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IOLTAs Unmasked: Legal Aid Programs' Funding Results in Taking of Clients' Property

Kevin H. Douglas

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IOLTAs Unmasked: Legal Aid Programs' Funding Results in Taking of Clients' Property

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I. INTRODUCTION

States have implemented Interest on Lawyers' Trust Account programs ("IOLTAs")[1] to generate revenue for legal aid. IOLTAs raise money through the creation of an economy of scale by directing attorneys to place clients' trust funds that could not profitably draw interest in individual checking accounts into an unsegregated interest-bearing bank account ("IOLTA account").[2] By significantly reducing the expense that results from opening and maintaining separate accounts for individual clients, the IOLTA account profitably draws interest when individual client accounts could not.[3] The interest generated from the IOLTA account is used to fund legal aid programs according to the specifications in the rules of the particular state's IOLTA, while the clients' principal is returned on demand to the attorney. Following the implementation of the original program in Florida in 1981, forty-nine states and the District of Columbia have adopted IOLTAs.[4] These programs currently raise $100 million annually in funding for legal aid.[5]

This Note examines whether a state's expropriation of the interest generated from clients' principal in IOLTA accounts results in

1. The acronym "IOTA" ("Interest on Trust Account") is also commonly used in some states to refer to these programs. For consistency, this Note will use the term "IOLTA" to refer to all such programs, regardless of the appropriate acronym for a specific state's program.

2. *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*, 94 F.3d 996, 998 (5th Cir. 1996), cert. granted as *Phillips v. Washington Legal Foundation*, 117 S. Ct. 2535, 138 L. Ed. 2d 1011 (1997).

3. *Cone v. State Bar of Florida*, 819 F.2d 1002, 1006 (11th Cir. 1987).

4. David A. Price, *Legal Services' Stealth Funding*, Investor's Business Daily A1 (October 15, 1996).

5. Joyce Price, *Ruling May Imperil Legal Aid for Poor*, Washington Times A6 (September 19, 1996) (quoting Leroy Cordova, Executive Director of the Texas IOLTA program).

an unconstitutional taking of clients' property.[6] Part II provides the historical and legal background of IOLTAs and discusses the often cursory judicial dismissal of the takings issue at the state level and the rejection of takings claims by both the First[7] and Eleventh[8] circuits. It then analyzes the Fifth Circuit's unprecedented holding in *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*,[9] the first case at any level to hold that clients possess a property interest in IOLTA funds. Part III examines whether clients have a constitutionally-recognizable property interest in IOLTA revenue. Particular attention is given to the claim that the inability of clients to benefit economically from IOLTA-generated interest precludes the finding of a property right in IOLTA funds. Part IV discusses whether, given the fact that clients do possess a property interest in IOLTA revenue, the government's[10] expropriation of IOLTA

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6. The Fifth Amendment Takings Clause, made applicable to the states through the Fourteenth Amendment, provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const., Amend. V. In addition to bringing takings claims, clients have often alleged that IOLTAs violate their first amendment right to free speech by compelling them, through the programs' funding of legal aid programs, to support political speech with which they disagree. See notes 56 and 64 for two such cases. Although a discussion of the constitutionality of IOLTAs under the First Amendment is beyond the scope of this Note, the threshold issue under both free speech and takings challenges is the same: Whether clients possess a property interest in IOLTA revenue. Since most courts have held that clients lack a property interest in IOLTA income, jurists typically have not had cause to determine whether the programs would violate the first amendment rights of clients if the state did expropriate clients' property under IOLTAs. See, for example, *Washington Legal Foundation v. Massachusetts Bar Foundation*, 993 F.2d 962, 980 (1st Cir. 1993) (concluding that Massachusetts's IOLTA did not violate the claimants' first amendment rights since IOLTA income "belongs te no one"). But see *Texas Equal Access*, 94 F.3d at 1004 (holding that since clients possess a property interest in IOLTA revenue, Texas's IOLTA violated the claimants' first amendment rights if the clients did not consent to the confiscation). Because of the highly political nature of many of the causes supported by IOLTA-funded legal aid programs, if clients are found to possess a property interost in program revenue, the Fifth Circuit's conclusion that IOLTAs violate the first amendment rights of clients is likely correct. See *Keller v. State Bar of California*, 496 U.S. 1, 16 (1990) (holding that the State Bar's compulsory use of attorneys' funds to finance ideological activities such as endorsing a nuclear weapons freeze initiative violated attorneys' first amendment rights). See also Price, Investor's Business Daily at A1 (cited in note 4) (documenting some controversial advocacy engaged in by legal aid lawyers, including an attempt to stop welfare reform in several states).

7. *Massachusetts Bar Foundation*, 993 F.2d at 962.

8. *Cone*, 819 F.2d at 1002.

9. 94 F.3d 996 (5th Cir. 1996), cert. granted as *Phillips v. Washington Legal Foundation*, 117 S. Ct. 2535, 138 L. Ed. 2d 1011 (1997).

10. With a few narrow and irrelevant exceptions, the Constitution only protects individual rights against government action. Thomas E. Baker and Robert E. Wood, Jr., *"Taking" A Constitutional Look at the State Bar of Texas Proposal to Collect Interest on Attorney-Client Trust Accounts*, 14 Tex. Tech L. Rev. 327, 337 (1983). Courts that have adjudicated the constitutionality of IOLTAs have given no indication that the programs do not involve state action. Because of the state's underlying role in establishing IOLTAs, the programs almost certainly will not be able

proceeds amounts to an unconstitutional taking of clients' property. Part V analyzes the constitutional rationale for invalidating IOLTAs in the face of claims that the abrogation of these programs would have dire consequences for the provision of adequate legal services to the indigent. Part VI summarizes why IOLTAs result in an unconstitutional taking of clients' property.

II. HISTORICAL AND LEGAL BACKGROUND

A. Implementation of IOLTAs

Although other countries have used similar programs since the 1960s,[11] the development of IOLTAs in the United States was only made possible by the passage of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA").[12] The Act authorized the creation of negotiable order of withdrawal ("NOW") accounts, which operate as interest-bearing checking accounts.[13] The Act allows individuals, certain charitable non-profit organizations, and public entities to use these accounts.[14]

Attorneys hold clients' funds in trust under a variety of circumstances, including situations in which money is required for filing fees, real estate closing costs, or personal injury settlement drafts.[15] Prior to the passage of DIDMCA, attorneys held trust money in non-interest bearing accounts, giving banks interest-free use of the

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to avoid constitutional scrutiny on the ground that no state action is present. Furthermore, in the majority of states in which attorney participation in IOLTAs is mandated, state action seems incontestable. For a discussion of the stato action issues relating to IOLTAs, see id. at 337-39.

11. Several British Commonwealth countries have successfully raised money for legal aid through IOLTA-type programs since the 1960s. Kenneth Paul Kreider, Note, *Florida's IOLTA Program Does Not "Take" Client Property For Public Use:* Cone v. State Bar of Florida, 57 U. Cin. L. Rev. 369, 369 (1988).

12. 94 Stat. 132, 146 (1980), codified at 12 U.S.C. § 1832 (1989).

13. *Texas Equal Access,* 94 F.3d at 998.

14. 12 U.S.C. § 1832(a)(2).

15. Paul Marcotto, *Big Interest in Small Change,* ABA Journal 70, 71 (July 1, 1987).

funds.[16] The legalization of NOW accounts allowed attorneys to hold eligible clients' funds in interest-bearing checking accounts.[17]

Not all NOW-eligible clients are able to draw interest profitably, however, since the administrative expense of opening and maintaining individual NOW accounts for some clients will exceed the interest accruing to these accounts.[18] The developers of IOLTAs recognized that attorneys did not place the trust funds of these clients into individual interest-bearing accounts, but instead placed the funds into a non-interest bearing pooled account held in the lawyer's name.[19] These developers wanted to shift the benefit of the implicit interest generated from such pooled accounts from depository institutions to legal aid organizations.[20]

By state supreme court decree, in 1981 Florida became the first state to implement an IOLTA.[21] Other states soon followed Florida's

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16. *Texas Equal Access*, 94 F.3d at 998. These trust funds could not be placed in interest-bearing savings accounts because attorney ethics rules demanded that they be immediately available, id., and federal law prohibited banks from paying interest on demand accounts. Depositery Institutions Deregulation and Monetary Control Act, S. Rep. No. 96-368, 96th Cong., 2nd Sess. 5, reprinted in 1980 U.S.C.C.A.N. 236, 240. See *Massachusetts Bar Foundation*, 993 F.2d at 968 (noting the ethical requirement that attorneys make clients' trust funds immediately available for reimbursement).

17. Lawyers have generally been recognized as being under an ethical obligation to place clients' trust funds that can profitably draw interest into interest-bearing accounts. *Matter of Indiana State Bar Association's Petition to Authorize a Program Governing Interest on Lawyers' Trust Accounts*, 550 N.E.2d 311, 315 (Ind. 1990) (quoting *In tho Matter of Interest in Trust Accounts*, 402 So.2d 389, 399 (Fla. 1981) (Boyd, J., dissenting)). In addition, the American Code of Professional Responsibility has been interpreted as barring lawyers from charging clients for costs incurred in holding clients' funds. Peter M. Siegel, *Interest on Lawyers' Trust Account Programs: Do They "Take" "Property" of the Client?*, 36 U. Fla. L. Rev. 674, 679 & n.14 (1984). Thus, attorneys are required to bear the costs associated with maintaining NOW accounts for their clients. *Texas Equal Access*, 94 F.3d at 998. See note 127 for a discussion of how placing the costs of NOW accounts on attorneys might create a property interest in the accounts by clients.

18. Expenses include the costs of establishing and maintaining an account, service charges, accounting costs, and tax reporting costs. *Texas Equal Access*, 94 F.3d at 999 (quoting Texas Rules of Court—State, Rules Governing the Operation of the Texas Equal Access to Justice Program rule 6 (West 1996)).

19. *Massachusetts Bar Foundation*, 993 F.2d at 968. For a discussion of the potentially improper benefits attorneys sometimes receive for giving banks interest-free use of clients' money, see Rachael Scovill Worthington, Note, *IOTA—Overcoming Its Current Obstacles*, 18 Stetson L. Rev. 415, 428-30 (1989).

20. *Texas Equal Access*, 94 F.3d at 998.

