MEMO

TO: Legal Team

FROM: Bernard Zimmerman

DATE: June 11, 1995

Attached are the following materials for your review:

1. A memorandum from Professor Lee Hargrave at the LSU Law School. Lee is an experienced constitutional scholar and professor who acted as reporter for the 1972 Louisiana Constitutional Convention which, as you can see, produced a Constitution in 1974. He discusses several of the issues that we may be faced with and I thought you would be interested in the Louisiana experience. The Revenue Estimating Conference (see Budget) is remarkably similar to Mr. Quitugua's proposal. As you can see, it is not fairing well.

2. A series of memoranda prepared by Pillsbury at my direction dealing with a variety of attempts to restrict the rights of aliens, such as tax surcharges and tax rebate impoundments.

These memoranda provide a good base against which to consider such issues, though with the exception of education, I have seen few proposals in this area.

If, in reading these materials, you have questions for Professor Hargrave or Robert Manicke, the principle Pillsbury lawyer who worked on these issues, please let me know.

Attachs.

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June 7, 1995

Dear Bernie,

Carolyn sent some Rex crab boil on Saturday. She could not find it in plastic bottles in Baton Rouge and sent along what she could find. Schwegmann's is the only store that carries Rex in BR.

Sounds like you are having an interesting time. Here are a few comments on your fax. I'm sending by mail a copy of the defunct Vietnam Constitution and the Louisiana Constitution of 1974.

Aliens. My thought is to include little detailed material on aliens in a constitution and let the legislature adopt statutes to govern them. If there is some basic due process or equal protection right provided for in the Constitution, it would be advisable to also include a grant of power to the legislature to control alienage and citizenship. Such a grant would make it clear that the subject is freed of some or all of the due process and equal protection guarantees.

Mexico has long had limitations on land ownership by aliens. In Louisiana's 1921 Constitution, it was "aliens ineligible to obtain citizenship" who were so limited. Such prohibitions, however, are evaded by having corporations, partnerships or trust take title to property. An effective limitation to avoid such subterfuge would probably have to be a detailed statute rather than a constitutional provision.

I don't have any definitive answer on charging aliens for services. My understanding is that such charges by states to nonresidents, as with out-of-state tuition, survive equal protection scrutiny if related to the costs to the states. I would assume that any equal protection concern about such regulations could be alleviated by the wording of the grant of power to regulate aliens and citizenship.

If the problem of aliens is confined to specific countries, the treaty power could be defined in the constitution in such a way to allow the problems to be handled by treaties or other international agreements with the other countries.

The anachronism I am sending by separate cover, the 1967 Vietnamese Constitution, is careful to phrase its rights in terms of citizenship rather than "persons." That Constitution, by the way, was drafted by some Columbia University political scientists and reflected the state of the art in developing country constitutions at the time.

Language. The Louisiana Constitution has a flexible provision establishing a right to speak one's language. Art. XII, §4 provides, "The right of the people to preserve, foster, and promote their respective historic linguistic and cultural origins is recognized." It was adopted as a result of Francophones wanting protection against laws that forbade the speaking or teaching of French. No attempt was made to require the teaching of French or that instruction be in French. Quebec, as far as I know, is the model that might be available. If you were to adopt such a provision, it might hinder government attempts to require that all instruction be in a specific language, at least as applied to non governmental schools.

My impression is that many countries establish an official language in their constitution. That then is the vehicle to require instruction in schools to be in that language.

The complex Belgian constitution establishes three linguistic areas, Flemish in the North, French in the South, and German in the east. Instruction in the government run schools is according to those rules. Indeed, all governmental activities, including road signs, must be in those languages.

Legislature. Although it is not political-science correct, a constitutional provision fixing the maximum salary and other payments to legislators would probably be the most effective device to ensure a part-time legislature.

As in many states, Louisiana attempts to limit the legislature's activity by specifying the length of annual sessions to 60 days. Also, a recent constitutional amendment provides every other annual session is confined to "fiscal" matters, so that the general sessions are theoretically bi-annual. However, the scheme has a back door – special sessions confined to stated matters can be called by the governor or by a majority of the members of the legislature. Another device to extend legislative activity (and per diem pay) is to have committees function during the period between sessions. Study committees and investigating committees are the order of the day.

