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Washington Legal Foundation v. Texas Equal Access to Justice Foundation: Is There an Iota of Property Interest in IOLTA

Brennan J. Torregrossa

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WASHINGTON LEGAL FOUNDATION v. TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION: IS THERE AN IOTA OF PROPERTY INTEREST IN IOLTA?

I. INTRODUCTION

Lawyers typically account for money received from clients in two ways. First, where lawyers receive client funds in large amounts which are held for a sufficient length of time so that the funds produce income for that client, the lawyer may be obligated to place the funds in an interest-bearing account for the benefit of the client. Second, where lawyers re-

1. See Betsy Borden Johnson, Comment, "With Liberty and Justice for All" IOLTA in Texas—The Texas Equal Access to Justice System, 37 Baylor L. Rev. 725, 726 (1985) ("The money held in trust for clients can be divided into two classes.").

2. See In re Arkansas Bar Ass'n Petition, 675 S.W.2d 355, 356 (Ark. 1984) ("In those cases in which these funds are more than nominal in amount or are to be held for longer periods, the client may instruct the attorney to place the funds in an interest-bearing account for the credit of the client."); In re New Hampshire Bar Ass'n, 453 A.2d 1258, 1260 (N.H. 1982) (per curiam) ("[L]awyers have a fiduciary obligation to place funds in an interest-bearing account and to credit the interest to the client when it is practical to do so."); In re Interest on Lawyers' Trust Accounts, 672 P.2d 406, 407 (Utah 1983) ("Where client funds are of sufficient amount or are held for a sufficient period that the lawyer can . . . foresee that they will yield enough interest to be of significant benefit to the client . . . the lawyer will . . . be obligated to make the funds produce income for . . . the client.").

Investing clients' funds for the benefit of the client where there are positive returns after accounting and banking charges is typically an ethical and fiduciary duty of the attorney. See Kenneth Paul Kreider, Note, Florida's IOLTA Program Does Not "Take" Client Property for Public Use: Cone v. State Bar of Florida, 819 F.2d 1002 (11th Cir.), cert. denied, 108 S. Ct. 268 (1987), 57 U. Cin. L. Rev. 369, 370 (1988) (explaining traditional approach for attorneys handling large or long-term client funds); see also Carroll v. State Bar of Cal., 213 Cal. Rptr. 305, 310-11 (Ct. App.) (discussing State Bar of California guidelines for handling large or long-term client funds), cert. denied, 474 U.S. 848 (1985). At the very least, upon receipt of client funds, the American Bar Association states in Disciplinary Rule 9-102(B) of the Model Code of Professional Responsibility that a lawyer shall:

(1) Promptly notify a client of the receipt of his funds, securities, or other properties. (2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable. (3) Maintain complete records of funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them. (4) Promptly pay or deliver to the client as requested by the client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102(B) (1980).
receive client funds which are nominal in amount or which are held for such a short time period that it is impractical or impossible to produce income for the client, the lawyer usually commingles the funds with other client funds of the same type in a noninterest-bearing account. Interest on Lawyers’ Trust Accounts (IOLTA) is a program whereby the lawyer places this second type of client funds together in an interest-bearing account to provide funding for legal services to indigent persons and other legally related public interest activities. In light of recent federal and state cuts in funding, IOLTA programs have become a critical source of funding for legal services to the poor.

The clients cannot collect the interest on these nominal and short-term accounts because separate accounts of the clients’ funds would not yield enough interest. Further, it is either impractical or impossible to apportion individual client interest from commingled funds because administrative costs would equal or exceed any amount the client might earn in interest. Johnson, supra note 1, at 726. Finally, professional ethical rules prevent an attorney from collecting the interest from these commingled accounts. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 348 (1982) (deciding it is ethically permissible for lawyers to participate in IOLTA programs).


The Economic Opportunity Act of 1964 created the Legal Services program to give legal assistance to the poor. Carol Horowitz, Activism of Legal Services Corp. Tax-Funded Group Tries to Expand Welfare State, INVESTOR’S BUS. J., July 24, 1995, at A1. Legal Services remained under the now defunct Office of Economic Opportunity for ten years. Id. Congress rechartered the program as a nonprofit corporation in
IOLTA programs are created by the states. All fifty states and the District of Columbia now have IOLTA programs. The Indiana Supreme Court, which in the past refused to create an IOLTA program due to ethical and constitutional concerns, recently became the last jurisdiction to adopt an IOLTA program. In addition, the Pennsylvania Supreme Court

6. See Rounds, supra note 4, at 173-74 (stating that IOLTA programs are “state-authorized or state-mandated programs”); Sackmary, supra note 4, at 189 (discussing process by which jurisdictions permit IOLTA programs). Courts, legislatures and attorneys have proposed IOLTA programs. Id.


8. See Indiana Committees Wrap Up Work, IOLTA UPDATE 4 (ABA Comm’n on Interest on Lawyers’ Trust Accounts, Chicago, Ill., Aug. 1996) (reporting progress of three committees to institute voluntary IOLTA program in Indiana). Recently, the Indiana Supreme Court appointed a commission to evaluate the types of gov-
just converted the Pennsylvania IOLTA program from a voluntary to a mandatory program for all attorneys, thereby making it the twenty-sixth state to have a mandatory IOLTA program.\(^9\)


\textbf{(d)} [A] lawyer shall place all funds of a client or of a third person in an interest bearing account. All qualified funds received by the lawyer shall be placed in an Interest On Lawyer Trust Account in a depository institution approved by the Supreme Court of Pennsylvania. All other funds of a client or a third person received by the lawyer shall be placed in an interest bearing account for the benefit of the client or third person or in an other investment vehicle specifically agreed upon by the lawyer and the client or third party.

\textbf{(1)} Qualified funds are monies received by a lawyer in a fiduciary capacity that, in the good faith judgment of the lawyer, are nominal in amount or are reasonably expected to be held for such a short period of time that sufficient interest income will not be generated to justify the expense of administering a segregated account.

\textit{Id.} The rule also provides that a lawyer may be granted an exemption by the IOLTA board if: (1) the nature of the lawyer's practice does not necessitate routine maintenance of a trust account in Pennsylvania; (2) compliance would cause undue hardship due to geographic locations of the lawyer or other compelling factors; or (3) if service charges on the IOLTA account would "significantly and routinely" outweigh any interest generated. \textit{Id.} at Rule 1.15(e)(i)-(iii).
Despite this high watermark and apparent universal approval for IOLTA programs, several federal and state court challenges have been brought against the programs. The two earliest federal court challenges, which claimed that IOLTA violated the First and Fifth Amendments of the United States Constitution, were unsuccessful. In the latest challenge, there are three types of IOLTA programs: twenty-six states have mandatory programs, twenty-one states operate under opt-out programs and three states remain voluntary. Wyoming Converts to Opt-out Status, IOLTA UPDATE 5 (ABA Comm'n on Interest on Lawyers' Trust Accounts, Chicago, Ill., Feb. 1996). Under a mandatory program, "the state requires that all lawyers' trust funds earn interest either for the client or the specified IOLTA organization." See Sackmary, supra note 4, at 192 (comparing mandatory, opt-out and voluntary programs). In contrast, in a voluntary IOLTA program, an attorney may participate by notifying the local bar foundation that an IOLTA account has been established with a financial institution. Id. Finally, in an opt-out program, there is an annual opt-out period where a lawyer must assert that he or she wants be excluded from the program. Id. Many states converted to a mandatory program, or what is sometimes also known as a comprehensive program, to generate a significant increase in IOLTA funds. James F. Mundy, Legal Services to Get a Boost, HARRISBURG PATRIOT, Aug. 13, 1996, at A6. For example, in Pennsylvania, the conversion to a mandatory IOLTA program is expected to generate $8 million for legal services each year as opposed to the $2 million that had typically been accumulated annually under a voluntary program. Id. Only one in four Pennsylvania attorneys participated when the program was voluntary in nature, but the mandatory or comprehensive status will affect approximately 30,000 lawyers who will now be required to set up IOLTA accounts. Id. For this reason, many of the top ten IOLTA program revenue producers in 1993 were mandatory. See Reske, supra note 7, at 33 (listing top revenue producers). The top ten state revenue producers in 1993 were: Florida, New York, California, New Jersey, Massachusetts, Texas, Maryland, Connecticut, Georgia and Illinois). Id. Moreover, the ABA House of Delegates overwhelmingly recommended in 1988 that all states having voluntary IOLTA programs switch to mandatory IOLTA status. Supreme Court Opens Mandatory-IOLTA Discussion, 19 MONT. LAW. 15, 15 (1994).

Many state supreme courts addressed the constitutional issues of IOLTA programs over First and Fifth Amendment challenges. See Washington Legal Found. v. Massachusetts Bar Found., 993 F.2d 962, 968 (1st Cir. 1993) (upholding constitutionality of IOLTA program); Cone v. State Bar of Fla., 819 F.2d 1002, 1007 (11th Cir.) (same), cert. denied, 484 U.S. 917 (1987); In re Arkansas Bar Ass'n Petition, 675 S.W.2d 355, 357-58 (Ark. 1984) (instituting IOLTA program), modified, 738 S.W.2d 803 (Ark. 1987); Carroll v. State Bar of Cal., 213 Cal. Rptr. 305, 311-13 (Ct. App.) (upholding constitutionality of IOLTA program), cert. denied, 474 U.S. 848 (1985); In re Interest on Trust Accounts, 402 So. 2d 389, 395-96 (Fla. 1981) (establishing IOLTA program and deciding no constitutionality concerns involved); In re Massachusetts Bar Ass'n, 478 N.E.2d 715, 718, 720 (Mass. 1985) (holding IOLTA program as constitutional and ethical); In re Petition of Minn. State Bar Ass'n, 332 N.W.2d 151, 152-53, 158 (Minn. 1982) (establishing IOLTA program and deciding that there were no constitutional concerns); In re New Hampshire Bar Ass'n, 453 A.2d 1258, 1260-61 (N.H. 1982) (per curiam) (holding IOLTA program constitutional); In re Interest on Lawyers' Trust Accounts, 672 P.2d 406, 408 (Utah 1983) (establishing IOTA program and deciding no constitutional issue existed).

Many state supreme courts addressed the constitutional issues of IOLTA programs when ordering implementation of a program in their respective states. See...
Washington Legal Foundation v. Texas Equal Access to Justice Foundation, the United States Court of Appeals for the Fifth Circuit held that clients have a cognizable property interest in the interest generated under IOLTA programs for freedom of speech and “taking” purposes under the First and Fifth Amendments of the Constitution.

This Note discusses the Fifth Circuit’s holding in light of other court decisions upholding the constitutionality of IOLTA programs. Part II summarizes the history of IOLTA, the constitutional issues associated with funds generated by IOLTA and the manner in which other courts have treated these constitutional issues. Part III describes the IOLTA program in Texas and how the resulting challenge arose. Next, Part IV traces the Fifth Circuit’s approach in finding a cognizable property interest in IOLTA funds. Part V analyzes the conclusions of law of the Fifth Circuit’s decision. Finally, Part VI focuses on the likely impact of the Fifth Circuit’s decision on IOLTA programs and on the relevant area of constitutional “taking” law.

