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NEWS & ANALYSIS

Regulatory Takings, Public Use, and Just Compensation After *Brown*

by Steven J. Eagle

This Article analyzes the potential impact on government regulation of private property rights of the U.S. Supreme Court's recent decision in *Brown v. Legal Foundation of Washington*.¹ That case upheld mandatory Interest on Lawyers' Trust Accounts (IOLTA) programs. While *Brown* ensures continued funding for legal services for low- and moderate-income persons, it is difficult to reconcile with the Court's existing property and takings doctrines. Furthermore, although the decision was a victory for regulators, much of *Brown*'s analysis favors landowners in future regulatory takings cases.

The Article begins with an overview of IOLTA and the *Brown* case and then discusses why the case is important. It proceeds to analyze, in separate sections, various aspects of the Takings Clause²; whether there was a per se "taking" of property, what we should make of the Court's dicta on the Public Use Clause, and the Court's holding that there was no violation of the Just Compensation Clause. Finally, the Article discusses how *Brown* is apt to affect regulatory takings law in the future in environmental and other contexts.

Brief Overview

Background and Facts

Prior to 1980, lawyers typically held client funds in law firm trust accounts, which were noninterest-bearing federally insured checking accounts in which funds belonging to the firm's clients were commingled. In that year, federal regulations that had precluded the payment of interest on checking accounts were modified. New negotiable order of withdrawal (NOW) accounts permitted the payment of interest on deposits by individuals and charitable organizations. Interest could be paid on funds deposited by for-profit corporations or partnerships only where charitable organizations had "the exclusive right to the interest."³ As a result of this change in federal banking law, every state and the District of Columbia have adopted IOLTA programs. These provide that client funds must be deposited in accounts in the names of the individual clients where the funds may generate interest for the clients net of the costs of administration. All other

client funds are deposited in pooled IOLTA accounts, with the interest (after expenses) being automatically transmitted for disbursement to legal services programs. According to *Brown*: "The result is that, whereas before 1980 the banks retained the value of the use of the money deposited in non-interest-bearing client trust accounts, today, because of the adoption of IOLTA programs, that value is transferred to charitable entities providing legal services for the poor."⁴

The Washington IOLTA program, which was challenged in *Brown*, was adopted by the state supreme court,⁵ and subsequently expanded to include limited practice officers (LPOs), who are nonlawyers licensed to act as escrowees in the closing of real estate transactions.⁶ The petitioners, who were regular purchasers of real estate, sought to enjoin the requirement that LPOs deposit client funds in IOLTA accounts. They objected to having their funds used by the organizations designated by the nonprofit Legal Foundation of Washington, which had been entrusted with management of the IOLTA program, and "to anyone other than themselves receiving the interest derived from those funds."⁷

The U.S. District Court for the Western District of Washington granted the defendants summary judgment on the ground that only funds upon which a client could earn no net return were subject to the IOLTA program and that the plaintiffs had "lost nothing."⁸ While plaintiffs' appeal was pending before the U.S. Court of Appeals for the Ninth Circuit, the Court held, in *Phillips v. Washington Legal Foundation*,⁹ that ownership of the interest generated within the Texas IOLTA plan belonged to the owners of the principal, i.e., the law clients. Based on *Phillips*, the Ninth Circuit panel decided that the interest generated by Washington's IOLTA program "is property of the clients . . . and that a government appropriation of that interest for public purposes is a taking entitling them to just compensation under the Fifth Amendment."¹⁰ The Ninth Circuit reconsidered the case en banc and affirmed the judgment of the district court.¹¹ The en banc decision asserted that the Court's ad hoc taking test in

4. *Id.* at 1411-12.

5. *Id.* at 1412.

6. *Id.* at 1415.

7. *Id.*

8. *Id.* at 1416 (quoting *Washington Legal Found. v. Legal Servs. Found. of Washington*, No. C97-0146C (W.D. Wash. Jan. 30, 1998)).

9. 524 U.S. 156 (1998).

10. *Washington Legal Found. v. Legal Found. of Wash.*, 236 F.3d 1097, 1115 (9th Cir. 2001). The court remanded for a determination of the appropriate remedy. *Id.*

11. *Washington Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835 (9th Cir. 2001).

Steven J. Eagle is a professor of law at George Mason University, in Arlington, Virginia. He is the author of *REGULATORY TAKINGS* (2d ed. 2000 and annual supplements) and of numerous other scholarly and popular works on land use regulation and property rights. He studied economics at the City College of New York and is a graduate of Yale Law School.

1. 123 S. Ct. 1406 (2003).

2. U.S. CONST. amend. V ("nor shall private property be taken for public use without just compensation"). See *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226 (1897) (applying the Fifth Amendment prohibition of uncompensated takings to the states).

3. 123 S. Ct. at 1411.