I'm not sure how you could stop a legislature form engaging in these kinds of subterfuges to enhance their authority and pay. Perhaps limit special sessions to emergencies? Louisiana allows emergency sessions in this language, "The governor may convene the legislature in extraordinary session without prior notice or proclamation in the event of public emergency caused by epidemic, enemy attack, or public catastrophe."

Budget

The La. constitution started with a simple provision requiring the governor to submit a balanced budget. That, of course, depended on an estimate of revenues, and there was no device to control optimistic forecasts by a governor. Also, it did not require the legislature to pass a balanced budget. What happened was that the legislature loaded up the budget. Functionally then, the governor used his line item veto to get the budget back where he wanted it. Indeed, a line item veto may be a desirable power for this and other reasons.

The next step in Louisiana was to establish the Revenue Estimating Conference to prepare an official forecast of revenues. It is composed of the Speaker of the House, the President of the Senate, the governor, and a college professor. It is required to act by unanimous vote, unless that requirement is changed by 2/3 vote of both houses of the legislature. Currently, the windfall from the gambling casino is coming in and the politicians want to include it in the budget; the LSU college professor is against that proposal. As a result, the legislature is no considering a bill to allow the conference to act by 2/3 vote.

In any event, an effective balanced budget device has to be somewhat detailed to work and has to be more than a hortatory statement. Another effective device is to control the borrowing of money to cover deficits.

Yours truly,

235 Montgomery Street
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April 19, 1994

VIA FACSIMILE

Sara Campos, Esq.
Lawyers Committee For Civil Rights
of the San Francisco Bay Area
301 Mission Street, Suite 400
San Francisco, CA 94105

Re: Senate Bill 1955

Dear Ms. Campos:

Attached is my memorandum in response to your request for an analysis of Senate Bill 1955 prior to your attendance at an upcoming Senate Committee hearing. I believe that the bill's most serious flaw is its proposal to levy what amounts to a special additional tax on illegal alien wage earners. This classification is invalid, as it lacks any rational connection to a significant state interest. The bill hearkens back to a shameful chapter in California's history in which a monthly per-capita tax was imposed upon Chinese residents of working age. That tax was struck down by the California Supreme Court in 1862, on the grounds that persons may not "be set apart as special subjects of taxation, and be compelled to contribute to the revenue of the State in their character of foreigners."

I believe it should be fairly easy to support an argument that an illegal alien surtax lacks a rational economic basis. It seems unrealistic to suggest that illegal immigrants will be deterred from entering California by the knowledge that they will be unable to collect state income tax refunds. There also is a real issue whether the additional revenue that might be generated by this proposal would be offset by the funds needed to obtain accurate information from the INS concerning the immigration status of such workers. Finally, as pointed out in Karen Niksch's memorandum, the bill would discourage compliance

with the California reporting requirements among precisely those illegal aliens who do contribute to the California tax base.

I have not analyzed the separate issue of the fines that would be imposed upon employers who failed to withhold taxes from the wages of undocumented workers. It seems to me that one might effectively address this issue as the imposition of yet another regulatory burden on employers at a time when California is under increasing attack for creating an environment that is hostile to the business community. Accordingly, it would seem that the business community might have an interest in opposing at least the employer penalty section of the bill.

I hope that this analysis is of some help. Please contact me if you have any questions.

Very truly yours,

Robert T. Manicke

Enc.

cc: Mr. Bernard Zimmerman w/enc.
Mr. James M. Canty w/enc.

PILLSBURY MADISON & SUTRO

M E M O R A N D U M

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| TO: | Sara Campos, Lawyers' Committee for Civil Rights of the San Francisco Bay Area | DATE: | April 18, 1994 |
| FROM: | Robert T. Manicke | File: | 99750-999-0320 |
| RE: | Senate Bill 1955 | | |

The following is my analysis of one of the more significant constitutional challenges that could be raised against the forfeiture provision of S.B. 1955.

a. Denial of Refund Claims Amounts to Imposition of Additional Tax on Illegal Aliens Alone.

