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**THE DOG IN THE MANGER¹:
THE FIRST TWENTY-FIVE YEARS OF WAR ON IOLTA**

I. INTRODUCTION

The American Bar Association’s (“ABA”) Commission on Interest on Lawyer’s Trust Accounts (“IOLTA”) hails IOLTA programs² as “an innovative funding source” that “supports a cornerstone of democracy” by “provid[ing] a public benefit without cost to the taxpayer” and “strengthen[ing] the community by promoting access to justice.”³ Proponents liken IOLTA programs to the legendary Robin Hood, who insisted: “Rob is a naughty word. We never rob, we just borrow a bit from those who can afford it.”⁴

Opponents, however, “decr[y] IOLTA programs as a ‘hidden scheme’ [devised] by ‘left-wing lawyers’ to ‘reach into the pockets of small businessmen and the middle class to fund their radical agenda.’”⁵ Clearly, a canyon of fundamental differences separates IOLTA proponents and opponents.

1. The assault on IOLTA programs over the past twenty-five years is comparable with the fabled “dog in the manger”—a metaphor in which the dog fiercely thwarts any other animal’s attempt to gain access to the hay in the manger—hay that has no practical value or use for the dog itself. See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 668 (1993) (defining a “dog in the manger” as “a person who selfishly withholds from others something that he himself cannot use or does not need.” The metaphor is derived from “the fable of the dog who would not allow a horse or ox to eat the hay in the manger, even though he did not want it himself.”).

2. Although Part I of this Note discusses the history and intricacies of the IOLTA program in detail, *see infra* notes 9–34 and accompanying text, a brief description is in order at this point. IOLTA programs target attorney-held client funds that could not individually generate enough interest to cover the costs of setting up and administering a separate account and require that attorneys pool these deposits into interest-generating accounts for the benefit of state bar foundations, which then direct the interest to providing legal services for the poor. Most often, deposits are subject to IOLTA regulations because they are to be held for a short period or time, are nominal in amount, or a combination of the two.

3. A.B.A. Commission on Interest on Lawyers’ Trust Accounts, *What is IOLTA?*, at <http://www.abanet.org/legalservices/iolta/ioltback.html> (last modified Apr. 4, 2002) [hereinafter *What is IOLTA?*].

4. *Robin Hood*, in DISNEY’S TREASURY OF CHILDREN’S CLASSICS 88, 91–92 (spec. ed., 1997).

5. Jarrod M. Mohler, Note, “*And Justice For All*” (*Who Can Afford It*): *IOLTA’s Future in Light of Phillips v. Washington Legal Foundation*, 118 S.Ct. 1925 (1998), 68 U. CIN. L. REV. 219, 227 (1999) (discussing criticism of IOLTA in the 1990s) (citations omitted).

Opponents have been waging war on IOLTA programs since their inception in the early 1980s.⁶ After twenty-five years⁷ of courtroom battles, what progress has been made? Perhaps the only progress opponents of IOLTA programs can claim is that a significant amount of IOLTA resources have been diverted from providing legal aid for the poor to courtroom battles over the constitutionality of the IOLTA program itself.

This Note explores the first twenty-five years of the war over IOLTA, beginning with a brief description of the creation and mechanics of IOLTA in Part II. Part III examines three major battlefields⁸ where the war between IOLTA and its opponents has been or is likely to be waged. Finally, Part IV analyzes potential solutions to the theoretical infirmities of IOLTA's design.

II. GETTING UP TO SPEED ON IOLTA

A basic understanding of IOLTA's creation and mechanics is valuable in analyzing the current battlegrounds confronting IOLTA and in evaluating possible solutions.

"Civil legal assistance for indigents in the United States began in New York City in 1876 with the founding of the Legal Aid Society of New York."⁹ It would not be presumptuous to assume that the chronic problem of providing funding for legal aid programs was also born with the Legal Aid Society of New York. The problem subsided when federal funds were used to support legal aid programs, but not for long. In the early 1980s, political changes led to drastic cuts in federal funding for legal aid services, and once again, legal aid programs faced serious funding challenges.¹⁰

6. IOLTA programs became popular in the early 1980s; the first state to adopt such a program was Florida in 1979. See *What is IOLTA?*, *supra* note 3.

7. From the first IOLTA program's establishment in Florida in 1979 to 2004, IOLTA programs have seen a number of fierce challenges. David J. Hrina, Comment, *The Future of IOLTA: Has the Death Knell been Sounded for Mandatory IOLTA Programs?*, 32 AKRON L. REV. 301, 303 (1999) ("Since their inception, IOLTAs have been highly controversial and under constitutional attack."). See also Keith H. Douglas, Note, *IOLTAs Unmasked: Legal Aid Programs' Funding Results in Taking of Clients' Property*, 50 VAND. L. REV. 1297, 1333 (1997) (asserting that IOLTA programs are "quietly confiscating property from a dispersed political minority").

8. Traditionally, IOLTA programs have faced challenges based on claims of violation of the Fifth Amendment's Takings Clause. Presently, IOLTA opponents are mounting First Amendment Free Speech challenges. In the future, this note suggests, IOLTA is likely to see challenges that construe the program as a tax. For more detailed discussion, see *infra* notes 35–150 and accompanying text.

9. Alan W. Houseman, *Civil Legal Assistance for Low-Income Persons: Looking Back and Looking Forward*, 29 FORDHAM URB. L.J. 1213, 1213 (2002) (describing the creation and evolution of civil justice programs).

10. A reduction of (the 2001 equivalent of) more than \$216 million federal dollars from the Legal Services grant occurred from 1980-1990. *Id.* at 1221.

States began looking for sources of funding to supplement the federal cuts, and IOLTA emerged in the early 1980s as one of the most successful and widespread alternative funding programs.¹¹

Since at least the early part of the twentieth century, lawyers have been ethically obligated not to mingle clients' funds with their own.¹² Attorneys maintained separate accounts for client funds and generally pooled those client funds that were small amounts to be held for a short period of time into one account because the costs of opening and maintaining separate accounts did not make individual accounts feasible.¹³ Pooled accounts were non-interest bearing because federal banking laws prohibited the payment of interest on demand deposit accounts, and therefore banks were essentially being given interest-free loans by the pooled, non-interest bearing trust accounts.¹⁴

IOLTA programs began in the early 1980s, when a change in banking laws coincided with drastic reductions in federal funding to legal services corporations. In 1980, with the passage of the Consumer Checking Account Equity Act (the "CCA EA"),¹⁵ the opportunity for IOLTA programs to flourish arose. The CCA EA created Negotiable Order of Withdrawal ("NOW") accounts, which allowed federally insured banks to pay interest on qualified checking accounts.¹⁶ NOW accounts could generate interest if "the entire beneficial interest is held by one or more individuals or by an organization which is operated primarily for religious, philanthropic, charitable, educational, political, or other similar purposes and which is not operated for profit"¹⁷

Desperate for a solution to their legal services funding woes, states took advantage of this open invitation and began to create IOLTA programs. "The purpose of IOLTA accounts is to give money to a worthwhile organization

11. James D. Anderson, Note, *The Future of IOLTA: Solutions to Fifth Amendment Takings Challenges Against IOLTA Programs*, 1999 U. ILL. L. REV. 717, 720 (1999) (proposing two solutions for IOLTA programs to remain viable after the holding in *Phillips*).

12. See *Wash. Legal Found. v. Legal Found. of Wash.*, 236 F.3d 1097, 1100 (9th Cir. 2001). Most states' IOLTA programs are created under the jurisdiction's Rules of Professional Conduct, typically Rule 1.15, which provides, "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 . . ." MODEL RULES OF PROF'L CONDUCT R. 1.15(a) (2003).

13. *What is IOLTA?*, *supra* note 3.

14. Anderson, *supra* note 11, at 721.

15. 12 U.S.C. § 1832 (2000).

16. See *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 161 (1998); *Wash. Legal Found. v. Mass. Bar Found.*, 993 F.2d 962, 968 (1st Cir. 1993) (discussing the changes to NOW accounts with the passage of the CCA EA).

17. 12 U.S.C. §1832(a)(2).

rather than to give an interest-free loan to a bank.”¹⁸ IOLTA programs continue to pool short-term, small deposits into one account, but the “difference is that with changes in the banking laws and the explicit permission of federal regulators, banks may remit interest on these pooled accounts to a not-for-profit organization: the IOLTA program[,]” which then distributes funding to legal aid groups.¹⁹

The Florida Supreme Court established the first IOLTA program in the United States in 1979.²⁰ By 2000, all fifty states and the District of Columbia had IOLTA programs in place, and IOLTA generated \$148 million dollars nationally in 2000.²¹ This number exceeded \$200 million dollars in 2001.²² IOLTA-generated interest funds fifteen percent of the total legal aid bill for the United States.²³

Most IOLTA programs were created by order of the jurisdiction’s highest court.²⁴ In five states, IOLTA programs were created by the state legislature.²⁵

18. Risa I. Sackmary, Comment, *IOLTA’s Last Obstacle*: Washington Legal Found. v. Massachusetts Bar Found.’s *Faulty Analysis of Attorney’s First Amendment Rights*, 2 J.L. & POL’Y 187, 188 (1994) (ultimately concluding that mandatory IOLTA programs which support activities against attorneys’ political and ideological beliefs violate the attorneys’ First Amendment rights).

