NOTE

Taking an Interest in Inmate Trust Accounts

The Fifth Amendment's Takings Clause is generally unconcerned about the size of property taken. But is it more concerned about the person from whom the property is taken? When that person is a prisoner, courts have found the relevance of the Takings Clause less clear. The Supreme Court has held that the interest earned on private accounts held by the state—however minimal—is protected by the Takings Clause. Circuits are split, however, on the question of whether that protection extends to the interest earned on inmate trust accounts. This Note examines the circuit split and considers other paths to recovery for inmates. Finally, this Note argues that both stare decisis and the notion of the "positivist trap" in the procedural due process realm indicate that courts should consider the interest earned on inmate trust accounts no differently than they would other trust accounts. In other words, courts should recognize that Takings Clause protection does not stop short of the interest earned on inmate trust accounts.

INTRODUCTION

Eddie's mother forgoes paying her bills to send a money order to her son in Virginia's Bland Correctional Center.[1] What Eddie does not spend on toothpaste, toilet paper, and perhaps an appointment with the doctor, he places in a compulsory savings account.[2] When he is released from incarceration following a twenty-year sentence, Eddie can bring the remaining funds with him.[3] In the meantime, interest accrues on his account.[4] But Eddie will not be able to add the earned interest to the sum he brings back home; instead, the interest will benefit the Department of Corrections.[5]

Eddie's situation is not uncommon. The majority of states have widened opportunities for inmates to earn or receive money while behind bars.[6] Approximately half of the 2.3 million individuals incarcerated in the United States work for private or state-owned businesses, in work-release programs, or, most commonly, in prison jobs

1. Daniel Wagner, *Meet the Prison Bankers Who Profit from the Inmates*, TIME (Sept. 30, 2014), http://time.com/3446372/criminal-justice-prisoners-profit/ [https://perma.cc/AY4A-VF25].
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *See* Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POL'Y INITIATIVE (Apr. 10, 2017), https://www.prisonpolicy.org/blog/2017/04/10/wages/ [https://perma.cc/JA6J-B3KB].

supporting the facilities.[7] Outside of Alabama, Arkansas, Florida, Georgia, and Texas, inmates often can earn wages[8]—on average, a maximum daily wage of $3.45.[9] Furthermore, inmates can receive funds from friends and family members or through benefits like Social Security, Veterans Administration ("VA") payments, or workers' compensation.[10]

For safety reasons, the vast majority of prisons prohibit inmates from carrying money on their persons.[11] As such, many Departments of Corrections ("DOCs") utilize some form of account system for inmates to deposit their funds.[12] Prison authorities generally have wide latitude over the management of these funds, such that they are able to deduct various fees and costs according to their policies.[13] Nevertheless, the ability to accumulate funds during incarceration can make a significant difference for an inmate, who can purchase snacks, hygiene products, or phone cards at the prison canteen while building savings to ease the transition to life outside prison walls.[14]

Some of these statutory programs require inmate funds to be pooled together so that the total amount can generate interest.[15] While a state may provide inmates the ability to receive their proportionate share of the interest, minus the costs of maintaining the account,[16] most do not. Rather, most state statutes allow their DOCs to spend the interest elsewhere, typically on a common fund benefiting general prisoner welfare.[17]

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7. Daniel Moritz-Rabson, *'Prison Slavery': Inmates Are Paid Cents While Manufacturing Products Sold to Government*, NEWSWEEK (Aug. 28, 2018, 5:12 P.M.), https://www.newsweek.com/prison-slavery-who-benefits-cheap-inmate-labor-1093729 [https://perma.cc/ZK69-YCBV]; Sawyer, *supra* note 6.

8. Moritz-Rabson, *supra* note 7.

9. Sawyer, *supra* note 6 (noting that the "average maximum daily wage for the same prison jobs has declined . . . from $4.73 in 2001 to $3.45 [in 2017]").

10. *See* Stewart v. Norwood, No. 16-3189-JAR-DJW, 2017 U.S. Dist. LEXIS 158603, at *7 (D. Kan. 2017) (describing a Kansas DOC regulation prohibiting DOC collection of funds derived from social security benefits, VA benefits, and workers' compensation benefits); Wagner, *supra* note 1.

11. *See, e.g.*, Schneider v. Cal. Dep't of Corr. (*Schneider II*), 151 F.3d 1194, 1195 (9th Cir. 1998).

12. *See, e.g.*, HAW. REV. STAT. ANN. § 354D-13(b) (LexisNexis 2018); TENN. CODE ANN. § 41-6-206(a)(5) (2018); WYO. STAT. ANN. § 7-16-205 (2018).

13. *See, e.g.*, Vance v. Barrett, 345 F.3d 1083, 1089–90 (9th Cir. 2003) (rejecting inmates' takings claim for deductions exacted from their accounts to compensate for "expenses incurred in creating and maintaining the inmates' accounts").

14. *See* Sawyer, *supra* note 6 (charting the wages paid to prisoners in different states).

15. *See, e.g.*, Schneider v. Cal. Dep't of Corr. (*Schneider IV*), 345 F.3d 716, 721 (9th Cir. 2003).

16. *E.g.*, KAN. STAT. ANN. § 76-175(b) (2018).

17. *See, e.g.*, *Schneider IV*, 345 F.3d at 719.

The question of whether state and federal DOCs' appropriation of the interest earned on inmate trust accounts constitutes a taking without just compensation in violation of the Fifth Amendment of the U.S. Constitution has divided courts since the early 2000s.[18] More specifically, courts disagree as to whether inmates even have a protectible property interest in the interest earned on their savings accounts.[19] The First, Fourth, and Eleventh Circuits have denied the existence of such a right,[20] but the Ninth Circuit has recognized a protectible property right in the interest earned on inmate trust accounts given the common-law principle that "interest follows principal."[21] The Ninth Circuit's determination trailed behind two Supreme Court decisions holding that the "interest follows principal" rule applies in the takings context;[22] nevertheless, the majority of circuits distinguished inmates' claims from those of non-incarcerated individuals.[23]

Part I of this Note describes the takings jurisprudence culminating in the circuit split over the question of whether a prison's appropriation of the interest generated from inmates' trust accounts constitutes a taking under the Fifth Amendment. Part II assesses whether or not interest earned on inmate trust accounts is a protectible property interest under the Takings Clause, in addition to exploring other avenues to recovery for prisoners, specifically through procedural due process and state constitutional law. Finally, Part III argues that stare decisis and the "positivist trap" concept rejected in procedural due process jurisprudence demand that courts adopt the Ninth Circuit's approach and hold that interest earned on inmate trust accounts constitutes a protectible property interest.

I. BACKGROUND

A. Takings Clause Jurisprudence

Incorporated against the states in 1897, the Fifth Amendment forbids the government from "tak[ing]" "private property . . . for public

18. U.S. CONST. amend. V; Stewart v. Norwood, No. 16-3189-JAR-DJW, 2017 U.S. Dist. LEXIS 158603, at *27–28 (D. Kan. 2017).

19. *Id.*

20. Young v. Wall, 642 F.3d 49, 51–52 (1st Cir. 2011); Givens v. Ala. Dep't of Corr., 381 F.3d 1064, 1068–69 (11th Cir. 2004); Washlefske v. Winston, 234 F.3d 179 (4th Cir. 2000).

21. Schneider v. Cal. Dep't of Corr. (*Schneider II)*, 151 F.3d 1194, 1201 (9th Cir. 1998).

22. *See* Brown v. Legal Found. of Wash., 538 U.S. 216, 235 (2003); Phillips v. Wash. Legal Found., 524 U.S. 156, 164–66 (1998).

23. *See Washlefske*, 234 F.3d at 179; *Givens*, 381 F.3d at 1068–69; *Young*, 642 F.3d at 51–52.

use, without just compensation."[24] To successfully make a takings claim, a plaintiff must show that the government has appropriated a protectible property interest before demonstrating public use and measuring just compensation.[25] A court must determine whether an asserted interest constitutes property based on sources of authority outside of the Constitution itself.[26]

Takings claims decided by the Supreme Court were sparse in the nineteenth century, and of those few, all involved physical encroachment of real property in some form.[27] In 1922, the Supreme Court initiated modern "regulatory takings" doctrine in *Pennsylvania Coal Co. v. Mahon*, recognizing the possibility that a regulation can "go[ ] too far" and establishing a test that evolved into the three-factor test of *Penn Central Transportation Co. v. City of New York*.[28] The Court has distinguished regulatory takings from "per se takings" that involve a direct "physical appropriation of property," but both real and personal property may serve as the subject of a takings claim.[29] The Supreme Court has increasingly made clear that money qualifies as private property under the Takings Clause.[30]

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24. U.S. CONST. amend. V; Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226 (1897).

25. *See e.g.*, Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980).

26. *See id.* Most courts cite *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) as establishing the standard by which to determine whether a particular property interest is protectible: "Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."

27. *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 794–96 (1995) (describing takings claims in the Supreme Court before 1870).

28. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978); Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); *see* Treanor, *supra* note 27, at 798.

29. Horne v. Dep't of Agric., 135 S. Ct. 2419, 2427–28 (2015); *see also* Loretto v. Teleprompter Manhattan Catv Corp., 458 U.S. 419, 435 (1982) (reasoning that "a permanent physical occupation . . . is perhaps the most serious form of invasion of an owner's property interests").

30. *See* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980). Nevertheless, the disagreement in *Eastern Enterprises v. Apfel* highlights the Court's struggle to define the extent to which property interests in money or net worth are protected by the Takings Clause. 524 U.S. 498 (1998) (plurality opinion) (recognizing money, in the form of a statutorily imposed financial obligation, as a property interest protected by the Takings Clause over Justice Kennedy's and the dissenters' view that the Due Process Clause controlled). Scholars wrangle with the question of whether the government's appropriation of money should be grounds for a takings claim. *E.g.*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 283–329 (1985) (assessing and questioning the constitutionality of taxation and wealth redistribution programs); Thomas W. Merrill, *The Property Strategy*, 160 U. PA. L. REV. 2061, 2064 (2012) ("An interesting question debated by contemporary English philosophers is whether something that has exchange value and nothing else, such as a bank account balance, should be regarded as 'property.' "). Although an intriguing topic, this question is outside the scope of this Note.

