Denver Law Review

Volume 81 | Issue 1 Article 7

January 2003

Give Them $4.96 and They Take $200 Million: Why Brown v. Legal Foundation of Washington Violates the Fifth Amendment

Brent Hultquist

Follow this and additional works at: https://digitalcommons.du.edu/dlr

Part of the Law Commons

Recommended Citation

Brent Hultquist, Give Them $4.96 and They Take $200 Million: Why Brown v. Legal Foundation of Washington Violates the Fifth Amendment, 81 Denv. U. L. Rev. 169 (2003).

This Note is brought to you for free and open access by the Denver Law Review at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu,dig-commons@du.edu.

Give Them $4.96 and They Take $200 Million: Why Brown v. Legal Foundation of Washington Violates the Fifth Amendment

This note is available in Denver Law Review: https://digitalcommons.du.edu/dlr/vol81/iss1/7

GIVE THEM $4.96 AND THEY TAKE $200 MILLION: WHY *BROWN V. LEGAL FOUNDATION OF WASHINGTON* VIOLATES THE FIFTH AMENDMENT

INTRODUCTION

The purpose of the Interest on Lawyers' Trust Accounts ("IOLTA") program is to fund organizations that provide legal services to the indigent with the interest earned from the principal held in attorneys' trust accounts.[1] The program is approved in every state and the District of Columbia,[2] but has been the target of Fifth Amendment challenges since its inception.[3]

In *Brown v. Legal Foundation of Washington*,[4] the United States Supreme Court addressed the issue of whether a state's appropriation of interest generated by IOLTA accounts amounts to a taking of private property, and, if so, the measure of just compensation due the claimants.[5] The *Brown* Court held that Washington's IOLTA program, which diverted interest earned on IOLTA accounts to charity, could result in a per se taking.[6] However, the Court also held that the just compensation due the claimants was zero,[7] despite previous rulings predicting a contrary result.

This Comment discusses the Fifth Amendment issues raised by the IOLTA program and demonstrates the constitutional problems inherent in the *Brown* Court's ruling. Part I explains the facts giving rise to the issues addressed in *Brown*. Part II provides the background of IOLTA programs and the significant cases leading to the *Brown* decision. Part III summarizes the majority and dissenting opinions in *Brown*. Part IV critiques the *Brown* majority's decision as a matter of precedent, and evaluates the majority's decision that just compensation in IOLTA cases is zero. Part IV concludes that the *Brown* decision is incongruous with the Fifth Amendment and offers constitutional alternatives to the IOLTA program's administration that will serve the dual purpose of maintaining the social benefits of the program without undermining the Constitution.

1. Erin E. Heuer Lantzer, *IOLTA Lost the Battle but Has Not Lost the War*, 33 IND. L. REV. 1015, 1015 (2000).
2. *Id.* at 1018.
3. *Id.* at 1015.
4. 538 U.S. 216 (2003).
5. *Brown*, 538 U.S. at 220.
6. *Id.* at 240.
7. *See id.*

I. FACTS

Petitioners Brown and Hayes were regularly involved in the purchase and sale of real estate in the State of Washington.[8] Both deposited funds in connection with their transactions with Limited Practice Officers ("LPOs").[9] Pursuant to Washington's IOLTA rules, the LPOs were required to deposit each client's funds into IOLTA accounts.[10]

Petitioner Brown deposited $90,521.29 of escrow funds into an IOLTA account, where it remained for two days and generated $4.96 in interest.[11] Petitioner Hayes deposited $2,000 in earnest money, plus another $12,793.32 of escrow funds, into an IOLTA account.[12] While neither petitioner would have earned any net interest if his funds were placed in *non*-IOLTA escrow accounts,[13] in both cases, each IOLTA account generated interest that was eventually paid to the Legal Foundation of Washington.[14]

II. BACKGROUND

The Legal Foundation of Washington's stated objective is to "use all funds received from lawyers' trust accounts for tax-exempt law-related charitable and educational purposes . . . ."[15] Washington's approach, by its terms, envelops a broad spectrum of recipient organizations and demonstrates that the IOLTA program's function is not necessarily limited to funding groups that provide legal aid for the indigent.[16] Like Washington, other states' uses of IOLTA funds also include educating school children about our legal system, supporting legal clinics run by law students, and litigating gay rights issues.[17]

The impact of the IOLTA program on these objectives is substantial. The Supreme Court noted in *Brown* that the sum of IOLTA contributions surpassed $200 million in 2001.[18] Those contributions help organizations furnish legal services to approximately 1.7 million people annually.[19] Following is a brief history of the IOLTA program's devel-

---

8. *See* Brown v. Legal Found. of Wash., 538 U.S. 216, 228 (2003).

9. *See Brown*, 538 U.S. at 229. In Washington, IOLTA Rules also extend beyond lawyers to Limited Practice Officers ("LPOs"). *Id.* at 227. LPOs "are licensed to act as escrowees in the closing of real estate transactions." *Id.* LPOs, like lawyers, typically control client funds for short periods of time. *Id.*

10. *See id.*

11. *Id.* at 229.

12. *Id.*

13. *Id.* at 230.

14. *See id.*

15. Brown v. Legal Found. of Wash., 538 U.S. 216, 225 (2003) (quoting IOLTA Adoption Order, 102 Wash. 2d 1101, 1102-04 (1984)).

16. *See* Lantzer, *supra* note 1, at 1019-20.

17. *Id.*

18. *Brown*, 538 U.S. at 223.

19. Jarrod P. Beasley, *Interest on Lawyers' Trust Accounts: A Fifth Amendment Analysis:* Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998), 25 S. ILL. U. L.J. 441, 441 (2001).

opment and the basis of its application to the Fifth Amendment Takings Clause.

A. Historical Development of the IOLTA Program

Lawyers commonly maintain client funds in trust accounts for short time periods in order to facilitate settlements and to finance filing fees and real property transaction costs.[20] Professional ethical standards prohibit lawyers from commingling these client funds with their own and mandate that client funds remain available on demand.[21]

Before 1980, federal banking laws prohibited banks from paying interest on demand deposit accounts, which included most attorneys' trust accounts, because of the inherent need for check-writing capabilities.[22] Attorneys would normally pool client funds held in trust in a single, non-interest bearing checking account.[23] When an attorney retained a large amount in trust for a client, he would typically place the funds in a savings account paying interest because the interest earned outweighed the burden posed by the incapability of writing checks.[24]

Changes in federal banking laws in 1980 made the IOLTA program possible when Congress sanctioned Negotiable Order of Withdrawal ("NOW") accounts which, for the first time, allowed banks to pay interest on the demand deposit accounts of individuals and charitable entities.[25] However, the new law still prohibited corporations and partnerships from earning interest on demand deposit accounts.[26]

The effect of this distinction was that lawyers were able to place funds in interest-bearing demand deposit accounts for clients who were either individuals or charitable entities, but clients who were corporations or partnerships were still not entitled to earn interest on their funds.[27] Therefore, despite Congress's authorization of NOW accounts, lawyers still maintained client funds incapable of earning interest in non-interest bearing accounts when the client was a corporation or partnership, or when an individual client's funds were too small or would not be held long enough to generate interest exceeding the bank's fees.[28]

---

20. J. David Breemer, *IOLTA in the New Millennium: Slowly Sinking Under the Weight of the Takings Clause*, 23 U. HAW. L. REV. 221, 223 (2000).

21. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.15(a) (2002) ("A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation *separate* from the lawyer's own property. Funds shall be kept in a *separate account* maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person." (emphasis added)).

22. *See* Beasley, *supra* note 19, at 442.

23. Phillips v. Washington Legal Found., 524 U.S. 156, 160 (1998).

24. *Phillips*, 524 U.S. at 160-61.

25. *See* 12 U.S.C. § 1832 (2000); *see also* Beasley, *supra* note 19, at 442.

26. Beasley, *supra* note 19, at 443.

27. *See id.* at 442-43.

28. *Id.* at 443.

After Congress sanctioned NOW accounts, every state and the District of Columbia subsequently adopted proposals that either required or allowed attorneys to pool these otherwise stagnant funds in a common trust account which would generate interest to be funneled to non-profit entities providing legal aid to the indigent.[29] These proposals would soon be known collectively as the IOLTA program.

B. The Fifth Amendment Takings Clause

The IOLTA program has spawned several challenges based on the Fifth Amendment Takings Clause.[30] The Takings Clause, applicable to the states through the Fourteenth Amendment,[31] states that "private property [shall not] be taken for public use, without just compensation."[32] The Clause's language contains four basic elements: (1) there must be private property; (2) the government action must take the private property; (3) the government action must take the private property for public use; and (4) if the preceding three elements are satisfied, the former owner's remedy is "just compensation."[33] In other words, the Takings Clause *permits* the government to take private property for public use, *subject to* the payment of just compensation.[34]

1. *Phillips v. Washington Legal Foundation*

The threshold question in a Takings Clause challenge to the IOLTA program is whether or not there is "a loss in connection with some cognizable property interest."[35] The Supreme Court answered this question affirmatively in *Phillips v. Washington Legal Foundation*,[36] which involved the Texas IOLTA program.[37] The Court explained that "regardless of whether the owner of the principal [in an IOLTA account] has a constitutionally cognizable interest in the *anticipated* generation of interest by his funds, any interest that *does* accrue attaches as a property right incident to the ownership of the underlying principal."[38] Accordingly, the Court held "that the interest income generated by funds held in IOLTA

29. *See Brown*, 538 U.S. at 221 (explaining that state IOLTA programs were adopted through either legislation or rules promulgated by the state's highest court); *see also* Beasley, *supra* note 19, at 443.

30. Kristi L. Darnell, *Pennies From Heaven—Why* Washington Legal Foundation v. Legal Foundation of Washington *Violates the U.S. Constitution*, 77 WASH. L. REV. 775, 780-81 (2002).

31. U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." *Id.*

32. U.S. CONST. amend. V.

33. *See generally* JAN G. LAITOS, LAW OF PROPERTY RIGHTS PROTECTION IV-1 to IV-6 (Supps. 2002 & 2003).

34. Darnell, *supra* note 30, at 281.

35. Beasley, *supra* note 19, at 456.

36. 524 U.S. 156 (1998). The Court framed the question presented as "whether interest earned on client funds held in IOLTA accounts is 'private property' of either the client or the attorney for purposes of the Takings Clause of the Fifth Amendment." *Phillips*, 524 U.S. at 160.

37. *Id.* at 161.

38. *Id.* at 168.

accounts is the 'private property' of the owner of the principal."[39] However, the only issue decided in *Phillips* was whether or not interest earned on IOLTA accounts is a property interest recognized by the Fifth Amendment.[40] The Court did not reach the issues of whether the IOLTA program causes a taking, and, if so, the "amount of 'just compensation,' if any, due . . . ."[41]

2. Ad Hoc v. Per Se Analysis

Takings Clause jurisprudence has developed two categories of takings analysis—ad hoc and per se.[42] In determining whether a taking of private property has occurred, the governmental action in question is analyzed under one of these two categories.[43]

Ad hoc takings, also referred to as "regulatory takings,"[44] involve regulations that strip property owners of an interest less than the property's total value.[45] The focus of an ad hoc analysis is to establish whether a regulation goes so far in denying an owner an interest in her property to constitute a taking.[46]

To determine whether an ad hoc taking occurs, courts apply a balancing test using factors established by the Supreme Court in *Penn Central Transportation Co. v. New York City*.[47] These factors include: (1) the regulation's economic impact on the property owner; (2) the degree of the regulation's interference with the owner's investment-backed expectations; and (3) "the character of the governmental action."[48]

In contrast, per se takings, also referred to as "physical takings," are characterized by a "permanent, physical occupation of the property or where the government has deprived the claimant of all of the property's economic or productive use."[49] The framework of a per se analysis was established by the Supreme Court in *Loretto v. Teleprompter Manhattan CATV Corp.*[50] In *Loretto*, a regulation required an apartment building owner to permit the installation of cable television equipment in the building.[51] The Court concluded that the cable company's installation of equipment was a permanent physical occupation of the owner's property,[52] and "that a permanent physical occupation authorized by govern-

39. *Id.* at 172.
40. *See id.*
41. *Id.*
42. Darnell, *supra* note 30, at 786.
43. *Id.*
44. *See id.* at 788.
45. *Id.* at 786.
46. *See id.* at 787.
47. 438 U.S. 104 (1978).
48. *Penn Central*, 438 U.S. at 124.
49. Lantzer, *supra* note 1, at 1028.
50. 458 U.S. 419 (1982); *see also* Darnell, *supra* note 30, at 788.
51. *See Loretto*, 458 U.S. at 421.
52. *Id.* at 438.

ment is a taking without regard to the public interests that it may serve."[53] Since a per se, or automatic, taking resulted from the physical occupation by the cable equipment, the need to employ the *Penn Central* balancing test was averted.[54]

Before *Brown*, the existence of these two competing analytical frameworks and the narrow holding in *Phillips* provided an uncertain environment for the Takings Clause's application to the IOLTA program.[55] Though *Phillips* unequivocally established that IOLTA interest is the private property of the owner of the principal, the circuit courts were split as to whether IOLTA programs were a taking and, if so, whether clients were due just compensation.[56] In short, although the *Phillips* holding seemingly delivered a blow to IOLTA programs,[57] the stage was set for the Supreme Court's determination of whether IOLTA constituted an ad hoc or per se taking of that property interest and, if so, the amount of just compensation due the claimants.