19. *What is IOLTA?*, *supra* note 3.

20. *Id.*

21. *Id.*

22. Ronald D. Rotunda, *Found Money*: Brown v. Legal Foundation of Washington, *and the Taking of Property without Compensation*, CATO SUP. CT. REV. 245, 248 (2002–2003).

23. Richard Tromans, *Supreme Court Upholds Law Firm Legal Aid Subsidy*, LEGAL WK, Apr. 17, 2003.

24. A.B.A. Commission on Interest on Lawyer’s Trust Accounts, *Current Status of IOLTA Programs*, at <http://www.abanet.org/legalservices/iolta/ioltus.html> (last modified Apr. 4, 2002) [hereinafter *Current Status of IOLTA Programs*]; See Ala. Rules of Prof’l Conduct R. 1.15(d), (g) (2004); Alaska Rules of Prof’l Conduct R. 1.15(d) (2003); Ariz. Sup. Ct. Rules R. 44(c)(2) (2004); Ark. Rules of Prof’l Conduct R. 1.15(d)(2) (2003); Colo. Rules of Prof’l Conduct R. 1.15(e) (2004); Del. Rules of Prof’l Conduct R. 1.15(h) (2004); D.C. Rules of Court R. 1.15 (2004); Fla. Bar R. 5-1.1 (2004); Ga. Bar R. 1.15(I) (2004); Haw. Sup. Ct. R. 11 (2004); Idaho Rules of Prof’l Conduct 1.15(d) (2004); Ill. Rules of Prof’l Conduct R. 1.15(d) (2004); Ind. Rules of Prof’l Conduct R. 1.15(d) (2004); Iowa Code of Prof’l Responsibility DR 9-102(C) (2004); Kan. Rules of Prof’l Conduct R. 1.15(d)(3) (2004); Ky. Sup. Ct. Rule 3.130, Rules of Prof’l Conduct R. 1.15 (2004); La. Stat. Ann., Tit. 37, ch. 4, App., Art. 16, Rules of Prof’l Conduct R. 1.15(d) (West 2004); Me. Code of Prof’l Responsibility R. 3.6(e)(4) (2004); Mass. Rules of Prof’l Conduct R. 1.15 (2004); Mich. Rules of Prof’l Conduct R. 1.15(d) (2004); Minn. Rules of Prof’l Conduct R. 1.15(d) (2004); Miss. Rules of Prof’l Conduct R. 1.15(d), (e) (2004); Mo. Sup. Ct. Rules of Prof’l Conduct R. 4-1.15(d) (2004); Mont. Rule Prof’l Conduct 1.18(b) (2004); Neb. Code of Prof’l Responsibility DR 9-102 (2004); Nev. Sup. Ct. Rules R. 217 (2004); N.H. Sup. Ct. Rules R. 50 (2004); N.J. Rules Gen. Application R. 1:28A-2 (2004); N.M. Rules of Prof’l Conduct R. 16-115(D) (2004); N.C. Rules of Prof’l Conduct R. 1.15-4 (2004); N.D. Rules of Prof’l Conduct R. 1.15(d)(1) (2004); Okla. Rules of Prof’l Conduct R. 1.15(d) (2004); Or. Code of Prof’l Responsibility DR9-101(D)(2) (2004); Pa. Rules of Prof’l Conduct R. 1.15(d) (2004); R. I. Rules of Prof’l Conduct, Art. V, 1.15(d) (2004); S.C. App. Ct. Rule 407 (2004); S.D. Tit. 16,

IOLTA programs fall into three categories: mandatory, opt-out, and voluntary. In mandatory programs, all lawyers in the jurisdiction who maintain client trust accounts must participate.²⁶ In opt-out programs, lawyers must participate unless they affirmatively choose not to participate (default is participation).²⁷ In voluntary programs, the default rule is non-participation,

ch. 16-18, App., Rules of Prof'l. Conduct R. 1.15(d), (e) (2004); Tenn. Sup. Ct. Rule 8, Code of Prof'l Responsibility R. 1.15 (2004); Tex. Rules of Prof'l Conduct R. 1.14 (2004); Utah Sup. Ct. Rules, Rules of Prof'l Conduct R. 1.15 (2004); Vt. Rules of Prof'l Conduct R. 1.15 (2004); Va. Sup. Ct. Rules, pt. 6, § II, Rules of Prof'l Conduct R. 1.15 (2004); Wash. Rules of Prof'l Conduct R. 1.14 (2004); W. Va. Rules of Prof'l Conduct R. 1.15(d) (2004); Wis. Sup. Ct. Rules R. 20:1.15 (2004); Wyo. Rules of Prof'l Conduct R. 1.15(d) (2004). *See* VA. CODE ANN. § 54.1-3915.1 (2004) (Virginia legislature overriding state Supreme Court rules and making lawyer participation in the IOLTA program optional rather than mandatory). *See also In re* Public Law No. 154-1990, 561 N.E.2d 791 (1990) (striking down legislative IOLTA program as encroachment on the court's power to regulate the practice of law); IND. RULES OF PROF'L CONDUCT R. 1.15(d) (2000) (Indiana Supreme Court adopting an IOLTA program of its own); Alfred J. Azen, *Building a Base for Pro Bono in Pennsylvania*, 24 Apr. Pa. Law. 28 (Mar.-Apr. 2002) (discussing the Pennsylvania Supreme Court's suspension of the Pennsylvania statute creating IOLTA and amending the Rules of Professional Conduct to require attorney participation in IOLTA).

25. *Current Status of IOLTA Programs*, *supra* note 24. California, Connecticut, Maryland, New York, and Ohio's programs were created by state statutes. *See* CAL. BUS. & PROF. CODE ANN. § 6211(a) (2004); CONN. RULES OF PROF'L CONDUCT R. 1.15 (2004); MD. CODE ANN. BUS. OCC. & PROF. § 10-303 (2004); N. Y. JUD. LAW § 497 (2004); OHIO REV. CODE ANN. § 4705.09(A)(1) (2004).

26. *Current Status of IOLTA Programs*, *supra* note 24. As of May 2003, twenty-eight jurisdictions had mandatory programs: Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Vermont, Washington, West Virginia, and Wisconsin. *Id.* An example of a mandatory participation rule is Illinois' Rule 1.15(d):

(d) All nominal or short-term funds of clients paid to a lawyer or law firm, including advances for costs and expenses, shall be deposited in one or more pooled interest-bearing trust accounts established with a bank or savings and loan association, with the Lawyers Trust Fund of Illinois designated as income beneficiary. Each pooled, interest bearing trust account shall comply with the following provisions:

- (1) Each lawyer or law firm shall establish one or more interest-bearing trust accounts
- (2) Each lawyer or law firm shall direct the depository institution to remit net interest or dividends, after deduction of reasonable charges and fees . . . directly to the Lawyers Trust Fund of Illinois
- (3) Each lawyer or law firm shall deposit into such interest-bearing trust accounts all clients' funds which are nominal in amount or are expected to be held for a short period of time.

ILL. RULES OF PROF'L CONDUCT R. 1.15(d) (2002).

27. *Current Status of IOLTA Programs*, *supra* note 24. Twenty-two jurisdictions had opt-out programs as of May 2003: Alabama, Alaska, Delaware, District of Columbia, Idaho, Indiana, Kansas, Kentucky, Maine, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New

and lawyers must affirmatively choose to participate.²⁸ Most states have a mandatory program.²⁹

It is the lawyer, rather than the client, who is charged with deciding whether a particular deposit is subject to IOLTA regulations.³⁰ The factors to be considered include:

Mexico, North Carolina, Rhode Island, South Carolina, Tennessee, Utah, Virginia, and Wyoming. *Id.* An example of an opt-out rule is Missouri's Rule 1.15(d) and (f):

(b) . . . a lawyer or law firm shall establish and maintain one or more interest-bearing insured depository accounts into which shall be deposited all funds of clients or third persons that are nominal in amount or are expected to be held for a short period of time

. . . .

(f) A lawyer or law firm may elect to decline to maintain accounts as described in paragraph (d) by so notifying the Missouri Lawyer Trust Account Foundation in writing on or before January 31 of any year. A lawyer or law firm that does not so advise the Missouri Lawyer Trust Account Foundation shall be required to maintain such accounts.

MO. SUP. CT. RULES OF PROF'L CONDUCT R. 4-1.15(d), (f) (2002).