The Supreme Court's decision in *Webb's Fabulous Pharmacies v. Beckwith* ("*Webb's*") serves as the primary starting point to analyze the Takings Clause's applicability to interest on private accounts held by the government.[31] The appellant, Eckerd's of College Park, Inc. ("Eckerd's"), filed a complaint of interpleader under Florida law after Eckerd's learned of Webb's Fabulous Pharmacies' substantial debt during the closing of an agreement to purchase substantially all of Webb's Fabulous Pharmacies' assets.[32] As part of the interpleader action, Eckerd's furnished the court with the purchase price.[33] Although the county clerk charged a separate fee for servicing the funds, the County retained the interest generated from the account as its own, pursuant to a Florida statute.[34]

The Court rejected the County's argument that the deposited fund constituted "public money" while in the County's care, a contention stemming from the Florida Supreme Court's holding that because the clerk would not have been able to invest the fund without Florida's statutory intervention, the County "[took] only what [the statute] create[d]."[35] Rather, the Court recognized the "usual and general rule" that interest on an interpleader fund "follows the principal" and belongs to the ultimate owners of the principal—not the state.[36] The Court further distinguished the County's action from mere use of police power, instead finding the retention of interest analogous to state appropriation of private air space for military usage.[37] Thus, the County's appropriation of the interest earned on the interpleader fund constituted a per se taking in violation of the Fifth and Fourteenth Amendments.[38]

Almost twenty years later, the Court returned to the question of ownership of interest generated from a privately owned principal in the care of the state.[39] In *Phillips v. Washington Legal Foundation*, Texas's Interest on Lawyers Trust Account ("IOLTA") program, which had counterparts in forty-eight other states and the District of Columbia,

31. *Webb's Fabulous Pharmacies*, 449 U.S. 155.
32. *Id.* at 156–57.
33. *Id.* at 157.
34. *Id.* at 155–56. The Court "noted probable jurisdiction" based on two state supreme court cases involving unconstitutional takings of private funds tendered in other interpleader actions. *Webb's Fabulous Pharmacies*, 449 U.S. at 159 (referencing Sellers v. Harris County, 483 S.W.2d 242 (Tex. 1972) and McMillan v. Robeson County, 262 N.C. 413 (1964)).
35. *Id.* at 158–59, 163.
36. *Id.* at 162.
37. *Id.* at 163–64 (citing United States v. Causby, 328 U.S. 256 (1946)).
38. *Id.* at 164–65.
39. Phillips v. Wash. Legal Found., 524 U.S. 156 (1998).

came under review.[40] IOLTA programs use the interest earned on client funds held in trust by attorneys to fund legal services for low-income populations.[41] Before the inception of IOLTA programs in 1981, lawyers typically pooled client funds into non-interest bearing, federally insured checking accounts, unless the deposit was large enough for an interest-bearing savings account to be cost-effective.[42] Federal law barred federally insured financial institutions from offering interest-bearing checking accounts until 1980, when Congress lifted the restriction for non-profit organizations.[43] Soon after, the Federal Reserve Board laid the groundwork for IOLTA programs by interpreting this change to allow corporate funds to be deposited in such interest-bearing accounts as long as the interest benefitted only charitable organizations.[44] In 1984, the Supreme Court of Texas required attorneys to place "nominal" client funds or funds "held for a short period of time"—those an attorney would not otherwise place in an interest-bearing savings account—into an IOLTA account.[45] The interest generated from the IOLTA checking accounts then benefitted nonprofit organizations providing legal services to the poor.[46]

In *Phillips*, the Court held that the interest generated from IOLTA accounts qualified as "private property" under the Takings Clause.[47] To reach this conclusion, the Court reasoned that property interests protected under the Constitution are discernible "by reference to 'existing rules or understandings that stem from an independent source such as state law.' "[48] As such, the Court relied on the common-law "interest follows principal" rule, invoking *Webb's*.[49] The Court addressed a similar contention as that in *Webb's*, where the interest was generated as a result of a Florida statute's authorization of the county clerk to invest Eckerd's interpleader deposit. As such, the Court rejected the argument that the interest did not belong to the client simply because the client's principal would be unable to earn net interest without the IOLTA program or based on any notion that the

40. *Id.* at 159–60.
41. *Id.* at 160.
42. *Id.* at 160–61.
43. *Id.*
44. *Id.* at 161.
45. *Id.* at 161–62 (citing Tex. State Bar Rule, Art. XI, § 5(A); Rules 4, 7 of the Texas Rules Governing the Operation of the Texas Equal Access to Justice Program; Texas IOLTA Rule 6).
46. *Id.* at 162.
47. *Id.* at 160.
48. *Id.* at 164 (quoting Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972)).
49. *Id.* at 165–66 (1998) (citing Beckford v. Tobin, 1 Ves. Sen. 308, 310, 27 Eng. Rep. 1049, 1051 (Ch. 1749)).

interest constituted "government-created value."[50] Because the principal belonged to the client, the interest necessarily belonged to the client as well.[51] Still, *Phillips* decided only the narrow question of whether the interest constituted "private property" under the Takings Clause, leaving the two other components of a Takings Clause claim—whether Texas had "taken" the interest or owed any "just compensation"—unaddressed.[52]

Five years later, the Court tackled the remaining takings issues for IOLTA programs in *Brown v. Legal Foundation of Washington*.[53] *Brown* again involved client funds held in trust that earned interest for the Legal Foundation of Washington; the funds supported legal services for low-income individuals but would otherwise have generated no net interest for the clients themselves.[54] After rejecting the argument that requiring the principal to be held in an IOLTA account constitutes a taking from the beginning,[55] the Court held that the appropriation of interest constituted a per se taking, not a regulatory taking.[56] Nevertheless, the Court reasoned that the Fifth Amendment did not demand just compensation in this case, calculating just compensation based on "the property owner's loss rather than the government's gain."[57] Because the plaintiffs suffered no net loss, they were entitled to no just compensation.[58]

B. Prison Law

The prison context makes applying *Phillips* and *Brown* to questions regarding interest earned on inmate trust accounts a unique challenge for asserting both common-law and constitutional rights. At common law, a prisoner convicted of a felony or treason forfeited his personal property to the King, as offending the King's peace by violating

50. *Id.* at 169–71; Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 158–59, 163 (1980).

51. *Phillips*, 524 U.S. at 164–66.

52. *Id.* (citing U.S. CONST. amend. V).

53. Brown v. Legal Found. of Wash., 538 U.S. 216 (2003).

54. *Id.* at 229–30. The Court decided *Phillips* while *Brown* was pending appeal in the Ninth Circuit. A three-judge panel on the Ninth Circuit initially held that the appropriation constituted a taking but remanded to determine just compensation. Upon reconsideration en banc, however, a majority found no taking under the three-factor regulatory takings analysis, or alternatively, no just compensation, even if there had been a taking. Wash. Legal Found. v. Legal Found. of Wash., 236 F.3d 1097 (9th Cir. 2001), *rev'd en banc*, 271 F.3d 835 (9th Cir. 2001), *rev'd sub nom*, Brown v. Legal Found. of Wash., 538 U.S. 216, 230–31 (2003).

55. *Brown*, 538 U.S. at 234.

56. *Phillips*, 524 U.S. at 231, 235; *see* Loretto v. Teleprompter Manhattan Catv Corp., 458 U.S. 419 (1982).

57. *Brown*, 538 U.S. at 235–36.

58. *Id.* at 237.

the criminal law undermined an individual's property rights.[59] Today, inmates do not possess a protectible property interest in any wages earned from their labor; unlike laborers outside the prison context, inmates have no constitutional right to compensation for their work.[60] Although prisoners retain many of the protections ensured by the Constitution, the "needs and exigencies of the institutional environment" may warrant limiting those rights in a given circumstance.[61] For due process claims evaluated under rational basis review, a prison regulation "is valid if it is reasonably related to legitimate penological interests."[62] Upon incarceration, prisoners do not lose the right to "some kind of hearing" for procedural due process claims pertaining to deprivations of property.[63]

Because prisoners' property interests in the inmate trust account realm are statutorily created, procedural due process claims must rely on the line of cases stemming from *Goldberg v. Kelly*.[64] In 1970, the Supreme Court first recognized "new property"—state-created property interests beyond traditional property rights—in *Goldberg*.[65] Two years later, the Court clarified the meaning of "liberty" and "property" protected by due process in *Board of Regents of State Colleges v. Roth* ("*Roth*"), reasoning that the plaintiff possessed no protectible interest in continued employment because he had no valid expectation of employment renewal and the state did not harm his ability to procure future employment.[66]

Later, the Court distinguished between liberty interests and property interests in the prison context in *Sandin v. Conner*, defining liberty narrowly as "freedom from restraint [that] . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life," and some circuits have extended this "atypical and significant hardship" requirement to property interests.[67] While a

59. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682 (1974) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *299).

60. *See, e.g.*, Washlefske v. Winston, 234 F.3d 179, 184–85 (4th Cir. 2000); Jennings v. Lombardi, 70 F.3d 994 (8th Cir. 1995).

61. Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974) ("There is no iron curtain drawn between the Constitution and the prisons of this country."); *see also* Turner v. Safley, 482 U.S. 78, 89 (1987).

62. *Turner*, 482 U.S. at 89.

63. *Wolff*, 418 U.S. at 557–58.

64. 397 U.S. 254 (1970).

65. *Id.* (holding that a welfare recipient had a right to a hearing before the termination of his benefits); *see* Kaitlin Cassel, *Due Process in Prison: Protecting Inmates' Property After* Sandin v. Conner, 112 COLUM. L. REV. 2110, 2114 (2012); Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

66. 408 U.S. at 570–74.

67. Sandin v. Conner, 515 U.S. 472, 484 (1995); *see* Cassel, *supra* note 65, at 2133.

post-deprivation remedy for both negligent and intentional deprivations of property executed by prison employees is generally sufficient to satisfy procedural due process requirements,[68] routine deprivations provided for in official administrative policy may require additional process.[69] Still, courts are likely to grant significant deference to prisons' determinations of adequate process for deprivations of property.[70] While due process claims often prove unsuccessful for prisoners seeking to recover the interest earned on their trust accounts, due process concepts can be helpful in resolving the circuit split over prisoners' rights to the interest generated from inmate trust accounts under the Takings Clause.

C. The Circuit Split: Do Inmates Have a Protectible Property Interest in the Interest Earned on Inmate Trust Accounts?

The following Section describes the circuit split over extending Takings Clause protection to interest earned on inmate trust accounts. This Section first introduces the Ninth Circuit's approach holding that the interest earned on inmate trust accounts constitutes a protectible property interest, before detailing the approach adopted by the majority of circuits, which refuses to extend Takings Clause protection. Finally, this Section pinpoints two recent cases that address the circuit split but avoid deciding whether the interest is protectible under the Takings Clause.