III. *BROWN V. LEGAL FOUNDATION OF WASHINGTON*

Brown v. Legal Foundation of Washington[58] focused on the claims arising from the IOLTA accounts of petitioners Brown and Hayes.[59] Petitioners sought to enjoin Washington officials from requiring LPOs to deposit client trust funds into IOLTA accounts.[60] Defendants were the Legal Foundation of Washington, the Foundation president, and the Washington Supreme Court justices.[61]

A. Procedural History

The petitioners' complaint contained three counts: (1) forcing petitioners to associate with the Legal Foundation of Washington violates their First Amendment rights; (2) the taking of the interest earned by their funds while in the IOLTA accounts violates the Fifth Amendment's Just Compensation Clause; and (3) the requirement that petitioners' trust funds be deposited into IOLTA accounts is "an illegal taking of the beneficial use of those funds."[62] Petitioners sought a refund of the interest their principal earned while the funds were in the IOLTA accounts, a

53. *Id.* at 426.
54. *See* Darnell, *supra* note 30, at 788-89.
55. *See id.* at 785-86.
56. *See id.* (illustrating the circuit split by describing the Fifth Circuit's use of the per se analysis in Washington Legal Found. v. Texas Equal Access to Justice Found., 270 F.3d 180, 186-88 (5th Cir. 2001), and the Ninth Circuit's adoption of the ad hoc analysis in Washington Legal Found. v. Legal Found. of Wash., 271 F.3d 835, 857-61 (9th Cir. 2001)).
57. Lantzer, *supra* note 1, at 1027.
58. 538 U.S. 216 (2003).
59. *Brown*, 538 U.S. at 228.
60. *Id.* at 227-28.
61. *Id.* at 228.
62. *Id.* at 228-29.

declaration that the IOLTA program is unconstitutional, and an injunction against enforcement of the IOLTA rules against LPOs.[63]

The defendants' motion for summary judgment was granted by the district court.[64] The court made the factual finding that it was impossible for petitioners to realize a net return on the interest accrued in their IOLTA accounts because if their funds were capable of generating a net return in non-IOLTA accounts in the first place, the LPOs would not have been required to deposit the funds into an IOLTA account.[65] The court made the further legal finding that the constitutional focus is on what a property owner has lost, rather than what the state has gained, and determined that petitioners lost nothing when the state took their interest from the IOLTA account because, without IOLTA, there would have been no net interest earned.[66]

While *Brown* was on appeal, the Supreme Court decided *Phillips v. Washington Legal Foundation*,[67] which held that the owner of the principal has a cognizable property right in any interest that accrues in an IOLTA account.[68] A three-judge panel of the Ninth Circuit relied on *Phillips* in holding that Washington's IOLTA program resulted in a taking of petitioners' property and that a remand was necessary to resolve whether the petitioners were due just compensation.[69] The panel explained:

> [T]he interest generated by IOLTA pooled trust accounts is property of the clients and customers whose money is deposited into trust, and . . . a government appropriation of that interest for public purposes is a taking entitling them to just compensation under the Fifth Amendment. But just compensation for the takings may be less than the amount of the interest taken, or nothing, depending on the circumstances, so determining the remedy requires a remand.[70]

Subsequently, the Ninth Circuit reconsidered the case en banc and affirmed the district court's judgment.[71] The majority adopted the ad hoc approach and, after application of the *Penn Central* balancing test,[72] found that no taking occurred because petitioners incurred "neither an

63. *Id.* at 229.
64. *Id.* at 230.
65. *See id.*
66. *See id.*
67. 524 U.S. 156 (1998); *see also* discussion *supra* Part II.B.1.
68. *See Phillips*, 524 U.S. at 168.
69. Washington Legal Found. v. Legal Found. of Wash., 236 F.3d 1097, 1115 (9th Cir. 2001).
70. *Washington Legal Found.*, 236 F.3d at 1115.
71. Washington Legal Found. v. Legal Found. of Wash., 271 F.3d 835, 841 (9th Cir. 2001) (en banc).
72. *See supra* notes 47-48 and accompanying text.

actual loss nor an interference with any investment-backed expectations, and that the regulation of the use of their property was permissible."[73]

The Ninth Circuit majority also commented that even if a taking did occur, the just compensation due petitioners was zero.[74] The majority reasoned that to establish whether petitioners were entitled to just compensation, the court must determine whether petitioners would have realized a benefit without the IOLTA program.[75] Since petitioners earned interest only because of the IOLTA program's existence, they would not have realized a benefit without the IOLTA program, and the value of the just compensation was therefore nil.[76]

The Ninth Circuit dissenters adopted in full the opinion of the three-judge panel and asserted that the case did not involve a regulatory taking necessitating reliance on *Penn Central*, but rather involved a per se taking.[77] Additionally, the dissenters reiterated the view that a remand was needed to determine whether or not the petitioners were entitled to any compensation for the taking.[78] As Judge Kozinski explained: "If the state believes that this is a service it should provide, it must be willing to pay for it. There ain't no such thing as a free lunch."[79]

In their petition for certiorari, petitioners Brown and Hayes asked the Supreme Court "to resolve the disagreement between the majority and the dissenters in the Ninth Circuit about the taking issue . . . ."[80]

B. The Majority Opinion

Justice Stevens, joined by Justices O'Connor, Souter, Ginsburg, and Breyer, delivered the majority opinion.[81] The Court found that the IOLTA program caused a per se taking of petitioners' private property for a public use.[82] However, the Court found no violation of the Just Compensation Clause when petitioners were not remunerated for the taken interest because, the majority reasoned, just compensation is measured by a property owner's pecuniary loss, and that loss is zero when the Washington IOLTA rules are followed.[83]

The Court began its analysis by finding that the IOLTA program took the petitioners' interest for public use under the Fifth Amendment

73. *Brown*, 538 U.S. at 231.
74. *Washington Legal Found.*, 271 F.3d at 861-62.
75. *Id.* at 862.
76. *See id.* at 863-64.
77. *See id.* at 865-67 (Kozinski, J., dissenting).
78. *Id.* at 880 (Kozinski, J., dissenting). The dissenters reproduced the original panel decision in full. *See id.* at 867-84 (Kozinski, J., dissenting).
79. *Id.* at 867 (Kozinski, J., dissenting).
80. *Brown*, 538 U.S. at 231.
81. *Id.* at 218.
82. *See id.* at 235.
83. *Id.* at 240.