21. Kreider, 57 U. Cin. L. Rev. at 369 (cited in note 11). The successful implementation of IOLTAs was predicated on the premulgation of an I.R.S. ruling that exempted IOLTA revenue from the taxable income of clients. Rev. Rul. 81-209, 1981-2 C.B. 16. Because of concern over setting a precedent for tax-avoidance schemes regarding the assignment of income, wherehy taxpayers could shift their income to other entities in whose control the income either would not be taxed or would be taxed at a lower rate, the I.R.S. issued Ruling 81-209, which provided that clients would not be taxed on the interest earned in IOLTA accounts so long as they had no

lead, and currently forty-nine states and the District of Columbia utilize IOLTAs to raise money for legal aid.[22] A few states have adopted their IOLTA through legislative action, but most states, like Florida, have authorized their program via judicial decision.[23]

IOLTA provisions typically require attorneys participating in the program[24] to make a good faith judgment regarding whether their clients' funds are so nominal in amount or will be held for such a short period of time that the money will be unable to draw interest profitably in an individual interest-bearing account.[25] If a participating attorney decides that this condition is met, she is required to place the client's funds into an IOLTA-designated unsegregated interest-bearing NOW account.[26] By eliminating the expense associated with opening and maintaining an individual NOW account for each client, an IOLTA account is able to draw interest profitably when accounts held individually for IOLTA-eligible clients could not.[27] A designated non-profit organization, often the state bar association, receives the interest generated from the IOLTA account[28] and allocates it among chosen forms of legal aid.[29]

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choice whether to participate in the program. *Matter of Interest on Trust Accounts*, 402 So.2d 389, 390-91 (Fla. 1981). The I.R.S. had no reservations in approving attorney-voluntary IOLTAs so long as client control was entirely removed. Kreider, 57 U. Cin. L. Rev. at 377 (cited in note 11). To prevent the anomalous situation of clients being taxed on income in which they purportedly did not have a property interest, IOLTA provisions give clients no control over whether their principal will be placed in an IOLTA account. See note 129 for an extended discussion of this anomaly.

22. Price, Investor's Business Daily at A2 (cited in note 4). Indiana is the only state not to have implemented an IOLTA. Id. See notes 42-46 and accompanying text for an explanation of the Indiana decision.

23. Price, Investor's Business Daily at A2 (cited in note 4).

24. Attorney participation is mandatory in 27 states. Id. "Opt out" programs, in which attorneys must participate unless they successfully petition to be exempted, exist in 19 states. Id. Three states have voluntary programs. Id. To raise more money for legal aid, many states have increased the level of compulsory attorney participation. Worthington, 18 Stetson L. Rev. at 421-24 (cited in note 19). Because of the reluctance of many atterneys to place clients' funds into IOLTA accounts, states that have mandated attorney participation have seen a significant increase in IOLTA revenue. See *Texas Equal Access*, 94 F.3d at 999 (noting Texas's IOLTA yielded $10 million annually under a mandatory program in the early 1990s, as compared to one million dollars under a voluntary program in 1988).

25. See, for example, *Texas Equal Access*, 94 F.3d at 999 (quoting Tex. Gov't Code Ann. tit. 2, subtit. G, app. A, art. 11 § 5 (West Supp. 1995)) (describing the Texas IOLTA's requirement that attorneys place into an IOLTA account clients' funds that "are nominal in amount or are reasonably anticipated to be held for a short period of time").

26. Id.

27. *Cone*, 819 F.2d at 1006.

28. Making non-profit organizations the sole recipients of the interest generated from clients' principal enables the IOLTA to use a NOW account without violating DIDMCA restrictions on NOW eligibility. Id.

29. In New Jersey, for example, Legal Services receives 75% of IOLTA money, the New Jersey State Bar Foundation receives 12.5%, and various grants account for the remaining

Since the amount of IOLTA-eligible funds is highly sensitive to changes in interest rates, IOLTAs are an inherently unstable source of revenue.[30] Nevertheless, the programs comprise a very important source of funding for legal aid. After federal funding, IOLTAs currently constitute the second largest source of funding for groups that provide legal services to the poor,[31] generating about $100 million nationally in annual revenue.[32] IOLTAs' financial support of legal aid has been rendered even more consequential as the result of Congress's recent funding cuts for legal services,[33] and legal aid supporters warn of the severe consequences that would result from the invalidation of IOLTAs.[34]

B. Judicial Treatment of the Takings Issue

1. State Courts

Most states that have judicially adopted IOLTAs have implemented their programs without a published opinion.[35] In those states in which IOLTAs have been implemented or upheld in published

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12.5%. Dana Coleman, *IOLTA Funding: Trouble Looming*, New Jersey Lawyer 1, 14 (Sept. 23, 1996).

30. See Janet Elliot and Robert Elder, Jr., *Fifth Circuit Casts Doubt on IOLTA*, Texas Lawyer 1, 18 (September 23, 1996) (noting that declining interest rates contributed to a decrease in the annual revenue generated by Texas's mandatory IOLTA from $10 million in the early 1990s to five million dollars in 1996).

31. Id.

32. Price, Washington Times at A6 (cited in note 5) (quoting Leroy Cordova, Executive Director of the Texas IOLTA pregram). By comparison, federal funding for legal services in fiscal 1996 was $278 million. Price, Investor's Business Daily at A1 (cited in note 4).

33. The 104th Congress cut the funding of Legal Services Corp., the federally-established organization that distributes legal aid outlays, by 30% for fiscal 1996. Id. These cuts have resulted in severe hardship for legal aid greups. See *Attorneys Do Battle Over LSC Cuts*, The Lawyer 5 (September 3, 1996) (noting speculation that federal cuts would result in one-third of Legal Services' attorneys being laid off and at least one-fourth of the organization's law offices being closed). Moreover, the 104th Congress placed additional restrictions on the manner in which federally-appropriated legal aid funds could be used, precluding Legal Services' attorneys from, among other things, filing class actions suits or representing prisoners. William Booth, *Attacked as Left-Leaning, Legal Services Suffers Deep Cuts*, Washington Post A1, A6 (June 1, 1996).

34. See Coleman, New Jersey Lawyer at 15 (cited in note 29) (noting comment of New Jersey President of Legal Services that the consequences of a Supreme Court holding that IOLTAs were nnconstitutional "would be devastating to Legal Services").

35. *Texas Equal Access*, 94 F.3d at 1001 n.30.

judicial opinions,[36] courts have typically given cursory treatment to the constitutional issues posed by the programs.[37]

With one exception, state courts analyzing the constitutionality of IOLTAs have uniformly rejected the argument that the programs result in an unconstitutional taking of clients' property on the ground that clients do not have a property interest in IOLTA income.[38] These courts have found that a property right does not exist in IOLTA revenue since such revenue has no net value to clients as a result of the fact that IOLTA provisions only mandate the surrender of trust funds that are unable to draw interest profitably in individual accounts.[39] Courts have emphasized that, prior to the implementation of IOLTAs, the interest presently generated by these programs was unavailable to clients.[40] Some courts have further noted that IOLTAs simply result in a shift of earnings from depository institutions to legal aid beneficiaries, since previously, banks had been given what amounted to an interest-free loan of trust funds that could not profitably draw interest.[41]

Indiana is the lone state that has failed to adopt an IOLTA. In *Matter of Indiana State Bar Association's Petition to Authorize a Program Governing Interest on Lawyers' Trust Accounts*,[42] the Indiana Supreme Court refused to implement a program as the result of both constitutional and ethical concerns. While not directly addressing the issue of whether IOLTAs constituted an unconstitutional taking, the court indicated that IOLTAs violated the long-established legal maxim that the owner of property is the owner of the income that his property

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36. The state courts that have analyzed IOLTAs in published opinions include *Carroll v. State Bar*, 166 Cal. App. 3d 1193 (1985); *Petition by Massachusetts Bar Association*, 478 N.E.2d 715 (Mass. 1985); *Matter of Interest on Lawyers' Trust Accounts*, 675 S.W.2d 355 (Ark. 1984); *Matter of Interest on Lawyers' Trust Accounts*, 672 P.2d 406 (Utah 1983) (per curiam); *Petition of Minnesota State Bar Association*, 332 N.W.2d 151 (Minn. 1982); *Petition of New Hampshire Bar Association*, 453 A.2d 1258 (N.H. 1982) (per curiam); *Matter of Interest on Trust Accounts*, 402 So.2d 389 (Fla. 1981).

37. See *Petition of Minnesota State Bar Association*, 332 N.W.2d at 158 (concluding without explanation that clients do not possess a property interest in IOLTA revenue).

38. See *Texas Equal Access*, 94 F.3d at 1001 & n.30 (collecting cases).

39. See *Matter of Interest on Trust Accounts*, 402 So.2d at 395 (stating that "no client is compelled to part with 'property' by reason of a state directive, since the program creates income where there had been none before, and the income thus created would never benefit the client under any set of circumstances").

40. See *Petition of New Hampshire Bar Association*, 453 A.2d at 1261 (noting that IOLTAs create a source of income that would not otherwise exist).

41. See *Petition by Massachusetts Bar Association*, 478 N.E.2d at 718 (quoting *Matter of Interest on Lawyers' Trust Accounts*, 675 S.W.2d at 357) (emphasizing that prior to the implementation of IOLTAs, the use of IOLTA-eligible principal "simply rebound[ed] to the benefit of the depository institution").

42. 550 N.E.2d 311 (Ind. 1990) (per curiam).

produces.[43] The court also disputed the argument that IOLTAs simply amount to a shift in windfall profits from depository institutions to legal aid beneficiaries.[44] The court asserted that, since banks typically furnish non-interest bearing accounts at no charge to attorneys, depository institutions' use of funds in non-interest bearing accounts represents the implied payment for services rendered.[45] Accordingly, the court concluded that depository institutions receive no unjust enrichment under these circumstances.[46]

The Indiana Supreme Court's concerns regarding IOLTAs have not been shared by other state courts, however. Focusing on the ability of IOLTAs to create income when no income existed before, the state judiciaries throughout the rest of the nation have implemented IOLTAs, with little constitutional critique, to raise revenue for legal aid programs believed by judges to be in need of increased funding.