1. The Ninth Circuit Approach: Interest on Inmate Trust Accounts is Protectible

Soon after the Supreme Court's decision in *Brown*, the Ninth Circuit in *Schneider v. California Department of Corrections* ("*Schneider IV*") faced a question that had been rebounding to and from the district court even before *Phillips*: whether the California DOC's failure to pay interest earned on inmate trust accounts, instead appropriating the interest for an Inmate Welfare Fund, constituted an unconstitutional taking under the Fifth Amendment.[71] Because California law prohibited inmates from possessing money in prison,

68. Hudson v. Palmer, 468 U.S. 517, 533 (1984).

69. *See* Marianne Sawicki, Comment, *Empathy for the Devil: How Prisoners Got a New Property Right*, 116 PENN. ST. L. REV. 1209, 1215 (2012) ("When the state takes funds from inmate accounts under terms of an established policy, courts usually require that policy to provide for pre-deprivation hearings.").

70. *See e.g.*, Sickles v. Campbell Cty., 501 F.3d 726 (6th Cir. 2007); Sawicki, *supra* note 69, at 1221.

71. 345 F.3d 716, 718–19 (9th Cir. 2003).

inmates had two options for depositing personal funds: the Bank of America-administered Inmate Passbook Savings Account ("IPSA"), which paid interest directly to the prisoner, and the Inmate Trust Account ("ITA"), which did not pay interest to the inmate.[72] While California did not require inmates to use an ITA, inmates would need an ITA with a minimum balance of $25.00 in order to establish an IPSA, and inmates could only use ITA funds for prison canteen purchases.[73] Because California incentivized inmates to establish an ITA despite the fact that interest earned on ITA funds directly benefitted the Inmate Welfare Fund rather than the individual inmate whose principal generated the interest, prisoners were effectively forced to choose between canteen purchases or interest with any given deposit.[74]

In a previous ruling in this case, the Ninth Circuit held that the interest constituted a protectible property right belonging to the inmates.[75] The district court had initially dismissed the prisoners' suit, finding that the inmates lacked a protectible property interest because they retained the option of depositing funds into an IPSA instead of an ITA.[76] The Ninth Circuit acknowledged that California statutory law's explicit mandate that interest be deposited into the Inmate Welfare Fund did not confer upon inmates a property right in the interest accruing to ITAs.[77] Nevertheless, the court relied on *Webb's* and *Phillips* to assert the existence of a property interest independent of statutory law.[78] The court rejected California's attempt to use *Roth* to limit protectible property interests only to those created by positive law, stating that *Roth*'s framework for determining property interests applied only to the "elevat[ion]" of rights to "new property."[79] Instead, the court found that the common-law principle that "interest follows principal" is an "old property" right that cannot be revoked by statute.[80]

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72. *Schneider II*, 151 F.3d 1194, 1195 (9th Cir. 1998).

73. *Id.*

74. CAL. PENAL CODE § 5008 (West 1981) (amended 2009); *Schneider II*, 151 F.3d at 1195–96. The Inmate Welfare Fund, established "for the benefit, education, and welfare of inmates," benefitted prison services such as canteens and hobby shops. CAL. PENAL CODE § 5006 (West 1981) (amended 2014). As part of the ITA authorization process, the inmate would also agree that any ITA interest would be placed into the Inmate Welfare Fund. *Schneider II*, 151 F.3d at 1195–96; 15 CAL. CODE REGS. tit. 15 § 3075.1(d)(3) (2012) (amended 2018).

75. *Schneider II*, 151 F.3d at 1201.

76. Schneider v. Cal. Dep't of Corr. (*Schneider I*), 957 F. Supp. 1145, 1149 (N.D. Cal. 1997).

77. CAL. PENAL CODE § 5008 (West 1981) (amended 2009); *Schneider II*, 151 F.3d at 1198–99 (distinguishing the California statute from the statute at issue in *Tellis v. Godinez*, 5 F.3d 1314 (9th Cir. 1993)).

78. *Schneider II*, 151 F.3d at 1199.

79. *Id.* at 1200–01.

80. *Id.* ("States may, under certain circumstances, confer 'new property' status on interests located outside the core of constitutionally protected property, but they *may not* encroach upon

Reasoning that "traditional 'background principles' of property law" determine the "core" meaning of "property" under the Takings Clause, the Ninth Circuit asserted that the early English roots of the "interest follows principal" rule, in combination with its embrace by U.S. courts, indicated that the common-law rule applied to interest from ITAs.[81] Thus, the court found a protectible property right in the interest generated by inmate trust accounts.[82]

Five years later in *Schneider IV*, the court held that the California DOC's removal and subsequent depositing of inmates' interest into the common prisoner fund constituted a per se taking for public use, violating the Fifth and Fourteenth Amendments.[83] About a month before deciding *Schneider IV*, the Ninth Circuit decided an almost identical issue in *McIntyre v. Bayer*.[84] McIntyre, the prisoner plaintiff, was similarly required to deposit personal funds in a personal property trust account maintained by the state under Nevada law; his funds were to be pooled together with the funds of other inmates in order to generate interest.[85] The generated interest would contribute to "the welfare and benefit of all offenders" and, according to the discretion of the Department of Prisons director, to a victims' fund.[86]

Following a Ninth Circuit decision finding a statutory right to the interest generated from inmate trust accounts,[87] Nevada revised the statute at issue, adding that "the provisions of this chapter do not create a right on behalf of any offender to any interest or income that accrues on the money in the prisoner's personal property fund."[88] In spite of this statutory language, the Ninth Circuit relied on *Schneider II* and held that the State's appropriation of interest on inmates' funds for the benefit of the general prison population constituted a taking.[89] The question of just compensation, though, was more complicated: applying *Brown*'s measurement for just compensation based on net loss to the individual plaintiff, the court remanded McIntyre's claim.[90] If McIntyre's individually earned interest surpassed the costs associated

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traditional 'old property' interests found within the core."); *see* Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972).

81. *Schneider II*, 151 F.3d at 1201.

82. *Id.*

83. *Schneider IV*, 345 F.3d 716, 720–22 (9th Cir. 2003).

84. 339 F.3d 1097 (9th Cir. 2003).

85. *Id.* at 1098; *see* NEV. REV. STAT. § 209.241(1) (LexisNexis 1995).

86. NEV. REV. STAT. § 209.221(3), 209.463(1)(a) (LexisNexis 1995); *McIntyre*, 339 F.3d at 1098.

87. Tellis v. Godinez, 5 F.3d 1314 (9th Cir. 1993).

88. NEV. REV. STAT. § 209.241(5) (LexisNexis 1995) (emphasis omitted); *McIntyre*, 339 F.3d at 1098–99.

89. *McIntyre*, 339 F.3d at 1100.

90. *Id.* at 1100–02.

with maintaining his share of the otherwise pooled personal property fund, then the State would owe just compensation.[91]

Schneider IV closely tracked *McIntyre* to hold that a taking occurred when the DOC applied interest earned on inmate trust accounts to the Inmate Welfare Fund rather than paying interest to the inmates. Directly quoting *McIntyre*, the Ninth Circuit held that the determination of just compensation required the "individualized analysis" of *Brown*.[92] Thus, the court remanded the case to determine whether the individual plaintiffs suffered a net loss of interest on their ITAs.[93]

2. The Majority Approach: Denying Protection for Interest on Inmate Trust Accounts

Unlike the Ninth Circuit, a majority of circuits distinguished inmate trust accounts from the IOLTA program at issue in *Phillips* and *Brown*. The First, Fourth, and Eleventh Circuits have denied the existence of a protectible property right in the interest earned on inmate trust accounts and, consequently, rejected inmates' takings claims.[94]

In 2000, the Fourth Circuit held that the Takings Clause did not protect interest generated from the inmate trust account of the plaintiff, Washlefske.[95] Washlefske's principal consisted of wages earned from prison labor, pooled together with the funds of all other prisoners' accounts.[96] The DOC Director then invested the funds at his own discretion and spent the interest income pursuant to statutory direction that the earned interest "may be used by the Director for the benefit of the prisoners under his care."[97]

The Fourth Circuit asked whether Washlefske possessed a protectible property right in the interest under "traditional rules of property law."[98] Because inmates do not have a common-law right to either the compensation from prison labor or access to any personal

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91. *Id.*

92. *Schneider IV*, 345 F.3d 716, 720–21 (9th Cir. 2003).

93. *Id.* at 722. For a later Ninth Circuit case in which prisoner plaintiffs' otherwise valid takings claim for the interest generated from inmate trust accounts was dismissed because the defendants were entitled to qualified immunity, see *Francis v. California*, No. C 04-01309, 2004 U.S. Dist. LEXIS 16816, (N.D. Cal. 2004).

94. *See* Young v. Wall, 642 F.3d 49, 51–55 (1st Cir. 2011); Givens v. Ala. Dep't of Corr., 381 F.3d 1064, 1068–69 (11th Cir. 2004); Washlefske v. Winston, 234 F.3d 179 (4th Cir. 2000).

95. *Washlefske*, 234 F.3d at 180–81.

96. *Id.* at 181.

97. VA. CODE ANN. § 53.1-44 (2018); *Washlefske*, 234 F.3d at 181 (detailing the Director's expenditures on "library books, newspaper and magazine subscriptions, exercise equipment, items for family visiting day, and other 'extras.' ").

98. *Washlefske*, 234 F.3d at 184.

property whatsoever, Washlefske's only right to the "wages" from his labor stemmed from positive law.[99] The Virginia statute at issue therefore infringed upon no constitutional property right; it only created a "limited property right[ ] for penological purposes."[100] Because Washlefske never had a common-law private property interest in his wages, he never had a common-law property interest in his account; thus, the common-law rule that "interest follows principal" could not apply to his principal amount.[101] The court seemed to vacillate on the question of whether the state could appropriate Washlefske's principal balance, first suggesting that a statutorily created property interest not previously existing in the common law could be appropriated as long as the state provided due process.[102] Later, the court indicated that the Takings Clause was not triggered because Virginia never took Washlefske's statutorily created right to the principal balance.[103] Regardless, no additional common-law rights attached to the statutorily created property interest.[104] Rejecting the Ninth Circuit's conclusion, the Fourth Circuit found no property interest to protect under the Takings Clause.[105]

The Eleventh and First Circuits followed the Fourth Circuit's lead. Former Alabama inmate and work-release participant Givens claimed that Alabama's refusal to pay interest on his Prisoner Money on Deposit ("PMOD") account, pursuant to the DOC's internal manual, violated both federal and Alabama state constitutional prohibitions on takings without just compensation.[106] The Eleventh Circuit rejected Givens's claim, mirroring the Fourth Circuit's reasoning that Givens could not invoke the "interest follows principal" rule without any Alabama statute, regulation, or policy conferring a private property right in his interest, given prisoners' forfeiture of property rights at common law and Givens's limited, statutorily created property right in

99. *Id.* at 185 (citing Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974); Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871); 1 WILLIAM BLACKSTONE, COMMENTARIES *299; 4 *id.* *385).