Sackmary, supra note 4, at 190 (noting that many states adopting IOLTA programs first ratified programs as constitutionally and ethically permissible). Apart from First and Fifth Amendment challenges, state court challenges to IOLTA programs included claims: (1) that IOLTA denied Sixth Amendment right to counsel; (2) that IOLTA was unconstitutionally vague in reference to funds that are nominal in amount or held for a short period of time; and (3) that IOLTA violated equal protection. Carroll, 213 Cal. Rptr. at 305. None of these claims were successful. Id. This Note addresses only whether there is a cognizable property interest in the IOLTA interest generated for First and Fifth Amendment federal constitutional claims.

The First Amendment provides: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I. The Fifth Amendment provides in relevant part: “No person shall be... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

12. 94 F.3d 996 (5th Cir. 1996).
13. Id. at 1004.
14. For a discussion of the court’s decision in Washington Legal Foundation, see infra notes 116-48 and accompanying text.
15. For a discussion of state implementation of IOLTA programs, First and Fifth Amendment concerns with IOLTA programs, and other court decisions in IOLTA constitutional challenges, see infra notes 20-99 and accompanying text.
16. For a discussion of the initiation, history and data on the Texas IOLTA program, see infra notes 100-15 and accompanying text.
17. For a discussion of the Fifth Circuit’s decision in Washington Legal Foundation, see infra notes 116-48 and accompanying text.
18. For a discussion of the appropriateness of the conclusions of law reached by the Fifth Circuit, see infra notes 149-67 and accompanying text.
19. For a discussion of the consequences of the Fifth Circuit’s decision, see infra notes 168-79 and accompanying text.
II. BACKGROUND

A. History of IOLTA

Clients often entrust funds to a lawyer. Before the adoption of IOLTA programs, the general practice was for lawyers to place clients' funds which were nominal in amount or which were to be held for a short period of time in noninterest-bearing accounts. The practice was premised on the notion that it was administratively and economically counterproductive to make these funds benefit the client. IOLTA began with the simple concept that while these accounts would generate no interest separately, collectively the funds could generate significant sums. This interest could then benefit certain identified charitable organizations.

20. See In re Massachusetts Bar Ass'n, 478 N.E.2d 715, 716 (Mass. 1985) ("'Attorneys have been entrusted with clients' funds and property since the early part of the development of our common law system of jurisprudence.'" (quoting Arthur J. England, Jr. & Russell E. Carlisle, History of Interest on Trust Accounts Program, 56 Fla. B.J. 101, 101 (1982))); see also Rounds, supra note 4, at 173 (stating that clients sometimes entrust lawyers with money); Johnson, supra note 1, at 726 (identifying first step in examining IOLTA program as recognizing that lawyers often receive money from clients or on behalf of clients).

The types of funds entrusted to a lawyer are varied. Kreider, supra note 2, at 370. Advanced funds for settlement drafts, court fees or miscellaneous expenses are a few examples of the many types of funds typically received by an attorney. Id. A lawyer may also temporarily hold a personal injury settlement or alimony payment for a client. Rounds, supra note 4, at 173.

21. See Massachusetts Bar Ass'n, 478 N.E.2d at 716 (describing historical method for dealing with nominal or short-period client funds in Massachusetts); In re Petition of the Minn. State Bar Ass'n, 332 N.W.2d 151, 156 (Minn. 1982) (finding that in most Minnesota cases, nominal amounts of client funds or those held for brief period are pooled in noninterest-bearing checking account); In re Interest on Lawyers' Trust Accounts, 672 P.2d 406, 407 (Utah 1983) ("Currently, [nominal or short-period client] funds are usually pooled and held in noninterest-bearing accounts since the separate balances do not yield enough interest to cover the expense of computing, remitting, and reporting to the Internal Revenue Service the amounts attributable to each client."); see also Rounds, supra note 4, at 173 (noting that nominal or short-period amounts were notable exception to general rule requiring lawyers to invest funds for clients' benefit); Kreider, supra note 2, at 371 (stating that prior to IOLTA, lawyers frequently pooled nominal client amounts in accounts bearing no interest); Sackmary, supra note 4, at 188-89 (noting practice of attorneys in handling nominal or short-period client funds prior to IOLTA as simply "left with the bank").

22. See Kreider, supra note 2, at 370 ("The funds advanced by individual clients were typically nominal amounts or were held for such a short term as to preclude the practical possibility of earning interest, after accounting for costs.")

23. See, e.g., In re Arkansas Bar Ass'n Petition, 675 S.W.2d 355, 357 (Ark. 1984) (finding that only depository institutions benefited from accounts which held nominal or short-period funds of clients prior to IOLTA programs). modified, 738 S.W.2d 803 (Ark. 1987). In accepting the petition to initiate an IOLTA program, the Arkansas Supreme Court found that the "underlying concept of the IOLTA program is that while the interest generated by each client's trust account funds is too small to warrant payment to the client, the collective interest generated by the lawyer's trust account as a whole may be substantial." Id.

24. Id. The Arkansas Supreme Court noted that this money "would be a very significant source of income for the benefit of public interest programs related to
Beginning in the 1960s, prior to initiation of IOLTA programs in the United States, many foreign jurisdictions made use of interest on lawyers' trust accounts to aid public service activities. Florida was the first state to contemplate implementation of an IOLTA program and initiated a study to consider the feasibility in 1971. After five years of research, the Florida Bar petitioned the Florida Supreme Court, requesting adoption of an IOLTA program.

The federal banking regulations at the time of the Florida Bar petition prohibited interest-bearing checking accounts on a nationwide basis and this served as a major impediment to implementation of an IOLTA program. This obstacle was partially removed by the 1980 federal bank...
ing regulations, which allowed negotiable order of withdrawal (NOW) accounts, or interest-bearing checking accounts.\textsuperscript{29} The federal banking regulations, however, prohibit the holding of interest-bearing checking accounts by for-profit businesses such as law firms.\textsuperscript{30} In a private letter ruling, the Federal Reserve System's general counsel stated that Florida attorneys could use NOW accounts for an IOLTA program.\textsuperscript{31}

When these initial banking concerns were lifted in 1981, the Florida Supreme Court adopted the nation's first IOLTA program.\textsuperscript{32} During the 1980s, with America's legal system for the poor in need of drastic help as a backdrop, many states followed Florida's lead and initiated IOLTA programs.\textsuperscript{33} Today, all fifty states and the District of Columbia have enacted IOLTA programs.\textsuperscript{34} By such action, state courts or legislatures have expressly or implicitly identified IOLTA programs as permissible on ethical and constitutional grounds.\textsuperscript{35}

The second concern which was raised by opponents of implementation of IOLTA programs was the ethical concerns for attorneys participating in IOLTA programs. \textit{In re Petition of Minn. State Bar Ass'n,} 332 N.W.2d 151, 159 (Minn. 1982). Formal Opinion 348 of the American Bar Association addressed these ethical implications for attorneys. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 348 (1982). The Formal Opinion 348 stated that nothing in the Code of Professional Responsibility would prohibit an attorney from participation in an IOLTA program. \textit{Id.} Specifically, the Committee on Ethics and Professional Responsibility found nothing that "prohibits a lawyer from participating in state-authorized programs . . . which use interest earned on bank accounts in which are deposited clients' funds, nominal in amount or to be held for short periods of time, providing for the interest to be paid to certain tax-exempt organizations." \textit{Id.}


30. 12 U.S.C. § 1832(a)(2). The NOW account privilege applied:

\[\text{O}nly\text{ with respect to deposits or accounts which consist solely of funds in which the entire beneficial interest is held by one or more individuals or by an organization which is operated primarily for religious, philanthropic, charitable, educational, political, or other similar purposes and which is not operated for profit.}\]

\textit{Id.}

31. Letter from Michael Bradfield to Donald M. Middlebrooks (Oct. 15, 1981), \textit{reprinted in} Donald M. Middlebrooks, \textit{The Interest on Trust Accounts Program—Mechanics of its Operation}, 56 FLA. B.J. 115, 117 (1982). The letter stated that "[s]ince no entity other than the Foundation has any interest to the income derived from funds maintained under the program, it would not appear that . . . the Foundation hold [sic] the entire beneficial interest to the funds." \textit{Id.} Thus, the letter concluded that the funds held under the proposed IOLTA program by law firms would be eligible to be held in NOW accounts. \textit{Id.}

32. Sackmary, \textit{supra} note 4, at 190.

33. \textit{Id.}

34. Sword, \textit{supra} note 8, at 6A.

35. \textit{See} Sackmary, \textit{supra} note 4, at 190 (discussing manner in which states ratified IOLTA programs and found them "constitutionally and ethically permissible"). Most states, however, adopted IOLTA programs without opinion or through legislation. Washington Legal Found. v. Texas Equal Access to Justice Found., 94
In analyzing IOLTA challenges, many courts recognized that *Penn Central Transportation Co. v. City of New York* was a good summary of the legal principles underlying the “taking” clause. In *Penn Central*, a zoning law which was designed to protect the integrity of historical landmarks in New York City prevented Penn Central from building an office tower above its existing terminal. Penn Central filed a complaint which alleged that because of an unreasonable regulation, a temporary “taking” of its property interest in the terminal had resulted. In an opinion by Justice Brennan, however, the United States Supreme Court ruled otherwise.

The *Penn Central* opinion had two significant effects in the area of “taking” law. First, *Penn Central* established that to state a cognizable claim of a “taking” in violation of the Fifth Amendment, plaintiffs must demonstrate as a threshold issue that they possess a recognized property interest protected by the Fifth Amendment. Second, *Penn Central* furnished a

...
multi-factor test for adjudicating “taking” cases in which a plaintiff has demonstrated a recognized property interest: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. 42

In Webb's Fabulous Pharmacies, Inc. v. Beckwith, 43 arguably the most important authority in evaluating IOLTA “taking” challenges, the Supreme Court used *Penn Central* to determine whether a plaintiff had a recognized property interest in the interest earned on an interpleader account. 44 In Webb's, a Florida statute provided that all interest earned on public or private monies deposited with a county circuit court registry became the property of the clerk. 45 The appellant, Eckerd's of College Park, Inc., challenged the Florida statute on the ground that it was an unconstitutional “taking” under the Fifth and Fourteenth Amendments of the Constitution. 46 The Florida Supreme Court held that the Florida statute was

02 (1972). The *Perry* Court stated that credible sources included positive rules of substantive law or mutually explicit understandings. Id.

42. *Penn Central*, 438 U.S. at 124. The *Penn Central* Court concluded that Penn Central was not deprived of property under this analysis. Id. at 138.


44. Id. at 161. The Court stated that “a mere unilateral expectation or an abstract need is not a property interest entitled to protection.” Id. (citing *Penn Central*, 438 U.S. at 122).

