

## A MILLION LITTLE TAKINGS

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In the United States, the most frequent and widespread government takings are the Interest On Lawyers' Trust Accounts (IOLTA). These takings of private property occur in all fifty states on a daily basis. IOLTA programs are the second largest source for funding legal services for the poor. While the programs are universally popular and generally work well, some inherent, recurring problems plague the programs and the entities funded by them. In addition, a more concrete legal problem has recently emerged: post-*Kelo* backlash reforms may have inadvertently created legal problems for IOLTA programs by limiting states' ability to take private property and distribute it to other private entities. The academic literature about post-*Kelo*

reforms has not yet addressed its implications for state programs like IOLTA, and commentators on IOLTA have assumed that its legal challenges ended with the Supreme Court's 2003 decision in *Brown v. Legal Foundation of Washington*.<sup>1</sup> This article explores for the first time the implications of post-*Kelo* legislative responses for IOLTA, as well as other unresolved legal problems for IOLTA that remain latent in the *Brown* decision. The descriptive portions of this article explain the looming legal problems for IOLTA, due to recent changes in eminent domain laws and some unrealistic boundaries that the Supreme Court set for IOLTA in *Brown*. Confronting these new legal problems presents an opportunity to address some previously ignored policy problems with IOLTA itself. The normative portions of this article, therefore, will focus on these longstanding theoretical problems with IOLTA and will offer some modest proposals for reform.

Apart from the temporary depletion of IOLTA funds during the recent financial crisis, the most pressing problem for IOLTA is a wave of changes in state-level eminent domain laws that affect the legality of the programs in several states. The Supreme Court's decision in *Kelo v. City of New London*<sup>2</sup> touched off a nationwide legislative response at the state level. *Kelo* upheld a municipal eminent domain action that transferred real property from private homeowners to commercial developers. In the aftermath, nearly every state passed either a statute or constitutional amendment to limit *Kelo*-style eminent domain actions. Most of these post-*Kelo* enactments have limited effect or are merely procedural, as other commentators have noted.<sup>3</sup> Even so, some state reforms may bear directly on their state's IOLTA program by prohibiting any "takings" where the government takes property and gives it to a private or non-governmental entity, regardless of the public purpose served or the compensation paid to the owner.

IOLTA was certainly not the target of any of these resolutions or amendments; they were responding instead to the public uproar over the *Kelo* decision. Even so, some appear to have made their state's IOLTA program illegal, based on the wording of their laws and the Supreme Court's criteria for upholding IOLTA programs, which is set forth in *Brown*. The IOLTA programs in these states have continued operating, of course, since these enactments. No

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<sup>1</sup> 538 U.S. 216 (2003); John D. Jurcyk, *Be Not Afraid*, J. KAN. B. ASS'N, Oct. 2009, at 10 ("There has been a great deal of confusion over the legality of IOLTA programs. This confusion has ended. The U.S. Supreme Court upheld the constitutionality of IOLTA programs.").

<sup>2</sup> 545 U.S. 469 (2005).

<sup>3</sup> See generally Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100 (2009) (providing a state-by-state survey of post-*Kelo* legislation and discussing the impact of various enactments).

significant new legal challenges to IOLTA have emerged since the *Brown* decision. The post-*Kelo* reform measures, however, could furnish the legal ammunition for a completely new wave of attacks targeting IOLTA if opponents of the programs are inclined to try, or when the opponents realize that the arsenal for attacks is expanding.

*Brown* explicitly held that IOLTA programs constitute a “taking,”<sup>4</sup> discussed in more detail below. The Supreme Court’s earlier decision about IOLTA, *Phillips v. Washington Legal Foundation*,<sup>5</sup> was similarly explicit in holding that IOLTA funds were “‘private property’ of the owner of the principal,”<sup>6</sup> that is, each lawyer’s clients. The Court ultimately upheld the constitutionality of this uncompensated “taking” on the basis that no compensation was due since the amount taken by the government, or owed to the citizen, in each case was extremely small.<sup>7</sup> For purposes of applying post-*Kelo* legislation, however, the Supreme Court has already answered the two important preliminary questions: IOLTA funds are “private property,” and the programs are indeed a “taking.”

The critical remaining question in each state, therefore, is whether the particular verbiage of the post-*Kelo* reforms categorically bans “private-to-private” takings by the state. IOLTA is such a taking; it culls private property owners’ miniscule interest on the funds from a sale, aggregating these small sums into a pool of millions of dollars, and then distributing this money to various non-profit entities that provide legal services or legal education for the poor. This article examines the post-*Kelo* reforms in ten states that have such verbiage or provisions, analyzing the applicability to those states’ IOLTA programs.

From a technical, procedural standpoint, even the milder versions of the post-*Kelo* reactions in other states, which merely impose new procedural mechanisms for eminent domain actions, could create temporary problems for existing IOLTA programs, which have probably never passed through these new procedures. It may seem ridiculous, of course, to declare that each “IOLTA taking”—every time an account contributes to the state’s legal services fund—should trigger the new eminent domain requirements, but a literal reading of the laws arguably justifies that conclusion. Similarly, statutory prohibitions on takings for the purpose of “economic development,” a common feature of post-*Kelo* enactments, could arguably apply to some of the legal work that IOLTA now subsidizes, such as combating homelessness and malnutrition, facilitating the use and maintenance of housing vouchers, and promoting the construction of new low-income housing. Undoubtedly, some courts would simply try to avoid the apparently unintended result of invalidating IOLTA programs due to post-*Kelo* enactments. Similarly, legislatures may simply pass amendments exempting IOLTA from the new eminent-domain proscriptions.

These post-*Kelo* reforms are not the only pending legal issues for IOLTA. Even as the Supreme Court upheld IOLTA property takings in the *Brown* decision, it constructed a rationale that depended heavily on current interest rates for banks and on questionable assumptions about current transaction costs for paying interest to the owners of deposited funds.<sup>8</sup> The Court deemed

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<sup>4</sup> *Brown*, 538 U.S. at 235.

<sup>5</sup> 524 U.S. 156 (1998).

<sup>6</sup> *Phillips*, 524 U.S. at 172.

<sup>7</sup> *Brown*, 538 U.S. at 240. This point implicates another looming legal problem for IOLTA—the fact that the Court’s criteria for legality could automatically render IOLTA programs unconstitutional if interest rates rise significantly. See *infra* Section I.D for a discussion of interest rates.

<sup>8</sup> *Brown*, 538 U.S. at 239-40.

the uncompensated takings to be constitutionally valid because the compensation owed to the private parties would be zero in the current banking environment. By implication, therefore, some or all IOLTA transfers could eventually become unconstitutional with increased computerization of banking services and significant shifts in the prevailing interest rates. For purposes of clarity, this article will describe these pending problems resulting from the *Brown* decision in the section summarizing the IOLTA litigation and the two relevant Supreme Court decisions.

The ensuing discussion also reaches three inherent tensions with public funding of legal services for the poor: crowding-out effects, monopoly/monopsony effects, and the moral hazard problems with providing free lawyers for the poor. “Crowding-out” describes situations where government funding of a public good causes a decline in private contributions and volunteer activity; this appears to be an ongoing problem with legal aid and pro bono work. Monopoly effects are present where there is only one provider of services in a market, which is often true of legal aid clinics; typically, there is a handful in each state, covering separate territories. Monopsony describes situations where there is only one purchaser or funder for certain services—in this case, the state’s IOLTA fund. These monopoly and monopsony effects interact in a way that causes entry barriers that effectively limit the number of legal aid entities in each state.

Moral hazard problems are normally present in any government-funded social service, but with legal aid, the opposite appears to happen. Unlike other welfare programs, government funded legal services seem to reduce the symptoms of moral hazard in local legal arenas, rather than contributing to them. This article addresses for the first time these three concerns as they pertain to IOLTA and legal services in general. It offers a few modest policy reforms in response to these issues: a small federal income tax credit for attorneys who perform pro bono work, a nationwide open jurisdiction for pro bono legal work, and a tax offset or deduction for commercial property owners who lease their facilities without cost to legal aid clinics. An additional proposal is to encourage earmarks of a consistent percentage of IOLTA funds in each state for pilot projects or startup agencies, which some states are already doing. These small reforms could significantly change the landscape of legal services for the poor.

The following sections of this article explore components of this problem that may initially seem unrelated. Part I provides a concise overview of IOLTA funding and summarizes the litigation over the programs that ultimately resulted in a pair of Supreme Court decisions upholding the constitutionality of the programs. The last section of Part I explains some lingering legal problems with the Court’s criteria for upholding the constitutionality of IOLTA, especially related to interest rates and transaction costs. Part II examines the legislative reforms that came after *Brown*, triggered by the *Kelo* decision. This Part has ten sections analyzing different states’ reforms that could pose the greatest problems for their IOLTA programs. Part III examines an important related issue both for post-*Kelo* jurisprudence and IOLTA programs, as well as the connection of the two: administrative and procedural problems with eminent domain takings, which become even more confusing when the “takings” do not involve tangible property. Part IV introduces three additional policy conundrums with funding legal services for the poor, apart from constitutional or statutory issues, and offers some modest policy proposals. Part V is a brief conclusion.<sup>9</sup>

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<sup>9</sup> A word of disclosure: the author worked as an IOLTA-funded legal aid lawyer before joining the academy and has a general bias in favor of government-supported legal services for the poor. This bias may not always be evident in the discussions about the serious theoretical problems with government funding for legal aid, found mostly in Part IV, but the ultimate goal is to confront these problems and find solutions, rather than ignore them or deny that the problems

## I. IOLTA

*“Without taxing the public, and at no cost to lawyers or their clients, interest from lawyer trust accounts is pooled to provide civil legal aid to the poor and support improvements to the justice system.”*<sup>10</sup>

### A. Introduction and History

Indigent criminal defendants in the United States have a constitutional right to a lawyer at the state’s expense.<sup>11</sup> In civil litigation, indigent parties usually have no such right,<sup>12</sup> and they represent themselves most of the time. This places them at a significant disadvantage to opposing parties who have retained counsel.

Apart from lawyers occasionally waiving their fees, professional legal services for the poor come from lawyers who devote themselves to this clientele all the time. These lawyers work for a variety of nonprofit agencies and NGO’s. The generic name for such agencies and organizations is “legal aid,” although each entity has its own unique name: Pine Tree Legal Assistance in Maine,<sup>13</sup> Native Hawaiian Legal Corporation,<sup>14</sup> California Rural Legal Assistance,<sup>15</sup> Lone Star Legal Aid in Texas,<sup>16</sup> Legal Aid Society of Cleveland,<sup>17</sup> Legal Services of New

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exist. Similarly, the author’s experiences from this stint on the staff of an inner-city legal aid clinic have informed the observations about the nature of legal aid and the typical activities that legal aid agencies pursue, discussed mostly in Part I. In addition, the author takes no position on the controversial *Kelo* decision itself, that is, about the creative uses of eminent domain, or on the merits of various post-*Kelo* reforms; the only point in discussing the reforms is to analyze the new legal context for IOLTA. The following sections present several legal and theoretical problems with IOLTA programs, but the point is certainly not to suggest abolishing IOLTA. Rather, the purpose is to highlight some areas that need to be addressed in order to safeguard the long-term viability of the programs, and to find additional ways to provide more legal services for the poor. The agency in question was Greater Hartford Legal Aid, in Hartford, Connecticut.

<sup>10</sup> IOLTA.ORG: LEADERSHIP FOR EQUAL JUSTICE, <http://www.iolta.org/grants/> (last visited Nov. 9, 2010).

<sup>11</sup> *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (noting that “reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.”).

<sup>12</sup> The Supreme Court has held fast to the proposition that “an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.” *Lassiter v. Dep’t of Social Services*, 452 U.S. 18, 26-27 (1981). Civil cases rarely lead to such loss of physical liberty. Federal and state courts have consistently held over the years that “[t]here is no constitutional or statutory right for an indigent to have counsel appointed in a civil case.” *Watson v. Moss*, 619 F.2d 775, 776 (8th Cir. 1980). This is, of course, the general rule but not the only rule. There are “civil *Gideon*” exceptions in some states for various types of cases. Texas, for example, provides for appointment of counsel for indigent litigants in child removal cases. *See, e.g.*, Act of June 6, 2005, §§ 1.06-07, 2005 Tex. Gen. Laws 268, S.B. 6 (codified at TEX. FAM. CODE ANN. §§ 107.013, 107.015 (2010)); Kimberly Schmitt, *Texas Access to Justice Foundation Awards New Grants for Pilot Projects Impacting the Texas Legal Delivery System* (Dec. 15, 2009), TEX. ACCESS TO JUSTICE COMM’N. <http://www.texasatj.org/node/347>; Laura K. Abel, *Keeping Families Together, Saving Money, and Other Motivations Behind New Civil Right to Counsel Laws*, 42 LOY. L.A. L. REV. 1087, 1088 (2009); Lana Shadwick and Sandra Hachem, *Expert Witnesses in Child Abuse and Neglect Cases Involving Termination of Parental Rights*, 69 TEX. B.J. 756, 758 (2006).