As the term implies, state "refund" checks generally consist of funds that have been withheld from the taxpayer throughout the year in excess of the taxpayer's income tax liability for the year. Most wage earners have money withheld from each paycheck by their employers, who collect the withholdings and pay them over to the state on a regular basis. At the end of the year, if the employer has withheld more money from a worker's paycheck than necessary to pay the worker's personal income tax, the state returns the difference--without any interest to compensate for the state's use of that money over the preceding year.[1] The state's failure to refund excess collections amounts to unjust enrichment of the state at the expense of a group of its taxpayers. See Stone v. White, 301 U.S. 532, 534 (1937) (stating that refund suits are in the nature of a suit to avoid unjust enrichment of the government). Since the bill would require illegal aliens to "forfeit" any claim to excessive amounts withheld, the bill amounts to imposition of an additional income tax that would be levied only upon illegal aliens.

1 It is true that the federal government and states sometimes choose to administer certain subsidies through the income tax system. For example, under certain circumstances the federal earned income credit and the now-suspended California renter's credit allow a taxpayer to receive a "refund" even though no money was withheld from the taxpayer during the year. However, California presently has no such refundable credits in place for individual wage earners, since the renter's credit was suspended in the 1993 legislative session. A.B. No. 760.

b. Tax Classification Based on Illegal Alien Status Is Unconstitutional.

Although state legislatures generally have wide discretion to establish classifications for purposes of taxation, this discretion is limited by the Equal Protection Clause of the United States Constitution and by parallel provisions of the California Constitution. See Plyler v. Doe, 457 U.S. 202 (1982) (invalidating Texas statute that withheld state funds from local school districts for education of children not legally admitted to United States; applying standard of intermediate scrutiny); Cal. Const. art. 1, § 16(a) (requiring uniform operation of laws). Under California law, the distinction between classes drawn by a tax statute "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." Haman v. County of Humboldt, 8 Cal. 3d 922, 926 (1973) (invalidating California statute purporting to apply higher tax rate on owners of fishing vessels who failed to document their tax situs in California by filing certain federal forms; granting refund to boat owners equal to the difference between the higher and lower rates).

A statute functionally similar to S.B. 1955 was invalidated by the California Supreme Court in 1862. Lin Sing v. Washburn, 20 Cal. 534 (1862). That case involved a California statute entitled "An Act to Protect Free White Labor Against Competition with Chinese Coolie Labor, and to Discourage the Immigration of the Chinese into the State of California." The statute in that case levied a monthly tax of $2.50 upon each Chinese person of working age except those engaged in specific lines of business. The court declared that the purpose of the statute was "not to impose a tax, but under the pretense of taxation, to drive the subject of it--the Chinese--from the State." 20 Cal. at 536. After first finding the statute in conflict with the federal Commerce Clause, the court addressed the issue of unfair classification, which it framed as follows:

> [T]he question is not whether [the Chinese] can be excluded as burdensome or dangerous persons, but whether they can be taxed for the privilege of residing here, without reference to their condition or character.

20 Cal. at 578. The court concluded that the tax required an invalid classification, stating:

> "That [the Chinese] may be taxed as other residents is not disputed, but that they may be set apart as special subjects of taxation, and be compelled to contribute to the revenue of the State in their character of foreigners, is a proposition which cannot be maintained."

20 Cal. at 578 (emphasis added).

Apart from the issue of whether a state may distinguish among its taxpayers on the basis of their immigration status, the bill would likely face a serious court challenge based on the "rationality" of the state's purpose. In Plyler, the United States Supreme Court noted that the countervailing costs associated with the Texas statute required that the statute further a "substantial" goal of the state. 457 U.S. at 223-24. The costs in that case were the social and economic costs of denying a basic education to the children of illegal immigrants which would likely result in a permanently illiterate underclass. In the case of S.B. 1955, the costs to the state include the more immediate costs of implementing the bill's mandatory program to determine the immigration status of thousands of workers.

In Plyler, the Court rejected the state's argument that illegal immigrant status alone was a sufficient rational basis for the state's classification because the Court was unable to find any evidence of a congressional policy corresponding to the state statute. 457 U.S. at 224-26. Similarly, there is no federal policy corresponding to the forfeiture provision of S.B. 1955; the federal tax system does not deny refunds to illegal aliens. The Plyler case also raises the issue of the statute's effectiveness in deterring illegal immigration. In Plyler, the Court acknowledged that a state might have an interest in "mitigating the potentially harsh economic effects of sudden shifts in population"; however, the primary reason for illegal immigration was the availability of jobs rather than free education. Accordingly, denying education benefits did not further the purpose of the statute. 457 U.S. at 228-29. In the case of S.B. 1955, the issue may be framed as whether the availability of state tax refunds stimulates illegal immigration such that the denial of a refund can be expected to have a significant effect on illegal immigration.[2]