*Penn Central Transportation Co. v. New York City*¹² was appropriate and that “there was no taking because petitioners had suffered neither an actual loss nor an interference with any investment-backed expectations, and that the regulation of the use of their property was permissible. Moreover, in the majority’s view, even if there were a taking, the just compensation due was zero.”¹³ Four judges dissented on the grounds that the case involved a per se taking rather than a regulatory taking.¹⁴

The Majority Holding

The opinion for the Court’s 5 to 4 majority was written by Justice John Paul Stevens.¹⁵ It noted that the Court “agree[d] that a per se approach is more consistent with the reasoning in our *Phillips* opinion than *Penn Central*’s ad hoc analysis.”¹⁶ However, it concluded:

A state law that requires client funds that could not otherwise generate net earnings for the client to be deposited in an IOLTA account is not a “regulatory taking.” A law that requires that the interest on those funds be transferred to a different owner for a legitimate public use, however, could be a *per se* taking requiring the payment of “just compensation” to the client. Because that compensation is measured by the owner’s pecuniary loss—which is zero whenever the Washington law is obeyed—there has been no violation of the Just Compensation Clause of the Fifth Amendment in this case.¹⁷

The Dissenting Opinions

Justice Antonin Scalia’s principal dissent declared:

The Court today concludes that the State of Washington may seize private property, without paying compensation, on the ground that the former owners suffered no “net loss” because their confiscated property was created by the beneficence of a state regulatory program. In so holding the Court creates a novel exception to our oft-repeated rule that the just compensation owed to former owners of confiscated property is the fair market value of the property taken. What is more, the Court embraces a line of reasoning that we explicitly rejected in *Phillips*. Our precedents compel the conclusion that petitioners are entitled to the fair market value of the interest generated by their funds held in interest on lawyers’ trust accounts (IOLTA).¹⁸

Justice Anthony M. Kennedy, while joining in the Scalia dissent, also wrote separately to warn that the devotion of

IOLTA interest to “causes the justices of the Washington Supreme Court prefer” resulted in those justices according themselves “a monopoly which might then be used for the forced support of certain viewpoints.”¹⁹

The Importance of *Brown*

The Court Sustains Mandatory IOLTA Programs

In the popular press and the general legal community, the main import of *Brown* is that mandatory IOLTA programs have been sustained.²⁰ Thus, they may continue to generate some \$200 million a year to support legal services programs.²¹ It is uncontested that IOLTA programs fund some very worthwhile legal services for the needy.²²

The Court’s Opinion Makes the Legal System Less Coherent

We all gain from living in a society with coherent legal principles. The eminent contracts scholar Arthur Corbin once argued that hard cases make good law, precisely because they force us to refine our principles.²³ *Brown*, however, reduces the coherency of our legal system in two ways. It introduces needless complexity into legal doctrine for the purpose of maintaining circuitous funding for a governmental program. It also ignores economic principles in drawing the simplistic conclusion that banks, and not law clients, derived the economic benefit of the interest generated in traditional law firm trust accounts.

The motivating force behind mandatory IOLTA programs is the idea of harnessing untapped gains. “Even though the public obviously benefits enormously from IOLTA programs, the clients whose monies support the programs have lost nothing.”²⁴ The Court vindicates this reasoning by ignoring both the legal doctrine of relativity of title and economic reality.²⁵ IOLTA benefits those who consume the legal services it funds. Not coincidentally, the program also benefits attorneys who produce those services and attorneys hired to oppose them. Naturally, the happy marriage of idealism and self-interest leads the organized bar to be among IOLTA’s fervent supporters. There is no inherent reason why these services could not be funded by public appropriations derived from the use of income or sales tax revenues, or specific fees. Such funding would not have been constitutionally problematic and would provide the political accountability that, under IOLTA, is missing in most states.²⁶

12. 438 U.S. 104, 8 ELR 20528 (1978). “The *Penn Central* analysis involves ‘a complex of factors including the regulation’s economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.’” *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 315 n.10, 32 ELR 20627, 20629 n.10 (2002) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 617, 32 ELR 20516, 20517 (2001)).

13. *Brown v. Legal Found of Wash.*, 123 S. Ct. 1406, 1416 (2003).

14. *Id.* (citing 271 F.3d at 865-66).

15. Joining were O’Connor, Souter, Ginsburg, and Breyer, JJ. Justice Scalia dissented, joined by Rehnquist, C.J., and Kennedy and Thomas, JJ. Justice Kennedy also filed a separate dissent.

16. *Id.* at 1419.

17. *Id.* at 1421 (emphasis in original).

18. *Id.* at 1422 (Scalia, J., dissenting) (citation to *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998) omitted).

19. *Id.* at 1428 (Kennedy, J., dissenting).

20. See, e.g., Linda Greenhouse, *The Supreme Court: Legal Aid for Indigents; Supreme Court Backs Plan on Financing of Legal Aid*, N.Y. TIMES, Mar. 27, 2003, at A18.

21. 123 S. Ct. at 1412.

22. *Id.* at 1417 n.7 (quoting Judge Alex Kozinski’s dissent from the Ninth Circuit’s en banc decision below: “It is no doubt true that the IOLTA program serves a salutary purpose, one worthy of our support.” 271 F.3d 835, 867 (9th Cir. 2001)).