100. *Id.* at 185.

101. *Id.* at 185–86.

102. *Id.* at 184 ("[I]f a statute creates a property right not previously recognized or one broader than that traditionally understood to exist, the property interest so created is defined by the statute and may be withdrawn so long as the State affords due process in doing so." (citing Goldberg v. Kelly, 397 U.S. 254, 262 n.8)).

103. *Id.* at 186 ("His property interest was that given by statute, and the State never took from him what was created by statute. Therefore, there was not a taking of private property as addressed in the Fifth Amendment.").

104. *See id.* at 186 (noting that "he cannot claim that a property interest based on traditional principles of property law was taken").

105. *Id.* at 186.

106. Givens v. Ala. Dep't of Corr., 381 F.3d 1064, 1065–66 (11th Cir. 2004).

the principal.[107] Likewise, in 2011, the First Circuit found no protectible property right in the interest on inmate trust accounts when the Rhode Island DOC halted its practice of paying inmates their proportionate shares of the interest earned on their pooled principals.[108] The First Circuit found no positive law creation of a property right in the interest earned on inmate trust accounts, and Rhode Island's prior official policy of paying interest to inmates was merely "an act of administrative generosity" that did not bind the state following the policy's replacement.[109] Thus, the First, Fourth, and Eleventh Circuits rejected the Ninth Circuit's finding of a protectible property interest in the interest generated from inmate trust accounts.[110]

3. Recent Cases: Skirting the Question

Recently, courts addressing the problem of inmate trust accounts have avoided weighing in on the circuit split.[111] In the 2015 *Debrew v. Atwood* decision, the D.C. Circuit declined to address the question of whether the plaintiff had a protectible property interest in the interest earned on his deposit account in the first instance.[112] On remand two years later, the U.S. District Court for the District of Columbia similarly sidestepped the question, dismissing the federal prisoner's takings claim for lack of standing and failure to state a claim against individual defendants.[113] In the same year, the U.S. District for the District of Kansas likewise avoided ruling on the merits of the circuit split in *Stewart v. Norwood* by finding that Kansas law expressly created a property right in the interest on Stewart's account.[114]

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107. *Id.* at 1068–70. The statutes establishing Alabama's work-release program also did not address interest generated from any wages earned from work release labor. *Id.*

108. Young v. Wall, 642 F.3d 49, 51–52 (1st Cir. 2011).

109. *Id.* at 53–55.

110. *See* Young, 642 F.3d at 51–55; Givens, 381 F.3d at 1068–69; Washlefske v. Winston, 234 F.3d 179 (4th Cir. 2000). This Note builds upon Emily Tunink's compelling argument why the First Circuit's decision is incorrect. *See* Emily Tunink, Note, *Does Interest Always Follow Principal?: A Prisoner's Property Right to the Interest Earned on His Inmate Account Under* Young v. Wall, 642 F.3d 49 (1st Cir. 2011), 92 NEB. L. REV. 212 (2013).

111. Stewart v. Norwood, No. 16-3189-JAR-DJW, 2017 U.S. Dist. LEXIS 158603, at *29–30 (D. Kan. 2017); Debrew v. Atwood, 244 F. Supp. 3d 123, 130 (D.D.C. 2017); *see also* Edwards v. Arnone, 2012 U.S. Dist. LEXIS 34575, *3–4 (D. Conn. 2012) (denying plaintiff's takings claim when the plaintiff failed to allege any facts indicating that the prison had ever received interest on the funds at issue).

112. 792 F.3d 118, 129 (D.C. Cir. 2015).

113. Debrew v. Atwood, 244 F. Supp. 3d 123, 130–32 (D.D.C. 2017).

114. No. 16-3189-JAR-DJW, 2017 U.S. Dist. LEXIS 158603, at *27–30 (D. Kan. 2017); KAN. STAT. ANN. § 76-175(b) (2018) ("Interest earned on moneys invested under this section shall be regularly prorated . . . and credited to the individual . . . inmate . . . on the basis of the amount of money each . . . has in the trust fund."). The question of whether Stewart's individual earned interest exceeded his share of account maintenance costs remained; because it was still unclear

These cases highlight the lingering disagreement over the relevance of the common-law rule to interest in the prison context; it remains unclear how to properly address a takings claim over interest earned on inmate trust accounts. The lack of consensus is troubling: inmates with trust accounts do not know if they have a path to recover the interest earned on trust accounts, and states cannot maintain an inmate trust account system with general welfare funds without risking litigation. Moreover, the issue extends beyond the context of inmate trust accounts as courts grapple with the scope of protection that the Takings Clause offers to statutorily created property interests.

II. RECOVERING INTEREST

Part II first examines some of the intricacies of inmate trust accounts, addressing the question of why an appropriation of interest differs from other government deductions, as well as various bases for distinguishing inmate trust account regimes on statutory grounds. Next, this Part tackles the takings analysis triggering the circuit split. It analyzes various arguments for and against finding a protectible property interest in the interest generated from inmate trust accounts before turning to the question of whether just compensation is warranted. Finally, it considers the use of procedural due process claims and state constitutional provisions as alternative avenues to recovery of the interest earned on inmate trust accounts. This Part suggests that, although prisoner plaintiffs should explore alternative options for recovery, the interest earned on inmate trust accounts should receive protection under the Takings Clause.

A. Inmate Trust Accounts

1. Why Interest Differs from Other Deductions

Courts must answer a threshold question before finding a property right in the interest earned on inmate trust accounts: why should interest receive greater protection than the various fees and contributions that states are permitted to deduct from inmates' accounts?[115] The withdrawal of maintenance or administrative fees is

whether the prison had appropriated his excess interest for the "public use" of administering other prisoners' accounts, the court denied the State's motion to dismiss with regard to Stewart's takings claim. Stewart v. Norwood, No. 16-3189-JAR-DJW, 2017 U.S. Dist. LEXIS 158603, at *31–34.

115. Vance v. Barrett, 345 F.3d 1083, 1089–90 (9th Cir. 2003) (holding that reasonable expenses related to account administration deducted from plaintiff's inmate trust account did not violate the Takings Clause).

not limited to the prison context—the Court in *Webb's* did not question the county clerk's exaction of a statutory fee for administrative services.[116] Prison authorities generally have substantial leverage with which to control inmates' funds, and courts generally reject inmates' claims, even after finding a statutorily created property interest in the inmates' funds.[117] Thus, prisons may constitutionally limit inmates' access to wages regardless of inmates' protected property interest.[118] The critical difference lies in the purpose of the taking; deductions for administrative and prison service costs, victim restitution, and required withholdings for inmates' later use do not constitute appropriations for "public use" warranting payment of just compensation.[119] Such deductions are subject to procedural due process protections but typically survive scrutiny, as they are reasonably related to a legitimate penological interest.[120]

2. Statutory Distinctions

Statutory schemes regulating inmate trust accounts vary; as such, an inmate plaintiff may grapple with jurisdiction-specific challenges in seeking compensation for interest earned on her trust account. First, the source of the principal may serve as a distinguishing factor. Statutes establishing inmate trust account systems are often accompanied by a provision enabling inmates to earn wages from their prison work,[121] but the funds comprising the principal may also consist

116. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 158–59, 162 (1980).

117. *See, e.g.*, Ward v. Ryan, 623 F.3d 807, 808–11 (9th Cir. 2010) (affirming the denial of an inmate's takings and due process claims over the withdrawal and subsequent deposit of prison wages into a discharge account to be returned upon release, when the inmate was serving a 197-year sentence).

118. *See, e.g.*, *id.*; Allen v. Cuomo, 100 F.3d 253, 261–62 (2d Cir. 1996) (rejecting inmates' due process challenges to a prison's "pay lag policy").

119. *See, e.g.*, Farias v. Hicks, No. 1:14-cv-01950-SKO, 2015 U.S. Dist. LEXIS 146449, at *3–8, *11–12 (E.D. Cal. 2015) (denying an inmate's takings claims following a prison's assessment of healthcare and law library fees); Walters v. Cate, No. EDCV 12-0137-JAK (DTB), 2013 U.S. Dist. LEXIS 63220, at *26–28 (C.D. Cal. 2013) (explaining why plaintiff's challenges to his restitution fine and account administrative fees are without merit).

120. *See, e.g.*, Rochon v. Louisiana State Penitentiary Inmate Account, 880 F.2d 845, 845–46 (5th Cir. 1989) (holding that a prisoner's right to wages is limited by statute and that usage restrictions for "education, court costs, victim repayment or the purchase of bonds" are "reasonably related to the valid goals of rehabilitation, restitution and assessing against inmates . . . the partial cost of prosecuting any future litigation"); Jones v. Skolnik, No. 3:10-cv-00162-LRH-VPC, 2010 U.S. Dist. LEXIS 139449, at *19–20 (D. Nev. 2010) (recognizing a plaintiff's due process claim for "excessive deductions" from his inmate trust account); *see also* Turner v. Safley, 482 U.S. 78, 89 (1987); Part I.B.

121. *See, e.g.*, VA. CODE ANN. §§ 53.1-42, .1-43 (2018).

of work-release income;[122] benefits like Social Security, VA payments, or workers' compensation;[123] or gifts from family and friends.[124] For example, VA benefits receive distinct statutory protections from taxation, creditors, and "attachment, levy, or seizure . . . before or after receipt by the beneficiary."[125] For funds deriving from non-wage sources, inmates may have a stronger claim of entitlement even in a court adopting the majority approach because inmates' lack of a common-law rights to wages would not apply.[126]

Further, the particular government action itself can be determinative. For example, the First Circuit's decision in *Young v. Wall* may be limited to a DOC's decision to halt the accrual of interest by switching from a system of pooled funds to separate accounts for each inmate.[127] Thus, *Young*'s holding is narrow, deciding only that inmates "lack a constitutionally protected property right in interest not yet paid."[128] In the same vein, a Connecticut district court rejected an inmate's takings claim because no state statute mandated depositing inmates' non-wage funds into an interest-bearing account.[129] The core takings problem, however, arises when a state uses the interest generated by inmate trust accounts to benefit the general prison population.[130]

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122. *See* Sara Feldschreiber, Note, *Fee at Last? Work Release Participation Fees and the Takings Clause*, 72 FORDHAM L. REV. 207 (2003).