Finally, proponents of S.B. 1955 may argue that the special tax on illegal aliens is necessary to recoup some of the costs associated with paying state benefits to members of the same class. The resolution of this issue would depend primarily on

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2 The provision of S.B. 1955 imposing fines on employers of illegal aliens, however, is more readily justifiable as a deterrent to immigration, as it might make employers less likely to hire illegal aliens in the first place.

the facts concerning such costs. However, as noted above, an effective argument probably could be made that the administrative costs associated with S.B. 1955 would be high compared to the revenue that it would generate. In this regard, the comments of the Plyler Court are worth noting:

> There is no evidence in the record suggesting that illegal entrants impose any significant burden on the State's economy. To the contrary, the available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax money to the state fisc.

457 U.S. at 228 (emphasis added). The irony of imposing the surtax on precisely those illegal aliens who not only report their income but overpay their tax also seems significant when weighing the overall rationality of the bill.

cc: Mr. B. Zimmerman
Mr. J.M. Canty

PILLSBURY MADISON & SUTRO

M E M O R A N D U M

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| TO: | James M. Canty | DATE: | June 22, 1994 |
| FROM: | Kerne H. O. Matsubara | File: | 99901-980-0048 |
| RE: | Lawyers' Committee for Civil Rights: "Taking" Analysis of California Senate Bill 1955 | | |

## QUESTION PRESENTED

Does Senate Bill 1955 ("S.B. 1955"), which denies illegal aliens a tax credit or refund with respect to withholdings of wage earnings, effect an unconstitutional taking of property without just compensation under the Fifth and Fourteenth Amendments and under the California Constitution?

## BRIEF ANSWER

Yes, under the federal and California Constitutions this bill may result in an unconstitutional taking, because these aliens have a property interest in their tax refunds, and the bill allows the state to permanently expropriate this property without compensating these taxpayers.

## STATEMENT OF FACTS

Senate Bill 1955 proposes, in part, to amend the California Revenue and Taxation Code to disallow any claim for tax refunds by illegal aliens. The bill provides that "no credit or refund shall be allowed or made with respect to any amount withheld . . . from the wages that are earned by any person who is in this state in violation of federal immigration laws, and those amounts shall be deemed forfeited to this state."

## ANALYSIS

Senate Bill 1955 effects an unconstitutional taking because the state expropriates aliens' tax refunds, which are protectable property interests under the Fifth Amendment, without providing any compensation. Under the U.S. Supreme Court's three-factor inquiry, S.B. 1955 results in a taking, because the state's action is invasive, deprives aliens of their investment-

backed expectations in their after-tax wage earnings, and has a substantial economic impact on these aliens.

The Fifth Amendment provides in part: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. This prohibition applies against the states through the Fourteenth Amendment. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160 (1980). According to the U.S. Supreme Court, once a property interest has been identified, whether a taking of that property has occurred depends on a three-factor inquiry. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 123-24 (1978). Specifically, the Court will look at the character of the governmental action, the extent to which the state has interfered with investment-backed expectations and the state action's economic impact on the claimant. Id. at 124.

A. Tax refunds as property interests.

As a threshold matter, taxpaying illegal aliens have protectable property interests in their tax refunds and credits. For Taking Clause purposes, "[p]roperty interests . . . are defined by existing rules or understandings that stem from an independent source such as state law." Webb's Fabulous Pharmacies, 449 U.S. at 161.

Tax refunds and credits are property interests under the Fifth Amendment. In determining whether a federal program withholding delinquent parents' federal tax refunds to satisfy their child support obligations violated due process, one district court found that a "tax refund . . . is the restoration to a taxpayer of his or her own funds. The interception of the refund is a diversion of the taxpayer's property." Rucker v. Secretary of the Treasury, 634 F. Supp. 598, 602 (D. Colo. 1986). Similarly, taxpayers have property interests in tax overpayments resulting from tax credits. Sorenson v. Secretary of the Treasury, 557 F. Supp. 729, 737 (W.D. Wash. 1982), aff'd, 752 F.2d 1433 (9th Cir. 1985), aff'd, 475 U.S. 851 (1986).