Takings Clause.[84] The Court analogized the IOLTA program to a state's imposition of a tax used to finance the Foundation's legal services, where "there would be no question as to the legitimacy of the use of the public's money."[85]

The Court concluded next that the IOLTA program's appropriation of interest is a per se taking.[86] The Court explained that "a *per se* approach is more consistent with the reasoning in our *Phillips* opinion than *Penn Central*'s ad hoc analysis. As was made clear in *Phillips*, the interest earned in the IOLTA accounts 'is the 'private property' of the owner of the principal.'"[87] In support of their finding of a per se taking, the Court drew a parallel between the taking of a client's IOLTA interest and the cable equipment's occupation of roof space in *Loretto*.[88] The Court reasoned that the government's permanent physical possession of the IOLTA interest at the time of transfer to the Foundation resembled the cable equipment's permanent physical occupation of the *Loretto* rooftop since, in both cases, the government action resulted in the state's complete control over the private property involved.[89] Accordingly, since the interest is private property, the Court determined that its transfer to the Foundation was in line with those takings cases applying a per se, rather than an ad hoc, analysis.[90]

After finding that a per se taking had occurred, the Court turned to the issue of the amount of just compensation to which petitioners were entitled and found that the just compensation for interest taken by the IOLTA program is zero.[91] The Court explained that "the 'just compensation' required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain."[92] The Court then surveyed precedent and restated this premise in the following ways: (1) "'the question is what has the owner lost, not what has the taker gained;'"[93] (2) "the private party 'is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more;'"[94] and (3) "the government should pay 'not for what it gets but for what the owner loses.'"[95]

---

84. *Id.* at 232.
85. *Id.*
86. *See id.* at 235.
87. *Id.* (quoting *Phillips*, 524 U.S. at 172).
88. *Id.*
89. *See id.*
90. *See id.*
91. *Id.* at 240.
92. *Id.* at 235-36.
93. *Id.* at 236 (quoting Boston Chamber of Commerce v. City of Boston, 217 U.S. 189, 195 (1910)).
94. *Id.* (quoting Olson v. United States, 292 U.S. 246, 255 (1934)).
95. *Id.* (quoting Kimball Laundry Co. v. United States, 338 U.S. 1, 23 (1949) (Douglas, J., dissenting)).

Applying the petitioners' claims to this model, the Court found that "any pecuniary compensation must be measured by [petitioners'] net losses rather than the value of the public's gain."[96] Thus, the Court determined that if the "petitioners' net loss was zero, the compensation that is due is also zero."[97]

The Court then addressed the Ninth Circuit dissenters' illustration of the reasons why an attorney or LPO might mistakenly place a client's funds into an IOLTA account when those funds would actually be capable of earning net interest into a non-IOLTA account, and dismissed the resulting need for a remand to determine the amount of just compensation due.[98] The Court rejected the dissenters' assertion that further hearings were necessary to determine whether or not petitioners were due any just compensation from respondents.[99] Since Washington's IOLTA rules require attorneys and LPOs to place client funds into *non*-IOLTA accounts when those funds are capable of generating net earnings, an attorney or LPO violates those rules when she mistakenly deposits ineligible funds into an IOLTA account.[100] The Court explained that clients, in those circumstances, would have claims directly against the attorney or LPO who mistakenly placed the funds into an IOLTA account, rather than against the state.[101]

In sum, the majority held that a state law mandating the transfer of interest on IOLTA funds to someone other than the owner of the principal, for public use, could be a per se taking requiring payment of just

96. *Id.* at 237.

97. *Id.*

98. *Id.* at 237-39. The Ninth Circuit dissenters illustrated their concern as follows:

> Even though when funds are deposited into IOLTA accounts, the lawyers expect them to earn less than it would cost to distribute the interest, that expectation can turn out to be incorrect, as discussed above. Several hypothetical cases illustrate the complexities of the remedies, which need further factual development on remand. Suppose $2,000 is deposited into a lawyer's trust account paying 5% and stays there for two days. It earns about $.55, probably well under the cost of a stamp and envelope, along with clerical expenses, needed to send the $.55 to the client. In that case, the client's financial loss from the taking, if a reasonable charge is made for the administrative expense, is nothing. The fair market value of a right to receive $.55 by spending perhaps $5.00 to receive it would be nothing. On the other hand, suppose, hypothetically, that the amount deposited into the trust account is $30,000, and it stays there for 6 days. The client's loss here would be about $29.59 if he does not get the interest, which may well exceed the reasonable administrative expense of paying it to him out of a common fund. It is hard to see how just compensation could be zero in this hypothetical taking, even though it would be in the $2,000 for 2 days hypothetical taking. It may be that the difference between what a pooled fund earns, and what the individual clients and escrow companies lose, adds up to enough to sustain a valuable IOLTA program while not depriving any of the clients and customers of just compensation for the takings. This is a practical question entirely undeveloped on this record. We leave it for the parties to consider during the remedial phase of this litigation.

Washington Legal Found., 271 F.3d at 883 (Kozinski, J., dissenting).

99. *Brown*, 538 U.S. at 239.

100. *Id.*

101. *Id.*

compensation to the client.[102] However, "just compensation is measured by the net value of the interest that was actually earned by petitioners and . . . by operation of the Washington IOLTA Rules, no net interest can be earned by the money that is placed in IOLTA accounts in Washington."[103]

C. Justice Scalia's Dissent

Justice Scalia, with whom all three remaining dissenting Justices joined, asserted that the proper measure of just compensation for petitioners' interest generated in their IOLTA accounts is the fair market value of the interest, which should be assessed at the point when the state takes the interest.[104] Furthermore, the dissenters averred that the majority's decision contravenes the *Phillips* holding by "refusing to treat the interest as the property of petitioners we held it to be . . . ."[105]

Rejecting the majority's analysis, Justice Scalia submitted an alternative definition of just compensation not considered by the majority: "When a State has taken private property for a public use, the Fifth Amendment requires compensation in the amount of the market value of the property on the date it is appropriated."[106] According to Justice Scalia, the Supreme Court has recognized only two exceptions to applying this standard: (1) when it is too difficult to determine the market value; and (2) when manifest injustice to the owner or the public would result from the payment of the market value.[107]

According to Justice Scalia, the majority neither ascertained the IOLTA interest's market value nor established that this case falls under an exception obviating the need to determine it.[108] Instead, Justice Scalia concluded, the majority merely defined just compensation as the owner's net loss, and endorsed two incompatible theories of how that net loss should be calculated.[109]

As Justice Scalia explained, the majority's first theory of the measure of just compensation is that it "is the interest petitioners *would have*

---

102. *Id.* at 240.
103. *Id.* at 238 n.10.
104. *See id.* at 243 (Scalia, J., dissenting).
105. *Id.* at 242-43 (Scalia, J., dissenting).
106. *Id.* at 243 (Scalia, J., dissenting).
107. *Id.* at 244 (Scalia, J., dissenting).
108. *Id.* The majority preemptively disagreed with Justice Scalia's assertion when concluding:

> Justice SCALIA is mistaken in stating that we hold that just compensation is measured by the amount of interest 'petitioners *would have earned* had their funds been deposited in *non-IOLTA* accounts.' We hold (1) that just compensation is measured by the net value of the interest that was actually earned by petitioners and (2) that, by operation of the Washington IOLTA Rules, no net interest can be earned by the money that is placed in IOLTA accounts in Washington.