<sup>13</sup> PINE TREE LEGAL ASSISTANCE, <http://www.ptla.org/index.html> (last visited Nov. 9, 2010).

<sup>14</sup> NATIVE HAWAIIAN LEGAL CORPORATION, <http://www.nhlchi.org/> (last visited Nov. 9, 2010).

<sup>15</sup> CALIFORNIA RURAL LEGAL ASSISTANCE, <http://www.crla.org/> (last visited Nov. 9, 2010).

<sup>16</sup> LONE STAR LEGAL AID, <http://www.lonestarlegal.org/> (last visited Nov. 9, 2010).

Jersey,<sup>18</sup> Legal Action of Wisconsin,<sup>19</sup> etc. Most cater to a limited geographic area and specialize in a few areas of law that most affect the impoverished members of the community. Some focus on immigration, while others focus on landlord-tenant disputes, administrative hearings for welfare applicants, or legal issues surrounding domestic violence. None covers the whole spectrum of litigation areas. Generally, each agency focuses on five or fewer areas of law.<sup>20</sup> Almost all of them avoid clients or cases that private sector lawyers would be willing to represent—that is, fee-generating cases.

Some legal services for the poor also come from law school clinics, which most American law schools have on their campuses.<sup>21</sup> These are programs where the law students do most of the legal work for indigent clients in exchange for academic credit from their institution, under the supervision of a lawyer/clinical professor on staff with the law school.<sup>22</sup> These programs typically serve a small number of clients who live close to the law school itself, and each clinic program focuses on only one area of law or type of case.<sup>23</sup> These limitations in the

<sup>17</sup> LEGAL AID SOCIETY OF CLEVELAND, <http://www.lasclev.org/> (last visited Nov. 8, 2010).

<sup>18</sup> LEGAL SERVICES OF NEW JERSEY, <http://www.lsnj.org/> (last visited Nov. 8, 2010).

<sup>19</sup> LEGAL ACTION OF WISCONSIN, <http://www.badgerlaw.net/Home/PublicWeb/LAW> (last visited Nov. 9, 2010).

<sup>20</sup> California Rural Legal Assistance lists their priority areas as housing, labor and employment, education, civil rights, and health and family well-being. *Priority Areas*, CALIFORNIA RURAL LEGAL ASSISTANCE, <http://crla.org/node/22> (last visited Nov. 9, 2010). Pine Tree Legal Assistance catalogs their priority areas as “preservation of housing and related housing needs; maintaining, enhancing and protecting income and economic stability; improving outcomes for children; and personal safety, stability and well-being.” *Getting Help From Pine Tree Legal Assistance*, PINE TREE LEGAL ASSISTANCE, [http://www.ptla.org/ptlasite/about/get\\_help.htm#what](http://www.ptla.org/ptlasite/about/get_help.htm#what) (last visited Nov. 9, 2010). They also explain:

Staff resources are allocated according to a list of the most pressing or serious legal problems facing low-income individuals in Maine. Th[e] list is regularly reviewed by the Pine Tree Board of Directors. . . .

. . . [P]eriodic surveys are conducted of low-income individuals around the State, as well as the staff of social service agencies, legislators and Congressional offices, court officials and other individuals whose work provides insight into the legal needs facing low-income Mainers. The surveys identify the most frequent problems faced by low-income people and invite comment on the most serious problems needing legal attention. Using this information, the Board of Directors then develops an updated list of priorities for the organization.

*Id.*

<sup>21</sup> *Clinical Program at South Texas College of Law*, S. Tex. Coll. of Law, [http://www.stcl.edu/clinics/mission\\_history.html](http://www.stcl.edu/clinics/mission_history.html) (last visited Nov. 9, 2010); *The Clinical Law Program*, UNIV. OF WASH. SCH. OF LAW, <http://www.law.washington.edu/Clinics/> (last visited Nov. 9, 2010); *Law School Clinics*, IND. UNIV. SCH. OF LAW, <http://indylaw.indiana.edu/clinics/> (last visited Nov. 9, 2010).

<sup>22</sup> *The Clinical Law Program*, UNIV. OF WASH. SCH. OF LAW, <http://www.law.washington.edu/Clinics/> (last visited Nov. 9, 2010) (“In a law school clinic, students receive law-school credit while they represent real clients or mediate real cases. They learn relevant lawyering skills through close supervision by an experienced lawyer/faculty member. Clinics offer students an opportunity to serve the community and reflect on their experience as they become a lawyer.”).

<sup>23</sup> For example, South Texas College of Law currently has six clinics that focus on five different areas of the law: mediation, family law (two clinics, one basic and the other complex, cover this one area), probate/estate planning, criminal (Access to Justice), and guardianship. *On-Site Clinics*, S. TEX. COLL. OF LAW, [http://www.stcl.edu/clinics/on-site\\_clinics.html](http://www.stcl.edu/clinics/on-site_clinics.html) (last visited Nov. 9, 2010).

scope of representation and geographic reach for clients mean that the law school clinics constitute only a tiny portion of legal services for the poor nationally.

Pro bono efforts by regular lawyers serve a range of individual indigent clients, nonprofit organizations, and even non-indigent clients whose case the attorney wants to handle as a favor or because it is a highly-publicized matter that puts the lawyer in the spotlight. In other words, the truly indigent receive only a portion of the pro bono service hours offered by private-firm lawyers. When attorneys can devote themselves full-time to helping the poor, not only do the poor receive more legal help, but also attorneys can develop specialized expertise in areas of law most pertinent to the poor. They learn to handle welfare hearings, child custody litigation, evictions, and immigration matters, among others.<sup>24</sup> One deterrent to lawyers doing pro bono work is the daunting task of navigating an unfamiliar area of law, which pro bono work often requires.

In addition, there are economies of scale that come from a group of lawyers helping the same type of clients with similar legal problems, making full-time poverty lawyers sometimes more efficient at their work than private firm lawyers who take an occasional pro bono case. Many legal aid agencies have foreign language interpreters on staff. Their attorneys have access to an in-house database or archive of briefs, forms, and client letters relevant to typical cases involving indigent parties. Attorneys and staff at the agencies maintain working relationships with social workers and government agency case managers, develop familiarity with the relevant clerk's offices, and can often stack multiple client hearings on the same day at the Housing Court, Social Security Appeals Office, or Family Court. On the other hand, the novelty of an indigent client's case for a pro bono lawyer might mean the client receives more of the lawyer's undivided attention on the days devoted to the task, which clients naturally appreciate.

For better or worse, most of the legal services for the poor come from legal aid agencies devoted to this task, and most of their funding comes from two sources: the federal Legal Services Corporation (LSC), a quasi-governmental entity whose annual budget is an apportionment from Congress, and state-based IOLTA programs ("Interest On Lawyers' Trust Accounts").<sup>25</sup> The LSC funds, distributed annually to agencies across the country, are approximately twice the aggregate amount of all the IOLTA funds in a given year. However, the LSC imposes stringent limitations on the activities of recipient agencies,<sup>26</sup> limitations added a decade ago when staunch conservatives controlled Congress.<sup>27</sup> These restrictions are onerous enough to prompt some legal aid agencies to forego the funds entirely and rely mostly on IOLTA money,<sup>28</sup> supplemented by

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<sup>24</sup> See generally James P. Levine, *The Impact of "Gideon": The Performance of Public & Private Criminal Defense Lawyers*, 8 *POLITY* 215 (1975) (discussing empirical studies on the relative competency of specialized poverty lawyers and regular pro bono lawyers).

<sup>25</sup> See Elena Romerdahl, *The Shame of the Legal Profession: Why Eighty Percent of Those In Need of Civil Legal Assistance Do Not Receive It and What We Should Do About It*, 22 *GEO. J. LEGAL ETHICS* 1115, 1123 (2009); James P. George, *Access to Justice, Costs, and Legal Aid*, 54 *AM. J. COMP. L.* 293, 313 (2006).

<sup>26</sup> See generally Rebekah Diller & Emily Savner, *Restoring Legal Aid for the Poor: A Call to End Draconian and Wasteful Restrictions*, 36 *FORDHAM URB. L.J.* 687 (2009).

<sup>27</sup> *Id.* at 692-704.

<sup>28</sup> See *id.* at 689:

In many states, justice planners have had to set up two, duplicative legal aid systems in order to ensure that state and other funds are not constrained by the non-LSC funds restriction. The result is that scarce funds must be spent on duplicate administrative costs—two rents, two copy machines, and two computer networks.

private donations, charitable fundraisers,<sup>29</sup> and small allocations from the states, such as percentages of court filing fees.<sup>30</sup> The lawyers who work for these agencies also contribute significantly, albeit less directly, by accepting wages that are substantially lower than those earned by their counterparts in private firms or even government posts.

IOLTA is conceptually elegant, and seemingly verges on finding “free money” for legal services. All lawyers must deposit their clients’ funds, such as those transferred between parties in a real estate transaction, in special “trust accounts” at a bank, except where funds bypass the lawyers, entirely separate from the lawyer’s own money or incoming fees. Client sums are typically too small, and the time too brief, to generate any discernible interest. Transaction costs for tracking or disbursing miniscule amounts of interest often exceed the interest itself. There is also a statutory prohibition dating back to the Great Depression on most corporations earning interest on bank accounts.<sup>31</sup> In the aggregate, all the temporary deposits by lawyers total millions or tens of millions of dollars statewide on any given day. In the past, banks would hold and use these deposits interest-free. The IOLTA plan has the banks calculate a modest interest rate on the aggregate deposits of all the attorneys, and then contribute that amount to a state agency or state-sponsored foundation, which in turn distributes the funds to legal aid agencies and related needs in that state. The banks pay a low enough rate that they still come out ahead by participating in the program, and as a result, the banks have stopped challenging the merits of IOLTA plans.<sup>32</sup>

Participation by individual banks is voluntary, but in most states, participation by the lawyers is not. It is mandatory for lawyers to deposit their clients’ funds, assuming these funds are otherwise interest-ineligible, into a bank that participates in the IOLTA program and offers IOLTA accounts.<sup>33</sup>

All fifty states have implemented IOLTA programs,<sup>34</sup> and together they generate

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(internal citation omitted). *See also* Legal Aid Servs. v. Legal Servs. Corp., 561 F. Supp. 2d 1187 (D. Or. 2008); Lorna K. Blake, *The IOLTA Fund and LSC Restrictions*, 17 YALE L. & POL’Y REV. 455 (1998).

<sup>29</sup> *See, e.g.*, Jennifer L. Colyer et al., *The Representational and Counseling Needs of the Immigrant Poor*, 78 FORDHAM L. REV. 461, 496 (2009).

<sup>30</sup> *See, e.g.*, Funding, TEX. ACCESS TO JUSTICE FOUND., [http://www.teajf.org/about\\_tajf/funding.aspx](http://www.teajf.org/about_tajf/funding.aspx) (last visited Nov. 9, 2010).

<sup>31</sup> *Phillips*, 524 U.S. at 160-61 (citing 12 U.S.C. §§ 371a, 1464(b)(1)(B), 1828(g)).

<sup>32</sup> *See* Betsy Borden Johnson, “*With Liberty And Justice for All: IOLTA in Texas-The Texas Equal Access To Justice System*,” 37 BAYLOR L. REV. 725, 727 (1985); *but see* Kenneth Paul Kreider, *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, 390 (1998) (explaining that some banks in the early 1980’s expressed concern about the increased accounting burden of having IOLTA, but noting that this may have been a smokescreen for the fact that banks were simply keeping all the interest on these accounts for themselves before IOLTA began).

<sup>33</sup> The state of Washington, for example, requires the placement of certain client trust funds in IOLTA accounts. *Brown*, 538 U.S. 216, 242 (2003) (Scalia, J., dissenting). It is estimated that “[o]ver 5,500 financial institutions participate in IOLTA by maintaining IOLTA accounts” across the country.” *Information for Banks*, IOLTA.ORG: LEADERSHIP FOR EQUAL JUSTICE, <http://www.iolta.org/fellowships/> (last visited Nov. 9, 2010). Banks play a key role in the success of IOLTA. The legal community and banks are partners in making IOLTA a lucrative program that can truly benefit those who need help in acquiring legal services. *See generally* Amy Sings In The Timber, *Access To Justice: IOLTA Leadership Banks*, MONT. LAWYER, Oct. 2009, at 20.