45. Id. at 156 n.1. The statute read in part: Moneys deposited in the registry of the court shall be deposited in interest-bearing certificates at the discretion of the clerk . . . . All interest accruing from moneys deposited shall be deemed income of the office of the clerk of the circuit court investing such moneys and shall be deposited in the same accounts as are other fees and commissions of the clerk's office.

*FLA. STAT. ANN.* § 28.33 (West 1977). In Webb's, Eckerd's of College Park, Inc. entered into an agreement to purchase all assets of Webb's Fabulous Pharmacies, Inc. for $1,812,145.77. Webb's, 449 U.S. at 156. At closing, however, it appeared as though Webb's debts were greater than the purchase price. Id. Eckerd's filed a complaint of interpleader in the Circuit Court of Seminole County, interpled Webb's and its creditors, and tendered the purchase price to the court. Id. at 156-57. Upon appointment of a receiver approximately one year after the tender of the purchase price, the clerk returned the remaining principal minus a $9,288.74 statutory fee which was not contested. Id. at 158. The deduction of a clerk fee was pursuant to the Florida Code. See *FLA. STAT. ANN.* § 28.24(14) (West 1977) (authorizing clerk fee). The clerk, however, also deducted the interest earned on the interpleader fund while held by the court, which amounted to over $90,000, pursuant to the Florida Code. Webb's, 449 U.S. at 158. The appellants in this case alleged that the court acted sua sponte in appointing a receiver because the clerk insisted that the county was entitled to the interest being earned on the interpleader fund and wanted to bring the controversy to an end. Id. at 158 n.4.

46. Webb's, 449 U.S. at 158. The procedural history of Webb's was not entirely clear. Id. at 159 n.5. The receiver moved that the circuit court direct the clerk to pay the accumulated interest to the receiver. Id. at 158. The circuit court held that “the clerk is not entitled to any interest earned.” Id. Apparently, the federal constitutional issues were not raised at the circuit court proceeding. Id. at 159 n.5. The Seminole County clerk appealed to the Florida District Court of Appeals and
constitutional because the private funds were considered public money from the date of deposit until the date of return. The Supreme Court reversed and held that, in the narrow context where a state statute authorized the deposit of a private fund for interpleader protection, any appropriation of the interest earned on the fund while in the account constituted a "taking" in violation of the Fifth and Fourteenth Amendments.

The Supreme Court established two principles in its decision. First, the Court determined that the interpleader fund was not public property, but private property. Second, and more importantly, the Court affirmed the general rule that interest earned on a deposit of principal belongs to the owner of the principal. The Court stated that Florida may not avoid this well-established rule by simply redefining the principal as "public money" while it was temporarily held by the court.

that court transferred the case to the Supreme Court of Florida. Id. at 158. While it was unclear where the federal issues were first raised, the Supreme Court found that the federal issues were satisfactorily addressed by the Florida Supreme Court for review. Id. at 159 n.5.

47. Beckwith v. Webb's Fabulous Pharmacies, Inc., 374 So. 2d 951 (Fla. 1979), rev'd, 449 U.S. 155 (1980). The court reasoned that "the statute takes only what it creates." Id. at 953. Further, the court added that "[t]here is no unconstitutional taking because interest earned on the clerk of the circuit court's registry account is not private property." Id.

48. Webb's, 449 U.S. at 164-65. The Supreme Court demonstrated the narrow focus of its decision by holding that:

[U]nder the narrow circumstances of this case—where there is a separate and distinct state statute authorizing a clerk's fee "for services rendered" based upon the amount of principal deposited; where the deposited fund itself concededly is private; and where the deposit in the court's registry is required by state statute in order for the depositor to avail itself of statutory protection from claims of creditors and others . . . the interest earned on the interpleader fund while it was in the registry of the court was a taking violative of the Fifth and Fourteenth Amendments.

Id. The Court further narrowed its decision by stating that it offered no view as to the constitutionality of a statute which allowed interest to be kept by a court as return for the services rendered. Id. at 165.

49. Id. at 160-62.

50. Id. at 160-61. The Court found that the creditors had a state-created property right to their respective portions of the fund. Id. at 161. The Court conceded that none of the creditors had rights to the fund until the court recognized their claim. Id. The Court stated, however, that even though the creditors had no immediate access to funds, this did not bar a property share in the interim. Id. at 162.

51. Id.; see also Murphy v. Travelers Ins. Co., 534 F.2d 1155, 1165 (5th Cir. 1976) (applying general rule that interest follows principal applied to interpleaded funds); In re Brooks & Woodington, Inc., 505 F.2d 794, 799 (7th Cir. 1974) (same); James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451, 463 (5th Cir. 1971) (same); Board of Law Library Trustees v. Lowery, 154 P.2d 719, 719-20 (Cal. 1945) (same); Kiernan v. Cleland, 273 P. 938, 938-40 (Idaho 1929) (same); McMillan v. Robeson County, 137 S.E.2d 105, 108 (N.C. 1964) (same); Southern Or. Co. v. Gage, 197 P. 276, 279 (Or. 1921) (same); Sellers v. Harris County, 483 S.W.2d 242, 243 (Tex. 1972) (same).

52. Webb's, 449 U.S. at 164. Specifically, the Court found that:
C. IOLTA Challenges

In light of the Supreme Court's decisions in *Penn Central* and *Webb's*, state supreme courts had to determine whether the Fifth Amendment impeded implementation of a state IOLTA program on the ground that it was an unconstitutional “taking” of clients' property. One problem, however, was that most states embraced IOLTA programs legislatively or judicially without published opinions. Nevertheless, six state supreme courts adopted IOLTA programs through published opinions. Of these six state supreme courts, five addressed the issue of whether there was a constitutional property interest in the income attributed to the individual client funds in IOLTA programs.

[A] State . . . may not transform private property into public property without compensation, even for the limited duration of the deposit in court [because] this [was] the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent [and the] Clause stands as a shield against the arbitrary use of [this type of] government[ ] power.

Id.


55. See *In re Arkansas Bar Ass’n Petition*, 675 S.W.2d 355, 357 (Ark. 1984) (authorizing inception of IOLTA program); *In re Interest on Trust Accounts*, 402 So. 2d 803 (Fla. 1987); *In re Interest on Trust Accounts*, modified, 402 So. 2d 389, 393-94 (Fla. 1981) (same); *In re Massachusetts Bar Ass’n*, 478 N.E.2d 715, 716 (Mass. 1985) (same); *In re Interest on Lawyers’ Trust Accounts*, 672 P.2d 406, 407 (Utah 1983) (same).

The Florida Supreme Court was the first state supreme court to address implementation of an IOLTA program. Kreider, *supra* note 2, at 372. As the first court to consider an IOLTA program and its consequences in the United States, the court faced many problematic issues. *Id.* The courts and legislatures adopting IOLTA programs often accepted the analysis of the Florida Supreme Court in resolving banking, tax, ethical and constitutional concerns in implementing the Florida IOLTA program. *Id.* Many of these courts relied on the Florida Supreme Court's opinion in instituting IOLTA programs in their state without comment. *Id.*

Until recently, Indiana remained the only state to publish an opinion refusing to implement an IOLTA program. See *In re Indiana State Bar Ass’n’s Petition*, 550 N.E.2d 511, 516 (Ind. 1990) (refusing inception of Indiana IOLTA program). Indiana has since initiated a process of implementing an IOLTA program. See *Sword, supra* note 8, at 6A. For a discussion of Indiana’s past refusal to initiate an IOLTA program, see *supra* note 8 and accompanying text.

56. See *Interest on Trust Accounts*, 402 So. 2d at 395-96 (resolving Fifth Amendment “taking” concern with respect to proposed IOLTA program); *Massachusetts Bar Ass’n*, 478 N.E.2d at 717-18 (same); *Petition of Minn. State Bar Ass’n*, 392 N.W.2d at 158 (same); *New Hampshire Bar Ass’n*, 458 A.2d at 1260-61 (same); *Interest on Lawyers’ Trust Accounts*, 672 P.2d at 408 (same).

Interestingly, the Arkansas Supreme Court did not address constitutional concerns, but did address tax concerns with IOLTA programs. See *Arkansas Bar Ass’n*, 675 S.W.2d at 357 (holding that interest earned on IOLTA program would not be
In *In re Interest on Trust Accounts*, the Florida Supreme Court was the first court to address constitutional concerns raised by *Webb’s* and *Penn Central*. The court modified earlier proposals and finally authorized implementation of an IOLTA program. Initially, the court agreed that the Supreme Court's decision in *Webb's* was a new factor to consider. The court, however, disagreed with the contention that the *Webb's* decision barred implementation of an IOLTA program.

The court pointed to two distinguishing aspects between the proposed IOLTA program and the situation which called for the Supreme Court to invoke the "takings" clause in *Webb's*. First, the court found the main distinction was that there was no "property" to "take" from clients because the income created by the proposed IOLTA program could not benefit the client under any circumstances. Second, the court noted taxable to clients). The other five state supreme courts addressed tax concerns as well. See *Interest on Trust Accounts*, 402 So. 2d at 390-91 (determining that tax issue was not concen to implementation of IOLTA program); *Massachusetts Bar Ass'n*, 478 N.E.2d at 719 (same); *Petition of the Minn. State Bar Ass'n*, 392 N.W.2d at 158 n.2 (same); *New Hampshire Bar Ass'n*, 453 A.2d at 1280 (same); *Interest on Lawyers' Trust Accounts*, 672 P.2d at 406 (same). In addition, all six state supreme courts discussed ethical concerns with instituting an IOLTA program. See *Arkansas Bar Ass'n*, 675 S.W.2d at 356-57 (deciding that participation in IOLTA program by attorney was ethically permissible given American Bar Association opinion); *Interest on Trust Accounts*, 402 So. 2d at 996 (same); *Massachusetts Bar Ass'n*, 478 N.E.2d at 718-19 (same); *Petition of the Minn. State Bar Ass'n*, 392 N.W.2d at 158 (same); *New Hampshire Bar Ass'n*, 453 A.2d at 1261 (same); *Interest on Lawyers' Trust Accounts*, 672 P.2d at 406-07 (same). For a discussion of tax and ethical issues as initial concerns of state courts, see supra note 28.

57. 402 So. 2d 389 (Fla. 1981).

58. Id. at 393. The court acknowledged that "a new consideration which affects the program in light of the Foundation's request that we make it . . . mandatory is the Supreme Court's 1980 decision in [Webb's]." Id.

59. Id. at 399.

60. Id. at 395.

61. Id. at 395.

62. Id. The court stated:

There are many distinguishing features between the program today implemented for the generation of interest on lawyers' trust accounts, and the legal requirements of state law which led the United States Supreme Court to invoke the [F]ifth [A]mendment "taking" clause for the protection of private property in its Webb's decision.

Id. The court, however, only discussed two distinctions which were described as the "most relevant distinction" and "another vast difference" between the property in the proposed IOLTA program and the property in *Webb's*. Id. at 395-96.