Id. at 238 n.10 (citations omitted).
109. *Id.* at 244 (Scalia, J., dissenting).

earned had their funds been deposited in *non-IOLTA* accounts."[110] Under the majority's theory, "just compensation is zero because, under the [Washington] Supreme Court's Rules, the only funds placed in IOLTA accounts are those which could not have earned net interest for the client *in a non-IOLTA* savings account."[111] Justice Scalia posited that this definition of just compensation is irreconcilable with *Phillips*,[112] which held that "any interest that *does* accrue attaches as a property right incident to the ownership of the underlying principal,"[113] and "[o]nce interest is earned on petitioners' funds held in IOLTA accounts, that money is petitioners' property."[114] Conversely, according to Justice Scalia, just compensation for the IOLTA interest must instead be assessed at the point where the state takes the interest to support the foundation—"*after* the interest has been generated in the pooled accounts . . . ."[115] Hence, under Justice Scalia's definition, the property has value when the state takes it for the benefit of the foundation despite the fact that the interest came to exist only because of a state-mandated IOLTA program.[116]

In addition, Justice Scalia argued that the majority's competing theory of just compensation is similarly unpersuasive.[117] According to the majority's competing theory, "just compensation is measured by the net value of the interest that was actually earned by petitioners . . . ."[118] Justice Scalia indicated that in order to support this definition of just compensation embracing a net value concept, the majority only cites to those cases establishing that "just compensation consists of the value the owner has lost rather than the value the government has gained."[119] However,

110. *Id.*
111. *Id.* at 244-45 (Scalia, J., dissenting).
112. *Id.* at 245 (Scalia, J., dissenting).
113. *Phillips*, 524 U.S. at 168.
114. *Brown*, 538 U.S. at 245 (Scalia, J., dissenting).
115. *Id.*
116. *See id.* Justice Scalia applied the majority's approach to the facts of Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980), to illustrate that the majority's holding suggests a nexus between the state's creation of the circumstances enabling net interest to accrue and the state's ability to take that interest declaring just compensation as zero. *See Brown*, 538 U.S. at 245-47 (Scalia, J., dissenting). In *Webb's*, a Florida statute permitted the court clerk to invest interpleader funds in interest-bearing certificates, and the earned interest would be deemed income of the clerk's office. *Webb's*, 449 U.S. at 156 n.1. The appellant deposited approximately $1.8 million with a state court in connection with an interpleader action. *Id.* at 156-57. The Supreme Court held that the state court's retention of the approximately $100,000 in interest earned from the corpus was a taking requiring just compensation. *See id.* at 164. The Court endorsed the rule that "any interest on an interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal." *Id.* at 162. Justice Scalia argues that under the majority's analysis in *Brown*, the just compensation for the taking in *Webb's* would be zero because the appellants' interpleader funds would not have been able to earn interest absent the Florida statute authorizing the court clerk to invest in interest-bearing certificates. *Brown*, 538 U.S. at 246 (Scalia, J., dissenting). Moreover, in *Webb's* the "Court *unanimously* rejected the contention that a state regulatory scheme's generation of interest that would otherwise not have come into existence gave license for the State to claim the interest for itself." *Id.* at 246-47 (Scalia, J., dissenting).
117. *See Brown*, 538 U.S. at 248 (Scalia, J., dissenting).
118. *Id.* at 238 n.10.
119. *Id.* at 248 (Scalia, J., dissenting). In *Brown*, the value the owner loses (the interest earned in the pooled accounts) is the same as the government's gain. *See id.*

according to Justice Scalia, the Court's "cases that have distinguished the 'property owner's loss' from the 'government's gain' say *nothing whatever* about reducing this value to some 'net' amount."[120] In particular, Justice Scalia reasoned that "*Phillips* flatly rejected the notion that just compensation may be reduced by transaction costs the former owner would have sustained in retaining his property."[121] Thus, Justice Scalia submitted that the Court has consistently held market value to be the proper measure of just compensation, rather than the owner's net loss.[122]

Additionally, Justice Scalia argued that "[e]ven if 'net value' . . . *were* the appropriate measure of just compensation, the Court has no basis whatsoever for pronouncing the 'net value' of petitioners' interest to be zero."[123] Though Justice Scalia acknowledged that petitioners could not have earned net interest in non-IOLTA accounts, he instead reasoned, that fact "has no bearing on the transaction costs that petitioners would sustain in removing their earned interest from the IOLTA accounts."[124] Furthermore, Justice Scalia determined that since it was possible that petitioners' funds generated net interest in the IOLTA account, despite being incapable of doing so in non-IOLTA accounts, a factual inquiry was necessary to determine petitioners' actual net interest.[125]

Justice Scalia further rejected the majority's finding that remanding the claim was inappropriate since the just compensation was automatically zero if petitioners' funds were incapable of earning interest in non-IOLTA accounts.[126] Justice Scalia criticized this reasoning as inconsistent with the majority's assertion that just compensation is measured by "'the net value of the interest that was actually earned by petitioners . . . .'"[127] Instead, Justice Scalia suggested that establishing the actual net value of petitioners' interest "requires a factual determination of the costs

120. *Id.* at 249 (Scalia, J., dissenting).

121. *Id.* (citing *Phillips*, 524 U.S. at 170 ("The government may not seize rents received by the owner of a building simply because it can prove that the costs incurred in collecting the rents exceed the amount collected.")).

122. *Id.* at 250 (Scalia, J., dissenting). The majority countered Justice Scalia's contention:

> Under [Justice Scalia's] view that just compensation should be measured by the gross amount of the interest taken by the State, the client should recover the $.55 of interest earned on a two-day deposit even when the transaction costs amount to $2.00. Thus, in this case, under Justice SCALIA's approach, even if it is necessary to incur substantial legal and accounting fees to determine how many pennies of interest were earned while petitioners' funds remained in escrow and how much of that interest belonged to them rather than to the sellers, the Constitution would require that they be paid the gross amount of that interest, rather than an amount equal to their net loss (which, of course, is zero). . . . [T]his is inconsistent with the Court's just compensation precedents.