23. Arthur L. Corbin, *Hard Cases Make Good Law*, 33 YALE L.J. 78, 78 (1923).

24. John D. Echeverria, *Regulatory Takings After Brown*, 33 ELR 10626, 10627 (Aug. 2003).

25. See *infra* text accompanying notes 67-74.

26. See *Brown*, 123 S. Ct. at 1411 n.2 (noting that in 45 states and the District of Columbia, IOLTA is imposed by judicial rule).

In *Phillips*, the Court's prior examination of IOLTA, the majority held that ownership of interest follows ownership of principal.²⁷ That doctrine should have been decisive in *Brown*. Whether or not the *Brown* majority was indulging in a "Robin Hood" taking,²⁸ it did seem to be engaging in the technique, not uncommon for legislators, of muddying legal principles for unrelated political ends.²⁹ With the bar, state attorneys general, and state governments urging as amici that mandatory IOLTA be upheld,³⁰ the Court flinched from applying *Phillips*.³¹ Instead, it instead adopted a novel view of the Just Compensation Clause, which precluded recovery by the petitioners in spite of *Phillips*. It also interpreted the Public Use Clause in particularly gratuitous dicta.

The Court Supports Per Se Analysis for Benefit-Confering Regulations

The Acquisition of Property by Benefit-Confering Regulations Is a Taking Per Se

In the Court's prior IOLTA case, *Phillips*,³² it "held 'that the interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal.'" ³³ *Brown* adhered to this precept.³⁴ The Court reviewed its regulatory takings jurisprudence, which says that when government appropriates property there is a taking per se, whereas when government regulates an owner's use of his or her property, the "complex factual assessments of the

purposes and economic effects of government actions" have to be made using the *Penn Central* multifactor test.³⁵ It concluded:

We agree that a *per se* approach is more consistent with the reasoning in our *Phillips* opinion than *Penn Central*'s ad hoc analysis. As was made clear in *Phillips*, the interest earned in the IOLTA accounts "is the 'private property' of the owner of the principal." If this is so, the transfer of the interest to the Foundation here seems more akin to the occupation of a small amount of rooftop space in *Loretto*.³⁶

The heart of *Brown* is that there was no police power purpose for the mandatory sequestration of law client funds in IOLTA accounts. Nor was there a police power purpose in paying the interest generated by those funds to legal services programs instead of to those acknowledged in *Phillips* to be the rightful owners of both principal and interest. Nothing about the traditional system of law firm trust accounts required such regulation. Restrictions on law firms and clients were merely incidental to the purpose of IOLTA—raising funds to support legal services. That was the basis for the Court's preference for use of a *per se* approach.

Brown differs sharply from the recent cases in which the Court reestablished the primacy of *Penn Central* ad hoc analysis, *Palazzolo v. Rhode Island*³⁷ and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.³⁸ In those cases, environmental restrictions were imposed on activities that, if unchecked, would have had a negative environmental impact.

Prof. John D. Echeverria asserted that "the Court's decision in *Brown*, following on the heels of several decisions that suggested that the Court favored an ad hoc rather than a *per se* approach to takings analysis, creates some confusion about which approach the Court prefers."³⁹ I suggest that no confusion is in order. The Court uses an ad hoc approach where measures plausibly intended to regulate property are asserted by the owner to constitute a partial regulatory taking.⁴⁰ On the other hand, regulations imposed to benefit the public and not to control the activities of the owner are takings per se. Permanent physical invasions are in that class.⁴¹ Deprivations of all economic value are in that class.⁴² And now, it appears, regulations to raise revenue for unrelated government programs are in that class.⁴³

27. 524 U.S. at 156.

28. 123 S. Ct. at 1428 (Scalia, J., dissenting). In his dissent, Justice Scalia states:

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

Id.

29. As an example, federal tax law long maintained that criminal conduct should be punished through criminal law and that illegal businesses were subject to income taxation under the same principles applicable to other businesses. See *Commissioner of Internal Revenue v. Sullivan* 356 U.S. 27 (1958) (allowing deductions for rent and wages paid by illegal bookmaking business). However, Congress amended the Internal Revenue Code in 1982 to disallow "any" deduction regarding illegal drug trafficking. 26 U.S.C.A. §280E (West 2003). Lawmakers apparently found it easier to obliterate the clear distinction between gross and net business income rather than to increase penal sanctions. The latter course would preserve doctrinal clarity, but at the political cost of rendering legislators vulnerable to the charge that they ratified "tax breaks" for drug dealers.

30. Amicus briefs supporting IOLTA were filed on behalf of the American Bar Association, about one-half of the states, the Conference of Chief Justices, AARP (formerly known as the American Association of Retired Persons), and similar governmental and advocacy groups.

31. Perhaps it is more accurate to say that one Justice changed her mind. Justice O'Connor voted in *Phillips* that the law clients owned the interest, but voted in *Brown* that their deprivation of those rights was not compensable. Otherwise, the other four Justices in the majority in *Phillips* dissented in *Brown*, and the four dissenters in *Phillips* were in the majority in *Brown*.

32. 524 U.S. at 156.

33. *Brown*, 123 S. Ct. at 1411 (quoting *Phillips*, 524 U.S. at 172).

34. It is important to note, however, that the Court radically changed the value of the property taken so as to equal the opportunity cost of the law clients. See *infra* text accompanying notes 49-74.