<sup>34</sup> In 1981, the first IOLTA program in the United States was adopted by Florida. Florida “authoriz[ed] the use of NOW accounts for the deposit of client funds, and provid[ed] that all of the interest on such accounts be used for charitable purposes. Every State in the Nation and the District of Columbia have followed Florida’s lead and adopted an IOLTA program, either through their legislatures or their highest courts.” *Brown*, 538 U.S. at 221.



between \$150 and \$250 million every year<sup>35</sup> for legal aid agencies across the nation.<sup>36</sup> In forty-three states and the District of Columbia, it is mandatory for all lawyers.<sup>37</sup> The remaining states either have opt-out rules (eight states) or opt-in rules (one state and the U.S. Virgin Islands), but the consistent trend is toward mandatory programs.<sup>38</sup> Every year or two, another state will switch from opt-out to mandatory, but never the reverse.<sup>39</sup> The consensus among the judiciary, the legal academic community, and the American Bar Association is that the IOLTA programs have been a stunning success.<sup>40</sup>

Litigation against IOLTA effectively ended in 2003, with the Supreme Court's decision in *Brown*.<sup>41</sup> Since then, most of the "activity" regarding IOLTA has been a nationwide push by advocates for more states to make the program mandatory for all lawyers, and a simultaneous push for more participating banks to offer "comparability" in the interest rates they pay on

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<sup>35</sup> "The aggregate value of those contributions in 2001 apparently exceeded \$200 million." *Id.* at 223. The 2008 contributions total reached a whopping \$263.4 million. Commission on Interest on Lawyers' Trust Accounts, *IOLTA Overview*, A.B.A., <http://www.abanet.org/legalservices/iolta/ioltback.html> (last updated Jan. 20, 2010). The National Association of IOLTA Programs and the American Bar Association Commission on IOLTA estimate that between 1991 and 2003, more than \$1.5 billion has been generated by IOLTA nationwide. *What Is IOLTA?*, IOLTA.ORG: LEADERSHIP FOR EQUAL JUSTICE, <http://www.iolta.org/grants/> (last visited Nov. 9, 2010).

<sup>36</sup> The state of Texas has provided that "interest earned by the funds deposited in an IOLTA account is to be paid to the Texas Equal Access to Justice Foundation (TEAJF), a nonprofit corporation established by the Supreme Court of Texas." *Phillips*, 524 U.S. at 162. The funds are then allocated as TEAJF sees fit to nonprofit groups providing legal services to low income individuals. *Id.* Each state distributes the funds created by IOLTA in different ways. *See generally* Aims C. Coney, Jr. & Barbara S. Rosenberg, *A Lawyer's Responsibility In Handling Funds and Property Recent Changes To Disciplinary Rule and Procedures*, 80 PENN BAR ASS'N. Q. 61, 65-66 (2009); Jayne B. Tyrell & Lisa C. Wood, *Practice Tips: Residual Class Action Funds: Supreme Judicial Court Identifies IOLTA as Appropriate Beneficiary*, 53 B.B.J. 17 (2009); *Focus on the Vermont Bar Foundation: Grants Awarded By the Vermont Bar Foundation for FY 2007*, Winter 2007/2008, VT. B. J., at 4, 4.

<sup>37</sup> Commission on Interest on Lawyers' Trust Accounts, *Status of IOLTA Programs*, A.B.A., <http://www.abanet.org/legalservices/iolta/ioltus.html> (last updated June 24, 2010); Romerdahl, *supra* note 25, at 1123.

<sup>38</sup> *Status of IOLTA Programs*, *supra* note 37; *see also* R.I. Supreme Court Approves Mandatory Participation In IOLTA, R.I. B.J., Jan.-Feb. 2009, at 42, 42 ("On December 11, 2009, the Rhode Island Supreme Court approved a request (petition), filed by the Rhode Island Bar Foundation and Rhode Island Bar Association, to convert Rhode Island's IOLTA program from opt-out to mandatory.").

<sup>39</sup> The ABA lists fifteen states that have made the change from voluntary status to mandatory and nineteen that have made the change from opt-out to mandatory. *Status of IOLTA Programs*, *supra* note 37. Nevada is one example of a state that has made the move from an opt-out state to a mandatory state. Kristina Marzec, *Access to Justice Commission*, NEV. LAW. (July 2008), at 19, 20.

<sup>40</sup> As the ABA notes, "IOLTA is among the most significant sources of funding for programs that provide civil legal services to the poor, with close to 90 percent of grants awarded by IOLTA programs (\$230.4 million in 2008) supporting legal aid offices and pro bono programs." *IOLTA Overview*, *supra*, note 35. Currently, the greatest threat to the continued success of IOLTA programs is continuously low interest rates, which lead to lower amounts of funds collected from IOLTA accounts. *See generally* Kenneth W. Babcock, *A Growing Threat to the Social Safety Net in Orange County*, ORANGE CNTY. LAW. June 2009, at 10, 11; James B. Sales, *Year In Review 2008: Access To Justice*, 72 TEX. B.J. 48 (2009).

<sup>41</sup> *See* David J. Dreyer, *Culture, Structure, and Pro Bono Practice*, 33 J. LEGAL PROF. 185, 218 (2009) ("So IOLTA programs are here to stay..."); Commission on Interest on Lawyers' Trust Accounts, *IOLTA Home*, A.B.A., <http://www.abanet.org/legalservices/iolta/> (last visited July 1, 2010) ("In October 2004 the Supreme Court declined to hear a case involving a Fifth Amendment claim brought in Missouri state court against that state's IOLTA program. That decision left standing a March 2004 appellate court decision to dismiss the claim against the IOLTA program.").

IOLTA accounts, bringing the rate into the usual range paid on savings accounts.<sup>42</sup> Both of these campaigns have been widely successful. Most states now have mandatory IOLTA programs,<sup>43</sup> and each year more banks agree to “comparability” requests from IOLTA advocates.

IOLTA is popular but not perfect. Even apart from the legal concerns that became the subject of litigation, there is an inherent weakness in the IOLTA programs regarding the wide fluctuations in available funds.<sup>44</sup> Falling interest rates will mean less interest rates paid on the deposits and less revenue available for funding legal aid agencies.<sup>45</sup> Offsetting this effect, however, is the increased number of client deposits that would be eligible for IOLTA accounts, as deposits large enough to earn substantial interest are now exempt from IOLTA. The falling interest rates can cause significant fluctuations in the funds available for legal aid agencies that year; this is a chronic uncertainty that makes it difficult to plan annual budgets for the recipient legal service providers.<sup>46</sup>

<sup>42</sup> At least twenty states have adopted comparability rules for banks offering IOLTA accounts to lawyers. *See, e.g.*, ALA. SUP. CT. RULES OF PROF'L CONDUCT R. 1.15; ARK. SUP. CT. RULES OF PROF'L CONDUCT R. 1.15; STATE BAR OF CAL. R. 2.110-2.130; CONN. SUPER. CT. RULES OF PROF'L CONDUCT R. 1.15; RULES REGULATING THE FLA. BAR R. 5-1.1; SUP. COURT OF HAW. R. 11; ILL. SUP. CT. RULES OF PROF'L CONDUCT R. 1.15; LA. SUP. CT. RULES OF PROF'L CONDUCT R. 1.15; MD. RULES OF P. R. 16-610; MASS. RULES OF PROF'L CONDUCT R. 1.15 & MASS. SUP. JUD. CT. R. 3.07 & 4.02; ME. BAR RULES R. 3.6(e); MICH. SUP. CT. RULES OF PROF'L CONDUCT R.1.15; MINN. SUP. CT. RULES OF PROF'L CONDUCT R. 1.15; MISS. SUP. CT. RULES OF PROF'L CONDUCT R. 1.15; SUP. CT. OF MO. RULES OF PROF'L CONDUCT R. 4-1.15; N.J. SUP. CT. R. 1:28A; N.Y. STATE REGISTER Ch. LXIX § 7000; OHIO RULES OF PROF'L CONDUCT R. 1.15; SUP. CT. OF TEX. IOLTA R. 7; UTAH SUP. CT. RULES OF PROF'L PRACTICE Ch. 14-1001. *See also* Thomas J. Methvin, *President's Page: Access to Justice—Now More Than Ever*, 70 ALA. LAW. 319, 320 (2009) (discussing Alabama's recent adoption of comparability rules for IOLTA); Sales, *supra* note 40 (discussing adoption of comparability rules in Texas); Dean R. Dietrich, *Banks to Pay Comparable Interest on IOLTA Accounts*, WIS. LAW., April 2009, at 25; James A. Kawachika & Robert F. LeClair, *Increase Funding for Access To Justice By Bank “Rate Comparability” In IOLTA Accounts*, HAW. B.J. March, 2008, at 27 (“An IOLTA Comparability Rule requires attorneys to place their IOLTA accounts in a financial institution that pays those accounts the highest interest rate generally available at that institution to other customers when IOLTA accounts meet the same minimum balance or other account qualifications, if any.”); Marta-Ann Schnabel, *IOLTA Rates: No Disappointing Comparables Here*, LA. B.J., June/July 2008, at 11; Jim Davis, *We Are Stuck in 1982!*, ADVOCATE (Idaho), Aug. 2008, at 38 (advocating adoption of comparability rules in Idaho); Bruce Beesley, *IOLTA: Doing the Right Thing*, NEV. LAW., Nov. 2008, at 4.

<sup>43</sup> *Status of IOLTA Programs*, *supra* note 37.

<sup>44</sup> *See* Kevin H. Douglas, *IOLTAs Unmasked: Legal Aid Programs' Funding Results in Taking of Clients' Property*, 50 VAND. L. REV. 1297, 1303 (1997) (“Since the amount of IOLTA-eligible funds is highly sensitive to changes in interest rates, IOLTAs are an inherently unstable source of revenue.”).

<sup>45</sup> *See, e.g.*, Chris Tweeten, *Legal Services Need Your Help*, MONT. LAW., April 2009, at 4 (noting that since the Federal Reserve Board lowered the benchmark interest rate to zero in 2008, “[r]ates of interest on deposit accounts have fallen to historic lows. Since IOLTA funds come from interest on deposits, the dramatic decrease in interest rates is projected to result in a 65 percent drop in IOLTA revenues by the end of [2009].”). *See also* Romerdahl, *supra* note 25, at 1123:

As billable work declines along with the economy, IOLTA funds have suffered a double blow: Both the amount of money being placed into IOLTA funds and the amount of interest the funds are producing have declined. IOLTA funds are tied to federal fund rates, and the Federal Reserve's interest rate drop has caused IOLTA revenues to plummet. Legal aid groups across the country will be forced to cut their staff by '20 percent or more in the coming months,' even as requests for legal aid have grown by 30 percent or more.

(internal citation omitted).

<sup>46</sup> *See* Diane Curtis, *Economic Downturn Puts a Crimp in Legal Services*, CAL. ST. B.J., Feb. 2009, at A1

Most of the IOLTA deposits are from real estate transactions, so when the housing market crashes there are fewer deposits to generate interest, and the deposits that do result are smaller due to falling sales prices. Taken together, this decline in the number and size of deposits can significantly reduce the funds available for legal aid lawyers.<sup>47</sup> A vicious cycle thus emerges: when the economy is at its worst, and when more indigent people need free lawyers, there will be fewer funds and fewer lawyers.<sup>48</sup>

### B. Opposition to IOLTA

The IOLTA scheme also has its detractors. In reality, IOLTA's critics object to the controversial causes supported by the funds.<sup>49</sup> Yet, for strategic reasons, detractors have focused their arguments, and legal challenges, on the mechanics of IOLTA itself.<sup>50</sup> This opposition has given rise to significant litigation, which itself constitutes an important chapter in the history of the IOLTA programs. Before discussing the cases, however, the underlying objection deserves an explanation.

As mentioned above, the primary objection to IOLTA is directed at the causes supported by the funds, or the legal aid agencies and their activities.<sup>51</sup> The problem is not that the agencies help the poor per se; all redistribution of wealth by the government is controversial in America, but IOLTA itself is one of the least redistributive programs of all. IOLTA mostly pays agencies that pay lawyers who do free legal work for the poor. The economically disadvantaged people at the end of this chain generally perceive their "benefit" solely in terms of the outcome of their case: securing their stream of welfare benefits, winning custody of their children, prevailing in their immigration hearing, or avoiding eviction from their apartment. They appreciate their free lawyer more vaguely as they would appreciate a neighborhood social worker or a kindhearted parish priest. IOLTA has far less of a "Robin Hood" aspect than almost any other state action to help the poor.<sup>52</sup> The money in question arguably did not exist for those from whom it was

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("This was the year IOLTA funds were supposed to swell and California legal aid organizations, which get much of their funding from trust account interest, were going to reap the benefits of the bulging coffers. The high hopes couldn't have been more misplaced . . .").