28. *Current Status of IOLTA Programs, supra* note 24. As of May 2003, voluntary programs exist in only two jurisdictions: South Dakota and the Virgin Islands. *Id.* An example of a voluntary rule is South Dakota's Rule 1.15(d)(3):

A lawyer may elect to create and maintain an interest-bearing account for clients' funds which are nominal in amount or to be held for a short period of time in compliance with the following provisions:

- (i) No earnings from such an account shall be made available to a lawyer or firm.
- (ii) The account shall include all clients' funds which are nominal in amount to be held for a short period of time.
- (iii) An interest-bearing trust account may be established with any bank authorized by federal or state law to do business in South Dakota and insured by the Federal Deposit Insurance Corporation. Funds in each interest-bearing trust account shall be subject to withdrawal upon request and without delay.
- (iv) The rate of interest payable on any interest payable on any interest-bearing trust account shall not be less than the rate paid by the depository institution to regular, nonlawyer depositors unless reduced to offset bank administrative costs. Higher rates offered by the institution to customers whose deposits exceed certain time or quantity minima, such as those offered in the form of certificates of deposit, may be obtained by a lawyer or law firm on some or all of deposit funds so long as there is no impairment of the right to withdraw or transfer principal immediately.

S.D. TIT. 16, CH. 16-18, APP., RULES OF PROF'L CONDUCT R. 1.15(d)(3) (2004).

29. *Current Status of IOLTA Programs, supra* note 24.

30. For an example, see ILL. RULES OF PROF'L CONDUCT R. 1.15(d)(5) (2004).

- (5) The decision as to whether funds are nominal in amount or are expected to be held for a short period of time rests exclusively in the sound judgment of the lawyer or law firm, and no charge of ethical impropriety or other breach of professional conduct shall attend a lawyer's or law firm's judgment on what is nominal or short term.

Id.

- (1) the amount of interest which the funds would earn during the period they are expected to be deposited;
- (2) the cost of establishing and administering the account, including the cost of the lawyer's services;
- (3) the capability of the financial institution, through subaccounting, to calculate and pay interest earned by each client's funds, net of any transaction costs, to the individual client.³¹

In summary, in the majority of the states, an order from the highest state court mandates that lawyers deposit client funds that could not generate net interest if separately held into pooled trust accounts and requires that the lawyer designate the state's IOLTA program as the beneficiary of the pooled account. Proponents argue that funding legal aid programs is essential because "[p]roviding those in poverty with free or low-cost legal advocates assures them equal access to the justice system and is one of the most effective means of alleviating economic oppression"³² and hail these programs as a "creative and lucrative solution"³³ to the funding problem. Opponents of the IOLTA program argue that "[w]hile the goals of this program are worthy, the mechanism is unconstitutional."³⁴

III. THREE MAJOR BATTLEFIELDS FOR IOLTA

Three battlefields currently exist for attacking IOLTA. Challenges to IOLTA programs based on the Takings Clause of the Fifth Amendment³⁵ have been by far the most active of the IOLTA battles.³⁶ A second battlefield is heating up, with challenges based on the Free Speech Clause of the First

31. ILL. RULES OF PROF'L CONDUCT R. 1.15(e)(1)-(3) (2004).

32. Emily C. Helms, Note, *Washington Legal Foundation v. Legal Foundation of Washington: Why The Supreme Court Should Protect Interest on Lawyers' Trust Accounts From Takings Challenges*, 38 WAKE FOREST L. REV. 289, 311 (2003) (arguing that the Court should hold, in *Brown*, that the Fifth Amendment has not been violated because no just compensation was due).

33. *Id.*

34. Kristi L. Darnell, Note, *Pennies From Heaven—Why Washington Legal Foundation v. Legal Foundation of Washington Violates the U.S. Constitution*, 77 WASH. L. REV. 775, 775 (2002) (arguing that IOLTA should be declared unconstitutional as a taking without just compensation and suggesting client consent as a constitutionally valid alternative).

35. U.S. CONST. amend. V (providing, "nor shall private property be taken for public use, without just compensation").

36. Mohler, *supra* note 5, at 225 n.54 ("The most consistent and seriously treated of the constitutional complaints, however, is a Fifth Amendment 'taking' claim applied through the Fourteenth Amendment, the assertion that some client property is infringed when interest from a pooled IOLTA account is funneled to public purposes.").

Amendment.³⁷ The potential for a third battlefield exists, where IOLTA programs would be challenged as functionally equivalent to a tax, yet not in conformity with general tax doctrines.

A. *Takings Clause Challenges to IOLTA*

Two recent Supreme Court cases addressed challenges to IOLTA based on the Takings Clause of the Fifth Amendment. Initially, after *Phillips v. Washington Legal Foundation*,³⁸ it appeared that IOLTA programs would lose the war and be declared unconstitutional in the near future. However, a bare majority of the Court rallied in *Brown v. Legal Foundation of Washington*³⁹ to surprise IOLTA proponents by turning the tide of the battle.

This section considers, in turn, the holdings and rationale for *Phillips* and for *Brown*, and then shifts focus to the future of Fifth Amendment claims against IOLTA.

1. *Phillips v. Washington Legal Foundation*

A Texas businessman named William Summers deposited a retainer with Attorney Michael Mazzone in connection with legal work Mazzone was performing for Summers.⁴⁰ Mazzone, in turn, deposited the retainer into an IOLTA fund.⁴¹ Summers learned in January of 1994 that the interest his deposit earned would go to the Texas Equal Access to Justice Foundation⁴² (“TEAJF”), rather than being returned to him.⁴³ In February of 1994, Summers, Mazzone, and the Washington Legal Foundation filed suit against the TEAJF, its chairman, and the Justices of the Texas Supreme Court,

37. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

38. 524 U.S. 156 (1998). The Washington Legal Foundation (“WLF”) is a non-profit activist group dedicated to promoting free enterprise, and its mission is “to defend and promote the principles of freedom and justice.” Washington Legal Foundation, *WLF Mission*, at <http://www.wlf.org/Resources/WLFMission/> (last visited Oct. 2, 2004).

39. 538 U.S. 216 (2003). Not to be confused with the similarly named opponents of IOLTA (the WLF, *see supra*, note 38), The Legal Foundation of Washington (“LFW”) is the legal services arm of the Bar Association of the State of Washington. LFW’s Mission Statement provides “The Legal Foundation of Washington is dedicated to the provision of equal access to the justice system by funding legal and educational programs for low-income persons through the fair and efficient administration of IOLTA and other funds.” Legal Foundation of Washington, at <http://www.legalfoundation.org/> (last visited Oct. 2, 2004).

40. *Phillips*, 524 U.S. at 163.

41. *Id.*

42. *Id.* The Texas Equal Access to Justice Foundation is a non-profit corporation created by the Texas Supreme Court to provide legal services to the poor. *Id.* at 162.

43. *Id.* at 163.

claiming that the Texas IOLTA program violated the Fifth Amendment by taking property without just compensation.⁴⁴

The District Court found that the plaintiffs did not have a property interest in the income generated by the principal held in IOLTA accounts and granted summary judgment for the TEAJF.⁴⁵ However, the Fifth Circuit Court of Appeals reversed, holding that “any interest that accrues belongs to the owner of the principal.”⁴⁶ TEAJF petitioned the Supreme Court, and the Court granted certiorari to resolve a circuit split between the Fifth and Ninth Circuits as to whether interest generated by IOLTA deposits was the private property of the owner of the principal.⁴⁷

In *Phillips*, the Court began by setting out that the Constitution merely protects, rather than creates, private property interests, and therefore property interests must be independently created.⁴⁸ For interest income, the Court found this source of independent creation in the state common law rule that “interest follows principal.”⁴⁹

Writing for the majority, Chief Justice Rehnquist was not persuaded by the petitioners’ argument that the general rule should be abandoned in cases where the principal could not generate the interest on its own, as with the client funds in IOLTA accounts.⁵⁰ Although the petitioners distinguished interest from net interest, Chief Justice Rehnquist determined that the distinction was irrelevant because of the Court’s “longstanding recognition that property is more than economic value,”⁵¹ that it includes “the right to possess, use, and dispose,”⁵² and “[w]hile the interest income at issue here may have no economically realizable value to its owner, possession, control, and disposition are nonetheless valuable rights that inhere in the property.”⁵³ Having rejected this argument in earlier takings cases, the Court also turned a deaf ear to the petitioners’ argument that the interest is not the private property of the owners of the principal because the interest was created by the state’s IOLTA

44. *Id.*

45. Wash. Legal Found. v. Texas Equal Access to Justice Found., 873 F. Supp. 1, 7, 11 (W.D. Tex. 1995).

46. Wash. Legal Found. v. Texas Equal Access to Justice Found., 94 F.3d 996, 1004 (5th Cir. 1996).

47. *Phillips*, 524 U.S. at 163.

48. *Id.* at 164.

49. *Id.* at 165. “The rule that ‘interest follows principal’ has been established under English common law since at least the mid-1700s. . . . This rule has become firmly embedded in the common law of the various States.” *Id.* (citation omitted).

50. *Id.* at 169.

51. *Id.* at 170.

52. *Phillips*, 524 U.S. at 170 (citation omitted).