35. *Brown*, 123 S. Ct. at 1418 (citations omitted).

36. *Id.* at 1419 (quoting *Phillips*, 524 U.S. at 172, and citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (emphasis in original) (holding a permanent physical occupation of private property authorized by government a categorical taking)).

37. 533 U.S. 606, 32 ELR 20516 (2001).

38. 535 U.S. 302, 32 ELR 20627 (2002).

39. Echeverria, *supra* note 24, at 10626.

40. See *Tahoe-Sierra*, 535 U.S. at 326-27, 32 ELR at 20631.

41. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

42. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 22 ELR 21104 (1992).

43. As Justice Scalia earlier conceded, the "distinction between 'harm-preventing' and 'benefit-confering' regulation is often in the eye of the beholder." *Lucas*, 505 U.S. at 1024, 22 ELR at 21109. Courts may have to analyze cases within the gray area under a *Penn Central* rubric, but this should not detract from the application of the *per se* rule where the beneficial intent is clear.

Characterization of the Governmental Action

The line separating ad hoc and per se analysis just described is consistent with the history of the “character of the governmental action” test in *Penn Central* itself.⁴⁴ The original content of the test was that “[a] ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”⁴⁵ However, after only four years, permanent physical invasions were removed from the *Penn Central* ambit and held to constitute categorical takings in *Loretto v. Teleprompter Manhattan CATV Corp.*⁴⁶ Now, *Brown* seems to say that regulations intending only to raise funds for government programs should not fall under *Penn Central* either.

Another aspect in the changing *Penn Central* “character of the governmental action test” might be mentioned here. Recent cases supplying content to that test have stressed whether government was “targeting” a particular property owner,⁴⁷ and whether “it is pertinent whether the party seeking compensation has created or contributed to the problem the government seeks to solve.”⁴⁸ These concerns reinforce those noted earlier in suggesting that government should not enjoy the latitude to use the means of eminent domain as substitutes for taxation or user fees.

“Just Compensation” and the Novel Concept of “Net Value”

Measuring What the Owner Has Lost

“The Fifth Amendment requires that the United States pay ‘just compensation’—normally measured by fair market value—whenever it takes private property for public use.”⁴⁹ “Fair market value” refers to “what a willing buyer would pay in cash to a willing seller.”⁵⁰ It does not compensate for an owner’s relocation costs, sentimental attachments, or special suitability of the property for the owner’s needs.⁵¹ As the Court in *Brown* quoted Justice Oliver Wendell Holmes, “the question is what has the owner lost, not what has the taker gained.”⁵²

Webb’s Fabulous Pharmacies, Inc. v. Beckwith,⁵³ decided in 1980, was a critical precedent for *Brown*. *Webb’s* involved the ownership of interest generated in an interpleader account. A trustee had deposited the proceeds from the bulk sale of the assets of an insolvent debtor as an interpleader

with a Florida clerk of courts. The clerk deducted an amount from the fund to cover costs and deposited the balance in an interest-bearing account for the benefit of creditors. Pursuant to state law, the clerk retained the interest that the account generated.⁵⁴ The trustee sued and was awarded the interpleader interest on behalf of creditors even though the clerk had not been obligated to deposit the funds at interest.⁵⁵

After reviewing the case law regarding just compensation, *Brown* concluded:

[I]t is clear that neither [petitioner] is entitled to any compensation for the nonpecuniary consequences of the taking of the interest on his deposited funds, and that any pecuniary compensation must be measured by his net losses rather than the value of the public’s gain.⁵⁶

* * *

Because that compensation is measured by the owner’s pecuniary loss—which is zero whenever the Washington law is obeyed—there has been no violation of the Just Compensation Clause of the Fifth Amendment in this case.⁵⁷

Justice Scalia argued in dissent that the majority’s finding of zero net loss could only have resulted from its consideration of “the interest petitioners *would have earned* had their funds been deposited in *non-IOLTA* accounts,” or incompatibly, from “the amount of interest *actually earned* in petitioners’ IOLTA accounts, minus the amount that would have been lost in transaction costs had petitioners sought to keep the money for themselves.”⁵⁸ Furthermore, although the majority had asserted that *Webb’s* was a case where the claimants also had received their net loss after expenses,⁵⁹ the expenses of administering the interpleader had been deducted from the interpleader amount before it had been placed on deposit.⁶⁰

In summary, the four dissenters asserted that the petitioners were entitled to the fair market value of the property taken as of the time it was taken. The majority asserted that the petitioners were entitled to the net proceeds that they could have earned outside of IOLTA, which were zero.

Although Justice Stevens opined that the result advocated by Justice Scalia was “bizarre,”⁶¹ it flowed from the fact that the state had created a mechanism through which wealth had been created, belonging to the petitioners, that, given the juxtaposition of state and federal rules, would not have existed otherwise. The situation was no different in *Webb’s*, where the trustee had no right to require that the clerk deposit the interpleader at interest, but nevertheless was entitled to the interest actually earned.⁶² The fact that the mechanism allowed a higher rate of return to be gener-

44. 438 U.S. at 124, 8 ELR at 20533.