123. *See* Stewart v. Norwood, No. 16-3189-JAR-DJW, 2017 U.S. Dist. LEXIS 158603, at *7 (D. Kan. 2017) (describing a Kansas regulation forbidding the state from collecting funds derived from social security benefits, VA benefits, and workers' compensation benefits).

124. *See* Wagner, *supra* note 1 (telling the story of prison inmate Eddie).

125. 38 U.S.C. § 5301(a)(1) (2018). *But see* Roop v. Ryan, No. CV 12-0270-PHX-RCB, 2013 U.S. Dist. LEXIS 86864, at *10–11, *13 (D. Ariz. 2013) (affirming a grant of summary judgment for the state because interest on VA benefits did not receive the same protections as the VA benefits themselves).

126. *See* Washlefske v. Winston, 234 F.3d 179, 184–85 (4th Cir. 2000).

127. 642 F.3d 49, 51–52 (1st Cir. 2011).

128. *Id.* at 51. The Second Circuit faced a similar issue before *Phillips* and *Brown* when inmates claimed that a prison regulation's prescribed "pay lag" for inmate wages violated the Takings Clause because the withheld wages earned no interest during the "lag" time. *Allen v. Cuomo*, 100 F.3d 253, 256, 262 (2d Cir. 1996). After briefly citing *Webb's Fabulous Pharmacies*, the Second Circuit rejected inmates' challenge using *Penn Central*'s regulatory takings analysis. *Id.* at 262.

129. Edwards v. Arnone, CV No. 3:11-cv-1537(AVC), 2012 U.S. Dist. LEXIS 34575, at *3–4 (D. Conn. 2012); *see also* Weeks v. Frank, CV No. 10-00235 DAE-RLP, 2011 U.S. Dist. LEXIS 63415, at *14–15 (D. Haw. 2011) (finding no taking where the plaintiff's funds were deposited in a noninterest-bearing account).

130. *See, e.g.*, McIntyre v. Bayer, 339 F.3d 1097, 1100 (9th Cir. 2003).

B. Takings Analysis

Part II.B will assess prisoners' claims for a protectible property interest and for just compensation under the Takings Clause, in addition to the policy implications of each position.[131]

1. Protectible Property Interest?

a. The Interest Constitutes a Protectible Property Interest

The most prominent argument for a protectible property interest in inmate trust account interest stems, of course, from the Ninth Circuit. In *Schneider II* and *McIntyre*, the Ninth Circuit applied the common-law "interest follows principal" rule without regard to the plaintiff's status as an inmate.[132] Without explicitly referring to inmates' lack of personal property rights at common law,[133] the court in *Schneider II* elucidated its interpretation of the relationship between property interests for the purpose of due process and takings analyses. The Takings Clause does not restrict states from "confer[ring] 'new property' status on interests located outside the core of constitutionally protected property," but it does prevent states from intruding on traditional rights.[134]

As a policy matter, the Ninth Circuit approach is appealing. Prisoners have a dignitary interest in retaining the interest earned on their inmate trust funds, based on the same reasoning that legislatures have drawn upon to permit prisoners to earn wages for their labor.[135] Still, any personhood value assignable to interest may be small: from a Lockean perspective, the interest is not "earned" through labor in the same sense that wages are,[136] and money is merely fungible, unlike a piece of personal property "bound up" with an individual's sense of

131. *See* U.S. CONST. amend. V. This analysis will exclude discussion of public use, as courts largely accept that the depositing of interest into an inmate welfare fund or applying to other general prison expenditures beyond maintenance costs or administrative fees constitutes a public use. *Schneider IV*, 345 F.3d 716, 720 (9th Cir. 2003).

132. McIntyre v. Bayer, 339 F.3d 1097 (9th Cir. 2003); *Schneider II*, 151 F.3d 1194, 1201 (9th Cir. 1998).

133. *See* Givens v. Ala. Dep't of Corr., 381 F.3d 1064, 1068–69 (11th Cir. 2004) ("Indeed, at common law an inmate not only did not have a property right in the product of his work in prison, but he also could be forced to forfeit all rights to personal property.").

134. *Schneider II*, 151 F.3d at 1200.

135. *See* Kaitlin Cassel, *Due Process in Prison: Protecting Inmates' Property After* Sandin v. Conner, 112 COLUM. L. REV. 2110, 2114 (2012) (discussing the relationship between property rights and individual freedom).

136. *See* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 958, 965 (1982) (briefly noting Lockean labor-desert theory's emphasis on individual autonomy).

identity.[137] More poignantly, though, allowing prisoners to retain interest could further the important goals of prisoner reentry and recidivism reduction. Access to more funds before reentering society can ease an inmate's transition and thereby facilitate an inmate's pursuit of a law-abiding life after prison, in addition to instilling a sense of accomplishment and dignity.[138]

Moreover, under Professor William Treanor's political process reading of the Takings Clause, prisoners represent a discrete minority group most deserving of Takings Clause protection.[139] Treanor emphasizes that the Founders originally designed the Takings Clause to prevent a majoritarian decision to take property specifically from a minority group incapable of defending itself using the political process.[140] While the common-law rule that prisoners forfeit property rights may indicate that prisoners should not be considered a group warranting Takings Clause protection,[141] the general disenfranchisement of prisoners should nonetheless warrant this protection.[142]

Furthermore, Isaac Colunga argues that an inmate has a common-law property interest stemming from the "possession, use, and disposition" of the principal deposited in the inmate's trust fund.[143] This argument has limited application, however, as a prisoner's rights to possess and use money are generally subject to many statutory

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137. *See id.* at 960 (describing "property that is bound up with a person and property that is held purely instrumentally" as "theoretical opposites").

138. *See* Beth M. Huebner & Mark T. Berg, *Examining the Sources of Variation in Risk for Recidivism*, 28 JUST. Q. 146, 165 (2011) (noting that "the largest risk for recidivism comes in the immediate months of release"); Joe Palazzolo, *A Shot at Banking Behind Bars: Can Financial Services for Inmates Reduce Recidivism, or Is It a Recipe for Trouble?*, WALL ST. J., (Jan. 30, 2014, 7:24 P.M.) https://www.wsj.com/articles/a-shot-at-banking-behind-bars-1391127801 [https://perma.cc/UJQ7-4UA3]; Sawyer, *supra* note 6 ("Making it hard for incarcerated people to earn real money hurts their chances of success when they are released, too. With little to no savings, how can they possibly afford the immediate costs of food, housing, healthcare, transportation, child support, and supervision fees?").

139. *See* Treanor, *supra* note 27, at 784; *see also* Feldschreiber, *supra* note 122, at 247–48 (discussing Professor Treanor's work).

140. Treanor, *supra* note 27, at 784.

141. *See* Washlefske v. Winston, 234 F.3d 179, 184–86 (4th Cir. 2000) ("Indeed, at common law a convicted felon not only did not have a property right in the product of his work in prison, but he also forfeited all rights to personal property.").

142. *See* Feldschreiber, *supra* note 122, at 247–48 (describing prisoners' status as a minority lacking representation in the political process).

143. Isaac Colunga, *An Alternative Look at the Takings Clause and Inmate Trust Accounts*, 39 U. TOL. L. REV. 791, 806 (2008). Although this Note agrees with Colunga's "endorse[ment] of the Ninth Circuit's position," Colunga advocates for a control-based test to determine whether the common-law "interest follows principal" analysis applies. *Id.* at 794, 810. *Cf.* Burns v. Pa. Dep't of Corr., 544 F.3d 279, 280–81 (3d Cir. 2011), *aff'd,* 642 F.3d 163 (3d Cir. 2011) (holding that a prisoner whose inmate fund was assessed for an assault victim's medical expenses had a protectible property interest warranting procedural due process protections).

restrictions that stop short of appropriating the entire balance of the prisoner's account.[144] For example, states may limit the amount a prisoner can withdraw and limit what a prisoner can purchase.[145] In *Stewart v. Norwood*, the court rejected Stewart's procedural due process and takings claims stemming from his restricted ability to send money from his VA benefits to family members in excess of $40 per pay period, despite VA benefits' special statutory protection from "fines, fees or payments."[146] If VA benefits can be subject to stringent constraints, inmates arguably are entitled to less control over the use of funds earned through prison labor. Even if some states do grant prisoners substantial control over their funds, as Colunga argues, this approach would not extend to states that grant fewer rights to inmates with regard to trust fund usage.

Despite attempting to provide an alternative common-law approach that works within states' statutory frameworks, Colunga's argument encounters the same problems as those in *Schneider*: because inmates begin with no common-law rights to property, any additional statutory property rights may be strictly limited to those statutorily defined.[147] As prisoners possess various other property rights formerly unattainable, it is possible that the common law has since been "updated" to also include a property interest in the interest generated from an inmate trust account.[148] An attenuated argument at best, a holding relying solely on "updated" common law would be extremely vulnerable to legislative overruling. Further, the argument skirts the reasoning of the majority approach, which is based not merely on common-law property rights but on "traditional" property interests protected at the time of the founding.[149]

In either case, though, the argument seems to penalize states that offer inmates greater control of their finances, thereby creating perverse incentives overall for proponents of expanding prisoners'

144. *See Washlefske*, 234 F.3d at 186 ("His property interest was that given by statute, and the State never took from him what was created by statute.").

145. The Fourth and Eleventh Circuits explicitly rejected the notion that prisoners had "full rights of 'possession, control, and disposition' " over the funds in their statutorily-created accounts. Givens v. Ala. Dep't of Corr., 381 F.3d 1064, 1069 (11th Cir. 2004); *Washlefske*, 234 F.3d at 185 (citing Phillips v. Wash. Legal Found., 524 U.S. 156, 170 (1998)).

146. No. 16-3189-JAR-DJW, 2017 U.S. Dist. LEXIS 158603, at *25–27 (D. Kan. 2017) (quoting IMPP 04-106A).

147. *Washlefske*, 234 F.3d at 184–86.

148. *See* Colunga, *supra* note 143, at 806 ("[A]n anomaly exists where courts mistakenly apply antiquated common law doctrines regarding the denial of inmate property rights solely due to inmate status despite recognizing that the state has granted its inmates substantial control over their deposited funds via statute and practice.").