<sup>47</sup> See, e.g., Ruth V. McGregor, *Rule of Law in Challenging Times*, 34 OKLA. CITY U. L. REV. 549, 559-60 (2009).

<sup>48</sup> One obvious solution is supplementing IOLTA funds with other, more consistent sources of funding. A more creative approach, not mutually exclusive with the first, would be for states to use a small portion of IOLTA moneys to purchase a specialized insurance instrument that would pay out a benefit to the IOLTA program if the program in that state collapsed for a year or two due to painful corrections in the regional housing market. Premiums paid in good years could fund an income-insurance policy for the IOLTA fund.

<sup>49</sup> See David Luban, Essay, *Taking out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CAL. L. REV. 209, 209-11 (2006); William P. Marshall, Response, *The Empty Promise of Compassionate Conservatism: A Reply to Judge Wilkinson*, 90 VA. L. REV. 355, 380-83 (2004).

<sup>50</sup> See Douglas, *supra* note 44, at 1331-32.

<sup>51</sup> Luban, *supra* note 49, at 209-11. Opposition to the Legal Services Corporation stems from similar concerns. Mark Kessler, *The Interorganizational Politics of Legal Activity*, 1986 AM. B. FOUND. RES. J. 1, 2 (1986) (summarizing and citing opposition to the Legal Services Corporation, but disagreeing with it); Roger C. Cramton, *Crisis in Legal Services for the Poor*, 26 VILL. L. REV. 521, 522 (1981); Howard Phillips, *Legal Services Should Not Be Federally Funded*, July 1980, CONSERVATIVE DIG., at 16; Heritage Foundation, MANDATE FOR LEADERSHIP: PROJECT TEAM REPORT ON THE POVERTY AGENCIES (1980).

<sup>52</sup> Justice Scalia, however, mocked IOLTA with precisely this comparison in his dissent in *Brown*, referring

“taken,” and none of it inures directly to the poor. The banks lose some of the net revenue they might have otherwise had through free use of the funds, but the interest they pay is low enough for them to still profit from the arrangement. The banks almost never object to IOLTA.

What rankles some about IOLTA is, instead, the legal aid lawyers themselves and some of their more ambitious endeavors.<sup>53</sup> Empirical studies and surveys show that legal aid lawyers are usually politically liberal or progressive, and are activists for their views, not just advocates for individual clients.<sup>54</sup> Studies indicate that this pattern may be due to the types of lawyers who founded most of the agencies and who perhaps left their imprint,<sup>55</sup> the nature of the work (always advocating on the side of the poor),<sup>56</sup> and the personal idealism required to work for a lower wage than the lawyer could easily earn at a regular firm.<sup>57</sup> These factors have a screening effect on the lawyers who work for these agencies so that those whose salaries come largely from IOLTA funds are disproportionately “leftist enough,” (or progressive, socialist, etc.) to seem radical to those on the other end of the spectrum.<sup>58</sup> Moreover, because these IOLTA-funded lawyers are being screened for progressive idealism by the hiring preferences of the agencies and by the below-market wages—they are not content merely to plod through the individual cases of each of their indigent clients.<sup>59</sup> They pursue systemic change.<sup>60</sup> Legal aid lawyers bring class action lawsuits, especially against state governments, lobby the legislature, appeal lost cases that other lawyers would have dropped in order to change precedent, and even team up against wealthy parties that appear to be exploiting the poor repeatedly, such as slum lords and certain employers.<sup>61</sup> The bigger or more successful the crusade, the more politically controversial it becomes, and the more each side looks critically at the source of money for the lawyers on the other side. IOLTA-funded lawyers therefore become a target for more politically conservative or “right wing” activists<sup>62</sup> because of who the IOLTA lawyers are (left-wing activists) and because of their pursuit of systematic change favoring the poor. There are, admittedly, a few IOLTA-

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to it as a “Robin Hood Taking.” *Brown*, 538 U.S. at 252 (Scalia, J., dissenting). For discussion of this metaphor, see Marshall, *supra* note 49, at 382.

<sup>53</sup> Marshall, *supra* note 48, at 380-82.

<sup>54</sup> See generally Howard S. Erlanger et al., *Law Student Idealism and Job Choice: Some New Data on an Old Question*, 30 LAW & SOC’Y REV. 851 (1996) (demonstrating empirically “that political orientation and participation in a social action law program during law school are the best predictors of” which individuals work for legal aid when they enter practice); Kessler, *supra* note 51, at 14 (noting that most legal aid lawyers in the studies identified themselves as Democrats or Independents).

<sup>55</sup> Kessler, *supra* note 51, at 14-15.

<sup>56</sup> See *id.* at 7-10 (arguing, based on impressive empirical data, that contact with the poor is the most common factor in moving legal aid lawyers to launch social-reform litigation).

<sup>57</sup> For a thought-provoking discussion of the decision of nonprofit workers to accept below-market wages, see Patrick Francois, *Making a Difference*, 38 RAND J. ECON. 714 (2007).

<sup>58</sup> See Erlanger et al., *supra* note 54, at 859.

<sup>59</sup> For an interesting discussion of type-casting among legal aid lawyers and screening factors, see Thomas M. Hilbink, *You Know the Type...: Categories of Cause Lawyering*, 29 LAW & SOC. INQUIRY 657 (2004) (book review).

<sup>60</sup> See Kessler, *supra* note 51, at 7-10.

<sup>61</sup> See, e.g., Beth Harris, *Representing Homeless Families: Repeat Player Implementation Strategies*, 33 LAW & SOC’Y REV. 911 (1999); Stephen Loffredo, *Poverty Law and Community Activism: Notes from a Law School Clinic*, 150 U. PA. L. REV. 173 (2001).

<sup>62</sup> See Dennis A. Kaufman, *The Tipping Point on the Scales of Civil Justice*, 25 TOURO L. REV. 347, 378 (2009); Marshall, *supra* note 49, at 380-83; Luban, *supra* note 49, at 220.

funded legal aid agencies run by evangelical Christian groups,<sup>63</sup> who would probably be more palatable to IOLTA's critics. Yet they are a tiny minority, and if they were ever the majority, there would be a completely new set of IOLTA critics.

### C. The Litigation

A conservative activist group challenged the constitutionality of IOLTA programs in several rounds of litigation,<sup>64</sup> four of which went to the federal appellate courts. The first was in the Eleventh Circuit,<sup>65</sup> a case originating in Florida; the second was in the First Circuit;<sup>66</sup> the third was in the Fifth Circuit;<sup>67</sup> and the fourth was in the Ninth Circuit.<sup>68</sup> The facts of each case were nearly the same:<sup>69</sup> a state-run IOLTA program, as described above, faced a challenge by the same plaintiffs in different states, with one or two depositors as token plaintiffs.<sup>70</sup> Given the similarity in facts and outcome, there is little value in discussing each of these cases individually.<sup>71</sup>

The plaintiffs argued that IOLTA violated the First Amendment protections of free expression and/or free association by compelling the owners of the funds, that is, the lawyers' clients, to support causes they disliked.<sup>72</sup> Of all the claims by the plaintiffs, this was by far the closest to their real objection to the IOLTA program. Legally, however, the argument was problematic. Taxpayers generally cannot use litigation to enjoin the government from using their

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<sup>63</sup> See, e.g., THE CHRISTIAN LEGAL SOCIETY, [www.clsnet.org](http://www.clsnet.org) (last visited Nov. 9, 2010); see also George, *supra* note 25, at 314.

<sup>64</sup> See Luban, *supra* note 49, at 228-29.

<sup>65</sup> Cone v. State Bar of Fla., 819 F.2d 1002 (11th Cir. 1987), *cert. denied*, 484 U.S. 917 (1987).

<sup>66</sup> Wash. Legal Found. v. Mass. Bar Found., 993 F.2d 962 (1st Cir. 1993).

<sup>67</sup> *Phillips*, 524 U.S. at 162; Wash. Legal Found. v. Tex. Equal Access to Justice Found., 94 F.3d 996 (5th Cir. 1996).

<sup>68</sup> *Brown*, 538 U.S. 216 (2003); Wash. Legal Found. v. Legal Found. of Wash., 271 F.3d 835 (9th Cir. 2001).

<sup>69</sup> For an overview of the leading cases, see Douglas, *supra* note 44, at 1303-08.

<sup>70</sup> The Washington Legal Foundation represented the various plaintiffs in these cases. *Brown*, 538 U.S. at 228 n.4; *Phillips*, 524 U.S. at 162. In *Brown*, the Court best described the firm as "a nonprofit public interest law and policy center with members and supporters nationwide, [that] devotes a substantial portion of its resources to protecting the speech and property rights of individuals from undue government interference." *Brown*, 538 U.S. at 228 n.4.

<sup>71</sup> In fact, these are not the only cases that one could look at when studying the IOLTA issues that have arisen. More cases involving IOLTA complaints and claims exist than could possibly be addressed in one article or even a dozen articles. Those interested can also refer to such cases as: *Carroll v. State Bar of Cal.*, 213 Cal. Rptr. 305 (Cal. Dis. Ct. App. 1985), *cert. denied*, 474 U.S. 848 (1985); *In re Interest on Lawyers' Trust Accounts*, 675 S.W.2d 355 (Ark. 1984); *In re Interest on Lawyers' Trust Accounts*, 672 P.2d 406 (Utah 1983); *In re N.H. Bar Ass'n*, 453 A.2d 1258 (N.H. 1982); *In re Interest on Trust Accounts*, 402 So.2d 389 (Fla. 1981). Professor Jim Paulsen waged a personal crusade over IOLTA in the 1990's. Paulsen had withdrawn from participation in Texas' mandatory IOLTA program in order to have his case go to court. In the state of Texas, failure to abide by the IOLTA program warranted suspension of an attorney's law license. The State Bar of Texas rejected Paulsen's application for a good-cause exemption to mandatory participation in the program. The Bar's decision was ultimately upheld by both a Texas district court and court of appeals. *Paulsen v. State Bar of Tex.*, 55 S.W.3d 39, 41-42 (Tex. App. 2001).

<sup>72</sup> The first count of the plaintiffs' complaint in *Brown* alleged a violation of the plaintiffs' First Amendment rights through a forced association created by IOLTA between the plaintiffs and the organizations receiving IOLTA funds from the States. *Brown*, 538 U.S. at 228.

tax dollars to further controversial programs or policies.<sup>73</sup> The plaintiffs tried to distinguish IOLTA from the unhappy-taxpayer analogy, but the distinctions seemed semantic. The Supreme Court rejected this argument in a cursory manner,<sup>74</sup> comparing IOLTA to a pacifist's home, "taken" through eminent domain and turned into a munitions warehouse.<sup>75</sup> The pacifist's moral offense at the government's use of the property has no legal relevance to the eminent domain case.

The most significant constitutional challenge to IOLTA was the argument that it constituted an unconstitutional government "taking" of private property in violation of the Fifth Amendment.<sup>76</sup> The government must show a *public purpose* and pay *just compensation* for exercising its eminent domain powers.<sup>77</sup> In the first IOLTA case that came before the Supreme Court, the Court restricted its holding to the antecedent question of whether the interest generated by IOLTA accounts was really the "private property" of the clients whose funds were on deposit.<sup>78</sup> The Court held that it was indeed private property, and remanded the case for the lower courts to consider whether there had been an unconstitutional "taking."<sup>79</sup> This essentially guaranteed the Court would have to revisit the IOLTA issue within two or three years when the lower court adjudicated the "takings" question on remand and the parties appealed again. The plaintiffs had prevailed on at least one critical issue, however, and many took this as a sign of the Court leaning to their side.<sup>80</sup> The Court, however, had been deeply divided, five-four, along

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<sup>73</sup> Federal taxpayers are not barred unconditionally from enjoining the government in their use of tax dollars, but their journey is not an easy one. To gain taxpayer standing, a taxpayer must fulfill a two-part test.

First, the taxpayer must establish a logical link between the status asserted and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, s 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8.

Flast v. Cohen, 392 U.S. 83, 102-103 (1968) (internal citation omitted).

<sup>74</sup> The Court ignores the First Amendment argument for the most part, mentioning only that the first count of the plaintiffs' complaint in *Brown* alleged a violation of the plaintiffs' First Amendment rights. *Brown*, 538 U.S. at 228. After this brief reference, the words "First Amendment" do not appear again until Justice Kennedy's dissent. *Id.* at 253.

<sup>75</sup> *Id.* at 232.

<sup>76</sup> The *Phillips* Court granted certiorari in part because of a split that had developed between the various federal courts "over whether the interest income generated by funds held in IOLTA accounts is private property for purposes of the Fifth Amendment's Takings Clause . . ." *Phillips*, 524 U.S. at 163.