63. Id. at 395. The court specifically found 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." Id.

The dissent stated that "[t]he majority's answer to the 'taking' argument was inadequate." Id. at 399 (Boyd, J., dissenting). Justice Boyd stated that there was an inconsistency in the majority's argument. Id. (Boyd, J., dissenting). The inconsistency was the majority's view that IOLTA created an income or benefit where there was none before, yet, when nominal or short-term client funds were held in non-interest-bearing accounts, the majority identified the beneficiary as the financial in-
that contrary to the situation in Webb's, the proposed IOLTA program was voluntary in nature. The five subsequent state supreme court opinions agreed with the Florida Supreme Court's view that there was no client "property" to "take" and consequently approved IOLTA programs despite the Webb's decision.

Moreover, in *Carroll v. State Bar of California*, the California Court of Appeals upheld the constitutionality of that state's IOLTA program in the only state court IOLTA challenge. In *Carroll*, the state bar appealed from the lower court's holding that the California IOLTA program was a voluntary program. The Court of Appeals for the Fourth District of California reversed and found that the program was mandatory for attorneys. The court also determined that the IOLTA program did not cause a "taking" and considered other constitutional claims not adjudicated by the trial court.

Interestingly, the *Carroll* court turned to the issue of whether there was a "taking" without first considering whether IOLTA interest was client...
money, satisfying the threshold issue of a recognized property interest under *Penn Central*. In analyzing the "takings" claim, the *Carroll* court determined that reliance on *Webb's* was misplaced. First, the court noted the facts were distinguishable because the sum deposited in *Webb's* was neither nominal in amount, nor to be held for a short period. Moreover, the court determined that if it were to void the IOLTA program on the constitutional ground of an unlawful "taking," the client would not be financially enhanced because the administrative costs would negate any "economic advantage." Finally, the *Carroll* court stated that even if a "taking" occurred, the action was constitutionally permissible under the *Penn Central* factors because it was a minimal and nonphysical regulatory invasion and the public good was served greatly by the IOLTA program.

Likewise, in *Cone v. State Bar of Florida*, the United States Court of Appeals for the Eleventh Circuit held that there was no unconstitutional "taking" of a client's residuary amount of a cost deposit with a law firm used in the Florida IOLTA program. Unlike the court in *Carroll*, the *Cone* court first considered the threshold issue established in *Penn Central* of whether the client had any recognized property interest. The court

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71. *Carroll*, 213 Cal. Rptr. at 311-12. The court, however, addressed the issue in the context of the consequences of voiding the IOLTA program. *Id.* at 312.

72. *Id.* ("Respondents mistakenly rely on . . . *Webb's* to bolster their claims of Fifth Amendment violations.").

73. *Id.*

74. *Id.* Specifically, the court stated that "[p]ractically speaking, should the court void *the IOLTA program* on-constitutional grounds, the clients would not be enhanced economically as their deposited funds would not be returned nor would they obtain any economic advantage." *Id.*

75. *Id.* The court stated:

Further, when the regulation is one which promotes the common good, even by adjusting the benefits and burdens of economic life, a compensable "taking" is less readily found than where there is a physical government invasion. Where the public good is great, and a "taking" is minimal, it is permissible. Even a substantial property interest may be taken through zoning laws, etc.

*Id.* (citation omitted).

76. 819 F.2d 1002 (11th Cir. 1987).

77. *Id.* at 1003-04. The client and appellant in *Cone* was Evelyn Glaeser. *Id.* at 1003. Evelyn Glaeser passed away and Jean Cone, the personal representative of Evelyn Glaeser, replaced her as appellant. *Id.* at 1004 n.1. In 1969, Evelyn Glaeser paid a $100 cost deposit to the law firm of Holland & Knight to probate the will of her late husband. *Id.* at 1003. Of the $100, $13.75 mistakenly remained in the trust account until 1981 when the firm transferred the amount, along with other nominal client amounts, into interest-bearing accounts pursuant to Florida's IOLTA program. *Id.* at 1003-04. Evelyn Glaeser's $13.75, combined with other nominal or short-term clients amounts, generated $2.25 of interest given to the Florida Bar Foundation. *Id.* at 1004. The court found that Evelyn Glaeser's funds could not have generated income without IOLTA due to economic realities of such a nominal amount. *Id.* This $2.25 amount of interest led to a $20 million lawsuit. *See Marcotte*, *supra* note 5, at 70 (discussing facts of *Cone*).

78. *Cone*, 819 F.2d at 1004. The court stated that "[t]he district court correctly perceived that the appellant's constitutional claims turned on one question,
affirmed the district court's finding that the threshold requirement was not met because the appellant failed to assert any protected property interest in the income earned on the nominal remaining cost deposit when combined with other nominal amounts.\textsuperscript{79} Thus, the court evaded discussing whether a governmental "taking" occurred.\textsuperscript{80}

There were two noteworthy aspects of the Eleventh Circuit's opinion in \textit{Cone}.\textsuperscript{81} First, the court noted that IOLTA funds were an exception to the traditional property rule that "'the interest goes with the principal, as the fruit with the tree.'"\textsuperscript{82} The court stated that this traditional doctrine, which the Supreme Court followed in \textit{Webb's}, assumed that there was a "fruit-bearing tree" in existence.\textsuperscript{83} Thus, as her deposit could not generate interest on its own, the court reasoned that the "taking" claim failed because the client had not asserted a legitimate claim of entitlement to the interest allegedly "taken" from her.\textsuperscript{84}

that being, whether the interest earned on nominal or short term funds held in an IOLTA account was the property of the client for the purposes of the Fifth and Fourteenth Amendments." \textit{Id.} The other claims in \textit{Cone} were that: (1) the IOLTA program deprived property without due process and (2) deprivation of her property was a breach of fiduciary duty under state law. \textit{Id.} A recognized property interest in IOLTA income earned on clients' deposits appears to be a threshold issue for First Amendment claims as well. See \textit{Washington Legal Found. v. Massachusetts Bar Found.}, 993 F.2d 962, 973 n.8 (1st Cir. 1993) ("We address the plaintiffs' Fifth Amendment claim first . . . in order to resolve the plaintiffs' property rights to funds deposited in IOLTA accounts before discussing the First Amendment claim which also involves that issue."). For a discussion of whether IOLTA violates clients' or attorneys' First Amendment right not to speak, see Sackmary, \textit{supra} note 4, at 197-212.

79. \textit{Cone}, 819 F.2d at 1004. The court held:

In affirming the district court, we 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, there was no taking of any property of the plaintiff. \textit{Id.} at 1007. The court further stated that the deposit could not generate interest by itself. \textit{Id.} Therefore, the court reasoned that by combining nominal and short-term accounts, the IOLTA program "created [interest] which was not within the legitimate expectations of the owner of any one of the principal amounts." \textit{Id.}

80. \textit{Id.} at 1004. For a discussion of a federal circuit's rejection of a "taking" claim against an IOLTA program based on the \textit{Penn Central} factors, see \textit{infra} notes 92-94 and accompanying text.

81. \textit{Cone}, 819 F.2d at 1004, 1007.

82. See id. (quoting Himely v. Rose, 9 U.S. (5 Cranch) 313, 319 (1809)); see also \textit{Webb's Fabulous Pharmacies, Inc. v. Beckwith}, 449 U.S. 155, 162 (1980) ("The usual and general rule is that any interest on . . . [a] deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal.") (citation omitted).

83. \textit{Cone}, 819 F.2d at 1004. The court concluded that "[Evelyn] Glaeser's money would not have borne any fruit, for her benefit or for anyone else's." \textit{Id.}

84. \textit{Id.} ("Thus, it could not be said that she had a legitimate claim of entitlement to the interest which she claimed was taken from her without due process or just compensation.").
The second noteworthy aspect of Cone was the court's treatment of the Webb's decision in a manner similar to that of other courts which had addressed IOLTA challenges. Like the court in Carroll, the Cone court found that the facts at bar had only "superficial similarity" to the facts in Webb's. The court noted that the interpledged funds in Webb's gave rise to a legitimate claim of entitlement because the funds were sufficient in amount and held for a longer period of time. The court determined that this was not the case in Cone because the funds generated no net value, and therefore, failed to create a legitimate expectation of interest over and above the administrative costs.

Finally, in Washington Legal Foundation v. Massachusetts Bar Foundation, the United States Court of Appeals for the First Circuit denied an action brought by Massachusetts lawyers and citizens which claimed that the Massachusetts IOLTA program violated their First and Fifth Amendment rights. The plaintiffs in this case, however, claimed a constitu-

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85. Id. at 1007.
86. Id.; see also Carroll v. State Bar of Cal., 213 Cal. Rptr. 305, 312 (Ct. App.) (distinguishing Webb's on ground that it "does not address issues pertinent to this case"), cert. denied, 474 U.S. 848 (1985).
87. Cone, 819 F.2d at 1007; see also In re Interest on Trust Accounts, 402 So. 2d 389, 395-96 (Fla. 1981) (distinguishing Webb's on basis that IOLTA program does not "take" client property); In re Massachusetts Bar Ass'n, 478 N.E.2d 715, 718 (Mass. 1985) (distinguishing Webb's on basis that interest involved in IOLTA programs is not property); In re Petition of Minn. State Bar Ass'n, 332 N.W.2d 151, 152-53, 158 (Minn. 1982) (finding no "property" in existence with IOLTA programs but not in reference to Webb's); In re New Hampshire Bar Ass'n, 453 A.2d 1258, 1260-61 (N.H. 1982) (per curiam) (agreeing with opinion of Florida Supreme Court in analysis of Webb's); In re Interest on Lawyers' Trust Accounts, 672 P.2d 406, 408 (Utah 1983) (agreeing with analysis of Florida and New Hampshire courts with respect to concerns raised by Webb's).
88. Cone, 819 F.2d at 1004.
89. 993 F.2d 962 (1st Cir. 1993).
90. Id. In Massachusetts Bar Foundation, the plaintiffs also included the Washington Legal Foundation, a nonprofit, public interest law and policy center. Id. at 969. In addition, two attorneys brought action on behalf of themselves and their clients. Id. Finally, the plaintiffs also included two citizens of Massachusetts. Id. One citizen-plaintiff expected to use attorneys in the future and one used attorneys in the state in the past, and thus, her money had been subjected to an IOLTA deposit. Id. Presumably, the diversity of the parties was an attempt to address any standing concerns. See id. Indeed, the First Circuit determined only one citizen and one attorney had standing. Id. at 972. The defendants were the Massachusetts Bar Foundation, Boston Bar Foundation, the Massachusetts Legal Assistance Corporation, the chair of the Massachusetts IOLTA committee, the chair of the Board of Bar Overseers and the justices of the Supreme Judicial Court of Massachusetts. Id. at 969.