53. *Id.*

program.⁵⁴ “[T]he State’s having mandated the accrual of interest does not mean the State or its designate is entitled to assume ownership of that interest[.]”⁵⁵ as “the State does nothing to create value; the value is created by respondents’ funds.”⁵⁶

The theory underlying *Phillips* is that property includes not only ownership of the actual thing but also the rights of control, use, and dispossession, and that those rights are incidents of ownership of the thing. Included in this theory is the idea that the economic value of the thing or one of the rights incidental to it does not affect its status as private property.

Viewing property as not only ownership of the physical thing but also the rights of control, use, and dispossession, *Phillips* confirms the rule that “interest follows principal” and therefore clearly holds that “the interest income generated by funds held in IOLTA accounts is the ‘private property’ of the owner of the principal.”⁵⁷ *Phillips* distinctly rejects the idea that whether the interest is property is conditioned upon (1) whether the interest would represent positive economic value if taken as a net amount, and (2) whether the interest could have been created *but for* the state mandated program.

Phillips did not address the other elements of a Takings Clause challenge but simply answered the question before it: that the interest earned by deposits in IOLTA programs was the private property of the owner of the principal. Accordingly, the Court remanded the questions of taking and just compensation to the District Court.⁵⁸

Washington Legal Foundation was declared the winner,⁵⁹ and IOLTA opponents celebrated. “While the final nail has not been pounded into the IOLTA coffin, the next to last one has.”⁶⁰ Tasting victory over IOLTA programs, opponents claimed, “mandatory IOLTA programs are on the verge of being declared unconstitutional and . . . states will need to consider alternative sources of money to fill the funding void left in the wake of IOLTA’s apparent demise.”⁶¹ Not ready to admit defeat, proponents of the program denounced the Court’s decision as “turn[ing] nearly twenty years of

54. *Id.* at 170–71. The argument that “government-created value” made the interest the property of the state rather than the owner of the principal was rejected by the Court in *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). *Id.* at 171.

55. *Webb’s*, 449 U.S. at 162.

56. *Phillips*, 524 U.S. at 171.

57. *Id.* at 172.

58. *Id.*

59. *Scorecard: Winners, Losers in Term’s Key Cases*, THE NAT’L L.J., Aug. 10, 1998, at B9 (declaring Washington Legal Foundation to be the winner in *Phillips*).

60. *IOLTA May Be Invalid—U.S. Supreme Court*, LAW. WKLY. USA, June 29, 1998, at 2 (quoting Richard Samp, Washington Legal Foundation Chief Counsel, commenting on the Court’s recent ruling in *Phillips*).

61. Hrina, *supra* note 7, at 303.

IOLTA jurisprudence upside down[.]”⁶² on the mild side, and “tramp[ing] upon precedent, the Fifth Amendment and good sense,”⁶³ “completely avoid[ing] the real issue of the case,”⁶⁴ and “[a]ffect[ing] literally millions of . . . Americans who . . . may be denied access to the judicial system as a result of this ruling”⁶⁵ on the more outspoken end of the spectrum. Reacting to the *Phillips* holding, one commentator suggested that “[i]n the end, the true victims are those who must rely on subsidized legal assistance when legal problems arise”⁶⁶ because loss of IOLTA funding would translate into a drastic reduction in subsidized legal assistance.

But, in March of 2003, IOLTA proponents had their own victory day before the Court.

2. *Brown v. Legal Foundation of Washington*⁶⁷

The Fifth Amendment allows a taking of private property, so long as two conditions are met: The taking must be for public use, and just compensation must be paid.⁶⁸ *Phillips* considered the preliminary question, whether the interest in IOLTA programs even qualifies as private property. The *Phillips* Court answered affirmatively but did not tackle the remainder of the Takings Clause analysis. Three questions remained: Does IOLTA work a taking of this private property interest?⁶⁹ Is that taking for public use? And if so, what just

62. Jason Lacey, Note, *IOLTA Programs and Professional Responsibility: Dealing with the Aftermath of Phillips v. Washington Legal Foundation*, 47 KAN. L. REV. 911, 926 (1999) (ultimately arguing that continued participation in mandatory IOLTA programs after *Phillips* violates lawyers’ ethical duties).

63. Mohler, *supra* note 5, at 237 (footnote omitted).

64. *Id.*

65. *Id.*

66. Lacey, *supra* note 62, at 934. The author continues:

If funding for legal service organizations is allowed to fall by the wayside, many people may be denied access to a legal system that is designed to aid and protect them. For them, the system would be meaningless, and to that end, the rule of law itself may become meaningless as well. As a matter of professional responsibility, the legal community has a duty to see that does not happen.

Id. at 934–35.

67. 538 U.S. 216 (2003). When it reached the Ninth Circuit, the case was perplexingly styled *Washington Legal Foundation v. Legal Foundation of Washington*. The Ninth Circuit determined that two of the four named petitioners and the Washington Legal Foundation lacked standing to bring Fifth Amendment challenges. *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 850 (9th Cir. 2001). The Supreme Court, when it issued its decision, renamed the case *Allen Brown and Greg Hayes v. Legal Foundation of Washington*, apparently agreeing with the Ninth Circuit’s judgment that the other parties lacked standing. *Brown*, 538 U.S. at 228.

68. U.S. CONST. amend. V (providing, “nor shall private property be taken for public use, without just compensation”).

69. In *Brown*, Justice Stevens writes for the majority, that in *Phillips*, “[w]e did not, however, express any opinion on the question whether the income had been ‘taken’ by the State

compensation is due?⁷⁰ The Court's refusal to answer these lingering questions made them ripe ground for another round of IOLTA battles. *Brown* was decided by the Court on March 26, 2003.⁷¹

Petitioners Allen Brown and Greg Hayes each placed escrow funds for the purchase of real estate into IOLTA accounts in the state of Washington, and the net interest on those funds was paid to the Legal Foundation of Washington pursuant to the state's IOLTA rules.⁷² In the U.S. District Court for the Western District of Washington, the petitioners⁷³ brought suit against the Legal Foundation of Washington and the Justices of the Washington Supreme Court, claiming that the IOLTA program violated two of their constitutional rights: the right not to have property taken without just compensation, as protected by the Fifth Amendment, and the right not to be compelled to speak, as protected by the First Amendment.⁷⁴ Ruling before the Supreme Court handed down its decision in *Phillips*, the District Court dismissed the petitioners' claims on summary judgment, holding that there could be no First or Fifth Amendment violations because the IOLTA interest was not private property.⁷⁵ The Ninth Circuit Court of Appeals reversed the District Court's decision shortly after the Supreme Court's decision in *Phillips* was announced.⁷⁶ Ruling that IOLTA interest was private property and that IOLTA programs' appropriation of that interest was a per se taking, the Ninth Circuit remanded the issue of just compensation to the District Court.⁷⁷

Rehearing en banc, the Ninth Circuit refused to find a per se taking when real property was not at issue, and instead employed an ad hoc⁷⁸ analysis.⁷⁹ Under the ad hoc analysis, the Ninth Circuit found that IOLTA programs were

or 'as to the amount of "just compensation," if any, due respondents.' We now confront those questions." *Brown*, 538 U.S. at 220 (quoting *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 172 (1998)).

70. *Brown*, 538 U.S. at 220. The question of just compensation would be the Court's main focus in *Brown*. See *id.*

71. *Id.* at 216.

72. *Id.* at 229–30. Washington's IOLTA program was created by order of the Washington Supreme Court. See *supra*, note 24. For Washington's IOLTA rules, see WASH. RULES OF PROF. CONDUCT R. 1.14 (2002).

73. *Brown* and Hayes were joined by two limited practice officers, also governed by the state's IOLTA rules, and the Washington Legal Foundation. *Wash. Legal Found. v. Legal Found. of Wash.*, 236 F.3d 1097, 1103 (9th Cir. 2001). Washington Legal Foundation and the limited practice officers' takings clause claims were later dismissed for lack of standing. *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 848–50 (9th Cir. 2001).

74. *Brown*, 538 U.S. at 228–29. See also *Wash. Legal Found.*, 271 F.3d at 845–46.

75. *Wash. Legal Found.*, 271 F.3d at 846.

76. *Wash. Legal Found.*, 236 F.3d at 1105–09, 1115.

77. *Id.* at 1111–15.

78. The ad hoc analysis was promulgated in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123–24 (1978).

79. *Wash. Legal Found.*, 271 F.3d at 856–57.

not a taking, and even if IOLTA did amount to a taking, the Fifth Amendment was not violated because no just compensation was due.⁸⁰ The Ninth Circuit measured just compensation by what the owner had lost, not what the taker had gained, and reasoned that all the petitioners had lost was the “right to let their principal lie fallow.”⁸¹ Brown and Hayes petitioned the Supreme Court for a writ of certiorari. The Court granted the writ to resolve a split between the Fifth and Ninth Circuits as to (1) whether an ad hoc or per se analysis should be applied in determining whether IOLTA resulted in a taking and (2) whether IOLTA resulted in a taking for which just compensation was due.⁸² Ultimately, the Court affirmed the Ninth Circuit’s en banc ruling.⁸³

The Supreme Court addressed all the elements of a Takings Clause claim, despite the fact that the writ did not mention the public use requirement.⁸⁴ Having held in *Phillips* that IOLTA interest was private property,⁸⁵ the Court made short work of the public use requirement. The majority easily concluded that “the overall, dramatic success of these programs in serving the compelling interest in providing legal services to literally millions of needy Americans certainly qualifies the Foundation’s distribution of these funds as a ‘public use’ within the meaning of the Fifth Amendment.”⁸⁶

The *Brown* opinion became most interesting, however, as the Court took up the confluence of the just compensation requirement and its takings jurisprudence. Distinguishing physical takings⁸⁷ from regulatory takings,⁸⁸ the

80. *Id.* at 861–62.