Id. at 238 n.10.

123. *Id.* at 250 (Scalia, J., dissenting).

124. *Id.*

125. *See id.* at 251 (Scalia, J., dissenting).

126. *Id.*

127. *Id.* (quoting *id.* at 238 n.10).

petitioners would incur if they sought to keep the IOLTA-generated interest for themselves."[128]

In short, Justice Scalia criticized the majority for failing to recognize and apply the market value measure of just compensation. Further, as a broader criticism, Justice Scalia maintained that the *Brown* Court's decision and reasoning endorsed the government's unconstitutional ability to take property in existence solely by operation of a governmental regulation without just compensation.[129]

D. Justice Kennedy's Dissent

Justice Kennedy filed a separate dissenting opinion, in which he addressed the First Amendment dimension of the IOLTA program:

> By mandating that the interest from these accounts serve causes the justices of the Washington Supreme Court prefer, the State not only takes property in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States but also grants to itself a monopoly which might then be used for the forced support of certain viewpoints.[130]

Justice Kennedy noted that although the Court in Brown did not address the First Amendment issues inherent in the IOLTA program, there is potential for a violation that may eventually come before the Court.[131]

IV. ANALYSIS

The *Brown* majority's opinion that the transfer of interest earned in lawyers' trust accounts amounts to a per se taking is founded in precedent and reason. However, the Court's assertion that there is no violation of the Just Compensation Clause of the Fifth Amendment because the owner's loss is automatically zero whenever the Washington IOLTA rules are obeyed is conversely lacking in factual and legal support, especially considering the holding in *Phillips*.

A. Phillips *Versus* Brown

The *Brown* majority laid the cornerstone of its opinion by quoting the *Phillips* holding: "'[T]he interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal.'"[132] However, against this backdrop, the majority is unconvincing in their attempt to reconcile their recognition that "'just compensation' . . .

---

128. *Id.* at 251-52 (Scalia, J., dissenting).

129. *See id.* at 243, 252 (Scalia, J., dissenting).

130. *Id.* at 253 (Kennedy, J., dissenting).

131. *See id.* The First Amendment inquiry is beyond the scope of this Comment. For a discussion involving the First Amendment, see Lantzer, *supra* note 1, at 1035-42.

132. Brown v. Legal Found. of Wash., 538 U.S. 216, 220 (2003) (quoting Phillips v. Washington Legal Found., 524 U.S. 156, 172 (1998)).

is measured by the property owner's loss rather than the government's gain"[133] with its holding "that [just] compensation is measured by the owner's pecuniary loss—which is zero whenever the Washington law is obeyed . . . ."[134]

To appreciate *Brown*'s anomaly in light of *Phillips*, it is helpful to note the basic property theory upon which the *Phillips* majority fashioned its holding.[135] *Phillips* recognized that "property" includes "'the group of rights which the . . . owner exercises in his dominion of the physical thing,' such 'as the right to possess, use and dispose of it.'"[136] Applying this concept to IOLTA interest, the Court reasoned that, while such interest "may have no economically realizable value to its owner, possession, control, and disposition are nonetheless valuable rights that inhere in the property."[137] In other words, the *Phillips* Court expressly recognized that IOLTA interest inherently confers on the client-owner the power to possess, control, and dispose of that interest, regardless of whether the value of that interest is economically realizable (e.g., whether the amount of the interest is exceeded by the bank's administrative fees).[138] The *Phillips* majority thereby enhanced the legal support for the intuitive conclusion that valuable property rights are embedded in IOLTA interest, and they are vested in the owner of the principal.

Such was the jurisprudential framework with which the *Brown* Court was equipped when it confronted the questions that *Phillips* did not reach—whether the IOLTA program caused a taking of petitioners' interest, and, if so, the amount of just compensation due.[139] *Brown* correctly found a per se taking occurred because petitioners' IOLTA interest (i.e., petitioners' property under *Phillips*) was taken by the state pursuant to the Washington IOLTA Rules for public use (i.e., funding IOLTA program recipient organizations).[140]

However, the issue presented by the amount of just compensation due is the core of the irreconcilable discrepancy between *Phillips* and *Brown*. Before *Brown*, one relying on *Phillips* would likely deduce that, because the *Brown* petitioners owned the principal in the IOLTA accounts, they also owned the interest, and that interest had pecuniary value. In other words, since *Phillips* affirmatively answered the question of whether the owner of principal in an IOLTA account also owns the

133. *Brown*, 538 U.S. at 235-36.
134. *Id.* at 240.
135. *Phillips*, 524 U.S. at 170.
136. *Id.* (quoting United States v. General Motors Corp., 323 U.S. 373, 378 (1945)).
137. *Id.*
138. *Id.*
139. *Brown*, 538 U.S. at 220.
140. *Id.* at 235.

generated interest,[141] it is reasonable, if not inescapable, to conclude that the *Brown* petitioners owned that interest.

Moreover, it is equally sound to conclude that the *Brown* petitioners' IOLTA interest has economically realizable pecuniary value. Indeed, one must look no further than the estimated $200 million enjoyed by recipient organizations through 2001[142] for undeniable proof that IOLTA interest has realizable pecuniary value, regardless of whether the petitioners or Washington is its owner. As a practical matter, the *Brown* petitioners' interest had pecuniary value as demonstrated by the taking because, without any value, the state would not have taken the interest earned. As such, the Just Compensation Clause's limitation on the state's Fifth Amendment power to take private property should require that the state reimburse the petitioners for their interest.[143]

The *Brown* majority held that just compensation for the taking of the interest generated by the IOLTA account must be zero under Washington's IOLTA rules because "no net interest can be earned by the money that is placed in IOLTA accounts in Washington."[144] In so finding, the *Brown* majority ignored the basic premise of *Phillips* by refusing to consider the interest to be the petitioners' property as already determined in *Phillips*.[145] Assigning a value of zero to property that is admitted to have pecuniary value effectively divests the property owner of his rights of possession, control, and disposition that inhere in the interest. The practical effect is that the property owner never owned the interest. A property owner who is precluded from exercising the inherent rights of possession, control, and disposition has no more control of his own property than he does over the Brooklyn Bridge if he claimed title to it and attempted a sale to the *Brown* majority. This result squarely contradicts the holding in *Phillips*, which expressly recognized a client's property right in interest generated by IOLTA accounts.[146] Thus, in refusing to allow petitioners' claim for reimbursement, the majority impliedly cast aside the well-reasoned and intuitive holding of *Phillips*.