In this case, the attorneys-plaintiffs alleged they were forced, to their financial detriment, to avoid participating in the IOLTA program by setting up their clients' deposits in noninterest-bearing accounts. Id. at 970. The attorneys-plaintiffs also alleged they were forced to choose between not practicing law or supporting groups that offended their political beliefs. Id. The citizens-plaintiffs alleged they were forced to support groups with which they disagree when employing attorneys in Massachusetts. Id.
tional interest not in the income earned, but in the right to control and exclude others from the use of those funds.\(^9\)

The First Circuit held that the IOLTA program was not an unconstitutional “taking” on two grounds.\(^9\) First, the court concluded that there was no recognized property interest in excluding others from the beneficial use of deposited funds.\(^9\) The court found no authority that recognized a constitutionally protected property right to control others’ use of intangible property.\(^9\)

Second, even though the plaintiffs failed to demonstrate the threshold showing of a recognized property interest required under \textit{Penn Central}, the court still rejected the appellants’ “taking” claim on the basis of the \textit{Penn Central} factors establishing whether a “taking” is constitutionally permissible.\(^9\) Citing the Eleventh Circuit’s decision in \textit{Cone}, the First Circuit distinguished the \textit{Webb}’s decision in its analysis of one of the \textit{Penn Central} factors.\(^9\) The court agreed that there were “superficial similarities” be-

Thus, the plaintiffs argued the IOLTA program violated their First and Fifth Amendment rights. \textit{Id.} The plaintiffs requested that the court: (1) require appellees to refund the interest earned on their funds; (2) declare the IOLTA rule void as unconstitutional; (3) issue permanent injunctions prohibiting the requirement that the attorney comply with IOLTA; (4) issue a permanent injunction directing the Supreme Judicial Court of Massachusetts to require attorneys to disclose the uses of IOLTA funds to their clients; and (5) reasonable attorney fees to appellants. \textit{Id.} The district court granted the defendants’ motion to dismiss the plaintiffs’ claims. \textit{Id.} at 971.

91. \textit{Id.} at 973. The court stated that this may have been in response to the many courts which held that there was no constitutionally protected property right in interest earned on IOLTA accounts. \textit{Id.}

92. \textit{Id.} at 974.

93. \textit{Id.} The plaintiffs relied on trust law to establish a protected property interest in the right to control the beneficial use of their funds. \textit{Id.} The court was “not convinced that the deposit of clients’ funds into IOLTA accounts transforms a lawyer’s fiduciary obligation to clients into a formal trust with the reserved right by the client to control the beneficial use of the funds as claimed by the plaintiffs.” \textit{Id.}

94. \textit{Id.} The court stated that “[t]he plaintiffs have cited no sources which recognize a similar constitutionally protected property right to control or exclude others from intangible property and we have found none.” \textit{Id.}

95. \textit{Id.} To address the \textit{Penn Central} factors, the court assumed that the appellants established a claimed property interest. \textit{Id.} The court then used the \textit{Penn Central} factors to analyze the “taking” claim. \textit{Id.} With respect to the physical invasion factor, the court held that the property rights claimed were intangible because the clients’ funds were left untouched by the IOLTA program. \textit{Id.} at 976. Next, the court decided that there was no economic interference because the appellants had no economic benefit derived from the right to control or exclude the use of the funds. \textit{Id.} The court concluded that no “taking” occurred and that they need not weigh any burden caused by “taking” private rights against public benefit. \textit{Id.}

96. \textit{Id.} at 975-76. Again, the court stated that the plaintiffs recognized that clients have no right to interest earned on IOLTA accounts and thus claimed only a right to exclude others from using the benefits of their deposits. \textit{Id.} at 976. Thus, the court further distinguished \textit{Webb}’s because that case involved tangible property interests and the plaintiffs claimed only intangible property interests. \textit{Id.}
between the statutory fee in Webb's and the Massachusetts IOLTA program. Distinguishing Webb's on the ground that the interest earned on IOLTA funds was not the property of the plaintiffs, the court concluded that there was no legal support for finding that the IOLTA program caused a physical invasion of their property rights. The courts addressing IOLTA challenges consistently concluded that the interest accumulated by IOLTA programs was not the property of the clients, that is, until the Fifth Circuit's decision in Washington Legal Foundation v. Texas Equal Access to Justice Foundation.


In 1984, the Texas Supreme Court initiated a voluntary IOLTA program which was modeled after IOLTA programs in other states. The Texas IOLTA program permitted attorneys to place client funds that were nominal in amount or reasonably believed to be held for a short period of time into a nonsegregated interest-bearing account. The interest on the account was to be paid to the Texas Equal Access to Justice Foundation (TEAJF), a nonprofit corporation created by the Texas Supreme Court. TEAJF distributed the interest earned from IOLTA accounts to

97. Id. at 975.
98. Id. at 976 ("We find no logical or legal support for the plaintiffs' claim that the IOLTA program has caused a physical invasion and occupation of their intangible property rights.")
99. 94 F.3d 996 (5th Cir. 1996).
100. Id. at 998. In 1984, the Texas IOLTA program was voluntary in that attorneys chose whether or not to participate with or without the consent of their clients. Id. For a discussion of voluntary, opt-out and mandatory IOLTA programs, see supra note 9. The Texas Supreme Court granted a court order in establishing the IOLTA program. See Tex. Rev. Civ. Stat. Ann. art. 320a-1, § 4(a) (West 1973) (granting authority to "[t]he Texas Supreme Court [to] prepare and propose rules and regulations for . . . the operation, maintenance, and conduct of the State Bar.").

In December 1981, the State Bar of Texas created a special committee to investigate the feasibility of an IOLTA program. Johnson, supra note 1, at 786. Upon the committee's recommendation that an IOLTA program was in order, the state bar drafted legislation for a mandatory program. Id. The bill passed the Texas Senate in the 1983 session, but the House rejected the bill on the basis that it would cause class action suits against agencies of the government. Id. The state bar, sensing the state legal services' immediate need for funding, petitioned the Texas Supreme Court for a voluntary program instead of waiting until the 1985 legislative session to submit another IOLTA bill. Id. at 737.

101. Washington Legal Found., 94 F.3d at 998. Attorneys were to make a reasonable determination whether a client's funds were nominal in amount or only held for a short period. See Tex. Gov't Code Ann. tit. 2, subtit. G, app. A, art. 11, §§ 6-7 (West 1987) (determining which client funds were appropriate for IOLTA deposit). If this determination was made in good faith, the attorney could not be held liable for his or her decision. Id. § 7.
102. Washington Legal Found., 94 F.3d at 998. A state bar commission drafted the rules, articles of incorporation and bylaws of the Texas Equal Access to Justice Foundation ("TEAJF"). Johnson, supra note 1, at 737. In December 1984, the
nonprofit organizations that "have as a primary purpose the delivery of legal services to low income persons."\footnote{Washington Legal Found., 94 F.3d at 998 (citing Tex. R. of Ct. 10). The rules, however, provided that TEAJF may provide funds "to finance suits against governmental entities on behalf of individuals in order to secure entitlement to benefits." Tex. R. of Ct. 15.}

The Texas IOLTA program initially generated only $1 million per year.\footnote{Washington Legal Found., 94 F.3d at 998.} In 1988, the Texas Supreme Court followed the lead of other states and made attorney participation in the program mandatory.\footnote{Id. The new Texas IOLTA Rule provides: An attorney ... receiving in the course of the practice of law ... client funds that are nominal in amount or are reasonably anticipated to be held for a short period of time, shall establish and maintain a separate interest-bearing demand account at a financial institution and shall deposit in the account all those client funds. Tex. Gov't Code Ann. tit. 2, subtit. G, app. A, art. 11, § 5 (West Supp. 1997). Rule 6 of the Texas Rules of Court on the Rules Governing the Operation of the Texas Equal Access to Justice Program further clarifies that client funds should only be deposited in IOLTA accounts if such funds "could not reasonably be expected to earn interest for the client." Tex. R. of Ct. 6. In addition, the attorney should not deposit funds in IOLTA accounts "if the interest which might be earned ... is not likely to be sufficient to offset the cost of establishing and maintaining the account, service charges, accounting costs and tax reporting costs which would be incurred in attempting to obtain interest on such funds for the client." Id.} Under the mandatory Texas IOLTA program, the earnings increased to approximately $10 million per year.\footnote{Washington Legal Found., 94 F.3d at 999. In 1993, Texas was the sixth highest IOLTA program revenue producer. See Reske, supra note 7, at 33 (listing top ten IOLTA revenue producing states).} TEAJF continued to disperse the income earned on IOLTA accounts to nonprofit organizations who applied for funding.\footnote{Id. at 999 n.10.}

The plaintiffs brought an action challenging the constitutionality of Texas's IOLTA program in the United States District Court for the Western District of Texas.\footnote{Id. at 998.} The plaintiffs included: a nonprofit public interest law and policy center called the Washington Legal Foundation, a Texas attorney who regularly placed clients' funds in an IOLTA account and a Texas citizen who had funds held in an IOLTA account.\footnote{Id. The plaintiffs alleged that the Texas IOLTA program violated the Fifth Amendment of the Constitution because it was an impermissible "taking" of clients' property and violated the First Amendment because it forced them to support speech that they found offensive. See Reske, supra note 7, at 33 (listing top ten IOLTA revenue producing states).} The plaintiffs alleged that the Texas IOLTA program violated the Fifth Amendment of the Constitution because it was an impermissible "taking" of clients' property and violated the First Amendment because it forced them to support speech that they found offensive.\footnote{Id. at 999.} The plaintiffs requested compensation for the interest earned on their funds in the IOLTA accounts and an
injunction prohibiting further application of the Texas IOLTA program.\textsuperscript{111}

The defendants in this case, including TEAJF, the director of TEAJF and all of the justices of the Texas Supreme Court, moved for summary judgment.\textsuperscript{112} The district court granted the defendants' motion.\textsuperscript{113} The district court found the reasoning of the First Circuit in \textit{Massachusetts Bar Foundation} and the Eleventh Circuit in \textit{Cone} "compelling" and determined that there was no property interest at stake in the proceeds earned on funds deposited in the Texas IOLTA program.\textsuperscript{114} The Fifth Circuit reversed the district court's decision and held that the plaintiffs had a recognized property interest in the interest proceeds earned on funds deposited in IOLTA accounts for purposes of the First and Fifth Amendments of the Constitution.\textsuperscript{115}

IV. \textbf{NARRATIVE ANALYSIS}

In reversing the district court's decision that clients have no protected interest in IOLTA-generated proceeds, the Fifth Circuit first noted the suggestion that the Texas IOLTA program was a "modern-day attempt at alchemy."\textsuperscript{116} The court was of the opinion that, just as the alchemists failed to turn ordinary metal into gold, the IOLTA program in this case failed to make "something from nothing."\textsuperscript{117} The IOLTA program failed because the claimed "nothing" was actually the fruits of the clients' deposits, and therefore, "something" for constitutional purposes.\textsuperscript{118}

The Fifth Circuit determined that state law defined "property,"\textsuperscript{119} The court then stated that Texas followed the traditional property doc-