45. *Id.* at 124, 8 ELR at 20533 (internal citation omitted).

46. 458 U.S. 419 (1982).

47. *American Pelagic Fishing Co., Ltd. Partnership v. United States*, 49 Fed. Cl. 36, 46 & 49-51 (Fed. Cl. 2001) (liability); 55 Fed. Cl. 575 (Fed. Cl. 2003) (damages).

48. *Chancellor Manor v. United States*, 331 F.3d 891, 905, 33 ELR 20222 (Fed. Cir. 2003).

49. *United States v. 50 Acres of Land*, 469 U.S. 24, 25-26, 15 ELR 20117, 20118 (1984).

50. *United States v. Miller*, 317 U.S. 369, 374 (1943).

51. *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 464 (7th Cir. 1988).

52. 123 S. Ct. at 1419 (quoting *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910)).

53. 449 U.S. 155 (1980).

54. *Brown*, 123 S. Ct. at 1424.

55. *Id.*

56. *Id.* at 1419-20 (emphasis added).

57. *Id.* at 1421.

58. *Id.* at 1423-24 (Scalia, J., dissenting) (emphasis in original).

59. *Id.* at 1420 n.10 (citing *Webb’s*, 449 U.S. at 155).

60. 123 S. Ct. at 1427 n.5 (Scalia, J., dissenting).

61. *Id.* at 1420 n.10.

62. *Id.* at 1424 (Scalia, J., dissenting). “Once interest is earned on petitioners’ funds held in IOLTA accounts, that money is petitioners’ property.” *Id.*

ated than would otherwise be the case does not make it any less the owner's property. The owner's gain is a normal incident of the trust relationship. To cite another example, a trustee who makes an illegal investment that generates a high rate of return must account to the beneficiary for that gain and cannot offset it against losses the trustee incurs on other transactions.⁶³

"Pecuniary loss" to the owner, the touchstone of the *Brown* majority,⁶⁴ must be either the loss of fair market value or, alternatively, the losses incurred by the owner as a direct result of the taking. In *Brown*, the Court asserted that the petitioners had incurred a "net loss" of zero. But "zero" was not the fair market value of the interest. If it were, legal services plans would receive no money. Likewise, the interest lost no value because its ownership was transferred from the law clients to the legal services organizations.

It is true, from an economic perspective, that the direct opportunity cost of the interest to the law clients was zero. That is, "but for" the IOLTA program, the clients would have received no net cash. But IOLTA did not take the clients' "opportunity cost," it took the clients' interest. Similarly, the fact that property owners suffer uncompensated costs such as loss of favorable mortgage financing, goodwill, and sentimental value in connection with takings⁶⁵ also is irrelevant. The law clients in *Brown* did not suffer losses consequent to the taking, they suffered the taking itself and were not compensated for it.

Petitioners should be "put in the same position monetarily as [they] would have occupied if [their] property had not been taken."⁶⁶ This means that they, and not the Washington Legal Foundation, should be able to withdraw their interest from the IOLTA account. After the foundation withdrew the funds, putting the owners in the "same position" that they would occupy absent the taking would require that they be awarded an amount equal to the interest.

Static and Dynamic Views of Value and Loss

IOLTA is premised on the notions that law clients cannot benefit from small or short-term deposits of funds with their lawyers because the cost of accounting for those funds is too great. Also, law firms cannot benefit from those funds because that would be in contravention of ethical rules.⁶⁷ Therefore, only banks benefit from law office trust accounts. IOLTA took this gain from the banks, who had no rightful claim to it, and devotes it to legal services for the needy.⁶⁸

One problem with this approach is that it assumes that finance and technology are static. Dissenting in *Brown*, Justice Kennedy noted that "had the State . . . not acted in violation of its constitutional responsibilities by taking for itself

property which all concede to be that of the client, . . . the free market might have created various and diverse funds for pooling small interest amounts."⁶⁹ "Micropayment" technology, now developing rapidly, might facilitate such change.⁷⁰ While the Court asserted that IOLTA is "self-adjusting and is adequately designed to accommodate changes in banking technology,"⁷¹ it is unclear that banks holding IOLTA deposits will have the same incentive to make changes resulting in a vastly reduced IOLTA program that new vendors would.

Another aspect of *Brown* that seems intriguing and erroneous is its assumption that the gains accruing to banks through their gathering of interest on traditional law firm deposits remained with them and were not recaptured by the law firms and their clients. Ethics rules, after all, clearly do not bar lawyers from enjoying any and all conceivable incidental benefits resulting from their representation.⁷²

"Relatively of title," in Anglo-American property law, denotes that it is not necessary for a claimant to have perfect title. Rather, an individual can have a claim to a thing that is better than the claim of some people but inferior to the claim of others.⁷³ A litigant might prevail not by demonstrating that its entitlement is absolute, but rather that it is better than that of the challenger. In its quibbles about "net value" of interest to law clients, law firms, and banks, *Brown* overlooks the crucial fact that they all are related through voluntary agreements entered into in generally thick markets.