149. *Washlefske*, 234 F.3d at 181.

rights.[150] The more usage rights a state grants to an inmate, the greater likelihood that the inmate can claim a property interest in the interest generated from his account.[151] Thus, states may resist conferring increased property rights to prisoners, for fear of unwittingly infringing on additional property rights that the legislature did not intend to create and thereby becoming amenable to suit.[152]

b. Arguments Against Finding a Protectible Property Interest

Under the majority approach, prisoners' only protectible property rights are those expressly created by statute. Thus, the inmate's trust fund principal receives Takings Clause protection, but the generated interest does not.[153] This approach reasons that because prisoners lacked any right to personal property at common law, an inmate would have no property interest in wages from prison labor without statutory intervention; common-law property rights would not apply to a limited, statutorily created property interest.[154] This analysis fails to recognize the full implications of refusing to apply common-law rights to a statutorily created right. The majority approach invokes the common-law rule that a convicted criminal "forfeited all rights to personal property,"[155] yet fails to acknowledge that inmates today retain some rights over personal property.[156] Further, the majority approach does not account for the Court's emphasis on government intervention; the mere fact that rights to a principal would not exist without government action does not nullify common-law rights once the right to the principal attaches.[157]

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150. *See* David A. Super, *A New New Property*, 113 COLUM. L. REV. 1773, 1874 (2013) (discussing a criticism that applying the Takings Clause to "the diminution or repeal of social programs might make legislatures reluctant to enact them in the first place"); *cf. Goldberg v. Kelly*, 397 U.S. 254, 278–79 (1970) (Black, J., dissenting) (arguing that requiring the government to afford additional process to welfare recipients will hinder the government's ability to provide welfare benefits in general).

151. *See* Super, *supra* note 150, at 1874.

152. *See id.*

153. *See* Colunga, *supra* note 143, at 806. *But see supra* notes 102–103 and accompanying text.

154. Washlefske, 234 F.3d at184–85 (referencing Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871); 1 WILLIAM BLACKSTONE, COMMENTARIES *299; 4 *id.* *385).

155. *Id.* at 185 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *299; 4 *id.* *385).

156. Wolff v. McDonnell, 418 U.S. 539, 556–57 (1974) (explaining that prisoners maintain due process protections over property); *see also* Tunink, *supra* note 110, at 226 (2013) ("[T]he early common law regarding a prisoner as a slave lacking property rights has been routinely repudiated.").

157. *See* Phillips v. Wash. Legal Found., 524 U.S. 156, 169–71 (1998); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 158–59, 163 (1980).

Modern regulatory takings analysis reaches the same conclusion.[158] In her Note advocating for the adoption of the regulatory takings approach, Rebecca Rogers argues that courts should consider interest as merely a right attaching to the principal.[159] Drawing from Justice Breyer's dissent in *Phillips*, Rogers contends that government appropriation of interest should merely affect the overall economic value of owning the principal rather than constituting a total taking of a separate property interest.[160] The *Phillips* majority, however, rejected this analysis, instead reasoning that the common-law "interest follows principal" rule indicates that the interest comprises a distinct property interest.[161] Deeming the interest generated from inmate trust accounts outside the purview of the Takings Clause could carry multiple policy benefits. In terms of institutional capacity, such a finding would allow legislatures to grant rights to prisoners without incurring further unexpected duties to prisoners, and it would allow prison administrators to make appropriate decisions regarding the safety and well-being of the prison environment, a task for which courts are less equipped.[162] Further, corrections facilities may benefit from increased administrative efficiency. The interest funds could offset high incarceration costs for taxpayers or contribute to facilities for prisoners themselves which otherwise may be unattainable.[163] Such advantages, however, are always a consequence of a government taking for public use, and the temptation to reap these benefits is largely the reason why individual protections under the Takings Clause required constitutionalizing in the first place.[164]

2. Just Compensation

Even if a court recognizes inmates' protectible property right in inmate trust accounts' generated interest, a plaintiff would still need to

158. Rebecca Rogers, Note, *Interest, Principal, and Conceptual Severance*, 46 B.C. L. REV. 863, 879 (2005).

159. *Id.* at 867.

160. *Id.* at 878.

161. 524 U.S. at 165–67.

162. *See* Turner v. Safley, 482 U.S. 78, 84–85 (1987) (explaining why courts should afford special deference to state penal authorities).

163. *See Washlefske*, 234 F.3d at 181 (describing the resources funded by interest earned on inmate trust accounts); *Schneider II*, 151 F.3d 1194, 1195–96 (9th Cir. 1998) (describing California DOC's Inmate Welfare Fund).

164. *See* Treanor, *supra* note 27, at 784 (noting that "the right against physical seizure received special protection . . . because of the framers' concern with failures in the political process").

prove "net harm" in order to receive just compensation.[165] Because most courts have ended their takings analysis after the property interest inquiry, the case law on just compensation in the context of inmate trust accounts is thin.[166] The Ninth Circuit invoked *Brown*'s method of calculating just compensation when requiring an "individualized analysis" to determine whether the specific claimant's earned interest exceeded the costs of maintaining his share of the account, rather than calculating the aggregate costs of managing inmate trust accounts, which contain the funds of many inmates.[167] This method of analysis, however, seems to contradict a component of *Brown*'s holding.[168] The *Brown* Court found that the plaintiffs suffered no "net loss" because the plaintiffs would not have otherwise been able to earn interest given the statutory restrictions on attorney trust accounts.[169] *McIntyre* and *Schneider* seem to ignore this facet of the just compensation analysis for interest: at least in California prisons, inmates essentially had no other option but to place their funds in the California DOC's account system.[170]

Nevertheless, Professor Christopher Serkin's reconciliation of *Brown*'s "net harm" rule with the standard assessment of fair market value sheds light on this discrepancy.[171] If the "net loss" rule is simply a "fact-specific application of fair market value," then the Ninth Circuit simply determined that the prison context is distinguishable from the statutory scheme for IOLTA accounts.[172] Under this view, a court need only calculate the valid deductions and administrative fees applied to an inmate's account to determine the individual's share of interest.[173] This approach salvages the "net loss" rule from undermining not only

165. *See* Brown v. Legal Found. of Wash., 538 U.S. 216, 235–37 (2003) ("[N]either Brown nor Hayes is entitled to any compensation for the nonpecuniary consequences of the taking of the interest on his deposited funds, and . . . any pecuniary compensation must be measured by his net losses . . . ."); *Schneider IV*, 345 F.3d 716, 720–21 (9th Cir. 2003) ("For takings purposes . . . the relevant inquiry is not the overall effect on fund administration but whether any of the *individual* inmates themselves have been deprived of their accrued net interest."); McIntyre v. Bayer, 339 F.3d 1097, 1100–02 (9th Cir. 2003) ("Just compensation . . . is measured by the *net value* of the interest that was *actually earned* by the owner of the principal" (internal quotation marks omitted) (quoting *Brown*, 538 U.S. at 239 n.10 (emphasis added))).

166. *See, e.g.*, Washlefske v. Winston, 234 F.3d 179, 186 (4th Cir. 2000) (ending the analysis after finding no protectible property interest).

167. *Schneider IV*, 345 F.3d at 720–21.

168. *See Brown*, 538 U.S. at 239–40 (discussing the holding).

169. *Id.*

170. *See Schneider IV*, 345 F.3d at 718–19 (discussing a California prisoner's options for personal funds held during incarceration).

171. Christopher Serkin, *Valuing Interest: Net Harm and Fair Market Value in* Brown v. Legal Foundation of Washington, 37 IND. L. REV. 417, 418 (2004).

172. *Id.*

173. *Schneider IV*, 345 F.3d at 720–21.

inmates' takings claims for interest, but also potential claims for government appropriations of "new property," as Justice Scalia iterated in his *Brown* dissent.[174] A state, however, may still be able to deploy *Brown*: because individual inmates would have no other way to earn interest on their accounts beyond those maintained by the state, an inmate will have suffered no net loss.[175] With inmates typically earning such low wages,[176] it is likely that administrative costs will frequently outweigh an inmate's individualized earned interest. Where funds originate from other sources, though, an inmate may actually build a substantial principal, especially when compared to other inmates' savings.[177] The Takings Clause operates regardless of the size of compensation warranted, however.[178]

C. Other Avenues to Recovery

1. Federal Procedural Due Process Clause

A due process claim would likely face the same difficulties as a takings claim in the context of inmate trust accounts and, even if successful, would only provide enhanced procedural protections rather than compensation.[179] Like the Takings Clause, procedural due process protects only preexisting property rights, including state-created property rights, from deprivation without proper procedural requirements.[180] In *Vance v. Barrett*, the Ninth Circuit found that an agreement conditioned upon inmates' waiver of net interest triggered procedural due process rights when a Nevada statute explicitly conferred upon inmates the right to interest.[181] In contrast, the First Circuit rejected the inmate plaintiff's procedural due process claim where the Rhode Island legislature had conferred no property right to

174. Brown v. Legal Found. of Wash., 538 U.S. 216, 247 (2003) (Scalia, J., dissenting) ("May the government now seize welfare benefits, without paying compensation, on the ground that there was no 'net loss' to the recipient?" (citation omitted)).

175. *Id.* at 235–37 (majority opinion).

176. *See* Sawyer, *supra* note 6.

177. *E.g.*, Stewart v. Norwood, No. 16-3189-JAR-DJW, 2017 U.S. Dist. LEXIS 158603, at *31–32 (D. Kan. Sept. 27, 2017) ("At one time, Plaintiff here had more than $8,000 in his inmate trust account, an amount that likely exceeds the balance in many other inmate accounts by a significant margin.").

178. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982) (holding that the encroachment of a television cable was a taking).

179. Goldberg v. Kelly, 397 U.S. 254, 267–68 (1970).

180. Vance v. Barrett, 345 F.3d 1083, 1090–91 (9th Cir. 2003); *see also* Kaitlin Cassel, Note, *Due Process in Prison: Protecting Inmates' Property After* Sandin v. Conner, 112 COLUM. L. REV. 2110, 2115–17, 2133 (2012) (discussing the concept of "new property").