\textsuperscript{111} Id.
\textsuperscript{112} Id. at 999 & n.11.
\textsuperscript{113} Id. at 999. The defendants first motioned to dismiss for failure to state a claim. \textit{Id.} This motion was denied by the district court. \textit{Id.} The plaintiffs also filed for summary judgment which the district court denied when granting defendants' summary judgment motion. \textit{Id.}
\textsuperscript{114} Id. at 999-1000; see Washington Legal Found. v. Massachusetts Bar Found., 993 F.2d 962, 980 (1st Cir. 1993) (upholding constitutionality of Massachusetts IOLTA program); Cone v. State Bar of Fla., 819 F.2d 1002, 1007 (11th Cir. 1987) (upholding constitutionality of Florida IOLTA program). For a discussion of these cases, see \textit{supra} notes 76-98 and accompanying text.
\textsuperscript{115} Washington Legal Found., 94 F.3d at 1004.
\textsuperscript{116} Id. at 1000. "While legends abound concerning the ancient, self-professed alchemists who worked tirelessly towards their goal of changing ordinary metal into precious gold, modern society generally scoffs at this attempt to create 'something from nothing.'" \textit{Id.} The court stated that the defendants believed they "unlocked the magic that eluded the alchemists." \textit{Id.} The ingredients were the combination of client funds and modern banking anomalies. \textit{Id.}
\textsuperscript{117} Id. The court viewed "the IOLTA interest proceeds not as the fruit of alchemy, but as the fruit of the clients' principal deposits." \textit{Id.}
\textsuperscript{118} Id.
\textsuperscript{119} Id.; see Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (declaring state law was one source of property interests).
trine that interest follows the principal.\textsuperscript{120} Thus, simply put, the interest earned on IOLTA accounts belonged to the clients.\textsuperscript{121}

The court further concluded that finding a recognized property interest in the IOLTA income generated by clients’ deposits gave proper weight to Supreme Court precedent in \textit{Webb’s v. Fabulous Pharmacies, Inc.}\textsuperscript{122} The court found the Supreme Court’s holding in \textit{Webb’s} to be helpful to an IOLTA constitutionality analysis.\textsuperscript{123} In addition, the court determined that the facts in \textit{Webb’s} were similar to those in the case at hand.\textsuperscript{124} Therefore, the court reasoned that just as the creditors had a property right in the interest earned on the interpleader fund in \textit{Webb’s}, so should the clients have a property right in the interest their deposits generated for IOLTA.\textsuperscript{125} Given the similarities between \textit{Webb’s} and the case at bar, the court applied the traditional property doctrine that interest follows principal and held that the clients had a recognized property interest for constitutional purposes in the income generated for Texas’s IOLTA program.\textsuperscript{126}

\textsuperscript{120} Washington Legal Found., 94 F.3d at 1000; see Sellers v. Harris County, 483 S.W.2d 242, 243 (Tex. 1972) (holding that interest on funds, held in trust pending litigation, accrued to owner of principal).

\textsuperscript{121} Washington Legal Found., 94 F.3d at 1000. The Fifth Circuit, discussing the traditional doctrine that interest follows principal, reasoned that “[i]n the light of this rule, it seems obvious that the interest earned in the IOLTA accounts is the property of the clients whose money is held in those accounts.” Id. The court believed the analyses of the First and Eleventh Circuits “circumvents this rule.” Id.

\textsuperscript{122} Id.; see \textit{Webb’s} Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164-65 (1980) (holding that interest on client interpleader principal went to owners of principal). For a discussion of \textit{Webb’s}, see supra notes 43-52 and accompanying text.

The Fifth Circuit summarized the district court’s opinion, stating that “the plaintiffs cannot have a [cognizable] property interest in interest proceeds that, but for the IOLTA Program, would have never been generated.” Washington Legal Found., 94 F.3d at 1000 (quoting Washington Legal Found. v. Texas Equal Access to Justice Found., 873 F. Supp. 1, 7 (W.D. Tex. 1995), aff’d in part, vacated in part and rev’d in part, 94 F.3d 996 (5th Cir. 1996)). The Fifth Circuit, however, found that the district court’s decision did “not give proper weight to Supreme Court precedent.” Id. Because the district court adopted the views of the First and Eleventh Circuits, the court implied their analyses of the “taking” claims with respect to IOLTA programs also did not give proper weight to Supreme Court precedent. See id. (stating that district court, following theory of First and Eleventh Circuits, circumvented traditional property rule relied upon by Supreme Court).

\textsuperscript{123} Washington Legal Found., 94 F.3d at 1000. Specifically, what the court found helpful was that interest earned on a state held interpleader principal was private property and could not be claimed by the state. Id. at 1001.

\textsuperscript{124} Id. at 1000 (“In [Webb’s], the Supreme Court addressed a similar situation.”).

\textsuperscript{125} Id. at 1002 (“We see no reason why [the Webb’s] rule does not apply to the instant case.”).

\textsuperscript{126} Id. at 1005. The court stated that “[t]he Texas IOLTA program, however, requires attorneys to place certain client funds into an IOLTA account and then takes the interest that accrues for itself . . . [and] the plain rule is that the interest proceeds, once they have accrued, belong to the owner of the principal.” Id.
Furthermore, the court bolstered its reasoning by finding that the many courts that were at odds with its decision, and in particular the Eleventh Circuit in *Cone v. State Bar of Florida*, used a shortsighted definition of "property." The court stated that the *Cone* court redefined "property" as "an interest that must necessarily benefit its owner." The court determined that this was an insufficient definition of "property for two reasons." First, according to the Fifth Circuit, the *Webb's* decision instituted a rule that a property interest existed in accrued interest independent from the value of the interest in dispute. Thus, the court reasoned that the Eleventh Circuit's observation that administrative costs associated with an IOLTA account may not allow a client to net any value did not mean that no property interest existed; rather, the court found no reason why the *Webb's* rule should not apply because a property interest existed "because 'the earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property.'"

Second, the Fifth Circuit determined that the *Cone* court's definition of "property"—that there must be a net value before a property interest exists—did not consider the two-step process of interest and principal in a banking transaction. The first step was that interest accrued on the clients' principal. The second step was that the bank deducted its charges from the depositor's account. The Fifth Circuit emphasized that the property interest attached after the first step or when the interest accrued. Therefore, the Fifth Circuit held that the *Cone* court and its

127. 819 F.2d 1002 (11th Cir. 1987). For a discussion of the *Cone* decision, see supra notes 76-88 and accompanying text.
128. Washington Legal Found., 94 F.3d at 1002. The court found that the *Cone* court erroneously defined "property." *Id.*
129. *Id.* (quoting Sinibaldi, supra note 37, at 492).
130. *Id.* at 1002-03.
131. *Id.* at 1002 ("The *Webb's* decision, however, creates a rule that is independent of the amount or value of interest at issue.").
133. *Id.* at 1002-03. The court stated that "[t]he *Cone* court also failed to consider the precise events of the transaction, concluding that the only protectable property interest in interest proceeds attaches to the amount of interest that remains after a bank deducts its charges from the interest earned, because the owner of the principal only has a legitimate expectation of receiving those interest proceeds." *Id.* "It appears, however, that a bank pays interest on the account and then deducts fees. It is a two-part process." *Id.* at 1003. The court found that banks first "pay" interest and then deduct administrative costs. *Id.* Presumably, the court meant that the bank credits accounts and then subtracts any banking charges. See *id.* (stating that interest accrues before bank deducts its charges from depositor's account).
134. *Id.*
135. *Id.*
136. *Id.* Because the interest accrued first in the two-step process, the court determined that "[a]s a result, a property interest attaches the moment that the interest accrues." *Id.*
progeny were determining property interest too late, namely, after the second step, when there was no net value left.\textsuperscript{137} The court also found that this erroneous "net-value" definition of property helped the \textit{Cone} court distinguish the facts of the Supreme Court's decision in \textit{Webb's} from the situation concerning the constitutionality of IOLTA programs.\textsuperscript{138} The court stated that the Eleventh Circuit's decision to distinguish \textit{Webb's} hinged on the basis that the interest appropriated from the interpleader fund in \textit{Webb's} clearly exceeded any fees assessed.\textsuperscript{139} Thus, the \textit{Cone} court avoided applying the traditional property doctrine in \textit{Webb's} because the Florida IOLTA program appropriated only interest from deposits which could not benefit the client in excess of administrative costs.\textsuperscript{140} The Fifth Circuit reasoned that the \textit{Cone} court ignored \textit{Webb's} initial holding, which stated that a property interest existed in accrued interest independent of its value.\textsuperscript{141} Finally, the court refused to declare that IOLTA interest was not property because it feared encouraging government agencies to find other possible sources of "unclaimed" interest.\textsuperscript{142} The court pointed to the interest

\begin{footnotes}
\footnoteref{3137} Id. at 1001-02 ("The Eleventh Circuit distinguished \textit{Webb's} on the basis that \textit{Webb's} involved the ownership of over $100,000 in accrued interest, an amount that clearly exceeded any fees that were assessed.").
\footnoteref{3138} Id. at 1002.
\footnoteref{3139} Id. Specifically, the court stated that "[a]ccording to the Eleventh Circuit, the use of the money had no net value because the IOLTA program only takes the interest from those deposits that do not produce interest in excess of the administrative expenses incurred." \textit{Id}.
\footnoteref{3140} Id. The court also stated that in \textit{Washington Legal Foundation v. Massachusetts Bar Foundation}, 993 F.2d 962, 976 (1st Cir. 1993), the First Circuit came to the same erroneous conclusion. \textit{Washington Legal Found.}, 94 F.3d at 1002 n.35. The Fifth Circuit believed, however, that the First Circuit's opinion in this regard was dicta because the plaintiffs in that case did not assert property rights in the IOLTA interest proceeds. \textit{Id}. In that case, the plaintiffs only sought to protect their right to exclude the state from using their principal. \textit{Id}. For a further discussion of the First Circuit's opinion, see \textit{supra} notes 89-98 and accompanying text.
\footnoteref{3141} \textit{Washington Legal Found.}, 94 F.3d at 1002-03. The court also rejected the defendant's argument that \textit{Webb's} was distinguishable because the interest in this case could never accrue. \textit{Id}. at 1003. The court found that "[t]his argument ignores one of the critical driving forces of IOLTA: IOLTA programs became possible only with the announcement of [the] Internal Revenue Service." \textit{Id}. The announcement of the IRS was that as long as clients had no choice but to participate in IOLTA programs, they would not be taxed on the interest earned. \textit{Id}. Thus, the court rejected the defendant's argument that interest could never accrue by noting that the IRS would consider the interest as taxable income of the clients if the clients had any control over the interest. \textit{Id}. The court acknowledged that the tax liability was not present here because Texas had an IOLTA monopoly depriving the clients of any right of control. \textit{Id}. Nevertheless, if the clients had any control, the clients would have to pay taxes on the interest earned, but would not have a property interest for constitutional purposes within the \textit{Cone} definition of "property." \textit{Id}. Thus, the court concluded that the defendant's argument "[flew] in the face of reason." \textit{Id}.
\footnoteref{3142} \textit{Id}. The court described the situation as "incit[ing] a new gold rush" if it found no property interest in IOLTA proceeds. \textit{Id}. For this reason, the court was "hesitant" to rule for the defendants. \textit{Id}.
\end{footnotes}
not credited to depositors by banks during the “float time” of checks as a possible source of government agency appropriation. The court also discussed technology as a source of banking anomalies that could create interest belonging to no one, and therefore, could be appropriated by the states. These concerns made the court “hesitant” to find that clients had no constitutional property interest in the interest earned on their deposits.