<sup>77</sup> *Id.* at 164.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 172. The Court failed to address whether or not the funds in question had "been 'taken' by the State" and gave no opinion as to "the amount of 'just compensation,' if any, due [to the] respondents." The Justices left these questions to the lower courts to decide and in the process left plenty of uncertainty for lawyers, judges, and legal scholars everywhere. *Id.*

<sup>80</sup> The Court, rather than continuing to ignore the problems altogether, at least heard the case, listened to the issues, and ruled on at least one of the questions.

partisan lines.<sup>81</sup> Its narrow decision merely postponed an inevitable consideration of the remaining points under the Takings Clause. This evasive maneuver probably represented the Justices' inability to reach a majority vote on anything but the antecedent issue.

When the IOLTA issue returned to the Court's docket in 2003, the outcome was very different.<sup>82</sup> The majority, despite a strident dissent by four justices,<sup>83</sup> held that IOLTA was indeed a taking.<sup>84</sup> But the Court held that it was perfectly legitimate, given the obvious "public purpose," helping the poor,<sup>85</sup> that easily satisfied a "just compensation" amount of zero.<sup>86</sup> The "zero compensation due" holding was the crux of the Court's decision, and the focus of the dissenters' attack. The majority's benchmark for "just compensation" was the actual, objective value of the interest taken in isolation, not the subjective or expectation value for the property owner himself.<sup>87</sup> The Court's previous ruling on the question of whether the interest was "property" had relied heavily upon the "expectation value" of the IOLTA interest.<sup>88</sup>

The dissenting Justices had a colorable argument that the new holding eviscerated the previous ones, and in fact, the dissenters from the first comprised the majority in the second, after winning over one more vote from Justice O'Connor.<sup>89</sup> On the other hand, despite the majority's avoidance of the "fair market value" verbiage, it seems that there would be negligible "fair market value" for the few cents of interest generated by the typical individual IOLTA deposit. Nevertheless, this 2003 decision ended nearly all IOLTA litigation in the United States for now,<sup>90</sup> to the great relief of the legal aid agencies. Even so, there are some remaining problems that

<sup>81</sup> Justice Rehnquist delivered the opinion of the Court in which Justices O'Connor, Scalia, Kennedy, and Thomas joined. Justices Souter, Stevens, Ginsburg, and Breyer dissented. *Phillips*, 524 U.S. at 158.

<sup>82</sup> *Brown*, 538 U.S. at 240.

<sup>83</sup> This time Justice Stevens delivered the opinion of the Court in which Justices O'Connor, Souter, Ginsburg, and Breyer joined. Justices Scalia, Rehnquist, Kennedy, and Thomas dissented. *Id.* at 218-219.

<sup>84</sup> The Court viewed this as a *per se* taking and not a regulatory taking, explaining that, "[a] state law that requires client funds that could not otherwise generate net earnings for the client to be deposited in an IOLTA account is not a 'regulatory taking.' A law that requires that the interest on those funds be transferred to a different owner for a legitimate public use, however, could be a *per se* taking requiring the payment of 'just compensation' to the client." *Id.* at 240.

<sup>85</sup> *Id.* at 232.

<sup>86</sup> *Id.* at 240.

<sup>87</sup> The Court recognized that the previous judges in various courtrooms across the country who had handled the compensation question had concurred that "the 'just compensation' required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain." *Brown*, 538 U.S. at 235-36.

<sup>88</sup> *Phillips*, 524 U.S. at 169. See also *Wash. Legal Found.*, 94 F.3d at 1002-03; *Cone*, 819 F.2d at 1005.

<sup>89</sup> In his dissent, Justice Scalia noted the Court's about-face turn from the *Phillips* decision of 1998. He pointed to precedent of the Court in his argument that the Court had simply created a "novel exception to [the Court's] oft-repeated rule that the just compensation owed to former owners of confiscated property is the fair market value of the property taken." In Scalia's view, the previous decisions of the Court "compel the conclusion that petitioners are entitled to the fair market value of the interest generated by their funds held in interest on lawyers' trust accounts." *Id.* at 241.

<sup>90</sup> See, e.g., *Wieland v. Lawyers Trust Fund of Illinois*, 836 N.E.2d 166, 168 (Ill. App. Ct. 2005) ("[W]e affirm the circuit court's order on the basis that *Brown* is dispositive."). One isolated post-*Brown* case challenging the legality of an IOLTA program, which was also unsuccessful, is *Mottl v. Missouri Lawyer Trust Account Foundation*. 133 S.W.3d 142 (Mo. Ct. App. 2004), *cert. denied*, 543 U.S. 927 (2004). Without reaching the takings question that was the subject of *Brown*, the Missouri Appellate Court in *Mottl* dismissed the case because it found no state action where the IOLTA program was voluntary, as in Missouri. *Id.* For an excellent discussion of this case, see Timothy D. Steffens, *Are You Misappropriating Client Funds? Missouri's IOLTA Plan After Mottl*, 71 MO. L. REV. 247 (2006).

could come to the surface at any time.

#### D. *Lingering Problems with Brown*

There are a few lingering problems with the *Brown* decision itself, apart from the post-*Kelo* reforms discussed in the following section. One problem is a small contradiction in Justice Stevens' majority opinion. At the beginning of the opinion, he says that ". . . federal banking regulations in effect since the Great Depression prohibited banks from paying interest on checking accounts, the value of the use of the clients' money in such accounts inured to the banking institutions."<sup>91</sup> Near the end of the opinion, however, he makes much of the fact that any client deposit that could have earned interest would be put in an interest-bearing account in the rationale for no compensation being due for this type of "taking."<sup>92</sup> This seems to be a contradiction unless he meant to refer only to individual depositors, rather than corporate depositors. This is a distinction he never makes. It seems like a minor point, but Stevens relied heavily on the idea that depositors would by definition fall outside of IOLTA if the funds had potential to earn interest.<sup>93</sup> If federal law still prohibits firms from having accounts that pay interest to depositors, it seems to undermine this point. This contradiction may not suffice as a basis for a future Supreme Court to overturn *Brown*, but in combination with the dissenters' other arguments, it could be a factor.<sup>94</sup>

<sup>91</sup> *Brown*, 538 U.S. at 221.

<sup>92</sup> *See id.* at 239-40 ("The District Court . . . was correct when it made the factual finding 'that in no event can the client-depositors make any net return on the interest accrued in these accounts. Indeed, if the funds were able to make any net return, they would not be subject to the IOLTA program.'").

<sup>93</sup> *See id.* at 240 ("The categorical requirement in Washington's IOLTA program that mandates the choice of a non-IOLTA account when net interest can be generated for the client provided an independent ground for the en banc court's judgment.").

<sup>94</sup> It is worth noting that the personnel on the Court changed after *Brown*, and the present Court might have decided the case differently. This is especially true given that Justice O'Connor, the "swing vote" between *Phillips* and *Brown*, has retired. There is an additional, more obscure problem with the *Brown* opinion, which could become a feature of a future case if serious litigation over IOLTA ever resumes. After the Supreme Court's decision in *Phillips*, which held that the client interest taken under the Texas IOLTA program was indeed "property" for purposes of Takings Clause analysis, a Texan law professor challenged this doctrinally in state court. Professor James Paulsen argued that under Texas banking statutes, the funds in a bank account are not, in fact, property, but are rather a contractual right (right of demand) of the bank account holder. *Paulsen v. Tex. Equal Access to Justice Found.*, 23 S.W.3d 42 (Tex. App. 1999). It was too late; the state appellate court dismissed the case as procedurally inappropriate, given that both parties wanted to preserve IOLTA, but wanted an advisory opinion that Texas' IOLTA program involved a contractual right rather than a property right. *Id.* at 48. The court did, however, concede that Paulsen appeared to be correct about the doctrinal question, and that the United States Supreme Court was mistaken about the relevant state law:

We are not unsympathetic to appellants' arguments. The *Phillips* decision does appear to have at least overlooked, if not misstated, a large body of Texas banking law that distinguishes between "general" and "special" accounts. In a general account, Texas law is clear that the financial institution holds title to the funds deposited. Paulsen's contract with his bank establishing an IOLTA account expressly states that it is a general account. Since the *Phillips* court stated that "interest follows principal," the natural conclusion would be that the interest earned in an IOLTA account belongs to the banks as well. This appears to be in direct conflict with the actual *Phillips* holding that interest earned in an IOLTA account is the property of the attorney's client.



A more serious problem is the ultimate criteria the Court used for upholding the IOLTA scheme: the transaction costs for tracking and paying tiny amounts of interest, and the minimal amount of interest owed under current interest rates. The majority insisted that IOLTA-eligible deposits generated zero payable interest for depositors because the transaction costs of sub-accounting, i.e., calculating minute amounts of interest each day, and then paying the interest out were greater than the individual interest generated by the funds.<sup>95</sup> If transaction costs fall low enough, from either technological advancements or spikes in interest rates, then more money would have to go into non-IOLTA accounts, leaving the programs unfunded. Reasonably foreseeable advances in technology would lower these transaction costs significantly. Computers could perform the necessary calculations and the electronic transfer of funds between accounts and between banks would seem to run the transaction costs closer to zero. As transaction costs go down, which seems inevitable, *Brown* requires more client deposits to go into non-IOLTA accounts. Ironically, *Brown* seems to require the gradual defunding of IOLTA programs as technology improves and transaction costs go down.

A spike in interest rates paid on accounts would produce the same result. The *Brown* decision came from a context where interest rates had been at historic lows for a decade or more (five percent or less). Even so, double-digit interest rates are entirely conceivable in the future. If non-IOLTA accounts begin earning significantly higher interest rates, then many deposits for which “compensation [would be] nil”<sup>96</sup> today would become ineligible for IOLTA accounts. As interest rates go up, *Brown* mandates a gradual defunding of IOLTA. Of course, the IOLTA accounts would be generating significantly higher returns as well if interest rates go up, and this should offset somewhat the effect of the diminished deposits. The decrease in deposits, however, will have a bigger impact on the amount generated.

Both of these developments seem inevitable and will certainly overlap in time. Transaction costs will decrease steadily as technology improves and will continue this downward trend, or reach zero, and at some point, there will be a spike in interest rates. This will make the ineligibility of many deposits even more evident. Even if we never reach a point where all deposits would be ineligible for IOLTA, it seems inevitable that the programs will eventually generate too little interest to be relevant.<sup>97</sup> As frustrating as the majority’s decision might have been to the dissenters, it seems that the majority guaranteed IOLTA’s eventual demise, perhaps inadvertently. No additional litigation is necessary to end IOLTA. The programs will collapse as technology improves and interest rates go up.

If rising interest rates and falling transaction costs are nearly certain, the enforcement mechanism by which these changes would make a practical difference is less clear. Conscientious and attentive attorneys in large numbers may shift their deposits from IOLTA to interest-bearing accounts as soon as the circumstances warrant, but there is little motivation for them to do so. If attorneys simply continue to deposit most or all of their clients’ funds in IOLTA accounts, the clients themselves would have to challenge the practice, and few are willing to

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*Id.* at 47 (internal citations omitted). In theory, this argument could convince a future Supreme Court to overturn both *Phillips* and *Brown*.

<sup>95</sup> *Brown*, 538 U.S. at 237-38.

<sup>96</sup> *Id.* at 237 n.8.

<sup>97</sup> Of course, when interest rates fall too low, this also depletes IOLTA’s reserves, as happened in 2008. See Tracy Carbasho, *Reduction in IOLTA revenue creates funding issues for legal services*, LAW. J. (Allegheny County, Pa.), March 13, 2009, at 5; see also Romerdahl, *supra* note 25, at 1123; Tweeten, *supra* note 45, at 4; Sales, *supra* note 40, at 48.

commence litigation over a few dollars of lost interest. In addition, their recourse would not be in the courts. The Supreme Court in *Brown* cleverly headed off this problem by suggesting that lawyers' mistakes in depositing funds would be a matter for a state-bar ethics complaint, according to the statute, rather than a constitutional challenge, as the wrongdoer would be the lawyer, a private actor rather than a state actor.<sup>98</sup> In other words, the problem of declining transaction costs and rising interest rates may never furnish the basis for courts to revisit the holding in *Brown*, or even to revisit IOLTA. Instead, the defunding of IOLTA because of these factors would depend on large numbers of attorneys adhering to the instructions of *Brown*. It is uncertain whether this will occur.

## II. POST-KELO REFORMS: TEN PROBLEMATIC STATES

After *Brown*, the Supreme Court decided a much more controversial and high profile case, *Kelo v. City of New London*.<sup>99</sup> The divided Court in *Kelo* upheld a municipality's use of eminent domain for taking private property from homeowners and transferring it to commercial developers, who promised transformative, tax-lucrative construction on the land. *Kelo* provoked a more widespread legislative response than any other Supreme Court case in history:<sup>100</sup> forty-three states quickly enacted post-*Kelo* reforms for their eminent domain laws.<sup>101</sup> The academic commentary on the *Kelo* decision has been similarly intense and voluminous;<sup>102</sup> the commentary

<sup>98</sup> *Brown*, 538 U.S. at 218.