Banks compete for clients among law firms, and law firms compete to represent businesses and individuals. Under such circumstances, static concepts about "ownership" of assets generated within the relationship neglect the role that competition plays in assigning the final incidence of benefit from those assets. At the margin, the more business a law firm brings a bank, the more apt the bank is to be accommodating to it in any of a myriad of ways. The notion that, without IOLTA programs, banks necessarily will keep windfall interest and that it would not redound to the benefit of contracting customers is erroneous.

Clients, law firms, and banks are parties to consensual arrangements. Each has a better claim to interest generated on trust funds than do those who sequester the interest from those funds for IOLTA. The idea that IOLTA is a particularly

63. See, e.g., *Russo v. Unger*, No. 86 CIV 9741 (CSH), 1992 WL 122790 (S.D.N.Y. May 26, 1992) (unreported).

64. 123 S. Ct. at 1421.

65. As the majority noted, these losses have been treated as "part of the burden of common citizenship." *Id.* at 1419 (quoting *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949)).

66. *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 474 (1973).

67. See, e.g., *Washington Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 842 (9th Cir. 2001) (noting that "lawyers must protect the integrity of their clients' property and avoid using their position as the property's temporary guardian to their own benefit").

68. *Brown*, 123 S. Ct. at 1411-12.

69. *Id.* at 1428 (Kennedy, J., dissenting) (citing *Phillips v. Washington Legal Found.*, 524 U.S. 156, 172 (1998)).

70. See, e.g., Jane Kaufman Winn, *Clash of the Titans: Regulating the Competition Between Established and Emerging Electronic Payment Systems*, 14 BERKELEY TECH. L.J. 675 (1999).

71. *Brown*, 123 S. Ct. at 1414.

72. As an illustration, lawyers who are reimbursed by clients for travel generally do not have to account for their frequent flyer miles. See Joanne Pitulla, *Freebies and Discounts From Vendors Can Spell Trouble*, 80 A.B.A.J., Apr. 1994, at 110 (noting that the Boston Bar Association's ethics committee "decided that disclosure of mileage points to clients is unnecessary as long as the lawyer always endeavors to obtain the lowest cost on air fares charged to clients, and the value of the points is minimal," and citing B.B.A. Ethics Opinion 93-4 (Oct. 1993)). See also Mass. Formal and Informal Ethics Opinion No. 94-1 (1994).

73. See, e.g., RESTATEMENT OF PROPERTY §521(2) cmt. b (1944) (asserting that interests that are less than possessory as against an owner in fee may be possessory as against third persons). The common illustration for first-year law students is that an intermediate person in a string of sequential losers and finders of an item has a good claim against those down the chain but an inferior claim to previous possessors. See, e.g., JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 108-11 (5th ed. 2002).

moral concept because legal services programs receive benefit without others suffering costs is without merit.⁷⁴ While neither a host nor her guest might be able to prove which is the rightful owner of coins found under the sofa cushion, each would have a better claim to the money than a visiting government inspector of upholstered furniture.

Exactions of Interest and “Public Use”

Brown’s Dicta on “Public Use” Is Particularly Gratuitous and Troubling

The Fifth Amendment’s Public Use Clause was not invoked by the petitioners in *Brown*, nor was it briefed or argued in the Court. Nevertheless, Justice Stevens’ opinion for the Court asserted:

While it confirms the state’s authority to confiscate private property, the text of the Fifth Amendment imposes two conditions on the exercise of such authority: the taking must be for a “public use” and “just compensation” must be paid to the owner. In this case, the first condition is unquestionably satisfied. If the State had imposed a special tax, or perhaps a system of user fees, to generate the funds to finance the legal services supported by the Foundation, there would be no question as to the legitimacy of the use of the public’s money.⁷⁵

Justice Scalia retorted in dissent that, “[i]n needlessly addressing this issue,” the Court “reduces the ‘public use’ requirement to a negligible impediment indeed, since I am unaware of *any* use to which state taxes cannot constitutionally be devoted.”⁷⁶

While not citing to them, the majority’s dicta are based on the Court’s pronouncements in *Berman v. Parker*⁷⁷ and *Hawaii Housing Authority v. Midkiff*.⁷⁸ *Berman* upheld the condemnation of even sound parcels in blighted neighborhoods in which urban renewal was planned. Justice William Douglas declared for the Court:

[T]he legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, . . . This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.⁷⁹

In *Midkiff*, which adjudicated the condemnation of fees simple for transfer to long-term ground lease owners, Justice Sandra Day O’Connor reviewed *Berman* and concluded

74. Perhaps this moral sense is behind what Justice Scalia, perhaps less charitably, terms the “Robin Hood” response. *Brown*, 123 S. Ct. at 1428 (Scalia, J., dissenting).

75. *Id.* at 1417 (internal citations omitted). Justice Stevens has been quite selective in reaching out for issues in property rights cases. His advisory opinion on the meaning of the Public Use Clause in *Brown* was not responsive to anything in the case. On the other hand, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 32 ELR 20627 (2002), Justice Stevens adamantly refused to consider more than 32 months of what was asserted to be a “temporary” moratorium on development, in spite of the fact that duration was raised in the certiorari petition and that the moratorium was then in its 21st year.