2. Federal Courts

a. Rejection of the Takings Argument by the First and Eleventh Circuits

Florida's IOLTA was the first program to be challenged in federal court. In *Cone v. State Bar of Florida*,[47] the Eleventh Circuit dismissed a client's takings claim against Florida's voluntary IOLTA program on the ground that the interest earned on the client's portion of the IOLTA account was not the client's property.[48]

The *Cone* court stated that to possess a constitutionally-protected property interest, a claimant must show a "legitimate claim of

43. Id. at 311-12.
44. Id. at 314.
45. Id. (quoting Thomas K. Milligan, *IOLTA—another view*, Res Gestae 194, 194 (Oct. 1983)).
46. Id. The court also recognized problems regarding the depositor eligibility requirements of IOLTAs that pose serious constitutional problems. The court asserted that trust funds that could not profitably draw interest in individual NOW accounts, and thus be eligible for deposit in an IOLTA account under the usual definition of IOLTA eligibility, could often profitably draw interest for clients in collective accounts through the process of subaccounting. Id. See Part III.C for a more extensive analysis of subaccounting.
47. 819 F.2d 1002 (11th Cir. 1987).
48. Id. at 1007. See note 24 for a discussion of voluntary, as opposed to mandatory, participation in IOLTA accounts.

entitlement" to the property based on substantive law.[49] The court found that the plaintiff lacked this entitlement to IOLTA income because such income lacks net value to clients.[50] The court found that this lack of net value rendered inapplicable the common law rule that the owner of principal is the owner of the interest generated by such principal.[51] The court did not cite any Supreme Court precedent for its assertion that net value was a prerequisite for possessing a property interest.[52]

The court rejected the plaintiff's claim that her property interest was established by I.R.S. Ruling 81-209,[53] which held that clients would not be taxed on IOLTA income only if they had no choice but to participate in the program.[54] The court reasoned that the "assignment of income" doctrine on which the I.R.S. ruling was based was designed not to determine the identity of the legal owner of property, but to assure that people were being properly taxed on earned income.[55]

The First Circuit, in *Washington Legal Foundation v. Massachusetts Bar Foundation*,[56] rejected a takings claim brought by clients against Massachusetts' mandatory IOLTA program. In *Massachusetts Bar Foundation*, the plaintiffs, although conceding that they did not possess a property interest in IOLTA proceeds, made the related claim that they possessed a protected property interest in controlling and excluding others from the beneficial use of their principal.[57] The First Circuit rejected the plaintiffs' claim on the ground that, while several Supreme Court cases had established the existence of a constitutionally-protected right to exclude others from real prop-

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49. *Cone*, 819 F.2d at 1004 (citing *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)). Although *Roth* was a procedural due process case, its definition of what constitutes a constitutionally-cognizable property interest has been cited in takings cases as well. See *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 161 (1980) (quoting *Roth* as authority for the law regarding property in a takings case).

50. *Cone*, 819 F.2d at 1007. The court accepted the district court's conclusion that no feasible banking procedures existed that would allow the client's principal to draw interest profitably in a pooled collective account held in her attorney's name. Id. at 1006. See Part III.C. for an exploration of how a client might successfully collect interest from a pooled account.

51. *Cone*, 819 F.2d at 1004. See Part III.A.1 for a discussion of the common law rule regarding principal and interest.

52. *Cone*, 819 F.2d at 1006-07.

53. Id. at 1007 n.8. See notes 21, 129 and accompanying text for further discussion of the IRS ruling.

54. Rev. Rul. 81-209, 1981-2 C.B. 16.

55. *Cone*, 819 F.2d at 1007 n.8.

56. 993 F.2d 962 (1st Cir. 1993). Both clients and attorneys also alleged that the program violated their first amendment right of free speech. As noted earlier, the free speech issue is beyond the scope of this Note. See note 6 for a brief discussion of the free speech issue.

57. Id. at 974.

erty, no precedent supported the existence of a similar constitutional right to exclude others from intangible property.[58]

In dicta, the *Massachusetts Bar Foundation* court analyzed whether, if the clients could establish a property interest in the beneficial use of their principal, the program resulted in an unconstitutional taking.[59] The court rejected the plaintiffs' argument that the government's action amounted to a per se taking, noting that categorical takings had only been found in cases involving physical invasions of real property, not in cases involving interference with intangible property rights.[60] Consequently, the First Circuit indicated it would resolve the takings issue under the ad hoc standards enunciated in *Penn Central Transportation Co. v. New York City*.[61] The court stated that, as the result of the IOLTA funds' lack of net value to clients, Massachusetts's program did not have an adverse economic impact on the claimants and did not interfere with the claimants' investment-based expectations. Therefore the court concluded that no taking had occurred under the *Penn Central* test.[62]

b. Washington Legal Foundation v. Texas Equal Access to Justice Foundation: *A Bold Break from Precedent*

The Fifth Circuit's holding in *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*[63] gravely threatened the continued operation of IOLTAs within its jurisdiction. In *Texas Equal Access*, clients alleged that Texas's mandatory IOLTA resulted in an unconstitutional taking of their property.[64] The three judge panel unanimously vacated the district court's dismissal of the plaintiffs' claim and held that clients possessed a property interest in IOLTA

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58. Id. at 974 & n.2. Justice Breyer was a member of the three judge panel that unanimously upheld the constitutionality of Massachusetts's IOLTA in *Massachusetts Bar Foundation*, a fact which may of some significance when the constitutionality of IOLTAs is litigated before the Supreme Court. Id. at 968.

59. Id. at 974.

60. Id. at 975. See Part IV.A for a discussion of per se takings.

61. Id. at 974 (citing *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978)). The Court in *Penn Central* analyzed the following factors to determine whether a taking had occured: (1) the economic impact of the regulation, (2) the extent to which the regulation interfered with the distinct investment-based expectations of the claimant, and (3) the character of the government action. *Penn Central*, 438 U.S. at 124.

62. *Massachusetts Bar Foundation*, 993 F.2d at 976. See notes 158-60 and accompanying text for a closer examination of IOLTAs under the *Penn Central* test.

63. 94 F.3d at 996.

64. The suit also alleged that Texas's program amounted to a violation of both clients' and attorneys' first amendment rights. Id. at 999.

revenue.[65] The court remanded the case and indicated that to prevail on the takings claim, the clients would simply have to show that they did not consent to Texas's expropriation of their IOLTA-generated interest.[66]

The court began its analysis by noting that state law defines property under the United States Constitution and that Texas follows the traditional rule that the interest earned from principal belongs to the owner of the principal.[67] The court asserted that the IOLTA proceeds' lack of net value to clients did not vitiate this long-held rule, citing *Loretto v. Teleprompter Manhattan CATV Corp.*[68] for the proposition that the value of expropriated property does not affect the determination of whether a property interest exists in such property.[69] The court rejected the defendants' contention that *Loretto* was inapplicable in the IOLTA context because IOLTAs concern the confiscation of money rather than real property.[70]

The Fifth Circuit noted flaws in the reasoning of past courts that had upheld the constitutionality of IOLTAs. The court asserted that since depository institutions typically pay interest first and then deduct fees, the focus of the *Cone* court on the lack of net value of IOLTA revenue to clients was inapposite.[71] The court reasoned that a property interest attaches the moment that interest accrues and that the bank's subsequent deduction of fees has no cleansing effect on this initial attachment.[72]

The Fifth Circuit also discussed the peculiarity made apparent by the I.R.S. ruling preventing clients from being taxed on IOLTA revenue only if they are given no control over whether their principal is placed in an IOLTA account.[73] The court explained that if a state created an IOLTA program in which clients were given a choice regarding which charitable beneficiary received their principal, a highly anomalous situation would arise because clients could be taxed on income in which they purportedly did not have a property interest.[74]

65. Id. at 1005.

66. Id. at 1004. The court indicated that the plaintiffs would have to meet a similar standard to prevail on the first amendment claim. Id. See note 6 for more discussion of the potential first amendment claim.

67. Id. at 1000. See Part III.A.1 for further exploration of this principle.

68. 458 U.S. 419 (1982).

69. *Texas Equal Access*, 94 F.3d at 1002 n.38 (citing *Loretto*, 458 U.S. at 436-37).

70. Id.

71. Id. at 1003. See text accompanying notes 49-52 for a discussion of the *Cone* court's reasoning.

72. *Texas Equal Access*, 94 F.2d at 1003.

73. Id. See notes 21, 129 for more discussion on the IRS Ruling.

74. Id.

The court further expressed the practical fear that holding that clients lacked a property interest in IOLTA proceeds could set a precedent for government agencies to take advantage of similar loopholes in banking regulations in order to expropriate unclaimed interest for programs in need of funding.[75]

The Fifth Circuit gave less attention to the question of whether, given its finding that clients possessed a property interest in IOLTA income, the Texas program resulted in an unconstitutional taking. The court did not explicitly address the question of whether the IOLTA's confiscation of clients' property constituted a per se taking or instead should be analyzed under the multi-factor *Penn Central* takings test. The court's application of the per se takings rule, however, was made clear by its direction on remand to the district court that the plaintiffs would prevail on the takings claim simply by a showing that "the taking was against the will of the property owner."[76]

III. CLIENTS POSSESS A PROPERTY INTEREST IN IOLTA REVENUE

Prior to *Texas Equal Access*, two federal courts and every state court but one that had discussed the issue had held that clients did not possess a property interest in IOLTA revenue. Consequently, most courts have not needed to decide the issue of whether the confiscation of clients' property under IOLTAs amounts to an unconstitutional taking. Notwithstanding the prevailing judicial view, however, courts that have upheld the constitutionality of these programs have incorrectly resolved the determinative issue by holding that clients do not have a property interest in IOLTA revenue.

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75. Id. at 1003-04.

76. Id. at 1004. See text accompanying notes 161-63 and Part IV.B.2 for more explanation of the significance of client consent. In the Fifth Circuit's denial of a rehearing en banc, tbe dissent took issue with several aspects of the panel's opinion. The dissent made the familiar argument that claimants must economically benefit from preperty in which a constitutionally protected interest is claimed. *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*, 106 F.3d 640, 642-44 (5th Cir. 1997) (per curiam) (Benavides, J., dissenting). More specifically, the dissent asserted that the panel overlooked the distinction between "accrued interest" and "interest proceeds" and contended that *Webb's Fabulous Pharmacies* suggested that a property interest only existe in the latter. Id. at 642-43. Moreover, the dissent stated that, as the result of the IOLTA funds' lack of net value to clients, the *Texas Equal Access* plaintiffs possessed no compensable claim for "just compensation," and thus had no remedy against the program. Id. at 644. See Part IV.B.3 for an extended discussion of appreppriate compensation. Finally, the dissent criticized the panel for not explicitly stating which takings standard it was applying, the per se rule or the *Penn Central* ad hoc test, and asserted that the panel's opinion left open the question of which criterion the district court should apply on remand. Id. at 645.

A. State Law Defines Property under the Federal Constitution

The Supreme Court has not attempted to give a uniform definition of what constitutes property under the United States Constitution.[77] Instead, in both takings[78] and due process[79] cases, the Court has emphasized that property interests are defined by an independent source such as state law. The Court has stated that a claimant must have a "legitimate claim of entitlement" to property for it to be protected under the Constitution and that a claimant's "unilateral expectation" in property will not be constitutionally recognized.[80] Some courts have seized upon this language when rejecting the existence of a property interest in IOLTA proceeds,[81] even though the language seemingly only reaffirms the Court's position that a constitutionally valid property interest must be based on an independent legal source.[82]

1. Common Law Rule that Interest Follows Principal

The traditional rule, deeply established in Anglo-Saxon jurisprudence, is that an owner of property owns the income that the property produces.[83] At common law, the right to receive income from real property was ownership, and this concept was readily transferable into the personal property arena.[84] Courts continue to apply the time-honored principle that interest follows principal when defining what constitutes property under state law.[85]

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77. At least one commentator has argued that the Constitution, not state law, should define property. See generally Frank I. Michelman, *Property, Utility and Fairness: Comments to the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967).

78. In its adjudication of a takings claim, the *Webb's* Court stated that "[p]roperty interests . . . are not creatod by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . ." *Webb's*, 449 U.S. at 161 (alterations in original) (quoting *Roth*, 408 U.S. at 577).