B. The "Robin Hood Taking"

By declaring the just compensation for the taking of IOLTA interest to be zero, the *Brown* majority summarily defeated petitioners' rights of possession, control, and disposition of that interest. The sole basis of the majority's finding was that the petitioners would have no interest without

---

141. *Phillips*, 524 U.S. at 172.

142. *See Brown*, 538 U.S. at 223.

143. *See* U.S. CONST. amend. V ("[P]rivate property [shall not] be taken for public use, without just compensation.").

144. *Brown*, 538 U.S. at 238 n.10.

145. *Id.* at 242-43 (Scalia, J., dissenting).

146. *See Phillips*, 524 U.S. at 172.

the IOLTA program.[147] Justice Scalia illustratively coined this concept the "Robin Hood Taking," stating that the majority suspended "the normal rules of the Constitution protecting private property" to sustain the IOLTA program's "highly favored," policy-driven function of siphoning interest from otherwise stagnant funds to finance legal services for the indigent.[148]

The "Robin Hood Taking" concept derives from the majority's holding "(1) that just compensation is measured by the net value of the interest that was actually earned by petitioners and (2) that, by operation of the Washington IOLTA Rules, no net interest can be earned by the money that is placed in IOLTA accounts in Washington."[149] In other words, since principal funds that are required to be deposited into IOLTA accounts would not generate net interest for the owner "but for" the IOLTA program, the owner of the principal is therefore incapable of suffering a loss of any interest that accrues in the IOLTA account. In short, the majority suggests that the owner of IOLTA interest should keep quiet since he would not have any property in which to have an interest in without the IOLTA program.

The validity of the "Robin Hood Taking" concept depends upon an analytic link conspicuously absent from the authority leading to *Brown*—if the government creates the mechanism by which property is created, the government may take that property without just compensation because without that mechanism, the property would not exist.[150] The statement in *Brown* that "no net interest can be earned by the money that is placed in IOLTA accounts"[151] runs afoul of the *Phillips* holding that IOLTA interest is the "'private property' of the owner of the principal."[152] The two statements are irreconcilable because *Phillips* establishes the existence of the property interest that *Brown* effectively declares non-existent. By finding that the interest, which is *actually* generated in IOLTA accounts, is somehow unearned when the owner of the principal seeks to control the interest, the *Brown* majority turns a blind eye to its decision in *Phillips*.

In sum, the notion that IOLTA interest, already recognized as "private property" in *Phillips*, is valueless, as found in *Brown*, has no rational or legal basis.[153] The *Phillips* holding is supported by well-established and reasoned tenets recognizing the property rights an owner

147. *See Brown*, 538 U.S. at 238 n.10.

148. *Id.* at 252 (Scalia, J., dissenting).

149. *Id.* at 238 n.10.

150. *See id.* at 252 (Scalia, J., dissenting) ("For to extend to the entire run of Compensation Clause cases the rationale supporting today's judgment—what the government hath given, the government may freely take away—would be disastrous.").

151. *Id.* at 238 n.10.

152. *Phillips*, 524 U.S. at 172.

153. *See Brown*, 538 U.S. at 252 (Scalia, J., dissenting) ("The Court's judgment that petitioners are not entitled to the market value of their confiscated property has no basis in law.").

of principal has in the derivative interest. Moreover, the "Robin Hood Taking" concept, concocted by the *Brown* majority, is proportionately devoid of congruent support. Thus, the *Brown* Court's opinion is unpersuasive in its ostensible constitutional justification for denying petitioners' due just compensation.

C. The New "Net Loss" Rule

In addition to contradicting *Phillips*, and imposing a condition that states can take, without just compensation, any state-granted property, the *Brown* majority also established a "net loss" rule that is a "novel exception to [the] oft-repeated rule that the just compensation owed to former owners of confiscated property is the fair market value of the property taken."[154] First, the majority lacks any basis for imposing a "net loss" rule in takings cases. The cases the majority cites in support of the rule do not include the word "net" qualifying the word "loss," and the "net loss" concept is therefore without legal support.[155] Moreover, the majority's rationale for imposing a "net loss" standard for just compensation is flawed because, "[e]ven if 'net value' . . . *were* the appropriate measure of just compensation," the majority did not make a factual inquiry into whether petitioners' interest *actually* represented a net value of zero.[156]

The fundamental defect in the majority's "net loss" rule is illustrated by applying it to the $4.96 in interest that petitioner Brown's principal earned while in the IOLTA account.[157] Brown, as the owner of the interest, is entitled to just compensation of $4.96 because it represents what he lost at the moment Washington took his interest. Brown's principal generated interest while in the IOLTA account; that interest is Brown's private property under *Phillips*; the state took Brown's private property for public use; and the measure of the loss of his property due to the taking is $4.96. The conclusion that the $4.96 was Brown's private property at the time of the taking is inescapable, regardless of whether Brown would have earned the $4.96 in a separate, non-IOLTA account, or whether the $4.96 was Brown's proportionate share of interest generated by his funds along with other clients' funds which Brown's lawyer pooled in a common IOLTA account.

Further application of the majority's "net loss" rule to these facts requires a factual inquiry as to whether Brown *actually* suffered a net loss. If Brown's principal would generate $4.96 in interest in a non-IOLTA account charging a $5.00 maintenance fee, the net value of that interest would be zero (and consistent with the holding in *Brown*) be-

154. *Id.* at 241 (Scalia, J., dissenting).
155. *See id.* at 249-50 (Scalia, J., dissenting).
156. *Id.* at 250 (Scalia, J., dissenting).
157. *Id.* at 229.

cause the amount of the fee exceeds the interest. However, if pooled with twenty clients' principal of equal time and amount in an IOLTA account, the aggregate earned simple interest would be $99.20. The $5.00 (or slightly more to match the complexity and nature of the pooled account) maintenance fee associated with the single, common IOLTA account would then spread among each depositor—$.25 per client in this example. The net loss to Brown after a taking of his interest in this hypothetical pooled IOLTA account is $4.71. However, the majority's holding requires the absurd finding that Brown's net loss of $4.71 equals zero.[158] This illustration establishes that, while it is possible to encounter IOLTA accounts in which the client realizes either (1) no net interest or (2) substantial net interest, a court cannot be certain of which situation is implicated without first undertaking a factual inquiry.