<sup>99</sup> 545 U.S. 469 (2005).

<sup>100</sup> Somin, *Limits of Backlash*, *supra* note 3, at 2101.

<sup>101</sup> *See id.* at 2102; *see also* Richard C. Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 HARV. L. REV. 482, 532 (2009) (noting that the negative reaction to *Kelo* cut "across the political spectrum"). Schragger goes on to explain, rather convincingly, the post-*Kelo* reaction as a frustration of over-taxed middle-class city dwellers to the ongoing problem of municipalities overdoing it in their efforts to attract big businesses to their locale:

*Kelo*, however, met resistance from the white middle class and from small business owners, who might otherwise favor economic development more generally. Economic localism helps explain that public reaction. *Kelo* elicited (using Robert Johnston's terminology) a reaction from the democratic, anticapitalist middle class — the petit bourgeoisie protecting their livelihoods against large-scale global capital.

*Id.* at 532.

<sup>102</sup> *See, e.g.*, RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION 126-34 (2006); Abraham Bell & Gideon Parchomovsky, Essay, *The Uselessness of Public Use*, 106 COLUM. L. REV. 1412 (2006); Joseph Blocher, Note, *Private Business as Public Good: Hotel Development and Kelo*, 24 YALE L. & POL'Y REV. 363 (2006); David L. Breaux, Note, *A New Take on Public Use: Were Kelo and Lingle Nonjusticiable?*, 55 DUKE L.J. 835 (2006); Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491 (2006); Richard O. Brooks, Essay, *Kelo and the "Whaling City": The Failure of the Supreme Court's Opportunity to Articulate a Public Purpose of Sustainability*, in THE SUPREME COURT AND TAKINGS: FOUR ESSAYS 5 (Vt. J. Envtl. L. 2004), available at [http://www.vjel.org/takings/Brooks\\_Article.pdf](http://www.vjel.org/takings/Brooks_Article.pdf); John Fee, *Eminent Domain and the Sanctity of Home*, 81 NOTRE DAME L. REV. 783 (2006); Ashley J. Fuhrmeister, Note, *In the Name of Economic Development: Reviving "Public Use" as a Limitation on the Eminent Domain Power in the Wake of Kelo v. City of New London*, 54 DRAKE L. REV. 171 (2005); Elizabeth F. Gallagher, Note, *Breaking New Ground: Using Eminent Domain For Economic Development*, 73 FORDHAM L. REV. 1837 (2005); Robert V. Kerrick & Jeffrey D. Gross, *Eminent Domain: Pro: Should Kelo be Condemned? Arizona's Experience with the Public Use Requirement*, 43 ARIZ. ATT'Y, Nov. 2006, at 30; Brett D. Liles, Note, *Reconsidering Poletown: In the Wake of Kelo, States Should Move to*

on post-*Kelo* legislative reforms less so, but still substantial.<sup>103</sup>

The rush to respond to *Kelo* left some of the ancillary consequences of the reforms unconsidered, especially results unrelated to real estate ownership. Some scholars have argued that most of the reforms changed little in terms of the states' ability to seize private property for purposes of economic development and transfer it to other private entities.<sup>104</sup> At least one scholar has suggested that post-*Kelo* reforms adversely affect the poor.<sup>105</sup> There has been no mention to date on the intersection of IOLTA and post-*Kelo* reforms, even though the *Kelo* case itself cites *Brown*.

This section examines which state reforms are most likely to pose problems for IOLTA, as well as states where such problems are less probable. The analysis is somewhat different for determining whether the statute infringes on IOLTA-type takings than for real property takings. Provisions regarding "economic development" purposes or "urban blight" exceptions are dispositive for the severity of the reforms on real property takings by states, but these are less relevant for IOLTA programs than prohibitions on transfers to non-governmental parties.

Twenty-two of the states that enacted laws in the wake of *Kelo* passed legislation that

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*Restore Private Property Rights*, 48 ARIZ. L. REV. 369 (2006); Alberto B. Lopez, *Revisiting Kelo and Eminent Domain's "Summer of Scrutiny"*, 59 ALA. L. REV. 561 (2008); Emily L. Madueno, Note, *The Fifth Amendment's Taking Clause: Public Use and Private Use; Unfortunately There Is No Difference*, 40 LOY. L.A. L. REV. 809 (2007); G. David Mathues, Note, *Shadow Of A Bulldozer? Rluipa and Eminent Domain After Kelo*, 81 NOTRE DAME L. REV. 1653 (2006); Marc B. Mihaly, Essay, *Public-Private Redevelopment Partnerships and the Supreme Court: Kelo v. City of New London*, in THE SUPREME COURT AND TAKINGS: FOUR ESSAYS 41 (Vt. J. ENVTL. L. 2004), available at [http://www.vjel.org/takings/Brooks\\_Article.pdf](http://www.vjel.org/takings/Brooks_Article.pdf); Jeffrey B. Mullan, *My Land is Your Land; Re-examining Massachusetts Eminent Domain Law in Light of Kelo v. City of New London*, B.B.J., May/June, 2006, at 18; Eduardo M. Penalver, Essay, *Property Metaphors and Kelo v. New London: Two Views of the Castle*, 74 FORDHAM L. REV. 2971 (2006); Marc L. Roark, Essay, *The Constitution as Idea: Describing - Defining - Deciding in Kelo*, 43 CAL. W. L. REV. 363 (2007); Sharon A. Rose, Note, *Kelo v. City of New London: A Perspective on Economic Freedoms*, 40 U.C. DAVIS L. REV. 1997 (2007); Eric Rutkow, *Case Comment: Kelo v. City of New London*, 30 HARV. ENVTL. L. REV. 261 (2006); Brett Talley, *Recent Development: The Supreme Court of the United States, 2004 Term: Restraining Eminent Domain Through Just Compensation: Kelo v. City of New London*, 125 S. Ct. 2655 (2005), 29 HARV. J.L. & PUB. POL'Y 759 (2006).

<sup>103</sup> See, e.g., Lynn E. Blais, *Urban Revitalization in the Post-Kelo Era*, 34 FORDHAM URB. L.J. 657 (2007); John J. Costonis, *New Orleans, Katrina and Kelo: American Cities in the Post-Kelo Era*, 83 TUL. L. REV. 395 (2008); James W. Ely, Jr., *Post-Kelo Reform: Is the Glass Half Full or Half Empty?*, 17 SUP. CT. ECON. REV. 127 (2009); Richard A. Epstein, *Public Use in a Post-Kelo World*, 17 SUP. CT. ECON. REV. 151 (2009); Joshua U. Galperin, Note, *A Warning to States—Accepting This Invitation May Be Hazardous to Your Health (Safety, and Public Welfare): An Analysis of Post-Kelo Legislative Activity*, 31 VT. L. REV. 663 (2007); Amanda W. Goodin, Note, *Rejecting the Return to Blight in Post-Kelo State Legislation*, 82 N.Y.U. L. REV. 177 (2007); Shaun Hoting, *The Kelo Revolution*, 86 U. DET. MERCY L. REV. 65 (2009); Douglas W. Kmiec, *Templeton Lecture: Eminent Domain Post-Kelo: Hitting Home—The Supreme Court Earns Public Notice Opining on Public Use*, 9 U. PA. J. CONST. L. 501 (2007); Alberto B. Lopez, *Weighing and Reweighing Eminent Domain's Political Philosophies Post-Kelo*, 41 WAKE FOREST L. REV. 237 (2006); Carol J. Miller & Stanley A. Leasure, *Post-Kelo Determination of Public Use and Eminent Domain in Economic Development Under Arkansas Law*, 59 ARK. L. REV. 43 (2006); Schragger, *supra* note 101, at 532-33; Somin, *Limits of Backlash*, *supra* note 3, at 2101; Kimberly M. Watt, Note, *Eminent Domain, Regulatory Takings, and Legislative Responses in the Post-Kelo Northwest*, 43 IDAHO L. REV. 539 (2007); Dale A. Whitman, *Eminent Domain Reform in Missouri: A Legislative Memoir*, 71 MO. L. REV. 721 (2006).

<sup>104</sup> See generally Somin, *Limits of Backlash*, *supra* note 3.

<sup>105</sup> David A. Dana, *The Law and Expressive Meaning of Condemning the Poor After Kelo*, 101 NW. U. L. REV. 365 (2007). For a more moderate view, see Ilya Somin, *Is Post-Kelo Eminent Domain Reform Bad for the Poor?*, 101 NW. U. L. REV. 1931 (2007).

substantially limited takings by the state government.<sup>106</sup> Florida<sup>107</sup> and New Mexico<sup>108</sup> were the first two states to pass reforms after *Kelo*, and theirs were arguably the most drastic in terms of banning eminent domain takings for the purpose of economic development.<sup>109</sup>

The post-*Kelo* responses most likely to implicate IOLTA programs are those that “ban virtually all condemnations that transfer property to a private owner,”<sup>110</sup> rather than those that restrict “economic development” takings. There appears to be no dispute historically that IOLTA and the provision of legal services to the poor is a bona fide “public purpose” for purposes of takings analysis. Even if the Supreme Court had ruled against the City of New London in *Kelo*, and had held that “economic development” is not a valid purpose for eminent domain, IOLTA programs would have been unaffected. The problem is that several states passed either statutes or state constitutional amendments in reaction to *Kelo* that banned private-to-private transfers by eminent domain, which seem directly applicable to IOLTA. The funds go to private entities, albeit nonprofits, by a relatively direct route, at most passing through a quasi-public foundation or an administrative department of the judiciary.

The impact of these enactments, of course, will emerge only through litigation. Perhaps only some of these states will see parties bring new court challenges to their IOLTA programs under the new statutes. Even where such challenges arise, it is unpredictable how the judiciary will respond. Hermeneutics could determine the outcome in these cases. A judge who is using an intentionalist approach to legislation could certainly find that IOLTA was not within the intended reach of the state’s post-*Kelo* reforms. A strict textualist judge, on the other hand, would be more likely to conclude that the enacted verbiage contains no apparent exception for IOLTA, and therefore renders the program illegal.

#### A. Texas

The most recent example, although not the clearest, is Texas. On November 3, 2009, a legislatively-referred<sup>111</sup> constitutional amendment appeared on the statewide ballot as “Proposition 11.” The ballot read:

The constitutional amendment to prohibit the taking, damaging, or destroying of private property for public use unless the action is for the ownership, use, and enjoyment of the property by the State, a political subdivision of the State, the public at large, or entities granted the power of eminent domain under law or for the elimination of urban blight on a particular parcel of property, but not for

<sup>106</sup> See *Legislative Center*, CASTLE COALITION, <http://www.castlecoalition.org/legislativecenter> (last updated July 16, 2009). See also Somin, *Limits of Backlash*, *supra* note 3, at 2138-39. Somin limits the number of substantial reforms to fourteen states, due to broad “urban blight” exceptions in eight states’ rules that function as easy loopholes for government takings.

<sup>107</sup> Act of May 11, 2006, ch. 2006-11, §§ 73.013 & 73.014, 2006 Fla. Laws 1-4 (further restricting and clarifying limitations on eminent domain).

<sup>108</sup> Somin, *Limits of the Backlash*, *supra* note 3, at 2138-39.

<sup>109</sup> Somin, *Limits of Backlash*, *supra* note 3, at 2138. Somin also notes that Utah already had significant eminent domain restrictions prior to *Kelo*. *Id.* at 2120.

<sup>110</sup> *Id.* at 2144 (citing public referenda for amendments in Nevada and North Dakota).

