that it allows a plaintiff who has lost nothing beyond the right to exclude others from the use of property to claim an injury sufficient to maintain standing to challenge the government act. Combined with the suggestion in *Eastern Enterprises* that the imposition of an obligation to pay money can implicate the Takings Clause, regardless of whether it involves an identifiable bank account or other source of funds, *Phillips* may provide the tools for constructing a Takings Clause of far more significance than previously imagined.

5. What Should the Takings Clause Protect?: A Brief Postscript

The language and history of the Takings Clause seem to indicate that, as Justice Kennedy and the dissenters in *Eastern Enterprises* maintain,[276] it was not intended to prevent the government from engaging in activity that could legitimately be seen as furthering public welfare. Instead, the Takings Clause was meant only to ensure compensation for deprivations of specific property interests. To employ the clause as a weapon to attack the imposition of a monetary obligation, as in *Eastern Enterprises*,[277] or to attack an expenditure of funds in a manner that a plaintiff finds ideologically objectionable, as in *Phillips*,[278] seems far beyond the proper scope of the provision. Of course, this does not mean that monetary assessments may not be challenged. The proper standard for assessing their validity, however, is the relatively permissive standard of substantive due process.[279] Similarly, a challenge such as that presented in *Phillips* should be assessed for what it is—a First Amendment claim. As in all such claims, though, the first requisite step for the plaintiff is to establish a sufficient injury to warrant standing.[280]

Moreover, it is unclear whether a deprivation that cannot be

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theories, and attempt to focus their attention only on what is necessary to resolve particular disputes.").

[276] *See Eastern Enter.*, 524 U.S. at 545 (Kennedy, J., concurring); *see also id.* at 554 (Breyer, J., dissenting).

[277] *See id.* at 538.

[278] *See* Phillips v. Washington Legal Found., 524 U.S. 156, 172 (1998).

[279] *See supra* notes 235-36 and accompanying text (discussing generally applied, low-level scrutiny utilized in substantive due process challenges to economic regulation).

[280] *See supra* notes 173-82 and accompanying text (discussing taxpayer standing).

translated into a dollar amount should be subject to the Takings Clause. Clearly, the true value of property cannot be reduced entirely to its dollar value. A number of commentators have stressed the extent to which at least some property is essential to one's "personhood"—one's unique sense of self.[281] Thus, the family home may be a substantially different type of property than a share in a mutual fund. One might easily conclude that "personhood" property should be protected more strongly than other types of property. Perhaps the government should be barred from acquiring such property altogether; at the very least, the inadequacy of equating just compensation with market value should be recognized.[282]

Not surprisingly, courts have consistently rejected this line of argument.[283] Not only is the law of eminent domain indifferent to the type of property acquired by the state,[284] but the valuation of just compensation is solely a function of market value, with no enhancement for subjective loss.[285] To a great extent, this is obviously a consequence of the enormous difficulties that would flow from allowing compensation for subjective or "personhood" losses. Perhaps even more significant is the difficulty of drawing the line between the extent to which property legitimately gives one freedom from undue control by others and the extent to which it gives one power over others.

Usually, these two elements are mixed together in a way that makes separating and comparing their relative weights uncertain. Owning one's own house gives the owner a legitimate, valuable sense of control over an aspect of the owner's life, but it also may give the owner power to frustrate legitimate community goals by refusing to sell to make way for a public use. The Takings Clause, then, and the jurisprudence developed under the clause, reach a compromise by limiting both the owner's power to frustrate the community and the community's power through the requirement of just compensation at market value.

Phillips seems to present a situation in which the intangible property right involved is entirely power over others, rather than the ability to be free of the power of others. It is difficult to see how this

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[281] *See supra* notes 137-39 and accompanying text (discussing the importance of at least some forms of property to personal freedom and identity).

[282] *See supra* notes 139-42 and accompanying text (asserting that some property has value beyond market value).

[283] *See supra* notes 137-38.

[284] *See id.*

[285] *See supra* note 142 and accompanying text (stating that objective market value is the standard for compensation in eminent domain cases).

should be afforded more constitutional protection than the nonmarket-based "personhood" aspects of property routinely ignored in normal eminent domain situations. Yet *Phillips* gives strong constitutional protection to a property right with no market value. The practical and theoretical difficulties presented by using the Takings Clause to protect property rights beyond those that have market value are enormous. If that is to be done, however, those aspects of property that afford the owner power over the community do not deserve more respect than those that allow one to tend one's own garden free from the power of others.

CONCLUSION

The *Phillips* decision has attracted much attention, most of which, however, has focused on the decision's impact on the future of IOLTA programs and the funding of legal services. Surely this is an important issue, but the significance of *Phillips* may, in the long run, extend far beyond IOLTA. Even if the court ultimately holds that the Texas IOLTA program is not a taking, the decision has established that the deprivation of the right to exclude, standing alone and with no monetary loss attached, can implicate the Takings Clause. Combined with the reasoning of the plurality in *Eastern Enterprises*, *Phillips* may well signal the willingness of the current Supreme Court to sharply expand the possible scope of the Takings Clause.

The Takings Clause was not meant to prevent the government from pursuing legitimate goals; it was meant only to assure that no individual would be unduly burdened in the process of doing so. Long-standing rules limiting taxpayer standing in federal court have worked to ensure that the political process, rather than the courts, will decide fundamentally political questions concerning government allocation of funds. Together, the reasoning in *Phillips* and *Eastern Enterprises* poses a potentially serious challenge to each of those principles. Mrs. Frothingham would be pleased; whether we should be as well is highly questionable.