79. *Roth*, 408 U.S. at 577.

80. Id.

81. See note 86.

82. See Siegel, 36 U. Fla. L. Rev. at 713 (cited in note 17) (stating that "[a]n entitlement exists if the fund owner can identify substantive law that supports his assertion of a property interest"). But see Baker and Wood, Jr., 14 Tex. Tech L. Rev. at 359 (cited in note 10) (arguing that a second tier of property analysis exists under the Constitution in which a court must decide "whether the state-creatod interest rises to the level of federally-protected property").

83. *Matter of Indiana State Bar*, 550 N.E.2d at 312.

84. Baker and Wood, 14 Tex. Tech L. Rev. at 357 (cited in note 10). Justice Johnson noted this equitable principle in 1809 in his statement that "interest goes with the principal, as the fruit with the tree." *Himely v. Rose*, 9 U.S. (5 Cranch) 313, 319 (1809) (Johnson, J., dissenting).

85. See *Blumberg v. Pinellas County*, 836 F. Supp. 839, 844-45 (M.D. Fla. 1993) (finding that claimants had a property right in the interest generated frem their principal because "under common law, the ownership of interest follows the ownership of principal").

Courts upholding the constitutionality of IOLTAs have shown no inclination to modify this traditional rule. Instead courts have simply concluded that clients do not possess a property interest in IOLTA proceeds because such proceeds lack net value to clients. In finding an exception to the customary rule, some courts have presumed that a "legitimate claim of entitlement" cannot exist in funds that have no net value to claimants.[86] These courts, however, have improperly used the Supreme Court's language regarding the need for a legitimate claim of entitlement to enunciate an independent constitutional definition of property in which net value is a prerequisite to recognition, when in fact the Court's statements simply reiterate its consistently-held position that property interests must arise from an independent legal source such as state law.[87] Accordingly, a proper analysis of the constitutionality of IOLTAs begins with the recognition that under state law, the income produced by principal becomes the property of the owner of the principal.

2. *Webb's Fabulous Pharmacies v. Beckwith:* The State May Not, by Ipse Dixit, Redefine Traditional Concepts of Property Rights

In *Webb's Fabulous Pharmacies v. Beckwith*,[88] the Supreme Court addressed the issue of whether a statute that expropriated interest that had accrued from a state-held fund composed of privately-owned principal amounted to an unconstitutional taking. The case arose when a prospective buyer of the assets of Webb's Pharmacies backed out of the purchase at closing after learning that Webb's had a substantial debt that had not been revealed.[89] The buyer filed a complaint of interpleader in Florida state court and

86. See *Cone*, 819 F.2d at 1004 (finding that no property interest existed in IOLTA funds since the client could not show a "legitimate claim of entitlement" to interest that had no net value to her). Instead of analyzing whether the client possessed a "legitimate claim of entitlement" by examining whether any substantive law supported her claim, the *Cone* court improperly used the Supreme Court's language in *Roth* as the basis for its presupposition that constitutionally-protected preperty rights must have some economic value te the claimant. Id. at 1007. See also Siegel, 36 U. Fla. L. Rev. at 693-96 (cited in note 17) (arguing that clients do not possess a "legitimate claim of entitlement" te IOLTA revenue because such revenue lacks net value to clients).

87. See *Webb's*, 449 U.S. at 161 (defining property interests by state law).

88. 449 U.S. 155 (1980).

89. Id. at 156.

surrendered the $1.8 million purchase price to the clerk of the court.[90] A state statute required that principal deposited in the registry of a county court be placed in an interest-bearing account and provided that the interest accruing from that account belonged to the state.[91] Subsequently, a receiver appointed for Webb's demanded that the court tender the interpleaded funds.[92] The court surrendered the $1.8 million principal in the account, minus a statutorily-mandated deduction for administrative fees, but pursuant to the statute withheld the $100,000 in interest that had accrued.[93]

The Supreme Court unanimously held that the state's expropriation of the interest generated from the interpleader fund amounted to an unconstitutional taking of the Webb's creditors' property.[94] The Court began by noting that property interests under the Constitution are defined by an independent source such as state law.[95] The Court asserted that Florida followed the rule that principal deposited in the registry of a court is private, not public, property.[96] The Court then noted the general rule that the interest accruing from principal belongs to the owner of the principal.[97] While recognizing that the Florida court could constitutionally exact a payment proportionate to the expenses that resulted from holding the principal in the interpleader fund,[98] the *Webb's* Court emphasized that the state could not violate the traditional rule that interest follows principal simply by recharacterizing the claimants' principal as "public money."[99] Therefore, the Court held that, because the Florida statute, by "ipse dixit,"[100] transformed the ownership of the interest accruing in the interpleader fund from the owners of the principal to the government, the state's action amounted to an unconstitutional taking of the creditors' property.[101]

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90. Id. at 156-57. An interpleader is "[a]n equitable proceeding to determine the rights of rival claimants to property held by a third person having no interest therein." Black's Law Dictionary 817 (West, 6th ed. 1990).

91. *Webb's*, 449 U.S. at 155-56 & n.1.

92. Id. at 158.

93. Id.

94. Id. at 164-65.

95. Id. at 161.

96. Id. at 160.

97. Id. at 162.

98. Id. at 163.

99. Id. at 164.

100. Black's Law Dictionary defines "ipse dixit" as "[h]e himself said it; a bare assertion resting on the authority of an individual." Black's Law Dictionary 828 (West, 6th ed. 1990).

101. *Webb's*, 449 U.S. at 164.

3. Application of *Webb's* to IOLTAs

Although *Webb's* involved the state's expropriation of $100,000 in interest rather than the state's retention of interest that had no net value to clients, the holding remains relevant to the IOLTA takings controversy. The Court reaffirmed that state law defines property under the Constitution and that, under state law, the interest produced by principal belongs to the owner of the principal.[102] Furthermore, the Court's holding that the rule that interest follows principal cannot be vitiated by a statutory recharacterization of interest as state property[103] makes clear that IOLTA proceeds are not exempt from the customary rule that interest follows principal simply because IOLTA provisions designate a non-profit organization, rather than clients, as the legal owner of the interest generated from the IOLTA account.

A favored argnment of IOLTA proponents is that the programs do not amount to a taking since they create the possibility of net interest when none was available before.[104] The *Webb's* Court's conclusion that the creditors were the rightful owners of the interest generated from the interpleader fund, however, was not altered by the inability of the creditors' principal to draw interest prior to the passage of the statute that gave ownership of the interest to the state. *Webb's* indicates that the fact that the government has enabled principal to accrue interest when none was available before does not give the government the right to claim such interest as its own.[105] Therefore, while the state is not constitutionally required to authorize the right to earn interest, once it does so, it is bound by traditional concepts of property ownership. As a result, the fact that IOLTA-eligible principal was unable to profitably draw interest for clients prior to the implementation of IOLTAs does not exempt the programs' revenue from the common law rule that interest follows principal.

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102. Id. at 161-62.

103. One scholar has criticized as incongruous the fact that prior-in-time state law definitions of property are accorded constitutional protection but subsequent state recharacterizations of property rights are not granted similar protection. Douglas W. Kmiec, *The Original Understanding of the Taking Clause is Neither Weak Nor Obtuse*, 88 Colum. L. Rev. 1630, 1641-42 (1988). While this insight does reveal a logical tension in takings jurisprudenco, the Court's position apparently reflects an attempt to reconcile the Justices' commitment that federalist principles govern constitutional conceptions of property with their desire that the Takings Clause pretect preexisting understandings of property rights.

104. See *Matter of Interest on Trust Accounts*, 402 So.2d at 395 (making this argument).

105. *Webb's*, 449 U.S. at 162.

B. Clients' State-Recognized Property Interest Is Not Vitiated by Their Inability to Economically Benefit from IOLTA Income

The *Webb's* Court indicated that state law defines property under the Constitution, that interest follows principal under state law, and that, even if claimants' property was unavailable prior to governmental intervention, the state may not, by fiat, transform such private property into public property.[106] Absent differentiation from the IOLTA context, *Webb's* demonstrates that clients are the owners of the interest earned from their principal in IOLTA accounts under the customary rule that interest follows principal. Courts, however, have distinguished *Webb's* from the IOLTA property interest issue on the ground that, in contrast to the inability of clients to personally benefit from IOLTA revenue, the claimants in *Webb's* had an expectation of a net return of interest.[107] These courts have properly noted that *Webb's* does not address the question of whether a claimant can have a property interest in funds that have no net value to him. Thus, other precedent must resolve the issue of whether the Takings Clause precludes the state from retaining interest that cannot economically benefit a claimant.

1. *Loretto v. Teleprompter CATV Corp.:* The Existence of a Property Interest Does Not Depend on the Value of the Property Being Confiscated

The Supreme Court in *Loretto v. Teleprompter Manhattan CATV Corp.*[108] examined whether the existence of a constitutionally-recognized property interest depends upon the size or value of the property in which an interest is claimed. In *Loretto*, a New York statute required landlords to allow cable television companies to install cable facilities upon their property in return for a one-time payment to the landlord of one dollar.[109] Pursuant to the statute, a cable television company installed two small boxes along cables on the roof of an apartment building that the *Loretto* plaintiff had recently purchased.[110]

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106. Id.

107. See *Cone*, 819 F.2d at 1007 (finding *Webb's* inapplicable in the IOLTA context since *Webb's* concerned the retention of interest that possessed value to the claimants).

108. 458 U.S. at 419.

109. Id. at 423-24.

110. Id. at 421-22.

The *Loretto* Court held that the company's action pursuant to the statute resulted in a taking of the claimant's property.[111] The Court began its analysis by noting that physical invasions short of an occupation or regulations that simply restrict the use of property are subject to the *Penn Central* balancing test.[112] The Court emphasized, however, that it had consistently held that "permanent physical occupation" of property amounts to a per se taking.[113]

Neither the possibility that the physical occupation increased the total value of the claimant's property[114] nor the fact that the government only authorized the possession of a small area of the claimant's property altered the Court's holding.[115] The Court stated that property interests had traditionally been described as the rights to possess, use, and dispose of property, and emphasized that permanent physical occupations of property completely destroy such rights.[116] The Court noted that, in conjunction with the inability to possess property, the property owner loses the right to exclude others, which the Court described as "one of the most treasured strands in an owner's bundle of property rights."[117] Accordingly, the Court concluded that constitutional protections for the rights of private property do not depend upon the size of the area permanently occupied.[118]

2. Application of *Loretto* to IOLTAs

Although the *Texas Equal Access* court relied on *Loretto* in finding that clients have a property interest in IOLTA funds,[119] most other courts have overlooked the applicability of the case to the IOLTA property interest issue.[120] Despite the judicial disregard of *Loretto*, the

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111. Id. at 441. The Court did not adjudicate the issue of what compensation should be paid to the landlord for the taking. Id.