81. *Id.* at 862–63.

82. *See* Wash. Legal Found. v. Legal Found. of Wash., 271 F.3d 835, 857–58 (9th Cir. 2001), *cert. granted*, 536 U.S. 903 (2002) (applying the ad hoc test from *Penn Central* to find that IOLTA did not result in a taking). *See also* Wash. Legal Found. v. Tex. Equal Access to Justice Found., 270 F.3d 180, 188–89 (5th Cir. 2001) (applying the per se test from *Loretto* to find that IOLTA did result in a taking).

83. *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 241 (2003).

84. Dissenting in *Brown*, Justice Scalia criticizes the majority for addressing a “nonjurisdictional constitutional issue raised by neither the parties nor their *amici*. Petitioners’ sole contention in this Court is that the State’s IOLTA program violates the just compensation requirement of the Takings Clause.” *Id.* at 243 n.2 (Scalia, J., dissenting).

85. *See supra* note 57 and accompanying text.

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

87. A physical taking occurs when the government takes physical possession of a portion or entire parcel of property. An example is when the government puts a cable television receptor box on the rooftop of an apartment building, physically occupying a portion of the privately owned parcel. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 (1982). For physical takings, a per se rule is applied. *Brown*, 538 U.S. at 233–34.

88. A regulatory taking occurs when government regulations prohibit certain uses of private property. An example is a governmental ban on private use of certain airspace. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 128 (1978) (citations omitted). For regulatory takings, an ad hoc approach is applied, and in order for a taking to have occurred, there must have

Court concluded that IOLTA programs are akin to a physical taking.⁸⁹ As *Phillips* held that the interest earned in IOLTA accounts “is the ‘private property’ of the owner of the principal[.]”⁹⁰ the *Brown* Court found that the taking of interest from IOLTA accounts was appropriately analogized to the taking of a small amount of rooftop space in *Loretto*⁹¹ and determined that the per se analysis should apply.⁹² *Brown* clearly sets out that IOLTA accounts result in a per se taking.⁹³

Addressing the final question, how to measure the just compensation due, the majority reiterated that just compensation is “measured by the property owner’s loss rather than the government’s gain.”⁹⁴ However, the majority also specified that only pecuniary losses are compensable, relying on Justice Frankfurter’s opinion in *Kimball Laundry Co. v. United States*⁹⁵ that “an owner’s nonpecuniary losses attributable to his unique need for property or idiosyncratic attachment to it, like loss due to an exercise of the police power, is properly treated as part of the burden of common citizenship.”⁹⁶ Justice Stevens wrote, “it is clear that neither *Brown* nor *Hayes* is entitled to any compensation for the nonpecuniary consequences of the taking of the interest on his deposited funds, and that any pecuniary compensation must be measured by his net losses rather than the value of the public’s gain.”⁹⁷ In the words of one practitioner, “[m]aybe we can call this the ‘no harm, no foul’ rule.”⁹⁸

Justice Stevens and the majority in *Brown* justified IOLTA by setting the baseline for measuring pecuniary loss as the owner’s opportunities to earn interest outside of IOLTA programs.⁹⁹ “[T]he private party ‘is entitled to be

been an “adverse economic impact” or “interfer[ence] with [an] investment-backed expectation.” *Brown*, 538 U.S. at 234.

89. *Brown*, 538 U.S. at 235.

90. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 172 (1998).

91. *Brown*, 538 U.S. at 235. See also *supra* note 87 and accompanying text.

92. Although the Ninth Circuit en banc decision applied an ad hoc analysis and the Supreme Court applied the per se analysis, both Courts reached the same ultimate conclusion that the Fifth Amendment was not violated because the just compensation due was zero. See *Brown*, 538 U.S. at 239–40; *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 861–62 (9th Cir. 2001).

93. The “interest was taken for a public use when it was ultimately turned over to the Foundation[.]” that funds legal services. *Brown*, 538 U.S. at 235.

94. *Id.* at 235–36.

95. 338 U.S. 1 (1949).

96. *Brown*, 538 U.S. at 236–37 (internal citations and quotation marks omitted).

97. *Id.* at 237. Justice Stevens and the majority are relying on a premise set forth by Justice Holmes in *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910) (“[T]he question is what has the owner lost, not what has the taker gained.”).

98. Dwight H. Merriam, *Panning for Gold in the Trickle of Supreme Court Cases this Term: What Can We Learn from the IOLTA and Referendum Cases?*, ZONING & PLAN. L. REP., June 2003, at 1, 1 (discussing the impact of the *Brown* decision on Takings law).

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

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.”¹⁰⁰ Further, *Brown* measures the just compensation by the *net* interest that would have been earned in a non-IOLTA account, not the gross interest that could have been earned.¹⁰¹ By the very construct of IOLTA, the owner’s opportunities to earn net interest in a separate, individual account must be zero.¹⁰² Therefore, according to the majority, when the interest is taken, the just compensation due is zero, and thus, there is no violation of the Fifth Amendment.¹⁰³

Brown sets out two methods of measuring just compensation: first, by discounting the interest earned on the principal when deposited in a pooled account by the interest that would have been earned on the same principal had the state not coerced its deposit into a pooled account, or what the State gives it may take away, and second, by the *net* interest that could have been earned had the funds been deposited into a non-IOLTA account, which by definition of eligible IOLTA deposits, must be zero.¹⁰⁴ Under either method, the majority concluded that the compensation due was zero.¹⁰⁵ Despite paying lip service to the holding of *Phillips*, that interest is the private property of the owner of the principal, the majority in *Brown* appears to have reasoned that although it is private property, there is no compensation due if the interest is “created” by the State because it provides the opportunity for owners to deposit their principal into interest-generating IOLTA accounts. Alternatively, the *Brown* Court qualified the holding in *Phillips* to state that only the *net* interest generated by the principal is private property. Both of these arguments were distinctly rejected by the majority in *Phillips*.¹⁰⁶

Dissenting in *Brown*, Justice Scalia was critical of the theory adopted by the majority, stating,

Perhaps we are witnessing today the emergence of a whole new concept in Compensation Clause jurisprudence: the Robin Hood Taking, in which the government’s extraction of wealth from those who own it is so cleverly achieved, and the object of the government’s larcenous beneficence is so highly favored by the courts (taking from the rich to give to indigent defendants) that the normal rules of the Constitution protecting private property are suspended.¹⁰⁷

100. *Id.* at 236 (quoting *Olson v. United States*, 292 U.S. 246, 255 (1934)).

101. *Brown*, 538 U.S. at 239–40.

102. *Id.*

103. *Id.* at 240.

104. *Id.* at 239–40.

105. *Id.* at 235–37.

106. *See supra* notes 50–54 and accompanying text.

107. *Brown*, 538 U.S. at 252 (Scalia, J., dissenting).

Justice Scalia's main criticism of the majority is that the holding departs from the precedent of *Phillips* and other just compensation cases,¹⁰⁸ which would require that the measure of "just compensation owed to former owners of confiscated property is the fair market value of the property taken[.]"¹⁰⁹ which for IOLTA programs is easily measured as the interest accrued. He also believed that the majority's holding "embrace[d] a line of reasoning that we explicitly rejected in *Phillips v. Washington Legal Foundation*,"¹¹⁰ and "contravene[d] our decision in *Phillips*—effectively refusing to treat the interest as the property of petitioners we held it to be . . ."¹¹¹ Scalia chastised the majority for holding, in his opinion, that "there is no taking when 'the State giveth, and the State taketh away.'"¹¹² Yet despite his criticisms of the majority, Scalia also begged the question that the only basis for measuring just compensation is the lost interest.

The question is indeed more difficult than Scalia treated it in his dissent. It is not a given that the appropriate measure of damages in IOLTA takings cases should be solely the lost interest. If property includes the rights to "possess, use or dispose," as in the theory behind the holding in *Phillips*, then to base just compensation for IOLTA takings solely on the amount of interest lost is a fallacy.

3. The Future of Takings Clause Challenges

Despite how recently the *Brown* decision was handed down, it is already drawing criticism from scholars. "[T]he constitutionality of IOLTA programs nationwide—whose possible demise distressed social justice advocates precisely because those programs are a vital source of funding for legal services—now rests on the dubious proposition that the more than \$200 million that these programs generate annually is actually worth nothing."¹¹³

Given the sharp division among the current Court over how to measure just compensation for IOLTA takings and the fact that both *Brown* and *Phillips* were 5-4 decisions, there does appear to be room for future litigation on IOLTA and Takings Clause issues. However, it will be an uphill battle for IOLTA opponents, who face the daunting task of convincing the Court that it made a mistake and cannot reconcile the *Brown* decision with the precedent it established in *Phillips*. Opponents who continue the takings assault on IOLTA

108. *Id.* at 241.