Here, taxpaying illegal aliens have property interests in their state tax refunds and credits. The California Revenue and Taxation Code provides that any tax "overpayment may be credited against any amount then due from the taxpayer and the balance shall be refunded to the taxpayer." Cal. Rev. & Tax. Code § 19301(a). Because any overpayment shall be refunded, a state tax refund restores to the taxpayer his or her own funds. Thus, the Taking Clause protects aliens' tax refund property interests.

B. Three-factor analysis.

Because taxpaying aliens have a property interest in their tax refunds, whether a taking occurs depends on a three-factor inquiry. Courts will likely find a taking if the government's

action has an invasive character, interferes with investment-backed expectations and economically impairs the claimant. Penn Central, 438 U.S. at 124; Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982). Senate Bill 1955 effects a taking under this analysis because the state's expropriation of tax refunds is a permanent invasion of property, destroys aliens' expectations in their after-tax wage earnings and causes a substantial economic deprivation.

1. Invasive character of the governmental action.

The character of the state's proposed outright expropriation of tax refunds is so invasive that it amounts to a taking. When the character of the governmental action is a "permanent physical occupation of property," there is a taking, "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."[1] Loretto, 458 U.S. at 434-35. Where monetary assets are concerned, the nature of the governmental action suggests a taking when the state "permanently appropriates" such assets for its own use. Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 225 (1986).

Although the Court did not find a permanent appropriation under the facts in Pension Benefit,[2] the Court did find a taking of monetary funds where the state exacted a "forced contribution to general governmental revenues." Webb's Fabulous Pharmacies, 449 U.S. at 163. In Webb's Fabulous Pharmacies, the Court held that a county government's expropriation of interest on interpleader funds deposited in a county court's registry was an unlawful taking. Id. at 164-65. Creditors with claims to these funds had a protectable property right to their respective portions of the fund. Id. at 161. The county's expropriation

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1 When the government's action takes the extreme form of a permanent physical occupation, a taking occurs irrespective of the two remaining factors in this 3-factor analysis. Loretto, 458 U.S. at 426. In Loretto, the Court held that a New York statute requiring landlords to permit a cable television ("CATV") company to install CATV facilities on landlords' property for a one-time $1 payment was a taking. Id. at 421, 438. The Court held that the cable company's affixing of wires, bolts and screws to a building was a permanent physical occupation of property and thus a per se taking. Id. at 437-38.

2 In Pension Benefit, the Court held that a federal statute requiring a withdrawing employer to contribute its share of unfunded vested benefits into a pension plan was not a taking. Pension Benefit, 475 U.S. 211. No taking occurred because the state did not permanently appropriate any of the employer's assets for its own use. Id. at 225. Instead, the statute merely "adjust[ed] the benefits and burdens of economic life to promote the common good." Id.

of the fund's interest was a taking, because the county deprived creditors of the full use of their property, where the earnings of a fund are "property just as the fund itself is property." Id. at 163-64.

Senate Bill 1955 similarly, if not more egregiously, amounts to a taking because the state not only deprives aliens of the use of their funds, but also permanently invades their entire tax refunds. An invasion occurs when the state takes possession of and title to these tax refunds and returns them to the state's coffers. This invasion is permanent, because S.B. 1955 neither provides for aliens' future recovery of these funds nor credits these amounts to any of the aliens' existing debt obligations. Thus, such an outright expropriation of funds is a taking, where the state's action involves a permanent invasion of property for the state's own use.

2. Investment-backed expectations.

Taxpaying aliens have investment-backed expectations in their tax refunds based on the state's tax code which promises to credit or return to the taxpayer any amount of tax overpayments. The second factor in determining whether a governmental action goes beyond "regulation" and effects a "taking" is the state's interference with reasonable investment-backed expectations. Penn Central, 438 U.S. at 124. The purpose of this factor is to find a taking only when state action interferes with interests sufficiently bound up with the reasonable expectations of the claimant to constitute "property" for Fifth Amendment purposes. Id. at 125. Thus, a reasonable investment-backed expectation must be more than a "unilateral expectation or an abstract need." Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984).