112. Id. at 426.

113. Id. at 432.

114. Id. at 437 n.15.

115. Id. at 436-37.

116. Id. at 435.

117. Id.

118. Id. at 436-37.

119. *Texas Equal Access*, 94 F.3d at 1002 n.38.

120. See, for example, *Cone*, 819 F.2d at 1006-07 (ignoring *Loretto* in its analysis of whether clients possess a property interest in IOLTA revenue). In *Massachusetts Bar Foundation*, one of the few IOLTA cases in which *Loretto* has been analyzed, the court was able to differentiate the case from the IOLTA context because of the form in which the plaintiff's claim was brought. *Massachusetts Bar Foundation*, 993 F.2d at 975. Since the *Massachusetts Bar Foundation* plaintiffs did not argue that they possessed a property interest in IOLTA income, but only argued

case contradicts the contention of IOLTA proponents that clients do not possess a property interest in IOLTA proceeds. As discussed by the *Texas Equal Access* court, *Loretto* made clear that the value of property to claimants does not affect the determination of whether a constitutionally recognizable property interest exists in such property.[121]

Courts that have upheld the constitutionality of IOLTAs have concluded that no property interest exists in IOLTA income because such income has no economic value to clients.[122] While courts have typically reached this conclusion with little or no analysis, and no reliance on Supreme Court precedent,[123] their deduction is seemingly based, either explicitly or implicitly, on the assumption that a valid property interest must economically benefit a claimant in some manner.[124]

This view of property, however, contradicts the reasoning of the *Loretto* Court, which emphasized that the private ownership of property is grounded on the rights of the property owner to possess, use, and dispose of his property.[125] The minimal size and value of the expropriated property played no role in the *Loretto* Court's determination of whether a constitutionally-protected property interest existed in such property.[126] In the case of IOLTAs, while the diversion of IOLTA income to state-designated beneficiaries does not economically harm clients, the state's action does deprive clients of the ability to exercise the bundle of property rights described in *Loretto* with respect to IOLTA-generated interest.[127] In particular, IOLTAs preclude cli-

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that they had an intangible property right to exclude others from the interest generated from their principal in IOLTAs, the court found *Loretto* inapplicable because it concerned a tangible property interest. Id. at 974.

121. See notes 67-70 and accompanying text.

122. See notes 38-41, 49-52 and accompanying text.

123. See *Massachusetts Bar Foundation*, 992 F.2d at 976 (citing one case for the proposition that IOLTAs do not concern a client's economic rights).

124. See *Matter of Interest on Trust Accounts*, 402 So.2d at 395 (operating under such an assumption).

125. *Loretto*, 458 U.S. at 435.

126. Id. at 436-37 & n.15.

127. See *Texas Equal Access*, 94 F.3d at 1002 (noting that under *Cone*, "'property' is [erroneously] redefined as an interest that must necessarily benefit its owner") (alteration in original) (quoting Mary O'Byrne Sinibaldi, Note, *The Taking Issue in California's Legal Services Trust Account Program*, 12 Hastings Const. L. Q. 463, 492 (1985)). Sinibaldi also argues that as the result of the ethical prohibition against attorneys charging clients for trust fund expenses, IOLTA income could benefit clients. Sinibaldi, 12 Hastings Const. L. Q. at 491-93. Even though IOLTA-eligible principal is unable to draw net interest in individual NOW accounts, such principal can always profitably draw interest for clients, since clients will receive the accrued interest because attorneys must absorb the NOW account expenses under Bar ethics rules. Id. at 491-92. Sinibaldi acknowledged that in situations in which the costs of maintaining NOW accounts

ents from excluding others from the use of the interest accruing from their principal, disregarding the *Loretto* Court's admonition that the right to exclude is one of the most important rights inherent in the private ownership of property.[128] Thus, *Loretto* reveals that the inability of clients to benefit from IOLTA revenue does not minimize the constitutional protection afforded to clients' ownership rights as vested under the common law rule that interest follows principal.[129]

Moreover, by its recognition under the facts of the case that the occupation may have *increased* the total value of the claimant's property, the *Loretto* Court revealed that a property interest in occupied property is not vitiated even if the government's permanent invasion of the property economically benefits the claimant.[130] In contrast, the

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exceed the possible benefits, the placement of clients' funds into individual NOW accounts makes no economic sense. Id. at 491. Consequently, in the absence of an IOLTA, an attorney would likely place such funds into a non-interest bearing account. See text accompanying note 19 for a description of how attorneys placed such funds into non-interest bearing accounts prior to the implementation of IOLTAs. In contrast to Sinibaldi's argument, one commentator has contended that IOLTA-eligible clients could not benefit from individual NOW accounts as the result of the customary trust rule that trustees are entitled to reimbursement for the expenses incurred in administering a trust. Siegel, 36 U. Fla. L. Rev. at 720 (cited in note 17). Under a customary trust agreement, in which the trustee is reimbursed for administrative expenses, a client could not benefit from the opening of an individual NOW account since bank fees would exceed accrued interest. Siegel did not explain, however, how the inability of a typical beneficiary to benefit from the maintenance of a trust account, when administrative costs exceed interest, abrogates a client's ability to benefit from the establishment of an interest-bearing account under these circumstances as a result of the ethical prohibition against attorneys receiving expense reimbursement.

128. *Loretto*, 458 U.S. at 435.

129. The *Texas Equal Access* court discussed the anomaly with respect to I.R.S. Ruling 81-209 (cited in note 21), which resulted from the finding of past courts that clients must benefit from property in which an interest is claimed. The possibility mentioned by the Fifth Circuit that, as the result of the I.R.S. ruling, clients could under some circumstances be taxed on IOLTA-generated interest, does not prove that clients have a property right in such interest. *Texas Equal Access*, 94 F.3d at 1003. As the *Cone* court noted, the ruling did not represent an attempt to define property, but instead was issued to prevent taxpayers from reducing their tax liability by shifting their income inte a revocable trust in which the income would be taxed at a lower rate or would not be taxed at all. *Cone*, 819 F.2d at 1007 n.8.

Nevertheless, while this potentially incongruous situation does not prove that clients have a property interest in IOLTA funds, it does expose the tension between traditional notions of property law and the reasoning of courts that have found clients to lack a property interest in IOLTA revenue. The I.R.S. ruling by its terms is an exception to the general scheme whereby the owner of principal is responsible for paying any taxes on interest generated from her principal. Thus, in the hypothetical situation in which IOLTA-generated interest is not tax-exempt as the result of clients' control over their principal, the illogic of the government's taxation of IOLTA revenue in which the clients purportedly do not have a property interest results from the discord between the Tax Code's recognition of the rule that interest follows principal and the disregard of this common law principle by courts that have rejected the existence of a property right in IOLTA income.

130. *Loretto*, 458 U.S. at 437 n.15.

government's expropriation of IOLTA revenue does not increase the total value of clients' property; rather, by simply leaving clients with their underlying principal, IOLTAs have no effect on the total value of clients' property.[131] If, as indicated by *Loretto*, the constitutional protections granted to seized property are not minimized by the economic benefit accruing to a claimant as the result of the government's occupation, *a fortiori*, the lack of economic harm resulting to clients from the state's expropriation of IOLTA revenue cannot invalidate the constitutional recognition of the clients' underlying property right in the interest generated from their principal.

Loretto cannot be distingnished from the IOLTA context on the ground that the case involved the confiscation of real property rather than money. The foundational underpinning of *Loretto* was the fact that, under state law, the claimant was the legitimate owner of the property that the state permanently occupied.[132] The Court's traditional reliance on state law in defining property rights under the Constitution and its concomitant refusal to impose its own definition of property[133] ensured that the *Loretto* claimant's state-established property interest would be accorded constitutional recognition by the Court.

Similarly, as the result of the common law rule that the interest generated from principal belongs to the owner of the principal, clients whose funds are deposited in an IOLTA account are the owners of IOLTA-generated interest under state law. The rule that interest follows principal is not confined to situations in which interest possesses a requisite value to the owner of the principal,[134] just as the *Loretto* claimant's state-recognized ownership in the seized property was not limited by any state rule that restricted fee simple ownership to property possessing a certain net value. The bundle of state-

131. As the result of the inability of IOLTA-eligible principal to earn net interest in individual accounts, the underlying principal in the IOLTA account represents the highest value that clients' trust funds could attain in the absence of IOLTA intervention.

132. See id. at 427 n.5 (quoting Michelman, 80 Harv. L. Rev. at 1184 (cited in note 77)) (stating that "[t]he one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, 'regularly' use, or 'permanently' occupy, space or a thing which theretofore was understood to be under private ownership").

133. See, for example, *Webb's*, 449 U.S. at 161 (stating that property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law") (quoting *Roth*, 408 U.S. at 577). See Part III.A for a discussion of the Supreme Court's definition of property.

134. See *Texas Equal Access*, 94 F.3d at 1002 (holding that the rule that interest follows principal is not vitiated by the inability of the owner of the principal to benefit economically from the accrued interest).

protected property rights described by the *Loretto* Court relates with equal force to all forms of property.[135] A property owner has a similar interest in exercising the state-secured rights to possess, use, and dispose of property regardless of the form that the property takes, whether it is chattels, real estate, or accrued interest. Thus, the *Loretto* Court's holding that a state-recognized ownership interest in confiscated property is not eliminated as the result of such property's minimal value to claimants applies with equal force to the IOLTA property interest issue.

C. Potential of Sub-Accounting

Courts have rejected the existence of a property interest in IOLTA revenue on the ground that clients are unable to benefit from such revenue. Even assuming the general validity of the faulty premise that one must be able to benefit economically from property for such property to receive constitutional protection, these courts have overlooked an alternative method by which IOLTA-eligible principal could accrue net interest for clients. The possibility that depository institutions could establish profitable sub-accounts for individual clients within a pooled interest-bearing account potentially undermines the assumption that all IOLTA-eligible funds have no net value to clients.[136]

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135. The applicability of the *Loretto* Court's definition of property to forms of property other than real estate was revealed by the Court's adjudication of a takings claim in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). In its determination that a constitutionally cognizable property right existed in trade secrets, the Court stated:

> That intangible property rights protected by state law are deserving of the protection of the Taking Clause has long been implicit in the thinking of this Court: "It is conceivable that [the term 'property' in the Taking Clause] was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter."

Id. at 1003 (alteration in original) (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945)).