In light of its decision that the plaintiffs had a valid property interest, the Fifth Circuit remanded the case to the district court for further consideration of the “takings” claim. The court noted that the plaintiffs must demonstrate that the “taking” was against the will of the property owner. The court stated that a similar showing of compelled speech was necessary for plaintiffs to prevail on the First Amendment claim.

143. Id. at 1003-04. The court stated that it usually takes one to two days before a check is cleared with the Federal Reserve Bank in the simple case. Id. at 1004. Thus, the depositary bank will receive a provisional credit during this process or, in other words, an interest-free loan similar to the situation in IOLTA programs.

144. Id. The court stated that “[a]s technology continues to advance, the speed with which such transactions can occur will continue to increase, providing greater opportunities for states to try to collect the fractions of pennies that could be earned as interest during the float time of all these activities.” Id. Regardless of these increased opportunities created by technology, the court noted that the traditional property doctrine, that any accrued interest belongs to the owner of the principal, still applied.

The court also rejected the argument made by one commentator that technology may change what constitutes property for constitutional purposes. Id. at 1004 n.47; see also Kreider, supra note 2, at 391-93 (arguing that change in technology could affect what constitutes protected property interest). Specifically, the court rejected this argument because any change in the cost to banks to manage small deposits “would impact the determination of whether a property right in IOLTA interest exists.” Washington Legal Found., 94 F.3d at 1004 n.47. The court viewed this argument as a “short-sighted view of property [that] renders it unacceptable” and instead instituted a bright line rule for property interest in IOLTA programs by rejecting this line of reasoning. Id.

145. Washington Legal Found., 94 F.3d at 1003.

146. Id. at 1004.


148. See Washington Legal Found., 94 F.3d at 1004. (“[A] similar showing would also likely be necessary to prevail on their First Amendment claim.”). For a discussion of whether IOLTA programs violate the First Amendment, see Sackmary, supra note 4, at 197-211.

The court also addressed the defendant’s claim that they were immune under the Eleventh Amendment with respect to plaintiffs’ claim for monetary restitution. Washington Legal Found., 94 F.3d at 1005. The Fifth Circuit held that the district court correctly granted immunity to the defendants with respect to these claims. Id.

V. CRITICAL ANALYSIS

The Fifth Circuit only addressed the threshold issue of whether there was a constitutionally recognized property interest in the income earned by clients' principals deposited in IOLTA accounts. The court correctly determined that this issue must be resolved before an IOLTA program can be held to violate the First and Fifth Amendments. The Fifth Circuit, however, incorrectly found a constitutional property interest in the interest generated by clients' funds in IOLTA accounts.

A. The Webb's Decision and the Traditional Property Doctrine that Interest Follows the Principal

The Fifth Circuit incorrectly relied on Webb's to assert that clients had a property interest in income accrued from their principal deposited in IOLTA accounts; the court extended the Webb's decision too far by holding that it created a rule that constitutional property interests attached to interest on the principal, regardless of the value or amount of the interest. The Supreme Court decided Webb's on very narrow grounds.

With respect to the First Amendment claim, the plaintiffs in this case argued that a mandatory IOLTA program forced them to financially support speech activities of those who received IOLTA funds. Washington Legal Found., 94 F.3d at 999. Thus, the plaintiffs had to be successful in arguing that they had a property right in the interest generated by their deposits in IOLTA programs before they could argue they were compelled to financially support certain "offensive" organizations. See id. at 1004 (rejecting district court's premise that clients have no valid property interest in IOLTA proceeds and remanding case for determination on First and Fifth Amendment claims).

149. See Washington Legal Found., 94 F.3d at 1004 (remanding case to trial court to address whether plaintiffs established Penn Central factors after holding that property interest in IOLTA interest proceeds existed).

150. See Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984) (recognizing that plaintiffs must assert cognizable property interest to raise Fifth Amendment takings claim); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980) (stating that "a mere unilateral expectation or an abstract need is not a property interest entitled to protection"); Penn Central, 438 U.S. at 125 (finding that government must interfere with interests that are bound up with reasonable expectations of plaintiff asserting "taking").

151. See Washington Legal Found., 94 F.3d at 1000 (relying on Webb's). For a discussion of the Fifth Circuit's application of Webb's to the facts of Texas's IOLTA program, see supra notes 123-27 and accompanying text.

152. See Washington Legal Found., 94 F.3d at 1002 (determining that [t]he Webb's decision, however, creates a rule that is independent of the amount or value of interest at issue).

153. See Webb's, 449 U.S. at 164-65 (holding "under the narrow circumstances of this case . . . [that] the interest earned on the interpleader fund while it was in the registry of the court was a taking violative of the Fifth and Fourteenth Amendments"). The Court found that "a State . . . may not transform private property into public property without compensation, even for the limited duration of the deposit in court." Id. at 164.
however, do not recharacterize either the principal deposit of clients or the resulting interest earned on the principal. In contrast, IOLTA programs create interest where there was none before.

Both the First Circuit in *Massachusetts Bar Foundation* and the Eleventh Circuit in *Cone* seized upon this point and correctly distinguished the Webb's decision, stating that the interest should follow the interpledged principal, as contingent upon a principal capable of bearing any interest. Thus, the Webb's decision, as well as the traditional property doctrine that the interest should follow the principal, applied only when there was an expectation that interest could follow the principal. If deposited separately rather than pooled, the funds used for Texas's IOLTA program could not, under any set of circumstances, generate interest. Therefore, the Fifth Circuit incorrectly applied the principles expounded in Webb's and the traditional property doctrine that interest follows principal.

154. See Kreider, supra note 2, at 387-88 (finding Florida's IOLTA program created interest instead of "taking" previously existing interest).

155. See Washington Legal Found., 94 F.3d at 998 (acknowledging IOLTA programs created with idea that client funds to be used were too small to generate interest in excess of costs); *Cone* v. State Bar of Fla., 819 F.2d 1002, 1004 (11th Cir. 1987) (finding that "[o]nly deposits which could otherwise not earn interest . . . could be used to generate interest under the [IOLTA] program").

156. See Washington Legal Found. v. Massachusetts Bar Found., 993 F.2d 962, 975-76 (1st Cir. 1993) (distinguishing Webb's because "[t]he Webb's claimants had property rights to accrued interest which is tangible personal property" and stating that "[i]n this case, the plaintiffs do not have a property right to the interest earned on their funds held in IOLTA accounts"); *Cone*, 819 F.2d at 1006-07 (concluding that Webb's decision was distinguishable because there was no property for state to appropriate); see also Carroll v. State Bar of Cal., 213 Cal. Rptr. 305, 312 (Ct. App.) (finding that "Webb's does not address issues pertinent to this case"); *Cone*, 819 F.2d at 1006-07 (finding that "Webb's decision was distinguishable because there was no property for state to appropriate"); *Cone*, 819 F.2d at 1004 (stating that there were many distinguishing features between facts surrounding implemented Florida IOLTA program and facts in Webb's); *In re Interest on Trust Accounts*, 402 So. 2d 389, 395-96 (Fla. 1981) (stating that there were no distinguishing features between facts surrounding implemented Florida IOLTA program and facts in Webb's); *In re Massachusetts Bar Ass'n*, 478 N.E.2d 715, 718 (Mass. 1985) (disagreeing that Webb's decision supported proposition that IOLTA interest was property); *In re Petition of the Minn. State Bar Ass'n*, 392 N.W.2d 151, 158 (Minn. 1982) (stating that IOLTA raised no constitutional Fifth Amendment claim without reference to Webb's); *In re New Hampshire Bar Ass'n*, 453 A.2d 1258, 1261 (N.H. 1982) (per curiam) (finding Webb's decision inapplicable because no client would be unjustly compelled to part with interest under proposed IOLTA program); *In re Interest on Lawyers' Trust Accounts*, 672 P.2d 406, 408 (Utah 1983) (adopting reasons explained in Florida, Minnesota and New Hampshire decisions that IOLTA programs implicated no Fifth Amendment concerns).

157. See Webb's, 449 U.S. at 161 (stating claim must go beyond "mere unilateral expectation" to be considered constitutionally protected interest); *Cone*, 819 F.2d at 1004 (stating IOLTA program was exception to traditional property doctrine that interest follows principal).

158. See Tex. R. of Cr. 6 (describing type of clients' funds suitable for IOLTA deposit). The Texas IOLTA rules provide that the only client funds suitable for deposit in IOLTA accounts are those which reasonably could not earn interest for the client or those which would not earn interest in excess of the costs associated with interest-bearing accounts. *Id.*
B. The Two-Step Process

The court's analysis with respect to the two-step banking process failed to consider the nature of attorneys' accounts prior to implementation of IOLTA programs.\(^{159}\) Prior to IOLTA, the general practice was for attorneys to place nominal or short-term client funds in a commingled, noninterest-bearing account.\(^{160}\) Indeed, this was the practice in Texas.\(^{161}\) Moreover, the court's two-step analysis was flawed because banks typically waived any fees in exchange for the interest-free use of attorney funds.\(^{162}\)

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159. See Washington Legal Found., 94 F.3d at 1003 (describing two-step banking process with attorneys' trust accounts). For a discussion of the court's analysis of how the two-step banking process gave rise to property interest in IOLTA income, see supra notes 133-37 and accompanying text.

160. See Massachusetts Bar Found., 993 F.2d at 968 ("Traditionally, in Massachusetts and in other states, clients' funds which lawyers held for a short term or in nominal amounts were deposited into non-interest-bearing pooled trust accounts."); Cone, 819 F.2d at 1005 ("Before the initiation of the [IOLTA], the only beneficiaries of the old regime were the banks, who were treated to 'free' use of trust account deposits."); Interest on Lawyers' Trust Accounts, 672 P.2d at 407 ("Currently, [IOLTA-qualified] funds are usually pooled and held in non-interest-bearing accounts. . . ."); Massachusetts Bar Ass'n, 478 N.E.2d at 716 ("Historically, client funds small in amount 'have been commingled and placed in non-interest-bearing accounts held in trust for the individual clients.'" (quoting Mark F. Wolfe, Special Project, Interest on Lawyers' Trust Accounts: A Proposal for Wisconsin, 66 MARQ. L. REV. 835, 835 (1983))); Petition of Minn. State Bar Found., 332 N.W.2d at 155-56 ("Traditionally, [IOLTA qualified] funds have been held in trust by lawyers in a non-interest-bearing checking account."); see also Rounds, supra note 4, at 173 (stating that "generally accepted practice in the United States allowed lawyers to deposit [IOLTA] funds in bank accounts bearing no interest"); Johnson, supra note 1, at 726 (noting client funds which would qualify for then proposed IOLTA program have been "traditionally commingled with other client funds of the same class and deposited in non-interest-bearing bank accounts").