109. *Id.*

110. *Id.* (citation omitted).

111. *Id.* at 242–43.

112. *Brown*, 538 U.S. at 247.

113. *The Supreme Court, 2002 Term: Leading Cases: Constitutional Law*, 117 HARV. L. REV. 369, 379 (2003) (footnote omitted).

will find four allies on the current court,¹¹⁴ but the challenge will be in finding the fifth ally. There may be some hope in convincing Justice O'Connor to switch sides, as she was the "swing" fifth vote in both *Phillips* and *Brown*, voting with Justices Scalia, Kennedy, Thomas and the Chief Justice in *Phillips* but apparently switching sides by the time *Brown* came before the Court.¹¹⁵ Another glimmer of hope for IOLTA proponents on the Fifth Amendment front turns on a vacancy on the Supreme Court that could result in the appointment of a conservative or moderate Justice who would be more likely to uphold property rights and vote with Justices Scalia, Kennedy, and Rehnquist on IOLTA issues. While certainly not based on much more than a hope and a prayer,¹¹⁶ the National Center for the Public Interest, a pro-IOLTA group, comments that "the only major five-to-four holdings in civil cases that would be endangered by virtue of a one-justice ideological shift would be those dealing with IOLTA"¹¹⁷

While IOLTA opponents could continue the takings assault, there are other battles to wage against IOLTA, battles where the odds are more favorable for opponents of the program.

B. First Amendment Challenges to IOLTA

"O'Melveny & Myers D.C. partner Walter Dellinger, the former acting solicitor general who argued in favor of IOLTA on behalf of the Washington State Supreme Court, said the [*Brown*] ruling 'as a practical matter settles once and for all the hugely important issue of legal funding for the poor.'"¹¹⁸ But does it?

114. The dissenters in *Brown* were Justices Kennedy, Scalia, Thomas and Chief Justice Rehnquist. *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 241 (2003).

115. For the proposition that Justice O'Connor was the key swing vote, see generally Frank Newton, *IOLTA's Final Fate: A first Hand Account of the U.S. Supreme Court Oral Arguments*, TEX. LAWYER, Dec. 23, 2002, at 70. There is also reason to believe that Justice O'Connor could be persuaded to consider the constitutionality of IOLTA programs in light of the Due Process claims. See Tony Mauro, *IOLTA Opponents Receive Grilling*, CONN. L. TRIB., Dec. 16, 2002, at 1 (commenting on oral arguments in *Brown*, "O'Connor seemed dubious, suggesting several times that 'there might be a due process argument' against IOLTA, but not one based on the Fifth Amendment just compensation clause[']").

116. National Legal Center for the Public Interest, *The Supreme Court's 2002-2003 Term in Review*, 24 JUD./LEGIS. WATCH REP., Oct. 2003, at 1, 1 ("[I]t was a Term that satisfied almost no one. On the Right, one televangelist encouraged his listeners to pray for a vacancy on the U.S. Supreme Court—a vacancy that presumably would occur only through the death or illness of a sitting justice.").

117. *Id.* at 2.

118. Tony Mauro, *IOLTA Programs Narrowly Saved*, CONN. L. TRIB. Mar. 31, 2003, at 1.

A second battlefield for IOLTA programs exists, and it is likely IOLTA will see new challenges focusing on First Amendment grounds.¹¹⁹ “It’s a pretty well established [U.S.] Supreme Court rule that, outside the area of taxes, you may not require somebody to contribute funds to something they don’t support,” Chief Counsel of the Washington Legal Foundation, Richard Samp commented.¹²⁰

First Amendment challenges have typically attacked mandatory IOLTA programs¹²¹ on the premise that “the states’ use of the interest earned on IOLTAs forces them to support ideological or political organizations they find to be offensive and in violation of both the right to free speech and the right to freedom of association”¹²² Washington Legal Foundation’s First Amendment argument “has been that, in general, litigation is something that is an expressive activity and to force people to finance activities, some of which they may find objectionable, violates the First Amendment.”¹²³

In earlier compelled support cases,¹²⁴ the Court acknowledged Thomas Jefferson’s view that, “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.”¹²⁵ Requiring citizens to fund speech they find to be repugnant has been held to be a violation of the First Amendment,¹²⁶ as has requiring owners to allow their property to be used by those who engage in speech repugnant to the owner.¹²⁷ IOLTA opponents construct their First Amendment claim from these two holdings, arguing that it is a violation of the First Amendment for the government to “require a citizen to lend his property to others for the purpose

119. Hrina, *supra* note 7, at 326. “Even if IOLTAs somehow emerge intact from the immediate threat . . . under the Fifth Amendment, they will undoubtedly be challenged again on First Amendment grounds, now that the United States Supreme Court has declared that a client has a property interest in IOLTA generated interest.” *Id.* (footnote omitted).

120. Jerry Crimmins, *Key Legal Aid Funding Program Now Two Decades Old*, CHI. DAILY L. BULL., June 12, 2003, at 1.

121. For a listing of states with mandatory IOLTA programs, see *supra* note 26.

122. Hrina, *supra* note 7, at 311.

123. Marcia Coyle, *Battle over IOLTA Could be Renewed: Using Funds for Indigent Clients Might be Seen as “Compelled Speech”*, NAT’L. L.J., Mar. 31, 2003, at A5 (quoting Richard Samp, Chief Counsel to Washington Legal Foundation).

124. See, e.g., *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507 (1991); *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435 (1984); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Bhd. of Ry. & S.S. Clerks v. Allen*, 373 U.S. 113 (1963); *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740 (1961); *Lathrop v. Donohue*, 367 U.S. 820 (1961); *Ry. Employees’ Dep’t v. Hanson*, 351 U.S. 225 (1956).

125. *Abood*, 431 U.S. at 235 n.31 (quoting I. BRANT, JAMES MADISON: THE NATIONALIST 354 (1948)).

126. *Abood*, 431 U.S. at 234–35.

127. *Pac. Gas & Elec. Co. v. Pub. Util. Comm’n of Cal.*, 475 U.S. 1, 20 (1986).

of raising money to fund speech objectionable to the property owner.”¹²⁸ The fact that the property compelled to be lent in IOLTA programs is personal property rather than real property does not change the analysis.¹²⁹

Although both district court cases leading up to *Phillips* and *Brown* initially alleged First Amendment violations in addition to their Fifth Amendment claims,¹³⁰ the respective district courts concluded that because IOLTA interest was not private property, there could be no compelled support and thus no violation of the First Amendment.¹³¹ *Phillips*’ holding destroys the

128. Matthew Davis, Comment, *Can the Ends Justify The Means? Illinois Lawyers Trust Fund: A Constitutional Analysis*, 23 S. ILL. U. L.J. 693, 707–08 (1999) (discussing First and Fifth Amendment Challenges to IOLTA and ultimately concluding that IOLTA does violate the Fifth Amendment).

129. For an interesting hypothetical illustrating this point, see *id.* at 708–09.

Consider a hypothetical analogous to IOLTA programs which requires only nominal or short term funds to be placed in a pooled account for the purpose of generating interest to fund various legal charities: O is the Owner of a vacant lot across the street from his residence. The lot is very small, only ten feet by ten feet, and far too small for O to have any reasonable expectation of using it to generate commercial income. O’s state government passes a resolution which forces O to allow the government to use O’s vacant lot for holding a government auction to sell off cars it has collected from various drug raids. By itself, O’s lot is far too small to stage such an event, but the lot happens to be adjacent to 100 other vacant lots owned by O’s neighbors. Of course, the state government’s resolution also requires O’s neighbors to surrender their vacant lots for the event as well. Using all the neighborhood’s ‘pooled’ vacant lots, the government auction is a smashing success and the government raises a great deal of money which it gives to XYZ Family Planning Clinic which provides obstetric care, including abortions, to poor citizens at a reduced cost. O opposes abortion in any form as a matter of religious conviction. O claims no property interest in the income generated by the auction.

The issue raised by the hypothetical is whether O has been compelled to speak in a manner violating the First Amendment. O has been required to lend his property for the purpose of generating income to fund objectionable speech. Certainly, O’s rights under the First Amendment have been violated, notwithstanding the argument that his property was too small to generate any income on its own The same arguments are raised by proponents of IOLTA and, for the same reasons, they must fail. . . . Since the emphasis . . . is on the ideological support of an objectionable cause, no distinction can be offered to distinguish a client’s contribution of his principal to be used to generate interest to fund objectionable speech. The result is identical [sic] his property is used to further a cause with which he disagrees.

Id.