136. The *Texas Equal Access* court argued that another banking practice, depository institutions' payment of interest before their deduction of fees, undermined the contention that clients lack a property interest in IOLTA revenue. See text accompanying notes 71-72 for an explanation of the court's argument. The Fifth Circuit's argument presupposes that an irrevocable property interest is created the moment interest accrues, an unsupported though logical assumption. According to the Fifth Circuit's reasoning, this sequence renders irrelevant the issue of whether clients can benefit from their interest, as the bank's subsequent deduction of fees does not nullify the clients' previously attached property interest. The *Texas Equal Access*

Under federal regulations, a lawyer can place trust funds of individual clients who are eligible to use NOW accounts into a collective interest-bearing account held in the attorney's name and distribute accrued interest proportionately to each client upon remittance of their principal.[137] By reducing the costs associated with opening and maintaining an individual account for each client, sub-accounting may be able to reduce the expense per client of using a NOW account, and thus, increase the number of clients whose principal can profitably accrue interest.[138] Nevertheless, wide disagreement exists among commentators and jurists regarding the ability of depository institutions to create profitable sub-accounts using clients' trust funds that are unable to draw net interest in individual accounts.[139] Some courts have asserted that the administrative costs of holding such funds within a pooled account would far exceed accrued interest,[140] while others have maintained that present technology would enable banks

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court's contention is bolstered by an examination of tbe theoretical uncertainty that would result from a contrary finding. A holding that, despite the accrual of interest prior to the deduction of bank fees, clients do not have a preperty right in the interest generated from their principal when fees exceed accrued interest begs the question of how much time must pass between the accrual of interest and the deduction of fees before a property right attaches to the interest. Presumably, at some point, the time gap between the interest accrual and the fee deduction would grow so large that a property interest would adhere in the interim. Notwithstanding the fact that in practice this gap may be short, the argument that a property interest does not immediately attach to intorest upon its accrual lacks a principled basis for determining how much time must pass before a property interest is established in accrued interest.

One can properly find fault in the *Texas Equal Access* court's argument. Under the Fifth Circuit's position, the existence of a property interest depends upon a procedural sequence that makes little practical difference to depositors. A constitutional scheme that allows a client to realize a property right in accrued interest simply by transferring funds from a depository institution that charges fees first to an institution that pays interest first seems arbitrary at best. This capriciousness results from the Fifth Circuit's attempt to discredit *Cone*. In making this technical argument, the *Texas Equal Access* court assumed the validity of the *Cone* court's definition of property, under which net value is a prerequisite to recognition. In contrast to the bright-line, long-held rule that interest follows principal, a constitutional framework that bases the existence of a property right on the ambiguous standard of whether a claimant can benefit from property invariably will result in unprincipled distinctions being made, as evidenced by the Fifth Circuit's insight regarding the sequence of banking procedures.

137. *Matter of Indiana State Bar*, 550 N.E.2d at 314 (citing 12 C.F.R. § 204.130(b), (e) (1996)).

138. See Marcotte, ABA Journal at 73-74 (cited in note 15) (discussing the availability of sub-accounting among depository institutions).

139. This issue is complicated not only by the differing abilities of depository institutions to sub-account at low cost to depositors but also by the floating rate of interest paid on NOW accounts.

140. See, for example, *Massachusetts Bar Foundation*, 993 F.3d at 973 n.9 (noting acknowledgment by both parties that no feasible procedure existed that would allow law firms to pool funds in a collective account that could profitably draw interest); *Cone*, 819 F.2d at 1006 n.6 (noting that the coste of opening a sub-account at a local bank would be 30 times the accrued interest on the claimant's principal in a sub-account).

to create profitable sub-accounts for virtually all funds presently deposited in IOLTAs.[141]

IOLTA rules typically provide that attorneys must place clients' trust funds into an IOLTA account when such funds are nominal in amount or are going to be held for a short period of time.[142] These eligibility provisions are grounded on the assumption that these funds would not be able to draw net interest in individual accounts, but the rules make no exception for funds that could draw net interest in a pooled account held in the attorney's name.[143] Thus, notwithstanding the statements of past courts that IOLTA revenue has no net value to clients, to the extent that clients' trust funds that are unable to draw net interest in an individual NOW account could draw net interest in a pooled NOW account through the process of sub-accounting, IOLTA provisions mandate the surrender of principal that could economically benefit clients.[144]

D. Summary

In contrast to the prevailing judicial view, clients possess a property interest in IOLTA revenue. Past Supreme Court cases have consistently held that an independent legal source such as state law determines property interests. The common-sense rule that the owner of principal is the owner of the interest generated by that principal is

141. See, for example, *Matter of Indiana State Bar*, 550 N.E.2d at 314 (characterizing sub-accounting technology as "simple and inexpensive"); Price, Investor's Business Daily at A1 (cited in note 4) (reporting opinion of trusts scholar that clients could profitably draw interest on NOW-eligible funds through the use of sub-accounting).

142. See toxt accompanying notes 24-26.

143. For example, Texas's IOLTA requires that an attorney consider the ability of a client's principal to draw positive interest "without regard to funds of other clients which may be held by tbe attorney. . . ." Texas Rules of Court—State, Rules Governing tbe Operation of the Equal Access to Justice Program rule 6 (West 1997).

144. Admittedly, difficulties would arise from any attempt to further limit IOLTA eligibility to principal that could not benefit clients in a pooled account. For example, the ability of a client's principal to draw interest through sub-accounting would hinge on whether the depository institution that the client's attorney used offered this service. Furthermore, even if the attorney's bank offered sub-accounting, the ability of the principal to accrue interost profitably would depend on the amount of funds held in the attorney's collective account at any particular time. These problems illustrate the difficulty of designing workable IOLTA-eligibility provisions that comport with the programs' underlying premise that clients do not possess a property interest in IOLTA revenue as the result of their inability to benefit from such rovenue under any circumstances. Moreover, the troublesome issues posed by sub-accounting reveal the haphazardness that results from the application of this premise, under which, for example, the existence of a client's property interest in IOLTA income may hinge on whether the client's attorney uses a bank that offers a sub-accounting service.

deeply established in common law tradition. Unless properly distinguished from the instant controversy, this rule governs the ownership of IOLTA revenue.

The *Webb's* Court established that a state may not vitiate the rule that interest follows principal simply by recharacterizing interest proceeds as belonging to the state.[145] The Court also rejected the "taking what it had created" argument of the state that Florida could render this common law rule irrelevant by authorizing the accrual of interest when none was available before and then retaining the statutorily-authorized interest in state coffers.[146]

Loretto repudiates the contention that IOLTA income is exempted from the interest follows principal rule as the result of such income's lack of net value to clients. The *Loretto* Court established that the existence of a constitutionally-recognizable property interest does not hinge on the ability of a claimant to benefit economically from property, but instead rests on the ability of a claimant to exercise the bundle of rights to possess, use, and dispose of property as protected under state law.[147] Furthermore, no proper basis exists for distinguishing *Loretto* on the ground that the case concerned the expropriation of real estate rather than money. Therefore, *Loretto* compels a finding that clients have a property interest in IOLTA funds under the state law rule that interest follows principal.

IV. THE EXPROPRIATION OF CLIENTS' INTEREST UNDER IOLTAS CONSTITUTES A TAKING

Once a client has shown a property interest in IOLTA proceeds, the focus shifts to the issue of whether the state's expropriation of clients' property under IOLTAs constitutes a taking. An examination of relevant precedent reveals that, absent client consent, IOLTAs result in an unconstitutional taking.

A. Introduction to Takings Jurisprudence

Government interference with private property does not automatically result in a taking. Instead, Supreme Court jurisprudence has divided government interference with property rights into two categories. First, state action that either results in a permanent

145. *Webb's*, 449 U.S. at 164.
146. Id. at 162.
147. *Loretto*, 458 U.S. at 435.

physical occupation of a claimant's property or deprives a claimant's property of all economic or productive value constitutes a per se taking.[148] Second, government regulation that falls short of a permanent physical occupation and does not deprive property of all value is considered under the factual standards enunciated in *Penn Central*.[149] Thus, the threshold inquiry in every takings case is whether the state action falls into the per se takings category or into the *Penn Central* category in which the constitutionality of government regulation is determined by ad hoc, easily manipulable standards.

An exception to the takings construct exists if the interference with property results from the government's legitimate use of its police power.[150] The Court in *Lucas v. South Carolina Coastal Council*[151] indicated, however, that this justification constitutes a very narrow exception to general takings jurisprudence.[152] In contrast to the statements of past courts,[153] the *Lucas* Court held that the police power justification can legitimize state action that otherwise amounts to a taking only if the contested state action does not extend the restrictions already placed on property by the state's property and nuisance laws.[154]

148. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).

149. *Loretto*, 458 U.S. at 432. In *Penn Central*, the Court indicated that the following criteria were particularly significant in the ad hoc determination of whether government regulation constitutes a taking: (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with the distinct investment-based expectations of the claimant, and (3) the character of the government action. *Penn Central*, 438 U.S. at 124.

150. *Lucas*, 505 U.S. at 1022-23.

151. 505 U.S. 1003 (1992).

152. Id. at 1027-29.

153. Prior to *Lucas*, the police power justification encompassed state regulation that prevented "harmful or noxious uses" of property. Id. at 1022. As the *Lucas* Court noted, however, the distinction between regulation that "prevents harmful use" and regulation that "confers benefit" was difficult to resolve on an objective basis. Id. at 1026. This situation gave judges almost unfettered discretion to uphold favored interferences with property under the police power justification. See id.

154. Id. at 1029. Thus, a valid exercise of the police power must not do more than duplicate the result that could have been achieved in the courts through the enforcement of a preexisting public or private right of action. Id.

B. Application of Takings Jurisprudence to IOLTAs

1. IOLTAs Amount to a Per Se Taking

Since most courts have upheld the constitutionality of IOLTAs on the ground that clients lack a property interest in IOLTA income, few jurists have had cause to analyze whether the expropriation of clients' property under IOLTAs amounts to a taking. In *Massachusetts Bar Foundation*, one of the few cases in which the takings issue has been discussed, the First Circuit, after rejecting the clients' claim that they possessed an intangible property right to exclude others from the use of IOLTA-generated interest, stated in dicta that even if clients did possess this intangible property interest, Massachusetts's program did not amount to a taking.[155] The First Circuit differentiated its holding from *Webb's* on the ground that, while *Webb's* involved the invasion of tangible property, the *Massachusetts Bar Foundation* claimants conceded that they did not possess a tangible property interest in IOLTA proceeds.[156] Finding the per se takings rule to be inapplicable to interferences with intangible property rights, the First Circuit analyzed Massachusetts's IOLTA under the multi-factor *Penn Central* test and concluded that the program did not constitute a taking.[157]

If analyzed under the ad hoc *Penn Central* standard, the First Circuit's conclusion that IOLTAs do not amount to a taking appears to be correct.[158] All three *Penn Central* factors weigh in favor of a finding that IOLTAs do not amount to a taking.[159] First, IOLTAs have little, if any, economic impact on clients since the expropriated interest cannot benefit clients in individual NOW accounts and, at best, can benefit clients only marginally in pooled sub-accounts. For similar reasons, the programs do not interfere to any significant degree with the investment-based expectations of clients. Finally, the character of the state's action can properly be viewed as a non-intrusive attempt to

155. *Massachusetts Bar Foundation*, 993 F.2d at 974; see notes 56-62 and accompanying text for a more extensive analysis of the *Massachusetts Bar Foundation* decision.