<sup>111</sup> See TEX. CONST. art. XVII, § 1. Like most states, constitutional amendments in Texas originate in the state legislature and then become a ballot referendum measure.

certain economic development or enhancement of tax revenue purposes, and to limit the legislature's authority to grant the power of eminent domain to an entity.<sup>112</sup>

IOLTA funds in Texas go directly from the lawyer's bank to the Texas Access to Justice Foundation, which distributes all the funds to various legal services agencies in the state.<sup>113</sup> Neither the allowance for "elimination of urban blight" nor the prohibition for "economic development or enhancement of tax revenues" would matter for the IOLTA program, as most would agree it is another legitimate type of "public purpose." The problem is that the amendment prohibits "taking . . . for public use" except in cases where the state itself or the public at large will "use" the property. IOLTA funds are *not* available for "the public at large," because even the legal service agencies that receive the funds must compete for grants with one another through an application process.<sup>114</sup> Nor is the use of the funds "by the State, a political subdivision of the State . . . or entities granted the power of eminent domain under law," because the Texas Access to Justice Foundation is neither an organ of the state, nor does it have clear statutory authority to exercise eminent domain.<sup>115</sup>

This state constitutional verbiage, which appears to ban private-to-private transfers except for certain "elimination of urban blight" programs, is new—it was not part of Texas state law during the earlier litigation over the constitutionality of the states' IOLTA program. Proposition 11 was actually the second round of post-*Kelo* backlash reforms in Texas—the first was a much milder statutory amendment passed immediately after the *Kelo* decision, in 2005.<sup>116</sup>

<sup>112</sup> Press Release, Tex. Sec'y of State Hope Andrade, Secretary Andrade draws for Nov. 3 ballot order, <http://www.sos.state.tx.us/about/newsreleases/2009/072809.shtml>, (July 28, 2009). This ballot for Proposition 11, HJR 14-1 amended the Texas Constitution at Article 1, §17. The amendment passed by a bit of a landslide—848,651 votes in favor and 198,822 votes against. For more information about the adoption by voters of Proposition 11, see *Constitutional Amendments*, LEGISLATIVE REFERENCE LIBRARY OF TEX., <http://www.lrl.state.tx.us/legis/constAmendments/amendmentDetails.cfm?amendmentID=641&sort=bill&legsession=81-0&outcome=Adopted> (last visited Nov. 9, 2010).

<sup>113</sup> TEX. STATE BAR RULES, art. XI, §§1-9; TEXAS RULES GOVERNING THE OPERATION OF THE TEXAS EQUAL ACCESS TO JUSTICE PROGRAM, R. 4, R. 7; *Brown*, 524 U.S. at 161-62; see also TEX. ACCESS TO JUSTICE FOUND., <http://www.teajf.org/> (last visited Nov. 9, 2010). For an academic discussion of the Texas IOLTA program, see Johnson, *supra* note 32, at 736-42.

<sup>114</sup> See, e.g., *Grant Applications*, TEX. ACCESS TO JUSTICE FOUND., <http://www.teajf.org/grants/applications.aspx> (last visited Nov. 9, 2010). For a history of their grants during the last ten years, see *Grants History*, TEXAS ACCESS TO JUSTICE FOUNDATION, [http://www.teajf.org/grants/grants\\_history.aspx](http://www.teajf.org/grants/grants_history.aspx) (last visited Nov. 9, 2010).

<sup>115</sup> The provision of the amendment referring to "entities granted the power of eminent domain under law" appears to be a reference to local school land boards and similar entities. See, e.g., TEX. EDUC. CODE ANN. § 11.155 (West 2006) (independent school districts); TEX. NAT. RES. CODE § 52.092 (West 2001) (board exercising eminent domain over riverbeds, etc.); TEX. NAT. RES. CODE § 11.079 (West 2001) (eminent domain for easements to exercise mineral rights). The operation of Texas' IOLTA program does not appear to involve the exercise of regular eminent domain proceedings, nor does a state actor participate as an intervening agent in the collection or disbursement of funds. While this might suggest a lack of state action, the Supreme Court determined that the program constituted a taking by the government in *Phillips*, 524 U.S. 156.

<sup>116</sup> See TEX. GOV'T CODE ANN. § 2206.001(b)(3) (West 2008) (exempting condemnations "to eliminate an existing affirmative harm on society from slum or blighted areas" from the ban on economic development takings); TEX. LOC. GOV'T CODE ANN. § 374.003(3) (West 2005) (defining "blighted area" as "an area that is not a slum area, but that, because of deteriorating buildings . . . defective or inadequate streets, street layout, or accessibility; unsanitary conditions; or other hazardous conditions, adversely affects the public health, safety, morals, or welfare . . ."). For a critique of the legislation's effectiveness, see Somin, *Limits of Backlash*, *supra* note 3, at 2123, and Texas, CASTLE COALITION,

Texas was one of several states that followed their initial statutory response to *Kelo* with a state constitutional amendment or similar public referendum.<sup>117</sup>

### B. Idaho

Idaho seems to prohibit transfers to private entities, regardless of public use.<sup>118</sup> The use of the term “pretext” in its statute is somewhat ambiguous, but the best interpretation seems to be that “public use” is merely a “pretext” if any private party acquires an interest in the taken property.<sup>119</sup> Even though the provision of legal services for the poor would constitute a “public use” in the general sense of the term, the phrasing of the Idaho Code creates two potential problems for the IOLTA program. First, it seems that the statute deems any transfers of taken property to non-governmental entities to be pretextual and illegal, without exception or consideration of the purpose or ultimate use of the funds. Second, the statute delineates an exclusive list of permitted “public uses,” and legal services are not present.<sup>120</sup> As with other states, the interpretive canon *expressio unius est exclusio alterius*<sup>121</sup> could bar a court from finding an exception for IOLTA in the statute, given that others receive specific mention. In fact, the Idaho Supreme Court has added its own twist to the *expressio unius* rule that might be particularly relevant in interpreting its post-*Kelo* statute:

Therefore, the rule of construction *expressio unius est exclusio alterius* applies to provisions of the Idaho Constitution that expressly limit power, but it does

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<http://www.castlecoalition.org/about/1372> (last visited Nov. 9, 2010) (criticizing the measures in Senate Bill 7). For a discussion of Texas’ constitutional provisions regarding eminent domain prior to the amendment of November 2009, see Timothy Sandefur, *Don’t Mess With Property Rights in Texas: How the State Constitution Protects Property Owners in the Wake of Kelo*, 41 REAL PROP. PROB. & TR. J. 227 (2006) (arguing that the previous verbiage of the state constitution already barred *Kelo*-type takings for economic development, regardless of the post-*Kelo* statutory enactments in 2005).

<sup>117</sup> See Somin, *Limits of Backlash*, *supra* note 3, at 2144-48; see also Sandefur, *supra* note 116, at 230 (arguing generally that the state constitutional provisions, especially Texas’, offered more protections for property owners than the post-*Kelo* statutes).

<sup>118</sup> IDAHO CODE ANN. § 7-701A(2)(a) (2010) (“Eminent domain shall not be used to acquire private property . . . [f]or any alleged public use which is merely a pretext for the transfer of the condemned property or any interest in that property to a private party.”). In addition, § 7-701 provides a definition of “public use” that does not include helping the poor or providing legal services. IDAHO CODE ANN. § 7-701 (2010).

<sup>119</sup> IDAHO CODE ANN. § 7-701A(2)(a).

<sup>120</sup> *Id.*

<sup>121</sup> Idaho courts generally adhere to the *expressio unius* rule in many different contexts. See, e.g., *Twin Falls County v. Cities of Twin Falls and Filer*, 146 P.3d 664, 668 (Idaho 2006) (“Idaho has recognized the rule of *expressio unius est exclusio alterius*—‘where a constitution or statute specifies certain things, the designation of such things excludes all others.’”); *Mallonee v. State*, 84 P.3d 551, 556 (Idaho 2004); *D & M Country Estates Homeowners Ass’n v. Romriell*, 59 P.3d 965, 970 (Idaho 2002) (“Under the first, *expressio unius est exclusio alterius*, where a statute specifies certain things, designation of the specific excludes other things not mentioned.”); *Poison Creek Pub., Inc. v. Cent. Idaho Pub., Inc.*, 3 P.3d 1254, 1257 (Idaho 2000) (“Idaho has also recognized that ‘where a constitution or statute specifies certain things, the designation of such things excludes all others.’”) (quoting *Local 1494 of the Int’l Ass’n of Firefighters v. City of Coeur d’Alene*, 586 P.2d 1346, 1355 (1978)); but see *Noble v. Glens Ferry Bank, Ltd.*, 421 P.2d 444, 447 (Idaho 1966) (“Such doctrine is not an unimpeachable rule of law, but merely a logical statement that the court, in cases consistent with recognized rules of interpretation, will adhere to the literal language of a statute in determining the legislative intent.”) (internal citations omitted) (quoted in *Wright v. Brady*, 889 P.2d 105, 108 (Idaho 1995)).

not apply to provisions that merely enumerate powers. The provision at issue here is a limitation on the power of the legislature to close its proceedings. Thus, *expressio unius est exclusio alterius* applies as a rule of construction.<sup>122</sup>

Given that the eminent domain provisions defining “public use” after *Kelo* are limiting power rather than enumerating it, Idaho’s version of the *expressio unius* rule appears to foreclose an interpretive exception for IOLTA. Idaho’s reaction to *Kelo* was one of the mildest in the country;<sup>123</sup> the Castle Coalition gives this state one of its lowest grades.<sup>124</sup> Its public ballot referendum, which would have added to the legislature’s enacted response, failed to pass.<sup>125</sup>

Idaho was the second state in the union to create an IOLTA program,<sup>126</sup> and its program continues to operate today.<sup>127</sup> It is suffering, of course, from the 2008-2009 financial crisis, and the funds coming in and grants going out have fallen precipitously.<sup>128</sup>

### C. Kansas

Kansas enacted new laws after *Kelo*<sup>129</sup> that appear to ban nearly all private-to-private condemnations.<sup>130</sup> The laws forbid any condemnations “for the purpose of selling, leasing or

<sup>122</sup> Idaho Press Club, Inc. v. State Legislature of the State, 132 P.3d 397, 400 (Idaho 2006) (internal citations omitted).

<sup>123</sup> Watt, *supra* note 103, at 577-78, 582-83.

<sup>124</sup> Idaho, CASTLE COALITION, <http://www.castlecoalition.org/about/1341> (last visited Nov. 9, 2010) (giving Idaho a D+).

<sup>125</sup> *Id.*; see also Somin, *Limits of Backlash*, *supra* note 3, at 2143 n.204; Watt, *supra* note 103, at 578-79.

<sup>126</sup> Merrily Munther, *A Heck of a Ride*, ADVOC. (Idaho), Mar. 2005, at 16.

<sup>127</sup> See IDAHO RULES OF PROF’L CONDUCT R. 1.15(e)-(k) (West 2010). For a further discussion, see Jeanne M. Whalen, *Safekeeping Client Property: Why the ABA is Hands-Off and the States are Hand-Holding*, 38 U. TOL. L. REV. 1279, 1302 (2007). For a terse historical discussion of Idaho’s IOLTA program, see Barbara Anderson, *Idaho’s IOLTA Program Created Twenty Years Ago to Support The Mission of the Idaho Law Foundation*, ADVOC. (Idaho), Jan. 2003, at 16.

<sup>128</sup> B. Newal Squyres, *President’s Message*, ADVOC. (Idaho), Nov./Dec. 2009, at 10:

Interest rates have dropped to the lowest level in half a century, causing a significant decrease in IOLTA funds available to support critical Idaho law-related services, such as legal services to low-income families and individuals. In 2008, the Idaho Law Foundation was able to grant \$450,000 to law-related services, of which about 77% went to organizations that provide legal services to the disadvantaged. In 2009, the total grant amount decreased to \$360,000. For the 2010 grant cycle, the designated amount for grants is approximately \$190,000, which includes allocating some funds from the IOLTA reserve account. The amount of interest generated from IOLTA accounts in 2009 is about 40% of the amount generated in 2008.

<sup>129</sup> Somin, *Limits of Backlash*, *supra* note 3, at 2139.

<sup>130</sup> See Act of May 18, 2006, ch. 192, 2006 Kan. Sess. Laws 1345, §§1-2 (codified at KAN. STAT. ANN. §§ 26-501a, 26-501b (2000)). KAN. STAT. ANN. § 26-501a reads:

On and after July 1, 2007: (a) Private property shall not be taken by eminent domain except for public use and private property shall not be taken without just compensation.

(b) The taking of private property by eminent domain for the purpose of selling, leasing or otherwise transferring such property to any private entity is prohibited except as provided in K.S.A. 26-501b, and amendments thereto.

otherwise transferring such property to any private entity,” except when needed for public utilities or if there is defective title.<sup>131</sup>

Arguably, the Kansas IOLTA program takes private property and transfers it to a variety of private, nonprofit legal services agencies,<sup>132</sup> passing from the banks to the Kansas Bar Foundation and then to the grant recipients.<sup>133</sup> The biggest grant recipient by far, receiving more than all other recipients in 2008, is Kansas Legal Services,<sup>134</sup> a private nonprofit agency. While this would probably suffice as a “public use” or “public purpose” for the disbursement of the funds, the statute does not base the permissibility of takings solely on the use or purpose. In fact, it expressly forbids “otherwise transferring [private] property to any private entity,”<sup>135</sup> regardless of the justification.

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(c) This section shall be part of and supplemental to the eminent domain procedure act.