In addition to the practical deficiency of the "net loss" rule, the majority's categorical finding that just compensation is automatically zero when interest is taken from IOLTA accounts is also unconstitutional under either the "market value" or the "net value" version, because in either case, the automatic rule forecloses any factual inquiry to determine the measure of just compensation for the private property taken. The Ninth Circuit dissenters correctly recognized the need for a factual inquiry when they "voted to remand to the District Court for a factual determination of what the 'net value' of petitioners' interest actually is."[159] Although it is entirely possible that a client's due just compensation would be zero under either rule, there are alternative conclusions. For example, a client's $.30 in earned interest would likely be superceded by the bank's administrative fees in either an IOLTA or non-IOLTA account, but it is possible that a client's $6.00 in interest will exceed that client's share of any administrative fees in a pooled IOLTA account. The majority's bright-line holding that the net value of IOLTA interest is zero as a matter of law forecloses any possibility of conforming to the Fifth Amendment's guarantee of just compensation.

---

158. A three-judge panel of the Ninth Circuit recently addressed a similar scenario in McIntyre v. Bayer, 339 F.3d 1097 (9th Cir. 2003), in the context of a Nevada statute requiring that the interest generated by prison inmate trust accounts be appropriated by prison authorities and spent for the entire prison population's benefit. *McIntyre*, 339 F.3d at 1097. The court stated:

> What is not clear on the record before us . . . is whether the interest earned by [the prisoner's] principal is exceeded by his share of the costs of administering the prisoners' personal property fund. This information, however, is precisely what we need to know in order to determine whether the [prison officials have] taken [the prisoner's] interest without just compensation.

Id. at 1101. The court then vacated the district court's grant of summary judgment in favor of the respondent prison officials and remanded for further proceedings to determine whether the prisoners are due just compensation after the taking of the interest generated in the inmate trust accounts. *Id.* at 1102.

159. *Brown*, 538 U.S. at 251 (Scalia, J., dissenting).

D. Constitutional Solutions

Although the Court's decision in *Brown* arguably violates the Fifth Amendment by categorically denying just compensation to the owners of "taken" interest, there are alternatives that would render the IOLTA system resistant to future constitutional assaults.[160] Despite a turbulent history, the ingenuity underlying the IOLTA program, recognized by the bench and bar,[161] compels a solution that would allow IOLTA programs to continue largely unchanged.[162]

First, notifying clients of the IOLTA program and asking them to sign a consent form would eliminate any Fifth Amendment issue because the state would not be taking the interest, but rather the client would be giving the interest to the state.[163] If the client refused to participate in the program, he could simply be responsible for any administrative costs associated with maintaining his funds in a separate account.[164] Under this option, recipient organizations will continue to enjoy the benefits of the IOLTA interest through the consent of willing donors without the tinge of a constitutional violation.[165]

Additionally, a state could add a fee to annual bar dues.[166] Since fees have never been the target of unconstitutional takings, but rather are treated as payments for services, "the service performed by the additional fee would be the fulfillment of an ethical obligation on the part of the state's attorneys to render pro bono assistance to the state's indigent population."[167] The goals of IOLTA beneficiaries would be financed vicariously through the collection of these fees.[168]

Finally, another constitutional solution for funding IOLTA recipient organizations is suggested in the dicta of *Brown* itself. In finding the "public use" component of the Takings Clause satisfied, the majority suggested: "If the State had imposed a special tax . . . to generate the funds to finance the legal services supported by the Foundation, there would be no question as to the legitimacy of the use of the public's money."[169] Justice Scalia's discussion of this statement includes his assertion that he is "unaware of *any* use to which state taxes cannot consti-

160. Darnell, *supra* note 30, at 806-07.

161. *See, e.g.*, *Washington Legal Found.*, 271 F.3d at 867 (Kozinski, J., dissenting) ("It is no doubt true that the IOLTA program serves a salutary purpose, one worthy of our support. As a citizen and former member of the bar, I applaud the state's effort to provide legal services for the poor and disadvantaged.").

162. Darnell, *supra* note 30, at 806.

163. *Id.*

164. *Id.* at 806-07.

165. *Id.* at 807.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Brown*, 538 U.S. at 232.

tutionally be devoted."[170] Accordingly, a state legislature could impose a tax earmarked for organizations providing legal assistance and education to the indigent that would be protected from a constitutional challenge.[171] A collateral benefit to this scheme is that any tax would be imposed by a democratically elected legislature, a body politically accountable to voters.[172] Thus, if a state's electorate deemed the tax undesirable, its voice would sound vicariously through the political process.[173]

Any of these alternatives would promote the worthwhile organizations that provide legal assistance to those in need without disparaging the constitutional protections guaranteed private property owners. Thus, the *Brown* majority should have abstained from contorting the Fifth Amendment and its own established precedent in *Phillips* by categorically proclaiming just compensation for private property taken by states' IOLTA programs to be zero.[174]

CONCLUSION

The IOLTA program is commendable because it provides resources that ultimately reach citizens who are otherwise unable to afford legal services. The interest taken from IOLTA accounts is often de minimis from the perspective of the interest's owner. However, because that interest *has* an owner, the Takings Clause of the Fifth Amendment must intervene to ensure the owner is justly compensated for what she has lost.

In *Brown*, the Supreme Court failed to recognize the need for a factual inquiry into whether an owner of principal actually realized a net gain in interest to compute just compensation, and thereby missed an opportunity to fortify the Takings Clause. Instead, the majority focused on the state-regulated circumstances giving rise to the interest as the basis for the conclusion that the just compensation due the owners is zero.

Following *Phillips*, an owner's cognizable private property right in interest generated from principal should stand safely behind the protection of the Takings Clause regardless of the circumstances in which it was generated. Instead, the new "Robin Hood Taking" principle poses an ominous threat of uncompensated loss to those who enjoy private property fortuitously created by operation of a state regulation.

---

170. *Id.* at 243 n.2 (Scalia, J., dissenting).

171. *See generally* Steven J. Eagle, *Regulatory Takings, Public Use, and Just Compensation After* Brown, 33 ENVTL. L. REP. 10807 (2003) (discussing how "the Takings Clause historically has been regarded as different from the police and taxing powers").

172. *Brown*, 538 U.S. at 243 n.2 (Scalia, J., dissenting).

173. *See id.*

174. *See id.* at 240.

Brent Hultquist[*]

* J.D. Candidate, 2006, University of Denver College of Law. This Comment is dedicated to my wife, Heather, for her sacrifice and enduring support during the challenge of law school, and to our son Peyton, who places our many blessings in the best perspective. I thank my parents, who see their son's name in print only because of their incessant example of a strong work ethic tempered by recognizing the important things in life. Finally, I thank Professor Jan Laitos for sharing his time, expertise, and thoughtful criticism that helped transform this Comment from a research paper into a rewarding analytical exercise.