156. *Massachusetts Bar Foundation*, 993 F.2d at 975-76.

157. Id. at 974-76.

158. See Siegel, 36 U. Fla. L. Rev. at 744-53 (cited in note 17) (arguing that IOLTAs do not constitute a taking under the multi-factor balancing test). But see Sinibaldi, 12 Hastings Const. L. Q. at 507-10 (cited in note 127) (suggesting that California's IOLTA constitutes a taking under the *Penn Central* test).

159. See note 149 for the three *Penn Central* factors.

adjust "the benefits and burdens of economic life to promote the public good."[160]

As the Fifth Circuit held, however, the *Penn Central* balancing test is not relevant to the determination of whether IOLTAs constitute a taking. In *Texas Equal Access*, the Fifth Circuit did not explicitly address the issue of whether the state's retention of clients' property under Texas's IOLTA constituted a per se taking.[161] The Fifth Circuit's implicit finding that the state's action amounted to a categorical taking was made clear, however, by its instruction on remand that the district court should find a taking if the plaintiffs could show that the state's confiscation of IOLTA-generated interest occured against the will of the clients.[162] Thus, the *Texas Equal Access* court made the analytical jump from holding that clients possessed a property interest in IOLTA income to concluding, without any intervening analysis, that, absent client consent, Texas's IOLTA resulted in a taking. The *Texas Equal Access* court's conclusion apparently resulted from its presumption that the Supreme Court's finding of a per se taking in both *Webb's* and *Loretto*, two cases the Fifth Circuit relied upon heavily in holding that clients possessed a property interest in IOLTA revenue,[163] similarly compelled a finding that the confiscation of clients' property under IOLTAs amounted to a per se taking.

While the Fifth Circuit's adjudication of the constitutionality of Texas's IOLTA would have been clearer if the court had discussed the takings issue separately instead of ending its analysis upon finding that clients possessed a property interest in IOLTA revenue,[164] the court's conclusion that IOLTAs result in a per se taking is correct. The *Loretto* Court made clear that the applicability of the per se takings rule to permanent physical occupations is not vitiated by the invaded property's lack of value to claimants.[165] Thus, *Loretto* reveals that the inability of clients to benefit economically from IOLTA revenue cannot liberate these programs from the categorical rule that permanent physical invasions constitute a taking.[166]

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160. *Penn Central*, 438 U.S. at 124.

161. See Part II.B.2.b for a discussion of the *Texas Equal Access* holding.

162. *Texas Equal Access*, 94 F.3d at 1004.

163. Id. at 1000-02.

164. See note 76 for Judge Benavides's criticism of the court's failure to specify which test it was using.

165. See Part III.B.1 for an extended analysis of *Loretto*.

166. Courts upholding the constitutionality of IOLTAs have given no indication that, if clients do possess a property interest in program revenue, the per se rule would be inapplicable to the IOLTA takings issue as the result of a de minimis standard. In fact, the *Cone* court stated:

Although some disagreement exists regarding the applicability of the per se takings rule to the state's confiscation of money rather than real estate,[167] *Webb's* indicates that this categorical rule extends to the expropriation of personal property such as deposited interest proceeds. While the *Webb's* Court never used the phrase "per se taking" or similar language in finding that Florida's confiscation of the claimants' interest proceeds constituted a taking, the Court's rhetoric made clear that it was applying the categorical rule.

For example, the *Webb's* Court emphasized that Florida's action did not simply increase the burdens on the claimants' property, but instead amounted to a "forced contribution" to the government unrelated to the costs of using the courts.[168] Furthermore, the Court stated that Florida's action was analogous to the state's action in *United States v. Causby*,[169] a case in which the Court found that the government's utilization of air space above the claimant's land as part of a flight plan for military aircraft amounted to an unconstitutional taking.[170] The *Webb's* Court subsequently included a quotation from *Penn Central* that differentiated the government's use of the claimant's property in *Causby* from regulation that simply reduces the value of a claimant's property.[171] This treatment of *Causby* revealed the *Webb's* Court's position that Florida's confiscation of the claimants'

> [W]e emphasize that we are not establishing a de minimis standard for Fifth Amendment takings, or due process violations. We do not wish to imply that the state may constitutionally appropriate property so long as the property is very small property. Here, thero was no taking of any property of the plaintiff.

Cone, 819 F.2d at 1007 (citations omitted).

167. The Takings Clause does not, of course, prevent the government from compelling people to surrender their money under the taxing power. While a complete discussion of the relationship between taxings and takings is beyond the scope of this Note, a fundamental difference between the two actions is that a tax exacts contributions based upon a "uniform rule of apportionment," while a taking compels a limited group of property owners to surrender more than their "proportionate share of the public burden." Baker and Wood, 14 Tex. Tech L. Rev. at 350 (cited in note 10). Although in practice the distinction between a taxing and a taking is not always clear, little attempt has been made to justify IOLTAs as a valid exercise of the state's taxing power. Id. at 349. If this argument is made, IOLTAs's targeting of legal clients to directly subsidize legal aid programs will weigh against a finding that the programs simply amount to a tax. See Part V for a description of how IOLTAs burden a limited group of people with financing a public program. Moreover, in the states in which IOLTAs have been implemented via judicial action, the characterization of the programs as a taxing may be precluded by separation of powers principles.

168. *Webb's*, 449 U.S. at 163.

169. 328 U.S. 256 (1946).

170. Id. at 265.

171. The *Webb's* Court stated that "*Causby* emphasized that [the] Government had not 'merely destroyed property [but was] using a part of it for the flight of its planes.' " *Webb's*, 449 U.S. at 164 (quoting *Penn Central*, 438 U.S. at 128 (alteration in original) (quoting *Causby*, 328 U.S. at 262 n.7)).

interest proceeds, like the government's appropriation of the claimant's real estate in *Causby*, should not be adjudicated under the ad hoc standards of *Penn Central*.[172] Most importantly, the *Webb's* Court's failure to enunciate or analyze the factors in the *Penn Central* test indicates that the Court was applying the per se takings rule.[173]

Despite the Court's rhetoric, the language in *Webb's* indicating that Florida could have retained the claimants' interest to the extent that the expropriation was reasonably related to the costs of using the courts has been interpreted to mean that the Court did not find the state's action to be a per se taking.[174] *United States v. Sperry Corp.*,[175] however, indicated that the enforcement of a reasonable user fee is conceptually different from a taking, and hence this language in *Webb's* should not be viewed as evidence that the *Webb's* Court applied the *Penn Central* balancing test.[176] In *Sperry*, the Court held that the deduction of a statutory fee from the claimant's compensation awarded by the Iran-United States Claims Tribunal did not constitute a taking because, in contrast to the state's disproportionate exaction in *Webb's*, the fee was reasonably related to the cost of setting up the Tribunal.[177] The *Sperry* Court emphasized that a reasonable user fee does not constitute a taking if it is imposed for the purpose of reimbursing the government for services provided to a claimant.[178] Thus,

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172. The *Loretto* Court similarly cited *Causby* as an example of a case in which the ad hoc standards of *Penn Central* were inapposite as the result of the permanent physical occupation of the *Causby* claimant's property. *Loretto*, 458 U.S. at 430-31.

173. See *Webb's Fabulous Pharmacies, Inc.*, 449 U.S. at 163-64.

174. See Siegel, 36 U. Fla. L. Rev. at 746 (cited in note 17). Siegel contended that the *Webb's* Court's acknowledgement that the state could retain the claimants' interest, to the extent the exaction constitution a fee for services rendered, revealed that the Court was not applying the per se takings rule. Id.

175. 493 U.S. 52 (1989).

176. Id. at 62.

177. Id. at 60, 62 & n.8.

178. Id. at 60-63. Some litigants have seized upon a footnote in *Sperry* to argue that the per se rule does not govern the state's expropriation of money. The footnote reads in relevant part:

> It is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible. . . . If the deduction in this case were a physical occupation requiring just compensation, so would be any fee for services, including a filing fee that must be paid in advance. Such a rule would be an extravagant extension of *Loretto*.

Id. at 62 n.9. This footnote should be analyzed in light of the *Sperry* Court's holding that the government's action was constitutional because the fee amounted te reasonable compensation for services rendered and should not be viewed as contradicting the rule of *Webb's* that the expropriation of money constitutes a categorical taking. The contrary interpretation that some litigants proffer not only overlooks the statement's status as dicta, but also ignores the context in which the statement was written. Moreover, this argument rests on the implausible supposition that, without a word of disapproval of *Webb's*, the *Sperry* Court sought to invalidate the standard

Sperry does not contradict the *Webb's* Court's holding that Florida's expropriation of the claimants' interest proceeds amounted to a per se taking; instead, *Sperry* merely confirms that the exaction of a reasonable user fee does not fall within the ambit of takings law.[179]

Therefore, *Webb's* reveals that the per se takings rule is the proper standard to apply to the state's expropriation of claimants' interest proceeds.[180] The applicability of *Webb's* to the IOLTA takings issue is not lessened by the minimal value of IOLTA income to clients, since *Loretto* reaffirmed that all permanent physical occupations of property constitute a per se taking, regardless of the size or value of the invaded property. Furthermore, like the state's confiscation of the claimants' interest in *Webb's*, the state's retention of IOLTA income cannot be justified as a user fee reasonably related to the expenses of holding clients' principal, since the only reason the principal is being held in an IOLTA account is to extract a profit for the state. Finally, the narrow police power exception to the Takings Clause does not apply to IOLTAs as the result of the lack of any underlying basis for the state's action under state property or nuisance law. Accordingly, IOLTAs, absent client consent, constitute an unconstitutional taking of clients' property.

2. No Client Consent to Programs

In order for a taking to be found, a claimant must show that she was compelled to submit to the government's interference with her property.[181] Since no court prior to *Texas Equal Access* had held that IOLTAs amounted to a taking absent client consent, jurists have had

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under which that case was decided. See *Texas Equal Access*, 94 F.3d. at 1002 n.38 (rejecting relevance of *Sperry* statement to IOLTA takings issue). But see *Nixon v. United States*, 978 F.2d 1269, 1285 (D.C. Cir. 1992) (interpreting footnote to mean that "money . . . is not subject to the per se doctrine because it is fungible").

179. The Court's holding in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), illustrates the similarity between the Supreme Court's treatment of real property and money. In *Dolan*, the Court held that the government could compel the claimant to dedicate land in return for approval of the claimant's application to expand her store and pave her parking lot only if the dedication was "roughly proportional" in nature to the proposed development. Id. at 391.

180. Many jurists have shared this view that *Webb's* established the per se takings rule as the proper standard to apply to the state's expropriation of money. See, for example, text accompanying notes 161-62; *Texas Equal Access*, 106 F.3d at 645 (Benavides, J., dissenting) (acknowledging that *Webb's* was "clearly a per se takings case"). See *Blumberg*, 836 F. Supp. at 845-46 (citing *Webb's* application of the categorical rule to invalidate the state's retention of claimaint's interest proceeds). But see Siegel, 36 U. Fla. L. Rev. at 746 (cited in note 17) (arguing that separating interest from principal is not a per se taking).