Here, wage-earning aliens expect to receive the balance of their earnings less any tax liabilities. First, the state currently directs employers to "deduct and withhold from such wages . . . a tax computed in that manner as to produce, so far as practicable . . . a sum which is substantially equivalent to the amount of tax. . . ." Cal. Unemp. Ins. Code § 13020(a). Second, the Franchise Tax Board must then credit or refund the amount of any tax overpayment to the taxpayer. Cal. Rev. & Tax. Code § 19301(a).

Accordingly, a tax overpayment refund is not merely a taxpayer's unilateral expectation, but an interest which the state recognizes as belonging to the taxpayer. Furthermore, tax refunds resulting from excess withholdings represent after-tax wage earnings, which are not gifts from the state but the economic returns to taxpayers' labor. Thus, taxpayers reasonably expect that any amounts withheld from their wages in excess of their tax liabilities will be refunded or credited to them.

3. Substantial economic impact.

Finally, S.B. 1955 has a substantial economic impact on taxpayers. Although the Court has not established a bright-line rule on what constitutes a "substantial economic impact," any nontrivial property should fall under the Taking Clause's protection. For example, the Court considered property valued within the $100 to $2700 range as involving "not trivial sums." Hodel v. Irving, 481 U.S. 704, 714 (1987). In Hodel, the Court determined that a federal statute's forced escheat of fractional Indian lands was a taking, even though the statute only involved land producing less than $100 in annual income. Id. at 709, 717.

Here, tax refunds usually involve more than de minimis amounts. Depriving taxpayers of these sums will substantially impact taxpayers. Because the state's uncompensated expropriation of tax refunds suggests a taking under all three factors, such state action constitutes a taking.

C. Taking under California Constitution.

Senate Bill 1955 also effects a taking under the California Constitution. The California Constitution provides, in part, that "[p]rivate property may be taken or damaged for public use only when just compensation . . . has first been paid to, or into court for, the owner." Cal. Const. art. 1, § 19. For eminent domain[3] purposes, property statutorily includes "real and personal property and any interest therein." Cal. Civ. Proc. Code § 1235.170. California taking cases do not provide a different standard than federal cases. In taking cases, the California Supreme Court has adopted the Penn Central three-factor inquiry. See Nash v. City of Santa Monica, 37 Cal. 3d 97, 102 (1984). In Nash, the California Court stated, "we are aware of no authority which would impose different requirements under the California Constitution." Id. Because S.B. 1955 works a taking under the federal standard, it also constitutes a taking under California law.

California law may even provide greater protection to aliens' tax refunds because of the California legislature's and the courts' expansive definition of property. In 1975, California extensively revised its eminent domain statutes. See City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 65 (1982). As currently defined, property includes "real and personal property and any interest therein." Cal. Civ. Proc. Code § 1235.170. The Law Revision Commission comment to section 1235.170 notes that "[s]ection 1235.170 is intended to provide the broadest possible definition of property and to include any

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3 The California Constitution and case law also use the term "taking" in the context of "eminent domain." Beaty v. Imperial Irrigation Dist., 186 Cal. App. 3d 897, 909 (1986).

type of right, title, or interest in property that may be required for public use." See Cal. Law Revision Comm'n cmt. to Code Civ. Proc. § 1235.170. Subsequently, the California Supreme Court held that California's "eminent domain law authorizes the taking of intangible property." Oakland Raiders, 32 Cal. 3d at 68. In holding that a professional football franchise was intangible property subject to a taking, the Court noted:

> For eminent domain purposes, neither the federal nor the state Constitution distinguishes between property which is real or personal, tangible or intangible. Nor did the 1975 statutory revision do so.

Id. Thus, under California law with its broad definition of property and under the Penn Central three-factor taking inquiry, the state's expropriation of aliens' tax refunds is a taking.

D. Counterarguments.

1. Senate Bill 1955 as a tax.

One possible counterargument to a taking claim is that S.B. 1955 is a lawful tax, imposed under the state's tax power, and thus outside the reach of any taking challenge. As one U.S. appellate court held, a tax is not a taking. Coleman v. Commissioner of Internal Revenue, 791 F.2d 68 (7th Cir. 1986). The court explained:

> Taxes indeed "take" income, but this is not the sense in which the constitution uses "takings." Article I, section 8, clause 1 of the constitution grants to Congress "Power To lay and collect Taxes."

Id. at 70. The State of California similarly exercises its tax power under Article XIII of the California Constitution. Cal. Const. art. 13.