130. “In *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*—the district court case leading up to the Supreme Court decision in *Phillips*—clients alleged that mandatory IOLTA participation forced them to support and associate with organizations funded by the IOLTA program.” Katharine L. Smith, Recent Development, *IOLTA in the Balance: The Battle of Legality and Morality Between Robin Hood and the Miser*, 34 ST. MARY’S L.J. 969, 1000 (2003). In their original action, *Brown* and *Hayes* alleged that IOLTA programs violated their First Amendment rights. See *supra* note 74 and accompanying text.

131. See *Hrina*, *supra* note 7, at 312–14 (discussing the respective district courts’ handling of the First Amendment claims).

district courts' reasoning, that the interest was not private property and therefore could not constitute compelled speech, as a basis for finding that there was no violation of the First Amendment.

Nevertheless, by the time these cases reached the appellate level, the Fifth and Ninth Circuits and the Supreme Court focused on the Fifth Amendment issues and largely ignored the First Amendment claims. However, dissenting in *Brown*, Justice Kennedy hypothesized that the Court would one day be confronted with the First Amendment issues surrounding IOLTA and suggested: "One constitutional violation (the taking of property) likely will lead to another (compelled speech). These matters may have to come before the Court in due course."¹³²

Are IOLTA opponents ready to challenge IOLTA on First Amendment grounds? Another full-scale constitutional challenge would certainly be a prolonged and strenuous campaign.¹³³ One commentator suggests that "the long road to *Brown* may have dissuaded a new attack. Chief Counsel for the Washington Legal Foundation, Richard Samp, stated that 'it was not clear' if the First Amendment challenge would be pursued."¹³⁴ Yet given the ferocity and determination with which the Washington Legal Foundation argued all the way to the Supreme Court over \$4.96,¹³⁵ IOLTA proponents would be well-advised not to let their guard down on the First Amendment front.¹³⁶

132. *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 253 (2003) (Kennedy, J., dissenting). 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. . . . [whereas] the free market might have created various and diverse funds for pooling small interest amounts.

Id.

133. James Burling, of the Pacific Legal Foundation, who filed an amicus brief supporting the Washington Legal Foundation, commented on the difficulty of pursuing a First Amendment challenge to IOLTA.

If you're talking about [IOLTA] money [being] used simply to help indigent persons in civil litigation, like divorces and landlord-tenant problems, I think that would be tough to raise a First Amendment challenge to If you're talking about money used for impact litigation—to make policy decisions—you might be on more fertile ground. I really haven't spent any time looking specifically at how [the various legal aid entities] use their IOLTA money. It would be a formidable task.

Coyle, *supra* note 123, at A5.

134. Smith, *supra* note 130, at 1001.

135. Brown estimated that the interest he would have earned on the funds he was forced to deposit into an IOLTA account amounted to \$4.96. *Brown*, 538 U.S. at 229.

136. See Smith, *supra* note 130, at 1001 (suggesting, "if IOLTA challengers pursued a new attack on First Amendment grounds, proponents of the program would be compelled to initiate a vigorous defense to save the program—much like the defense to the Fifth Amendment challenge."). *But see* Coyle, *supra* note 123, at A5 (reporting that, according to Legal Foundation

C. IOLTA as a Tax

A third potential argument for IOLTA opponents is that at its core, the IOLTA program is actually a tax. This section considers whether the IOLTA program is merely a disguised tax and why, if it is a tax, it may be improper.

1. Is IOLTA a Veiled Tax?

A tax is “an enforced contribution, exacted pursuant to legislative authority . . . for the purpose of raising revenue to be used for public or governmental purposes”¹³⁷ IOLTA easily fits the first two elements of the definition. It is certainly enforced in at least the twenty-seven jurisdictions where participation is mandatory,¹³⁸ and the transfer of interest to legal aid funds surely qualifies as a contribution.¹³⁹ IOLTA also seems to satisfy the fourth and fifth elements; the purpose of the program is to raise revenue, and the revenue is to be used for a public or governmental purpose, especially in light of Justice Stevens’s finding in *Brown* that “providing legal services to literally millions of needy Americans certainly qualifies the Foundation’s distribution of these funds as a ‘public use’”¹⁴⁰ It would appear, then, that the only element of the definition that IOLTA does not satisfy is the third: IOLTA is not “exacted pursuant to legislative authority.”¹⁴¹

IOLTA can still operate as a tax, even though it fails to satisfy all the definitional elements, because it is the substance, not the form, of a revenue-raising measure that makes it a tax. “[T]he question whether a particular contribution or charge is to be regarded as a tax depends upon its real nature. If it is in the nature of a tax, it is not material that it may be called by a different name”¹⁴² IOLTA effectively functions as a tax, despite its judicial, rather than legislative, origination.

of Washington counsel, David Burman, “[a] First Amendment challenge doesn’t present much risk”).

137. RICHARD A. WESTIN, WG&L TAX DICTIONARY 779 (2002).

138. For a listing of jurisdictions with mandatory IOLTA programs, see *supra* note 26, and accompanying text.

139. WESTIN, *supra* note 137, at 138 (defining a contribution as “a transfer to another *person* with no reciprocal transfer. Typical examples are contributions to . . . *charitable organizations*.”).

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

141. See *supra* note 137 and accompanying text for the definition of “tax” being used in this section. In a wide majority of jurisdictions, IOLTA was created by order of the jurisdiction’s highest court. IOLTA was enacted under state legislative authority in only five states. See *supra* notes 24–25 and accompanying text. More discussion on IOLTA’s judicial enactment is included later in this section.

142. Rev. Rul. 57-345, 1957-2 C.B. 132–33.

2. Problems with IOLTA as a Tax.

IOLTA's origination in the judicial, rather than legislative, branch of state governments presents a very rudimentary constitutional issue—separation of powers.¹⁴³ During oral argument in *Brown*, counsel for the justices of the Washington Supreme Court¹⁴⁴ offered a second rationale for IOLTA programs, “namely that it amounted to a tax beyond the reach of Takings challenges. ‘Why not treat this as a valid revenue measure?’ Dellinger [counsel for the Washington Supreme Court Justices] asked. To that Justice Antonin Scalia retorted, ‘Courts have the power to tax?’”¹⁴⁵

Indeed, courts do not have the power to tax,¹⁴⁶ and a whole new can of constitutional worms may be opened in the forty-six jurisdictions¹⁴⁷ where the IOLTA program has been created by order of the jurisdiction's highest court. However, despite the likely success of such a challenge, this defect in construction has an easy remedy that would allow IOLTA programs to continue: State legislatures need only pass a statute authorizing IOLTA.

One might assume that the general public supports providing legal services for the indigent, especially when led to believe it costs them nothing. However, statutory authorization of IOLTA may be an unappealing solution for state legislatures because of the anti-tax bias of the average American citizen. After all, new taxes or increases in tax are the sorts of things that cost re-elections.¹⁴⁸

Counsel for Washington Legal Foundation alluded to IOLTA as a tax not long after *Brown* was decided.¹⁴⁹ “The IOLTA people's theory is that no-one gets hurt by [IOLTA]. But this is a tax on a small number of people.”¹⁵⁰ In essence, IOLTA is a tax imposed on a select group of people, users of legal services.

Moreover, IOLTA has a very narrow scope of application. The IOLTA “tax” is not imposed on all users of legal services, as a filing fee would be, it is

143. *See infra* note 145.

144. The Washington Supreme Court created Washington's IOLTA program, and the Legal Foundation of Washington, which receives funding from IOLTA. *See supra* note 24.

145. Mauro, *supra* note 115, at 13.

146. Courts do not have the power to tax, and any attempt to do so may be met by a constitutional challenge founded on Separation of Powers principles, as taxation is an enumerated power of the Legislative Branch under Article 1, section 8, clause 1: “The Congress shall have Power To lay and collect Taxes . . .” *U.S. CONST. art. I, § 8, cl. 1.*

147. For a listing of jurisdictions where IOLTA programs exist by virtue of court order, *see supra* note 24.

148. For a discussion of political considerations surrounding IOLTA and the probability of legislative action, *see infra* note 153 and accompanying text.

149. Richard Tromans, *Supreme Court Upholds Law Firm Legal Aid Subsidy*, *LEGAL WEEK*, Apr. 17, 2003.

150. *Id.* (quoting Richard Samp, Chief Counsel for Washington Legal Foundation, in an interview with *LEGAL WEEK*).

imposed on just those users who must, for one reason or another, have a nominal amount of funds held by their attorney for a short period of time. If IOLTA were to be construed as tax, it would likely face challenges alleging that the tax is impermissibly narrow or lacks uniformity in its application.

IV. IOLTA'S FUTURE

Picture a circus performer, teetering precariously on a thin wire cable, high above the arena floor, juggling several flaming torches at once. The performer must maintain perfect timing and perfect balance in order to sustain his lofty perch. IOLTA is like the tightrope walker, juggling several constitutional issues, taxation considerations, and a very narrowly defined program in order to continue to fund legal aid programs. How long can IOLTA maintain this delicate balancing act? Admittedly, social and political conditions surrounding IOLTA programs make it unlikely that IOLTA opponents will taste victory anytime soon.