181. 345 F.3d 1083, 1090–91 (2003).

interest to prisoners.[182] Similarly, the court in *Stewart v. Norwood*, while ultimately rejecting any claimed right to the current use of the plaintiff's funds, addressed the Tenth Circuit's ambiguity over the question of inmates' property interest in the principal funds in their accounts by emphasizing the distinctive protections afforded to VA benefits.[183] Thus, in the absence of a statutory right to interest, a due process claim poses the same challenges as the requirements for a takings claim.[184]

A potential due process claim may still provide hope for inmates seeking some form of redress if a court finds that the interest earned on inmate accounts is a protectible property interest but that no just compensation is due, as in *Schneider IV*.[185] Even if an inmate cannot receive just compensation, due process may afford the minimal protections of notice and hearing.[186] While due process seems an unlikely avenue for prisoner plaintiffs to reclaim a property interest in the interest generated from their trust accounts—let alone full compensation for the appropriated funds—the recognition of statutorily created property rights in the due process context is significant in light of the circuit majority's refusal to apply a common-law rule to a statutorily created right.[187]

Indeed, due process analysis may provide a helpful analog by which to argue for the existence of a protectible right under the Takings Clause. When determining the existence of a protectible property interest in the takings context, courts typically cite *Roth* to hold that state law defines the boundaries of protectible property rights.[188] Professor David Super suggests that courts incorporate "new property" concepts into Takings Clause analyses to further the Takings Clause's goal of protecting dependent minority groups from majoritarian appropriations.[189] He argues that the Court's recent invocation of reliance interests supports finding a property interest where a claimant relies upon a benefit conferred gratuitously by the legislature.[190] Thus,

182. Young v. Wall, 642 F.3d 49, 55 (1st Cir. 2011) ("[W]here, as here, there is no property interest, that procedural prophylaxis [of notice and hearing] is not required.").

183. No. 16-3189-JAR-DJW, 2017 U.S. Dist. LEXIS 158603, at *21–23 (D. Kan. Sept. 27, 2017).

184. *See, e.g.*, *id.*

185. *See Schneider IV*, 345 F.3d 716, 720–21 (9th Cir. 2003).

186. Goldberg v. Kelly, 397 U.S. 254, 267–68 (1970).

187. *See* Part I.C.2.

188. *See, e.g.*, Phillips v. Wash. Legal Found., 524 U.S. 156, 164 (1998) (quoting Board of Regents of States Colleges v. Roth, 408 U.S. 564, 577 (1972)).

189. Super, *supra* note 150 at 1873.

190. *Id.* at 1875–78 (pointing specifically to role of unconstitutional coercion in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012)).

a creative litigant could invoke the Due Process Clause's goal of protecting reliance interests that a state has "created or helped to define" by contending that a state's creation of a right to the principal inherently creates a reliance interest in the ensuing interest.[191] The Ninth Circuit in *Schneider II*, however, distinguished the concept of "new property" from the "interest follows principal" rule, reasoning that the latter fell within the "core" of Takings Clause protection and therefore did not face *Roth*'s limitations.[192] Thus, a key issue is whether the "interest follows principal" rule can be applied to new property, or whether the Due Process Clause and the Takings Clause each require distinct modes of analyzing whether a claimed property interest warrants constitutional protections.[193] This question likewise asks whether the problem of the "positivist trap" applies in the takings context: in other words, whether novel state-created property interests can lie outside the scope of the Takings Clause simply because they are the product of state creation.[194] Ultimately, the problem of the positivist trap provides a persuasive basis for recognizing Takings Clause protection for the interest earned on inmate trust accounts.[195]

2. State Constitutional Provisions

In *Givens v. Alabama Department of Corrections*, the Eleventh Circuit assumed that the federal and Alabama Takings Clauses have the same meaning because they have "virtually identical wording" without providing further analysis.[196] State courts, however, began interpreting state constitutional provisions protecting citizens from government takings of private property well before federal courts.[197]

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191. Sandin v. Conner, 515 U.S. 472, 497–98 (1995) (discussing *Roth*); *see also* Cassel, *supra* note 180. *Sandin v. Conner*'s heightened standard of review for Due Process claims for deprivations of liberty in the prison context should not apply to deprivations of property.

192. *Schneider II*, 151 F.3d 1194, 1200–01 (9th Cir. 1998).

193. *Cf.* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 893 (arguing that courts should define "constitutional property" differently for procedural due process, takings, and substantive due process claims).

194. *See* Arnett v. Kennedy, 416 U.S. 134, 163 (1974) (holding that Congress's creation of a statutory right for certain employees not to be discharged except for "cause" did not create an expectancy of job retention protected by the Due Process Clause).

195. *See infra* Part III.

196. 381 F.3d 1064, 1066 (11th Cir. 2004); *see also* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 174–75 (2018) (describing state courts' tendency to impute interpretations of federal constitutional provisions onto state counterparts as "lockstepping," including with regard to takings clauses).

197. James W. Ely, Jr., *'The Sacredness of Private Property:' State Constitutional Law and the Protection of Economic Rights Before the Civil War*, 9 N.Y.U. J.L. & LIBERTY 620, 632 (2015) (referring specifically to eminent domain proceedings); *see also* Treanor, *supra* note 27, at 789–91 (tracing the development of revolutionary era state constitutional takings provisions).

Thus, state constitutional law can serve as a fruitful avenue for making takings claims beyond the reach of the circuit majority's takings interpretation.[198] State constitutional takings provisions, framed in whatever form,[199] however, do not constitute the sole resource for inmates seeking compensation for their appropriated funds, as many state constitutions also include provisions directly related to prisoners' labor and welfare.

a. State Takings Clauses

Many state Takings Clauses largely concern eminent domain and seem to limit protection to government appropriation of real property.[200] While the "interest follows principal" line of takings cases technically falls within federal Takings Clause jurisprudence, inmate plaintiffs could argue that the "interest follows principal" rule likewise applies to state Takings Clauses. Some state court decisions already evince a willingness to recognize interest as a protectible property interest. For example, the Court of Appeals of Wisconsin distinguished from *Webb's* a takings claim over interest generated by a condemnation award held by a circuit court clerk pending appeal.[201] The Court did not find a taking under the Wisconsin Constitution because the interest retained under the challenged state law constituted only a service fee, and the owners of the principal balance had a right to withdraw funds and invest elsewhere.[202] Under this analysis, interest from an inmate trust account is more closely related to that in *Webb's* because in both cases the plaintiffs were required to deposit the principal balance with the government, and both were charged separate services fees.[203]

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198. *See* SUTTON, *supra* note 196, at 19 (2018) ("A modest standard for enforcing the Takings Clause works for national taking-of-property claims, says the Court, but it is by no means clear that every State should embrace the same approach in addressing similar challenges under its own constitution." (footnotes omitted)); *see also id.* at 204–05 (noting that the Ohio and Oklahoma Supreme Courts expanded protections against eminent domain under their respective state constitutions following the unpopular *Kelo v. City of New London*, 545 U.S. 469 (2005) decision).

199. State constitutional provisions that can be considered state counterparts to the federal Takings Clause often vary in language and form. *See, e.g.*, MASS. CONST. art. X ("[B]ut no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people."). For the sake of simplicity, this Note will refer generally to these provisions as "Takings Clauses."

200. *See, e.g.*, GA. CONST. art. I, § III, para. I.

201. Bronfman v. Douglas County, 476 N.W.2d 611, 615–16 (Wis. Ct. App. 1991) (citing Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164–65 (1980)).

202. *Id.*

203. *Webb's Fabulous Pharmacies*, 449 U.S. at 155–57 (1980); *Schneider II*, 151 F.3d 1194, 1196 (9th Cir. 1998).

The Supreme Court of Montana's decision in *Siroky v. Richland County* likewise provides hope for inmates seeking to recover the interest earned on their trust accounts.[204] The Court adopted the "interest follows principal" rule to find that a county's retention of the interest earned on a criminal defendant's cash bond constituted a taking, in violation of Montana's Takings Clause.[205] The court examined the statutory scheme regulating bail conditions, noting that the court was required to return the cash deposit following the performance of the defendant's obligations; the relevant statutes were silent as to the interest earned on the cash deposit while in the County's possession.[206] Applying the Supreme Court's reasoning in *Webb's*, the court determined that because the cash deposit remained the claimant's private property the entire time the County held the deposit, the interest must also belong to the claimant under the "interest follows principal" rule.[207] While the court did acknowledge that the claimant had not yet been convicted while the deposit earned interest, the court did not posit this factor to contrast this case with a convicted inmate but rather to explain the court's fear that allowing the county to retain the interest would create perverse incentives by encouraging the county to delay trials in order to maximize profit for the State.[208] Finally, the court compared the interest on the cash bond to "dividends on a deposit of stocks or bonds or the appreciated value on a pledge of real estate," noting that a State appropriation of either would be unconstitutional.[209] State courts in Michigan, North Carolina, and Ohio have likewise held that interest can be a protectible property interest under state Takings Clauses.[210]

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204. 894 P.2d 309 (Mont. 1995).

205. *Id.* at 312–13 (holding that the county's retention of interest violated both Montana's Takings Clause and Montana's due process clause); *see also* MONT. CONST. art. II, § 29 ("Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner.").

206. *Siroky*, 894 P.2d at 310.

207. *Id.* at 312–13.

208. *Id.*

209. *Id.* at 313.

210. *E.g.*, Butler v. Mich. State Disbursement Unit, 738 N.W.2d 269, 270–72 (Mich. Ct. App. 2007) (holding that the government's retention of accrued interest earned on child support payments constituted a taking under both the federal and Michigan Takings Clauses); McMillan v. Robeson County, 137 S.E.2d 105, 108 (N.C. 1964) ("The constitutional provision . . . that no person shall be deprived of his property 'but by the law of the land,' applies to earnings in the same manner, and with the same force, it applies to principal."); Sogg v. Zurz, 905 N.E.2d 187, 192 (Ohio 2009) (holding that Ohio's statute allowing appropriation of interest earned on unclaimed funds violated the Ohio Takings Clause). *But see* Weber v. Hvass, 626 N.W.2d 426, 435–36 (Minn. Ct. App. 2001) (applying regulatory takings analysis to hold that a cost-of-confinement fee of 10% of "non-exempt, non-wage funds" did not violate either the federal or state Takings Clauses).

While state Takings Clause protections for interest do not necessarily resolve the problem of inmates' lack of common-law rights, state constitutional law provides an alternate path to recovery for prisoners. Because state courts are not bound to interpret their own constitutions in the same manner as the federal Constitution, the rationale underlying the Ninth Circuit's approach remains a feasible possibility for prisoner plaintiffs.[211]

b. Prisoner-specific Provisions

A prisoner-plaintiff may find state constitutional provisions specifically addressing prisoner treatment to provide an additional avenue for attack. Some states include constitutional provisions delineating the specific goals of incarceration and prescribing certain rights for prisoners. Illinois, Indiana, New Hampshire, and Wyoming identify rehabilitation as the central purpose of their criminal justice systems.[212] A rule that enables prisoners to improve their financial stability, particularly upon re-entry into society, and that encourages individual responsibility comports well with the goals of restoration and reformation.[213] Such a principle indicates acceptance of prisoners' rights to the interest earned on their trust accounts.