76. *Brown*, 123 S. Ct. at 1422 n.2 (Scalia, J., dissenting) (emphasis in original).

77. 348 U.S. 26 (1954).

78. 467 U.S. 229, 14 ELR 20338 (1984).

79. 348 U.S. at 32.

that the “public use” requirement is thus coterminous with the scope of a sovereign’s police powers.⁸⁰

However, as Prof. Thomas Merrill has noted, “if public use is truly coterminous with the police power, a state could freely choose between compensation and noncompensation any time its actions served a ‘public use.’ This approach would seemingly overrule the entire takings doctrine in a single stroke.”⁸¹ Furthermore, Justice Scalia’s *Brown* dissent observed that “[t]axes and user fees, since they are not ‘takings,’ are simply not subject to the ‘public use’ requirement, and so their constitutional legitimacy is entirely irrelevant to the existence *vel non* of a public use.”⁸²

The Court has traditionally considered taxes and user fees differently than takings.⁸³ A substantial reason for this is tax laws are general in nature. Indeed, “tax” laws designed to punish specific individuals are bills of attainder. Chief Justice Thurgood Marshall declared, in *Fletcher v. Peck*,⁸⁴ that “[a] bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.”⁸⁵ Marshall’s “pronouncement therefore served notice that the Bill of Attainder Clause was not to be given a narrow historical reading . . . but was instead to be read in light of the evil the Framers had sought to bar: legislative punishment, of any form or severity, of specifically designated persons or groups.”⁸⁶ Similarly, user fees recoup the costs of benefits provided by government, which provides an intrinsic nexus between the fees and the parcels affected. Because user fees are compensated by services rendered, for instance, the United States can impose a valid user fee on state activities, despite the implied immunity of a state government from federal taxation.⁸⁷ All of this confirms that the Takings Clause historically has been regarded as different from the police and taxing powers, and that analogies are apt to be treacherous.

The Casual Equation of Permissible Police Power Ends With Eminent Domain Means

As noted above, both Justice O’Connor’s “coterminous” language in *Midkiff* and Justice Stevens’ equation of “public use” with permissible objects of taxation in *Brown* seem to suggest that “public interest” and “takings” are no more than synonymous with what might be deemed “permissible objectives of the State’s police and taxing powers.” If that were true, the Takings Clause indeed seems superfluous.

However, Professor Merrill provided a good explanation for the seemingly overbroad language in *Berman* and *Midkiff* that seems appropriate for *Brown* as well:

80. 467 U.S. at 240.

81. Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 70 (1986).

82. *Brown*, 123 S. Ct. at 1422 n.2 (Scalia, J., dissenting) (emphasis in original) (citing *United States v. Sperry Corp.*, 493 U.S. 52, 63 (1989)).

83. See Echeverria, *supra* note 24, at 10630.

84. 10 U.S. (6 Cranch) 87 (1810).

85. *Id.* at 138.

86. *United States v. Brown*, 381 U.S. 437, 447 (1965) (quoting *Fletcher*, 10 U.S. (6 Cranch) at 138).

87. See *Massachusetts v. United States*, 435 U.S. 444 (1978) (upholding imposition of annual registration tax imposed on all civil aircraft flying in navigable airspace of the United States for recoupment of costs of federal aviation programs on state aircraft used exclusively for police functions).

The illogic of the Court's statements disappears, however, once one recognizes that the police power, like eminent domain, can also refer to the question of proper governmental ends, rather than means. This is clearly what Justice Douglas meant in *Berman* when he said that the police power "is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition." He was not saying that government could freely employ any means of achieving slum clearance, and with it choose either compensation or noncompensation. Instead, he was saying that slum clearance is a permissible end of government. The Court's recent decisions echo this notion. "Police power" is here synonymous with the extent to which government may constitutionally regulate private activity. It defines those issues with which government may properly concern itself. The Court's statements again indicate that the permissible ends principle cuts across all means of resource acquisition, and that one should, for the sake of analytical clarity, keep questions of ends and means distinct.⁸⁸

Although governmental powers might share constitutional ends, *Brown* indicates why justifiable ends do not necessarily justify specific means. As *Brown* noted, the provision of legal services to the needy is a legitimate government purpose. That does not mean, however, that the Fifth Amendment Public Use Clause is thereby satisfied. The Court demonstrated no connection between the interest generated on the petitioners' funds, which were awaiting a real estate closing, and the need of low- and moderate-income persons for basic legal services. In fact, the only real nexus between the petitioners' deposits and legal services was that the state supreme court justices both were concerned about funding for the latter and, independently, had disciplinary powers over those who held the former.