A. *Court Invalidating IOLTA*

Having the Court invalidate IOLTA would be a dream come true for IOLTA opponents, but it is not likely to happen. “[T]he Court’s conclusion [in *Brown*] that just compensation was zero as a matter of law rests on such shaky foundations that one cannot help wondering whether it was driven simply by a desire not to invalidate IOLTA programs.”¹⁵¹

This desire not to invalidate IOLTA programs will presumably extend to any constitutional challenges opponents might bring, including First Amendment challenges. Further, the Court has already passed on one opportunity to review the free speech and forced association issues surrounding IOLTA.¹⁵²

IOLTA opponents may find marginal success in challenging IOLTA on Separation of Powers grounds as a tax enacted by the judiciary rather than the legislature, but such success is sure to be short-lived because state legislatures could easily enact statutes to remedy this defect in the program’s construction.

B. *Legislative Change to IOLTA Programs*

The factors that would be necessary to prompt legislative change invalidating IOLTA programs are not properly aligned. Specifically, IOLTA taking issues do not generate the kind of political potency that would incite legislatures to consider statutory remedies. Further, the public sentiment attached to legal aid programs and the public’s perception of the inability to

151. *The Supreme Court, 2002 Term: Leading Cases: Constitutional Law*, *supra* note 113, at 376.

152. *See supra* notes 131–33 and accompanying text.

provide other funding for legal aid programs combine to make legislatures and other elected officials unlikely to disturb the status quo by enacting statutes that radically alter the IOLTA programs as we know them despite the feasibility of new approaches to tracking collectively managed accounts made possible by technology.

Legislatures inclined to take action on the IOLTA debate might consider altering the general structure of IOLTA accounts by allowing depositors to decide which charitable institution might receive the interest generated by their principal—a method akin to the “check-box” method currently found on personal income tax return forms. The benefit of such a proposal may be that the choice feature would better position the IOLTA programs of many states to withstand potential Free Speech and Forced Association challenges. A significant shortcoming of this proposal is that it does nothing to address the tension between *Brown* and *Phillips* because unless the new variation on IOLTA allows the owner to withdraw the interest, it will not answer the questions of takings and the measure of just compensation, and any attempt to add client consent or control over the interest as a component of IOLTA programs will resurrect the tax concerns from the program’s early days.¹⁵³

C. *Advances in Technology Resulting in a Phasing Out of IOLTA*

By the very construct of the IOLTA program, it may eventually become a casualty of rapid technological change. Technological changes in software for tracking sub-accounts have been rapid, and these advances reduce the costs of administering and tracking so that fewer and fewer accounts fall into the category of not being able to generate net interest and therefore subject to IOLTA rules requiring their deposit into pooled accounts.¹⁵⁴ But, transaction costs will never be reduced to zero. Therefore, some deposits will always have to go into IOLTA accounts, albeit the number will be increasingly small until it hits that “floor.” Given that IOLTA opponents fought all the way to the Supreme Court over \$4.96 in *Brown*, it would not appear that the “dog in the manger” will give up even then.

D. *Client Consent Clauses*

From the early days of the IOLTA program, it has been suggested that adding a “client consent” clause to attorney retainer agreements or another form of client consent to participation in the IOLTA program would provide a

153. See *infra* notes 155–63 and accompanying text.

154. See *In re Ind. State Bar Ass’ns Petition to Authorize a Program Governing Interest On Lawyers’ Trust Accounts*, 550 N.E.2d 311, 314 (Ind. 1990) (The Indiana Supreme Court suggested that technology as of 1990 was sufficient to make the tracking of individual sub-accounts “simple and inexpensive.”).

route for escaping the Fifth and First Amendment challenges to IOLTA.¹⁵⁵ “Yet, the concept of a consensual IOLTA program is no panacea to the ailing IOLTA. Revising the IOLTA concept to create a system reliant on client consent would resurrect the tax-related concerns IOLTA programs faced prior to their initial implementation.”¹⁵⁶

Revenue Ruling 81-209 made clear that IOLTA interest would not be imputed to the owner of the principal under the assignment of income doctrine, granting this exception for IOLTA programs specifically because depositors had absolutely no control over the disposition of the interest.¹⁵⁷ During oral argument of *Brown*, Justice Ginsburg suggested that allowing the owner of the principal control over the disposition of the interest would transform the interest into taxable income.¹⁵⁸

Presumably, a consent component to IOLTA programs would necessitate another exception from the Internal Revenue Service (“IRS”), an exception that seems unlikely to be granted given the rationale that persuaded the IRS to grant the original exception.¹⁵⁹ An alternative to an IRS exception for IOLTA income would be a congressional amendment to the Internal Revenue Code, providing a statutory deduction for depositors who consent to participation in IOLTA.¹⁶⁰ Congress has already provided income tax deductions for charitable contributions,¹⁶¹ and IOLTA could be viewed in that same light, as a deduction that “encourages private funding of organizations providing ‘essential services’ but which the government alone cannot afford to finance.”¹⁶²

155. Lacey, *supra* note 62, at 931. If IOLTA programs were to operate on a consensual basis, there could be no taking of the interest, the interest would be given, and thus no need to determine just compensation; there could be no forced association claim because the association would be voluntary.

156. *Id.*

157. Rev. Rul. 81-209, 1981-2 C.B. 16–17. The Internal Revenue Service does not classify IOLTA-generated interest as income for federal income tax purposes “so long as the client has no control over the decision whether to place the funds in the IOLTA account and does not designate who will receive the interest generated by the account.” *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 162 (1998).

158. Mauro, *supra* note 115, at 13.

159. Lacey, *supra* note 62, at 932–33.

The IRS’s primary concern in granting the original income exclusion for IOLTA interest was the potential for unforeseeable tax-avoidance schemes that could develop incidental to the exclusion. IOLTA promoters were able to allay the IRS’s concerns by structuring the program such that there was absolutely no control by clients over the use of their funds.

Id. (footnote omitted).

160. *Id.* at 933.

161. I.R.C. § 170(a) (2000) (authorizing income tax deductions for charitable contributions).

162. Lacey, *supra* note 62, at 934.

Although some legislative maneuvering might solve the tax problem of a client consent component to IOLTA, the program will still face other tax issues, including its judicial creation.¹⁶³

E. Alternatives to IOLTA

If IOLTA as we know it were declared unconstitutional by the Court, how might legal aid be funded? It is possible that the state courts could supplement lost IOLTA funding with increases in filing fees or bar association dues.

Indeed, the Illinois Supreme Court recently raised the state's annual licensing fee by \$42.00 in order to help offset a shortage in IOLTA income caused by declining interest rates.¹⁶⁴ Missouri took another approach, enacting a statute that created a "basic civil legal services fund."¹⁶⁵ Revenue generated by increased filing fees for all actions other than non-alcohol related traffic violations is channeled into the basic civil legal services fund.¹⁶⁶

Providing legal aid for indigent civil litigants will always be a problem, and thus, courts will always be searching for new and creative funding alternatives. If IOLTA were to be abolished, it is likely that courts would use increased fees to cover the cost of legal aid programs.

V. ACCEPTING IOLTA'S THEORETICAL DEFICIENCIES IN EXCHANGE FOR A JUSTICE SYSTEM ACCESSIBLE TO ALL

Times have certainly changed since IOLTA was created in the early 1980s. Several of the original justifications for the program, specifically the expense and difficulty of tracking and paying out meager amounts of interest on numerous accounts, are less compelling today as a result of technological advances. IOLTA becomes more objectionable as technological changes undermine its inceptive rationale, yet the alternatives discussed above may be inadequate.

Nevertheless, IOLTA's result is desirable. Providing legal services to the poor, making the justice system of this country available to all of its citizens, is an important cornerstone of democracy in action. And so it may be that we must accept the theoretical deficiencies of IOLTA's design in exchange for a

163. For a discussion of IOLTA's infirmities when viewed as a tax, see *supra* notes 137-50 and accompanying text.

164. Crimmins, *supra* note 120, at 1. "Net interest on IOLTA accounts, due to declining interest rates, had fallen from \$3.9 million in fiscal 2001 to about \$2.3 million in fiscal 2003." *Id.*

165. MO. REV. STAT. § 488.031 (2003).

166. Filing fees above and beyond other fees authorized in separate statutes are paid to a specially created basic civil legal services fund. The new filing fees are \$20 for Supreme Court and Court of Appeals filings, \$10 for Circuit Court filings, and \$8 for Associate Circuit Court filings. *Id.* For a thorough analysis of whether these additional filing fees will withstand constitutional scrutiny, see Jeanne M. Janchar, Comment, *Give Me Your Poor . . . In Support of the Constitutionality of the Proposed Legal Services Fund*, 71 UMKC L. REV. 863 (2003).

solution to the important problem of ensuring that all citizens have access to the justice system designed to protect them.

Perhaps it is time for the dog in the manger to realize that the hay just isn't worth fighting for. To be sure, IOLTA will remain a matter of principle, principal, and interest, in more ways than one.

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