In the present case, however, S.B. 1955's tax refund scheme is not a tax. The bill does not on its face label this a tax; the bill refers to this as a forfeiture. The bill also does not explicitly assess a tax on income, property, sales or use. Additionally, even though S.B. 1955 involves aliens' income taxes, this is not an income tax because the tax refund forfeited to the state is the balance remaining after income tax liability has been deducted from wage withholdings.

Even if the state classifies this as a tax, a purported tax is not automatically shielded from a taking challenge. The Fifth Amendment requires judicial nullification of a statute that is ostensibly a tax but in actuality amounts to a constitutionally impermissible taking of private property. See Acker v. Commissioner, 258 F.2d 568, 574 (6th Cir. 1958), aff'd, on another issue, 361 U.S. 87 (1959). Although upholding the

validity of the 1913 federal Income Tax Law, the U.S. Supreme Court noted that the government's tax power would be limited if the tax law was:

> so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, or . . . so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion.

Brushaber v. Union Pacific Railroad Co., 240 U.S. 1, 24-25 (1916).[4] In this case, the confiscation of tax refunds--even under the guise of a state imposed tax--does involve an arbitrary and unequal tax. A tax that targets illegal aliens is unequal; a tax based on the chance occurrence of tax overpayments is arbitrary. Thus, even if the state characterizes S.B. 1955 as a tax, this tax must still pass Fifth Amendment constitutional muster.

2. Senate Bill 1955 as imposing a user fee.

A second possible counterargument which may be raised is that S.B. 1955 merely assesses a "user fee" to illegal aliens, perhaps to reimburse the state for its welfare services and border patrol activities. If S.B. 1955 is a proper user fee statute, then a taking may not be found. However, because the bill's exaction is so excessive, a court would not likely find this to be an appropriate user fee.

The U.S. Supreme Court recently limited its holding in Webb's Fabulous Pharmacies, 449 U.S. 155, by refusing to apply a taking analysis to a state's exaction of private funds, where such exaction was an appropriate user fee. U.S. v. Sperry Corp., 493 U.S. 52 (1989). Whereas Webb's Fabulous Pharmacies established that the Taking Clause protects monetary property interests, the Court in Sperry held that "a reasonable user fee is not a taking if it is imposed for the reimbursement of the cost of government services." 493 U.S. at 63. The Court found that the federal government's exaction of a percentage of any award made by the Iran Claims Commission was a permissible means of collecting reimbursement for costs incurred in the operation of that Commission. Id. at 62-63. The Court reasoned that deductions in the range of one to two percent were "not so

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4 The Court reaffirmed this principle by noting that "discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment." Steward Machine Co. v. Davis, 301 U.S. 548, 585 (1937). Although the Court in Steward Machine Co. upheld a Social Security tax, it did so only after finding that such a tax was not "arbitrary." Id. at 584.

clearly excessive as to belie their purported character as user fees." Id. at 62. Furthermore, the Court stated:

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

Id. at 62 n.8.

The facts in the present case, however, are distinguishable from Sperry because S.B. 1955 makes no mention of a "user fee," and if a user fee is found, such a fee is "clearly excessive." Whereas the federal statute in Sperry expressly imposed a percentage deduction as "reimbursement to the United States Government for expenses incurred in connection with the arbitration of claims" (493 U.S. at 58), Senate Bill 1955 mentions no such cost recovery scheme.

Furthermore, a user fee is appropriate only if it is not clearly excessive.[5] Under S.B. 1955, however, the state does not take a reasonable percentage deduction from aliens' tax refunds. Instead, the state takes 100% of these refunds, a significantly higher percentage than the 1-1/2% in Sperry. Thus, even if S.B. 1955 purports to be a user fee, its clear excessiveness and confiscatory nature make it subject to a taking challenge.

## CONCLUSION

Senate Bill 1955 effects an unconstitutional taking because the state proposes to expropriate tax refunds without providing just compensation. The strongest argument in support of a taking claim is that the state has taken outright possession of and title to property in which taxpayers have investment-backed

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5 The purported user fee in Webb's Fabulous Pharmacies was inappropriate, and hence a taking, because it was duplicative. 449 U.S. at 162. The county's appropriation of interest on interpleader funds was an impermissible fee amounting to a taking, where the county's appropriation was in addition to a statutorily imposed service fee.

expectations and the loss of which will be economically substantial.

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