181. *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992). The *Yee* Court emphasized that the element of "required acquiescence is at the heart of the concept of occupation." Id. (quoting *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987)).

no reason to analyze the issue of whether client consent is present in these programs.[182]

Clients are compelled to participate in IOLTAs under standard program guidelines.[183] In response to I.R.S. Ruling 81-209, IOLTAs have given clients no control over whether their principal will be deposited in the IOLTA account once they have deposited trust funds with an attorney.[184] This aspect of the program, by itself, compels clients to acquiesce in the state's expropriation of their property, as clients will only be able to avoid the confiscation of their interest by limiting their search for legal help to attorneys who choose not to participate in IOLTAs.

Client participation in IOLTAs is further coerced in states that mandate attorney participation, since regardless of which attorney a client hires, the client's trust money will be deposited in the IOLTA account.[185] Even within the minority of states that do not mandate attorney participation, client consent is practically limited by the usual lack of any requirement that attorneys notify clients of their participation in the program.[186] Therefore, the only realistic way a client typically can prevent the government from taking her property is to refrain from dealing with attorneys in a manner that would require the surrender of trust funds, an option that hardly seems adequate to cure the compulsion inherent in IOLTAs.

3. Proper Remedy for Taking

Some observers have suggested that clients do not have a remedy against IOLTAs because the Constitution only prohibits takings that occur without "just compensation."[187] According to this reasoning, IOLTAs do not constitute a compensable taking because the programs

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182. In *Texas Equal Access*, the Fifth Circuit remanded the case on the issue of whether the clients consented to the taking of their property. *Texas Equal Access*, 94 F.3d at 1004.

183. See Baker and Wood, 14 Tex. Tech L. Rev. at 367 (cited in note 10) (asserting that "client consent apparently is not a real solution to the taking issue . . . because of the tax problem").

184. See notes 21, 129 for a further discussion of the IRS Ruling.

185. See *Texas Equal Access*, 106 F.3d at 645 (Benavides, J., dissenting) (implying, by his acknowledgement that Texas's IOLTA is "almost certainly unconstitutional," that if the per se takings rule is applied, then no client consent is present in the mandatory program).

186. See *Matter of Interest on Lawyers' Trust Accounts*, 672 P.2d at 407 (stating that it was unnecessary for attorneys participating in Utah's voluntary IOLTA to notify clients that their trust funds were being placed in the IOLTA account).

187. *Texas Equal Access*, 106 F.3d at 644 (Benavides, J., dissenting); Siegel, 36 U. Fla. L. Rev. at 751-53 (cited in note 17).

render clients no worse off since they only take interest previously unavailable to clients.[188] This argument reveals a misunderstanding of what constitutes "just compensation." The constitutional mandate to pay "just compensation" has been interpreted to mean that the government must reimburse the property owner for the value of the taken property.[189] Therefore, the relevant issue is not whether the total value of clients' trust funds has decreased as the result of the imposition of IOLTAs. Under this standard, Florida's confiscation of the claimants' interest proceeds in *Webb's* would not have constituted a compensable taking, since the interest-expropriating statute, by only taking what it had created, did not decrease the value of the claimants' money held by the county court. Rather, the state must compensate claimants for the value of the property taken, which in the instant situation equals the total amount of IOLTA revenue.[190]

Plaintiffs challenging the constitutionality of IOLTAs have typically sought both restitution for the value of past interest taken and an injunction against future application of the programs.[191] In *Texas Equal Access*, the Fifth Circuit held that the Eleventh Amendment, which shields states from suits in federal court without their consent, barred the clients' restitutionary claim.[192] Whether a court rejecting the constitutionality of IOLTAs issues an injunction or orders restitution matters little, however, as IOLTAs will be rendered inoperable regardless of which type of relief is granted.[193]

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188. Siegel, 36 U. Fla. L. Rev. at 751-52 (cited in note 17).

189. See *United States v. Miller*, 317 U.S. 369, 373 (1946) (stating that the Takings Clause's "just compensation" language requires that "[t]he owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken"). Siegel cited precedent for the contention that in the determination of what compensation is due, the government is entitled to subtract the benefit accruing to the property owner as the result of state action from the value of the property taken. Siegel, 36 U. Fla. L. Rev. at 752 n.390 (cited in note 17). He emphasized that when the loss from a taking does not exceed the benefit, compensating the owner "would be to grant him a special bounty." Id. at 752 (quoting *United States v. Sponenbarger*, 308 U.S. 256, 266-67 (1939)). Siegel's "special bounty" argument is inapposite under the facts of IOLTAs, however, because, while the state receives the value of clients' interest proceeds under the programs, IOLTAs do not in any way increase the value of the clients' non-expropriated property, their principal.

190. Baker and Wood, 14 Tex. Tech L. Rev. at 366 (cited in note 10).

191. See *Texas Equal Access*, 994 F.3d at 999.

192. Id. at 1005.

193. See Baker and Wood, 14 Tex. Tech L. Rev. at 366 (cited in note 10) (stating that "[i]t is easy to see that the just compensation requirement, if applicable because [Texas's IOLTA] is a taking, makes the program unfeasible").

V. ABROGATION OF IOLTAS PROMOTES CENTRAL PURPOSE OF TAKINGS CLAUSE

IOLTA supporters have questioned the propriety of using the Takings Clause to dismantle a program that exacts little, if any, burden on clients and provides a significant portion of the revenue for legal aid.[194] This position overlooks the Taking Clause's fundamental purpose of preventing the state from burdening a limited class of people with the responsibility of financing government programs that the general tax-paying public should properly support.[195]

The states' violation of this constitutional tenet can be seen in the enactment and evolution of IOLTAs. The ardor to implement IOLTAs was based upon a belief among jurists that legal aid was in need of increased funding.[196] Furthermore, recent decreases in federal funding for legal services have prodded states to increase the revenue generated by IOLTAs by increasing the level of attorney compulsion in their programs.[197] In pushing for measures designed to increase IOLTA income, program supporters have often framed the debate in terms of whether the community is willing to meet its social obligation to provide for the poor.[198]

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194. See notes 31-34 and accompanying text for a discussion on the use of IOLTA revenue.

195. Jurists have long recognized the dangers that the Takings Clause was meant to prevent. As early as 1893, the Supreme Court stated:

> [The Takings Clause] prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.

Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893). See also *Penn Central*, 438 U.S. at 123 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)) (noting that the purpose of the Takings Clause is to prevent the state from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole").

Some observers have overlooked the fact that the Takings Clause only prevents the *state* from inequitably distributing costs throughout society. See, for example, *Texas Equal Access*, 106 F.3d at 643 (Benavides, J., dissenting) (suggesting that, if clients possess a property interest in IOLTA revenue, depository institutions in the absence of an IOLTA violate the common law rule that interest follows principal by retaining the full amount of depositors' interest); Elliot and Elder, Texas Lawyer at 18 (cited in note 30) (noting IOLTA supporter's improper belief that the *Texas Equal Access* holding would allow "every bank customer [to] call every bank every day and tell them what to do with the float off their account"). See note 10 for an extended discussion of the state action requirement.

196. See *Matter of Interest on Lawyers' Trust Accounts*, 672 P.2d at 406 (noting petitioner's desire to support "law-related charitable objects such as legal aid for the disadvantaged").

197. Worthington, 18 Stetson L. Rev. at 421 (cited in note 19).

198. See id. at 440 (stating that the implementation of a mandatory IOLTA in Florida would "ensure that the legal profession continue its tradition of responding to the social needs of the community . . .").

These moral exhortations shroud the true nature of the IOLTA debate, however. The real issue is not whether legal aid is a deserving source of increased government expenditures; rather, the proper question is who should shoulder the burden of paying for legal services for the poor—the public at large or an isolated political minority. The Takings Clause encourages political accountability by deterring states from isolating funding decisions from the cost-benefit analysis that necessarily arises out of a general government appropriations process in which politicians must determine how to allocate limited revenue and justify their decisions to the electorate. This accountability is lost under IOLTAs by confining the costs of these programs to a dispersed political minority.[199]

In the instant controversy, the issue of the proper level of funding for legal aid has plainly been subject to the rigors of the political process as the result of the public furor surrounding the decision of the 104th Congress to target legal aid for substantial budgetary cutbacks.[200] Notwithstanding the assumption of IOLTA supporters that an unmitigated need for increased government spending on legal services exists, the majority of our nation's representatives voted to *decrease* significantly the level of funding for legal services.[201] For those people who believe that Congress erred by decreasing funding for legal services, the constitutional solution rests in persuading the political majority that Congress's decision was unwise, not in using banking loopholes to impose the costs of funding their politically-repudiated priority on an unorganized political minority.

VI. CONCLUSION

In *Texas Equal Access*, the Fifth Circuit properly recognized that state law defines property under the Constitution, and that under state law, the owner of principal is the owner of interest generated by that principal. In contrast, courts affirming the constitutionality of IOLTAs have disregarded Supreme Court precedent addressing the parameters of constitutionally-recognized property rights. The *Webb's* Court rejected the argument that, because the state creates the

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199. See Frances A. McMorris, *Ruling May Undermine Programs That Fund Legal Services for Poor*, Wall Street Journal B12 (September 30, 1996) (noting comment of lawyer challenging constitutionality of IOLTAs that such programs "do an end-run around state legislatures").

200. See *Legal Aid and Federal Funds*, Washington Post A20 (July 22, 1995) (exhorting Congress not to reduce funding for legal services).

201. Price, Investor's Business Daily at A1 (cited in note 4).

possibility of interest when none was available before, it may recharacterize such interest as state property. Furthermore, *Loretto* revealed that the existence of a constitutionally-cognizable property right does not depend on whether the confiscated property possesses any economic value to the claimant. Thus, no precedent exempts IOLTAs from the common law rule that interest follows principal. Consequently, clients possess a property interest in IOLTA revenue.

Takings jurisprudence reflects a balance between the historical protection given to property rights and the recognition that effective government would be imperiled if the state were held financially responsible for all decreases in the value of private property resulting from state action.[202] In the case of permanent physical occupations of property, these conflicting concerns have been resolved in favor of a per se takings rule. This categorical standard, which applies to the confiscation of money as well as real estate and governs regardless of the value of the invaded property, compels a finding that IOLTAs result in an unconstitutional taking of clients' property. While jurists' motives for implementing and expanding IOLTAs have no doubt been sincere, the constitutional solution for increasing government funding for legal aid lies in convincing the political majority of the need to dedicate a greater amount of limited government resources to this priority, rather than in quietly confiscating property from a dispersed political minority under IOLTAs.

Kevin H. Douglas[*]

202. See *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 413 (1922) (recognizing that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law").

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