161. Supreme Court of Texas Code of Professional Responsibility DR 9-102 (1984). The Texas Code of Professional Responsibility provided three universal principles. Id. First, attorneys aggregated nominal or short-term funds into trust accounts held in their law firms' names, rather than being deposited on an individual client basis. Id. Second, clients did not earn income on these funds deposited with their attorneys because they were held in noninterest-bearing accounts. Id. Third, the rules prohibited attorneys from benefiting from their clients' trust accounts. Id.

162. See Kreider, supra note 2, at 371 ("[D]epository institutions that held these attorney trust accounts essentially had free use of the funds, after the usual service charges, costs a bank waives when it can use funds without paying interest.")

While clients and attorneys may not have a viable constitutional interest to challenge IOLTA programs, this Note does not address whether banks may have a legitimate claim because they no longer are able to have interest-free use of funds that now fall under state IOLTA programs. One commentator noted, however, that banks generally have accepted IOLTA programs for two reasons. See Johnson, supra note 1, at 727 (describing IOLTA shift of economic benefit from banks to nonprofit organizations). First, while banks clearly now receive less benefit under IOLTA programs, banks still received some benefit from IOLTA programs because they utilize the funds at a higher rate of return than the interest paid to nonprofit organizations. Id. Second, because of modern economics and the competition between financial institutions, lawyers will move clients' funds to a bank providing

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Thus, while the court characterized the pre-IOLTA attorney practice concerning nominal or short-term client funds as a two-step banking process, it was really a one-step process of placing the clients' funds in a non-interest-bearing account with no banking fees. A recognized property interest sufficient to sustain a constitutional challenge could not possibly attach at any stage because the interest was never generated in the first place, and consequently, the clients had no reasonable expectation to earn such interest. The court, therefore, improperly used the two-step banking process as a reason to justify the conclusion that a property interest attached to interest earned on clients' funds in an IOLTA program.

C. Unclaimed "Floating" Interest

The court correctly reasoned that various governmental agencies might seek other unclaimed floating interest to use in an IOLTA-type program if they found no property interest in IOLTA funds for constitutional purposes. This point, however, did not properly address whether there was in fact a constitutionally protected interest in IOLTA-generated interest. Rather, the court's analysis was dicta concerning an issue outside

IOLTA services. The financial institutions' general acceptance of IOLTA programs suggests that few banks may be willing to constitutionally challenge the programs if they indeed had a viable claim. See id. (stating financial institutions accepted IOLTA programs).

163. See Kreider, supra note 2, at 371 (stating that attorneys pooled clients' funds in noninterest-bearing demand or transaction accounts with banks waiving associated costs).

164. See Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 125 (1978) (stating plaintiff asserting deprivation must demonstrate government interfered with "interests that [are] sufficiently bound up with the reasonable expectations" of plaintiff). Thus, contrary to the Fifth Circuit's opinion, clients had no reasonable expectation to earn interest even for the simple purpose of paying for the administrative costs to maintain these accounts. See id. (stating that even though government action may cause harm, plaintiff can not prevail without showing constitutionally protected interest). With no reasonable expectations to earn interest, the clients failed to establish the threshold issue of a constitutionally protected interest. Id.

165. See Washington Legal Found. v. Texas Equal Access to Justice Found., 94 F.3d 996, 1003-04 (5th Cir. 1996) (citing examples in banking anomalies that government agencies could appropriate in future). For a discussion of the Fifth Circuit's hesitancy to declare no property interest in IOLTA interest for fear of state appropriation of other unclaimed "floating" interest, see supra notes 142-45 and accompanying text.

166. See, e.g., Washington Legal Found. v. Texas Equal Access to Justice Found., 873 F. Supp. 1, 4 n.3 (W.D. Tex. 1995) (warning that commendable goals of IOLTA were not reason to uphold constitutionality of program), aff'd in part, vacated in part and rev'd in part, 94 F.3d 996 (5th Cir. 1996). The district court noted that the goals of the Texas IOLTA program were "laudable." Id. The court, however, stated it was "conscious of Justice Holmes' warning that '[a] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Id. (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922)) (alteration in original). Along the same line of reasoning, the Fifth Circuit should not find a
VI. IMPACT

Under a proper analysis of constitutionally recognized property interest, the Fifth Circuit should have held that the Texas IOLTA program did not violate the First or Fifth Amendments of the United States Constitution because there was no threshold showing that the clients had a recognized property interest in IOLTA-generated interest. The court should have found the Supreme Court's decision in Webb's to be distinguishable. Moreover, in light of the noninterest-bearing nature of commingled client nominal and short-term funds prior to IOLTA, the court should have concluded there was no client property to take.

Instead, the court's decision in Washington Legal Foundation will have implications that reach beyond an incorrect application of constitutional law. Given that IOLTA programs are present in all fifty states and the District of Columbia, the court's decision in this case will no doubt give rise to a large number of other constitutional challenges to IOLTA programs in other jurisdictions. Many of these challenges will undoubtedly rely on the Fifth Circuit's decision in Washington Legal Foundation.

protected property interest because not doing so would create potential for greater appropriation by states, even though such appropriations would be constitutionally permissible.

Arguably, the court might have been addressing the first Penn Central factor, the economic impact of the state action, that defines an impermissible "taking" under the Constitution. See Penn Central, 438 U.S. at 124-25 (holding that plaintiffs must establish both recognized property interest and that such interest was impermissibly taken according to three factors to sustain cause of action for "taking" under Fifth Amendment). The problem was, however, that the court remanded the case to the lower court in order to determine whether there was a "taking" under Penn Central. Washington Legal Found., 94 F.3d at 1004. Therefore, any consideration by the court on this issue was dicta.

For a discussion of the threshold showing necessary under Penn Central to sustain a Fifth Amendment "taking" cause of action, see supra notes 36-42 and accompanying text.

For a discussion of the Fifth Circuit's application of Webb's, see supra notes 122-26 and accompanying text.

For a discussion of the Fifth Circuit's application of the two-step banking process, see supra notes 133-37 and accompanying text.

See Michael A. Riccardi, Fifth Circuit Causes Split on IOLTA Validity, LEGAL INTELLIGENCER, Sept. 24, 1996, at 1 (comparing Fifth Circuit's opinion to those of other circuits). Chief Counsel of the Washington Legal Foundation, Richard A. Samp, stated that several lawyers contacted him about the possibility of mounting challenges in other states. Id. Pennsylvania is not one of the states that currently has a challenge in progress. See id. (stating that "no Pennsylvania [c]ase [i]s on [the] [h]orizon").

For a discussion of the Fifth Circuit's decision in Washington Legal Foundation, see supra notes 116-48. One commentator suggested, however, that courts faced with an IOLTA constitutional challenge should address the Penn Central factors in addition to the threshold issue of whether IOLTA involved a protected
The increased number of challenges to IOLTA programs, however, will not be the only impact of the Fifth Circuit’s decision. In addition, the court’s decision will have a significant impact on the effectiveness of existing IOLTA programs in generating funds for legal services to the poor. Attorneys in states with opt-out or voluntary IOLTA programs will be hesitant to place client funds in IOLTA accounts for fear of litigation or uncertainty. Moreover, the current trend of states switching from voluntary or opt-out to mandatory IOLTA status may quickly subside. Thus, IOLTA program revenue could drop significantly, causing major distress for legal services to the poor—services which are already impaired financially due to cuts in their public funding. As described by one attorney in the area of legal services, the result will be that needy clients will be “beating down our doors” in order to get legal services.

Ultimately, this case or one of its progeny may come before the Supreme Court for review. The Court will weigh the arguments made by the First and Eleventh Circuits, as well as other state courts which hold that clients have no property to “take” in IOLTA programs, against those

property interest. See Amy L. Mauk, Comment, Constitutional Law—Massachusetts IOLTA Program’s Charitable Assignment of Accrued Interest Not Taking in Violation of Fifth Amendment, 28 Suffolk U. L. Rev. 807, 814 (1994) (criticizing First Circuit because court failed to consider state interest advanced in IOLTA programs, thereby passing opportunity to reject on those grounds as well). The argument would be that the Fifth Circuit could have avoided extensive litigation of the constitutionality of IOLTA if the court upheld the program based on the Penn Central factors. See id. (using same argument in critiquing First Circuit’s analysis). Nevertheless, the Fifth Circuit remedied the case for more factual determinations by the district court on this issue. Washington Legal Found., 94 F.3d at 1004.

Both the First Circuit and the California Court of Appeals found that IOLTA programs do not impermissibly take clients’ property under the Penn Central factors. See Washington Legal Found. v. Massachusetts Bar Found., 993 F.2d 962, 976 (1st Cir. 1993) (finding that IOLTA program’s use of clients’ funds was not governmental physical invasion); Carroll v. State Bar of Cal., 213 Cal. Rptr. 305, 311-14 (Ct. App.) (applying Penn Central factors in upholding Fifth Amendment challenge to IOLTA program), cert. denied, 474 U.S. 848 (1985). For a discussion of these cases, see supra notes 66-75, 89-99 and accompanying text.

173. For a discussion of the importance of IOLTA funds to legal services to the poor, see supra note 5.

174. For a discussion of mandatory, voluntary and opt-out IOLTA programs, see supra note 9.

175. For a discussion of the trend of states to switch to mandatory IOLTA programs in order to generate increased revenue, see supra note 9.

176. For a discussion of the importance of IOLTA revenue for legal services due to cuts in funding by the federal government, see supra note 5.

177. See Cummings, supra note 5, at 1 (stating that IOLTA revenue will not be enough to fill void of traditional sources of funding). Admittedly, however, the effect of the Fifth Circuit’s decision on the poor is not a reason to hold that clients have no property interest in the interest generated by their IOLTA accounts.

178. See Riccardi, supra note 171, at 29 (noting that IOLTA issue is likely to go to Supreme Court for review). If the Fifth Circuit’s opinion is to be reviewed by the Supreme Court, however, the district court will have to conclude its remand proceedings. Id.
arguments made to the contrary by the Fifth Circuit.\textsuperscript{179} In view of the incorrect application of Supreme Court precedent by the Fifth Circuit in \textit{Washington Legal Foundation}, the Court should distinguish its decision in \textit{Webb's} from the interest on IOLTA accounts and unequivocally uphold the constitutionality of IOLTA programs.

\textit{Brennan J. Torregrossa}

\textsuperscript{179} For a discussion of the Eleventh, First and Fifth Circuit's opinions regarding a recognized property interest in IOLTA funds, see \textit{supra} notes 76-88, 89-98, 116-48 and accompanying text.