Mandatory IOLTA programs did not result from fears that clients were abused under the former system of law firm trust accounts. Moreover, as *Brown* noted, the former system did protect against the real ethical problem, lawyers "commingling their clients' money with their own."⁸⁹ There is no apparent reason for state supreme court justices to utilize disciplinary rules to raise money for IOLTA. "The taking has nothing to do with ethics."⁹⁰ Indeed, the self-evident arbitrariness that would be associated with a judge urging litigants to contribute to the judge's favorite charity is not absent in the IOLTA situation. As Justice Kennedy said, the disciplinary rule enforcing IOLTA simply is a way of "mandating [that] the interest from these accounts serve causes the justices of the Washington Supreme Court prefer."⁹¹

The taxing power is suited to raising funds for public purposes because valid taxes do not target individuals. The Takings Clause, on the other hand, targets particular assets owned by individuals when those assets are needed for public use. The parcel needed for a road may be taken in full and the adjoining parcel left undisturbed. It is precisely the fact that takings are targeted, whereas tax burdens are spread, that leads to the just compensation requirement for takings. The Court reiterated this point in *Tahoe-Sierra*,⁹²

emphasizing, in what it dubbed the "Armstrong principle," that "the Takings Clause was 'designed to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole.'"⁹³

It would be difficult to reconcile an emphasis on "fairness and justice" with the targeting nature of eminent domain were the latter not constrained by the requirement that there must be a relationship between the property to be taken and the public use to be served. Imagine, for a moment, a government procurement official needing to purchase Parcel A, located in a narrow valley, upon which to run a highway. The official is aware Parcel B, located some distance away, that might be condemned and its owner browbeaten into accepting 30 cents on the dollar as compensation.⁹⁴ Might the official condemn Parcel B and use the profits from its subsequent resale to obtain Parcel A at fair market value? The Court's casual acquiescence in the taking of interest generated by funds awaiting disbursement at real estate closings to fund legal services invites this type of abuse.

In a sense, this problem is the converse of the issue considered by the Court in another case involving the application of the Takings Clause to money as such, *Eastern Enterprises v. Apfel*.⁹⁵ There, as Professor Echeverria described, a majority of the Justices viewed "government-imposed financial liabilities" as being "outside the scope of the Takings Clause" because they do not involve an effect on what Justice Kennedy termed a "specific property interest."⁹⁶ If individuals facing cash liabilities to government should not be able to invoke the Takings Clause, it would follow that governments seeking cash to fund useful projects should not be able to invoke eminent domain.

Brown Neglects Problems of Political Accountability

While IOLTA programs exist in every state, only in five states have they been enacted by the legislature. In the other 45 states and the District of Columbia, they were imposed by rules adopted by the state's highest court.⁹⁷ This distinction was not at issue in *Brown*, and the Court "assume[d]" that it was "irrelevant" to the takings issue.⁹⁸ However, decisions about the use of public funds are inherently political. Decisions about whether the interest generated from the funds of law clients should support legal services for low-income families, increased welfare allowances for such families, or tuition vouchers usable at private schools for their children should not be imposed under rules established to discipline lawyers by judges not accountable to the voters.

The outcome in *Brown* excludes the owners of the interest taken for IOLTA from this dialogue. Had the interest remained in the hands of law clients, they "would have allowed the true owners of the property the option to express

88. Merrill, *supra* note 81, at 70.

89. *Brown*, 123 S. Ct. at 1411.

90. *Id.* at 1423 n.2 (Scalia, J., dissenting).

91. *Id.* at 1428 (Kennedy, J., dissenting).

92. 535 U.S. at 302, 32 ELR at 20627.

93. *Id.* at 321, 32 ELR at 20630 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

94. A reader considering this example farfetched should consult *Althaus v. United States*, 7 Cl. Ct. 688, 692 (Cl. Ct. 1985).

95. 524 U.S. 498, 542 (1998).

96. Echeverria, *supra* note 24, at 10630 (quoting *Eastern Enters.*, 524 U.S. at 542 (Kennedy, J., concurring in the judgment and dissenting in part); see also 524 U.S. at 554 (Breyer, J., dissenting)).

97. *Brown*, 123 S. Ct. at 1412 & n.2.

98. *Id.* at 1412 n.2.

views and policies of their own choosing. Instead, as these programs stand today, the true owner cannot even opt out of the State's monopoly."⁹⁹

The Importance of *Brown* in Future Takings Cases

While its immediate impact was to sustain mandatory IOLTA programs, *Brown* may have what is perhaps the paradoxical effect of strengthening constitutional protections accorded owners of land and other types of property. The *Brown* petitioners lost because the Court determined that they suffered no "net loss" and therefore deserved no just compensation. However, property owners asserting that en-

vironmental regulations constitute regulatory takings should be able to demonstrate substantial net losses.

In cases where regulations seem intended only to achieve some public benefit, owners may claim advantage of the Court's reiteration of per se takings doctrine. Also, *Brown* represents a continuation of the Court's emphasis on fairness in *Palazzolo*¹⁰⁰ and *Tahoe-Sierra*.¹⁰¹ Thus, considerations of fairness should encourage the Court to review the use of targeted takings primarily to benefit governmental programs as arguing in favor of compensation under the "character of the governmental action" test of *Penn Central*.¹⁰²

100. 533 U.S. at 606, 32 ELR at 20516.

101. 535 U.S. at 302, 32 ELR at 20627.

102. 438 U.S. at 124, 8 ELR at 20533 and *supra* text accompanying notes 44-48.

99. *Id.* at 1428 (Kennedy, J., dissenting) (citing *Phillips v. Washington Legal Found.*, 524 U.S. 156, 172 (1998)).