Nevertheless, it is more likely that a prisoner-specific state constitutional provision will do little to assist an inmate seeking compensation for interest earned on his trust account. New York, New Mexico, Kentucky, Mississippi, and Oregon specifically regulate prison work programs in their constitutions.[214] In New York, the legislature is constitutionally required to "provide for the occupation and employment of prisoners"; the same provision allows the legislature to allow public institutions to benefit from "the products of [prisoners'] labor."[215] New Mexico's Constitution directly addresses inmate

211. *See* SUTTON, *supra* note 196, at 174–75 (discussing how state courts need not interpret state constitutional guarantees in the same manner as federal constitutional guarantees).

212. ILL. CONST. art. 1, § 11 ("All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship."); IND. CONST. art. 1, § 18 ("The penal code shall be founded on the principles of reformation, and not of vindictive justice."); N.H. CONST. pt. 1, art. 18 ("The true design of all punishments being to reform, not to exterminate mankind."); WYO. CONST. art. 1, § 15 ("The penal code shall be framed on the humane principles of reformation and prevention."); *see also* S.C. CONST. art. XII, § 2 (dictating that the South Carolina General Assembly establish penal institutions and "provide for the custody, maintenance, health, welfare, education, and rehabilitation of the inmates").

213. *See supra* note 138 and accompanying text.

214. Relatedly, the Vermont Constitution also encourages visible labor as a punishment to reduce "sanguinary punishments" and to serve as a deterrent to crime. VT. CONST. § 64.

215. N.Y. CONST. art III, § 24.

earnings, explaining that "[t]he penitentiary is a reformatory and an industrial school" in which prisoners must be employed in some capacity and that dependent families of prisoners should receive inmates' net earnings.[216] While these provisions may reinforce a prisoner's claim to interest in the sense that inmate employment is constitutionally required, such support would likely be minor.

Kentucky and Mississippi's provisions are generally neutral to a prisoner's interest claim. The Kentucky Constitution limits when and where prisoners may work[217] and empowers the Commonwealth to "maintain control of the discipline, and provide for all supplies, and for the sanitary condition of the convicts."[218] Mississippi's Constitution similarly enables its legislature to provide for inmate employment, delimiting the scope of such employment, in addition to allowing the state to institute reformatory schools or "prison industries programs" employing inmates.[219] Oregon specifically restricts the uses to which inmate compensation can be applied—none of which include an inmate's personal use—and prescribes that any income earned from prison work programs benefit only those work programs.[220] Inmates' rights to compensation itself are limited beyond even those limitations intrinsic to legislatively facilitated deductions: thus, the provision seems to leave little room for inmates seeking to claim a personal property in interest.[221]

III. TAKING AWAY THE POSITIVIST TRAP

Although state constitutional provisions and the federal Due Process Clause offer potential avenues to recovery, the interest generated from inmate trust accounts should remain within the purview of the Takings Clause. Based on an application of *Phillips v. Washington Legal Foundation* and the Supreme Court's procedural due process jurisprudence, courts should adopt the Ninth Circuit's approach and find that a state's appropriating interest from inmate trust accounts constitutes a taking in violation of the Fifth Amendment.[222]

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216. N.M. CONST. art. XX, § 15.

217. KY. CONST. § 253.

218. *Id.* § 254.

219. MISS. CONST. art. 4, § 85; *id.* art. 10, § 224–26.

220. OR. CONST. art. 1 § 41(8)–(9).

221. *See id.* Interestingly, Oregon's constitution explicitly provides that Oregon's criminal justice system is based on more than merely rehabilitation: "protection of society, personal responsibility, accountability for one's actions and reformation." *Id.* art. I, § 15.

222. *See* 524 U.S. 156, 172 (1998) ("In sum, we hold that the interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal."); *Schneider II*, 151 F.3d 1194, 1201 (9th Cir. 1998) (holding that a state may not appropriate "interest income"

Phillips involved essentially the same circumstances as the prison cases. Both a lawyer's client and a prisoner begin in the same situation: they are unable to place particular funds in an interest-bearing account absent government intervention.[223] Both Justice Souter's and Justice Breyer's *Phillips* dissents emphasized the fact that without the IOLTA program, a client would otherwise be unable to earn any interest on her funds held in trust by her attorney.[224] By rejecting the *Phillips* dissenters' reasoning, the Court refused to limit an individual's right to interest based on the fact that the individual could not have otherwise earned interest.[225]

Thus, in *Phillips*, once the legislature intervened, it could not subsequently limit the common-law rights attaching to the account.[226] Likewise, in the inmate trust account context, the legislature overrode prisoners' lack of common-law rights to property to create a property interest in the principal amount that could then generate interest.[227] Once the legislature created that property right, and the inmate's right to interest vested through the building of a principal balance, the state should not be able to choose which common-law rights then attach to the vested property right.[228]

By failing to recognize the attachment of common-law rights to statutorily created property, courts risk falling into the "positivist trap" criticized in the procedural due process realm.[229] The Supreme Court's decision in *Arnett v. Kennedy*, which held that the fulfillment of statutory procedures satisfied due process requirements prior to the termination of a statutorily created liberty interest, exemplifies the

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from inmate trust accounts "without implicating the Takings Clause"); *see also* Tunink, *supra* note 110, at 230–33 (analyzing the circuit split in 2013—particularly the First Circuit's approach—and arguing that the Supreme Court should recognize a prisoner's property interest in the interest on an inmate trust account).

223. *See Phillips*, 524 U.S. at 160–61 (discussing the creation of Texas's IOLTA program); *Schneider II*, 151 F.3d at 1196 ("The State is not required by California law to place [Inmate Trust Account] monies in an interest-bearing account. Rather, the Penal Code merely provides that the State 'may deposit such funds in interest-bearing bank accounts . . . .' " (quoting CAL. PENAL CODE § 5008 (West 1981) (amended 2009)).

224. 524 U.S. at 176–77 (Souter, J., dissenting); *id.* at 180–81 (Breyer, J., dissenting).

225. *See* 524 U.S. 156, 172–79 (1998) (Souter, J., dissenting); *id.* at 179–83 (Breyer, J., dissenting).

226. 524 U.S. at 169–71 (1998); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 158–59, 163 (1980).

227. *Schneider II*, 151 F.3d at 1195.

228. *See id.* at 1200–01 ("States may . . . confer 'new property' status on interests located outside the core of constitutionally protected property, but they *may not* encroach upon traditional 'old property' interests found within the core.").

229. Merrill, *supra* note 193, at 922 (quoting Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 888 (1981)). Considering the role of the positivist trap in this context does not necessarily require an analysis of an inmate's level of control over his funds, as Isaac Colunga argues. Colunga, *supra* note 143, at 810.

problem of the positivist trap.[230] In *Arnett*, Justice Rehnquist's plurality opinion held that beneficiaries of statutorily created liberty—and, by inference, property—interests "must take the bitter with the sweet."[231] The Court later rejected this principle in *Cleveland Board of Education v. Loudermill*, holding instead that constitutional procedural guarantees applied even to state-created property subject to statutory procedures.[232] Justice Scalia invoked this problem in his *Brown* dissent, criticizing the majority for deciding that "there is no taking when 'the State giveth, and the State taketh away.' "[233] He explicitly references the concept of new property, asking whether the "government may now seize welfare benefits, without paying compensation, on the ground that there was no 'net loss.' "[234] While Justice Scalia's comment focused on the majority's refusal to find just compensation for a taking, the principle extends to the finding of a protectible property interest.[235]

The *Phillips* Court rejected in the Takings Clause context what would be called "tak[ing] the bitter with the sweet" in the procedural due process context.[236] Professor Thomas W. Merrill noted that the *Phillips* Court did not "look to *all* relevant provisions of state law" under which the client would have no property in the interest: Texas Supreme Court rules already provided that any funds that "would not earn net interest in a separate account must be placed in an IOLTA, and if placed in an IOLTA, those funds would not earn interest for the client."[237] Thus, in *Phillips*, the Court looked first to whether state law has created a property interest in the principal; if the answer is in the affirmative, common-law rights apply.[238] By rejecting inmates' claims, the majority of circuits fall prey to the positivist trap by concluding that traditional property rights do not apply to statutorily created rights. Recognizing prisoners' common-law right to the interest generated from inmate trust accounts both reflects *Phillips*'s reasoning and learns from the lessons taught by procedural due process jurisprudence.

230. 416 U.S. 134, 163 (1974); *see also* Merrill, *supra* note 193, at 923 (identifying *Arnett v. Kennedy* as the "most notorious example of the positivist trap").

231. 416 U.S. at 154.

232. 470 U.S. 532, 540–41 (1985).

233. Brown v. Legal Found. of Wash., 538 U.S. 216, 247 (2003) (Scalia, J., dissenting).

234. *Id.* (citing Goldberg v. Kelly, 397 U.S. 254 (1970)).

235. *See id.*

236. Phillips v. Wash. Legal Found., 524 U.S. 156, 169–71 (1998); *Arnett*, 416 U.S. at 154.

237. Merrill, *supra* note 193, at 897.

238. 524 U.S. at 169–71.

CONCLUSION

At first glance, the divide over interest earned on inmate trust accounts may appear trivial. The amount of interest at issue is generally small—so small that an award of just compensation is unlikely because the costs of account administration probably surpass the amount of interest itself.[239] But relative size of encroachment is not a threshold requirement for application of the Takings Clause in a per se takings context.[240] Rather, the protection of inmates' rights to the interest generated on trust accounts administered by prisons strikes at the heart of the Takings Clause—defending an individual, particularly a politically powerless minority, from the intrusions of the majority.

State constitutional law, through state Takings Clauses or prisoner-specific provisions, offers a potential alternative avenue to vindicate the interests of prisoners. But prisoner plaintiffs should still prevail under the federal Takings Clause. An inability to earn interest based on one's status as a prisoner and an inability to earn interest based on regulations on client trust accounts is not a meaningful distinction when considering the application of traditional property rights to statutorily created property under the Takings Clause. The Ninth Circuit's approach to whether the interest earned on inmate trust accounts should constitute a protectible property interest under the Takings Clause avoids the positivist trap into which the circuit majority falls.

Charlotte Elam*

239. *See* Sawyer, *supra* note 6 (highlighting the very low wages that incarcerated people earn).

240. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982) (holding that a government-authorized installment of a television cable constituted a per se taking).

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