<sup>131</sup> KAN. STAT. ANN. § 26-501b (2009):

On and after July 1, 2007, the taking of private property by eminent domain for the purpose of selling, leasing, or otherwise transferring such property to any private entity is authorized if the taking is:

- (a) By the Kansas department of transportation or a municipality and the property is deemed excess real property that was taken lawfully and incidental to the acquisition of right-of-way for a public road, bridge or public improvement project including, but not limited to a public building, park, recreation facility, water supply project, wastewater and waste disposal project, storm water project and flood control and drainage project;
- (b) by any public utility, as defined in K.S.A. 66-104, and amendments thereto, gas gathering service, as defined in K.S.A. 55-1, 101, and amendments thereto, pipe-line companies, railroads and all persons and associations of persons, whether incorporated or not, operating such agencies for public use in the conveyance of persons or property within this state, but only to the extent such property is used for the operation of facilities necessary for the provision of services;
- (c) by any municipality when the private property owner has acquiesced in writing to the taking;
- (d) by any municipality for the purpose of acquiring property which has defective or unusual conditions of title including, but not limited to, clouded or defective title or unknown ownership interests in the property;
- (e) by any municipality for the purpose of acquiring property which is unsafe for occupation by humans under the building codes of the jurisdiction where the structure is situated;
- (f) expressly authorized by the legislature on or after July 1, 2007, by enactment of law that identifies the specific tract or tracts to be taken. If the legislature authorizes eminent domain for private economic development purposes, the legislature shall consider requiring compensation of at least 200% of fair market value to property owners.

<sup>132</sup> See KAN. RULES OF PROF'L CONDUCT R. 1.15(d)(3) (1997), which was cited in the *Phillips* decision, 524 U.S. at 159; see also KAN. STATE B. ASSOC'N, [http://www.ksbar.org/public/kba/2003\\_news/IOLTA.shtml](http://www.ksbar.org/public/kba/2003_news/IOLTA.shtml) (last visited Nov. 9, 2010) (describing the state's IOLTA programs, and noting that IOLTA grants go to a variety of entities, “with the largest share going to provide direct legal services for victims of domestic violence”).

<sup>133</sup> KAN. STATE B. ASSOC'N, *supra* note 132.

<sup>134</sup> *Id.*; John D. Jurcyk, *The IOLTA Program Hits the Mark*, J. KAN. B.A., Sept. 2009, at 8 (describing the new IOLTA grants made in 2009).

<sup>135</sup> KAN. STAT. ANN. § 26-501a (2009).



At the time of this writing, the Kansas Supreme Court is considering making its IOLTA program mandatory rather than opt-out.<sup>136</sup> Such a change usually meets some resistance from a few lawyers who have not been contributing to the program so far,<sup>137</sup> which could occasion a legal challenge to the program itself. Even though the program meets the demands of the Supreme Court's takings analysis as set forth in *Brown*, Kansas' post-*Kelo* enactments could furnish the basis for a new, different kind of legal challenge. Kansas, however, does not use IOLTA funds for grants to private individuals, as all the grants appear to be to nonprofit entities.

A final caveat in the interpretation of Kansas' statute is the clause "taken by eminent domain,"<sup>138</sup> which could function as a limiting clause for the provisions that follow, i.e., those barring private-to-private transfers. No state, including Kansas, uses eminent domain procedures for the funds taken as part of the IOLTA program. It is not clear why certain takings, particularly takings of property other than land, consistently sidestep the eminent domain rules in every state, but this is a subject of a later section. To the extent that there is a well-accepted practice in our legal system for applying eminent domain rules only to takings of real property, this phrase in the Kansas statute, and perhaps statutes elsewhere, could serve to make its restrictions inapplicable to IOLTA. It is not clear, however, that courts have articulated such a broad-brush rule, and most states' statutes do not limit their eminent domain protocols to "real property;" they specifically use terms like "private property" or even "all classes of property, [including those] not enumerated."<sup>139</sup> For example, South Dakota's post-*Kelo* reforms used similar terms to those of Kansas,<sup>140</sup> and South Dakota forbids any takings that "transfer [property] to any private person, nongovernmental entity, or other public-private business entity."<sup>141</sup> Even so, the statutory section limits itself with the introductory clause, "[n]o county, municipality, or housing and redevelopment commission, as provided for in this chapter,"<sup>142</sup> which makes it inapplicable to the South Dakota IOLTA program.<sup>143</sup> It remains a puzzle why non-land takings, like IOLTA, would be immune from eminent domain rules.

#### D. Louisiana

Louisiana's constitution now forbids transfers to other private entities.<sup>144</sup> It was the first state where a legislative-initiated referendum forced more anti-*Kelo* restrictions on the

<sup>136</sup> Jurcyk, *Be Not Afraid*, *supra* note 1. The proposal will also require mandatory interest rates by participating banks. *Id.*

<sup>137</sup> *See id.* (describing the parameters of the IOLTA program—with and without the proposed changes—in an attempt to allay the concerns that some local attorneys voiced about IOLTA).

<sup>138</sup> KAN. STAT. ANN. § 26-501a(b).

<sup>139</sup> *See, e.g.*, ARIZ. REV. STAT. § 12-1114(6)

<sup>140</sup> *See Somin, Limits of Backlash, supra* note 3, at 2139.

<sup>141</sup> S.D. CODIFIED LAWS § 11-7-22.1(1) (2010).

<sup>142</sup> S.D. CODIFIED LAWS § 11-7-22.1 (2010).

<sup>143</sup> *See* S.D. CODIFIED LAWS RULES OF PROF'L. CONDUCT, app. ch. 16-18, R. 1.15(d)(3)-(d)(4)(2009). South Dakota is the only state that still has an "opt-in" or voluntary IOLTA program for its lawyers. Tarra L. Morris, Comment, *The Dog in the Manger: The First Twenty-Five Years of War on IOLTA*, 49 ST. LOUIS U. L.J. 605, 610 n. 28 (2005); Leigh Anne Manlove, *Foundation Update*, WYO. LAW., April 2009, at 50.

<sup>144</sup> "Property shall not be taken or damaged by the state or its political subdivisions . . . (a) for predominant use by any private person or entity; or (b) for transfer of ownership to any private person or entity." LA. CONST. art. I, § 4(B)(1).

government than those provided through the normal enacted statutes.<sup>145</sup> Louisiana is one of seven states that reacted to *Kelo* by amending its constitution, rather than merely by passing a statute. Louisiana passed a series of constitutional amendments, the most important of which was “Amendment V.”<sup>146</sup> This amendment significantly altered the language of Article I, Section 4(B).<sup>147</sup>

Section 4(B) begins by stating: “Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit.”<sup>148</sup> It goes on to state that “[p]roperty shall not be taken or damaged by the state or its political subdivisions: (a) for predominant use by any private person or entity; or (b) for transfer of ownership to any private person or entity.”<sup>149</sup> This amendment seems fairly restrictive, and it explicitly forbids a taking of property for predominant use by a private person or entity. It seems questionable whether the state’s IOLTA program remains constitutional in Louisiana.

Louisiana’s IOLTA program<sup>150</sup> also differs from programs in other states because it includes more explicit private-to-private transfers. For example, some IOLTA funds in Louisiana become grants to public interest lawyers to pay their student loans, to fund paid summer internships for students with public legal service organizations, and to fund a Law Signature School pilot project, which seeks to highlight law-related education and curricula in public schools across the state.<sup>151</sup> The program has also changed in a significant way since *Brown* and *Kelo*: the state adopted a “comparability” rule in April 2008 that significantly increases the interest rates paid on lawyers’ trust accounts and the amount of net revenue transferring to the legal services providers.<sup>152</sup>

### E. Nevada

Nevada also went a step further than most states in its post-*Kelo* reforms by amending its

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<sup>145</sup> See Somin, *Limits of Backlash*, *supra* note 3, at 2144 (“Indeed, only one state—Louisiana—passed a legislature-initiated referendum that provided significantly greater protection for property owners than that available under preexisting statutory law enacted through the ordinary legislative process.”).

<sup>146</sup> Louisiana ratified Amendment V on September 30, 2006. Act of Sept. 30, 2006, S.B. No. 1, 2006 La. Acts 2957. For an extended discussion, see John J. Costonis, *Eminent Domain under the 2006 Louisiana Constitutional Amendments: The Legislature’s Forward Pass to the Judiciary*, April/May 2008, LA. B.J., at 398 (arguing that the terms of the new constitutional amendment contain enough ambiguity to render their meaning or effect uncertain). See also Blais, *Urban Revitalization in the Post-Kelo Era*, *supra* note 103, at 659 n. 20.

<sup>147</sup> LA. CONST. art. I, § 4(B).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* LA. CONST. art. I, § 4(B)(2) defines “public purposes” in narrow terms: (a) A general public right to a definite use of the property; (b) Continuous public ownership of certain types of common use property; (c) The removal of a threat to public health or safety caused by the existing use or disuse of the property.

<sup>150</sup> As with other states, Louisiana’s IOLTA funds go directly from banks to a charitable entity (which is called a Foundation, but is actually a 501(c)(3) corporation and not a “private foundation” under the Internal Revenue Code). For more information, see LA. B. FOUND., <http://www.raisingthebar.org> (last visited Nov. 9, 2010).

<sup>151</sup> Marta-Ann Schnabel, *IOLTA Rates: No Disappointing Comparables Here*, June/July 2008, LA. B.J., at 11.

<sup>152</sup> *Id.*

constitution to ban any takings that transfer property to private parties.<sup>153</sup> The language is stronger and more precise than the Texas constitutional amendment discussed in the previous subsection: “public uses . . . do not include the direct or indirect transfer of any interest in the property to another private person or entity.”<sup>154</sup>

Nevada has an IOLTA scheme similar to that of Texas—funds are transferred directly from the lawyers’ banks to the Nevada Justice Foundation,<sup>155</sup> which in turn distributes the money directly to legal services agencies throughout the state as “direct grants.”<sup>156</sup> The Nevada Justice Foundation is, in fact, “another private entity,” as the new constitutional prohibition specifies. In addition, the fact that Nevada’s amendment included the phrase “or indirect”<sup>157</sup> seems inescapably to apply to the flow of money from the lawyers’ trust accounts to the Nevada Justice Foundation and then to the legal services agencies. It does not appear, however, that Nevada’s IOLTA program has ever faced a challenge in court.

#### F. New Hampshire

New Hampshire’s legislature passed moderately effective anti-*Kelo* legislation and followed up it with an arguably redundant public referendum amending its state constitution.<sup>158</sup>

<sup>153</sup> The Nevada Revised Statutes provide that:

Notwithstanding any other provision of law and except as otherwise provided in this subsection, the public uses for which private property may be taken by the exercise of eminent domain do not include the direct or indirect transfer of any interest in the property to another private person or entity.

A list of exceptions follows, none of which includes or suggests IOLTA-funded programs or any similar services. NEV. REV. STAT. §37.010(2) (2009); see also Somin, *Limits of Backlash*, *supra* note 3, at 2144.

<sup>154</sup> NEV. REV. STAT. §37.010(2) (2009).

<sup>155</sup> NEV. SUP. CT. R. 216-17 (2010); see also NEV. L. FOUND., [www.nevadalaawfoundation.org](http://www.nevadalaawfoundation.org) (last visited Nov. 9, 2010).

<sup>156</sup> NEV. L. FOUND., *supra* note 155.

<sup>157</sup> NEV. REV. STAT. § 37.010(2).

<sup>158</sup> Somin, *Limits of Backlash*, *supra* note 3, at 2143-45 (stating that New Hampshire “passed initiatives that added little or nothing to post-*Kelo* reforms already enacted by the state legislature . . .” and “New Hampshire’s referendum initiative also comes in the wake of a strong legislative proposal and adds nothing to it.”). In contrast, the Castle Coalition declares on their website that New Hampshire’s constitutional amendment was truly significant:

Knowing that statutes are easier to repeal than constitutional provisions, the New Hampshire General Court also made sure that the state’s citizens had the opportunity to vote on a constitutional amendment that would guarantee the greatest possible protection for their property rights. CACR 30 was that proposed constitutional amendment, which said: “No part of a person’s property shall be taken by eminent domain and transferred, directly or indirectly, to another person if the taking is for the purpose of private development or other private use of the property.” In the November 2006 elections, more than 85 percent of New Hampshire voters cast their ballots in favor of this new provision.

This is one of the strongest reform efforts mounted in response to *Kelo*. New Hampshire legislators understand what defenders of eminent domain abuse still do not—that *Kelo* created a big problem for the states to fix, that economic development will undoubtedly continue without eminent domain, and that every home, business, farm, and place of worship needed protection against condemnation for private gain.

The relevant language of its state constitution now reads: “No part of a person’s property shall be taken by eminent domain and transferred, directly or indirectly, to another person if the taking is for the purpose of private development or other private use of the property.”<sup>159</sup>

The problem here is the phrase “other private use of the property” modifying the limitation on transfers of taken property to another, “directly or indirectly.”<sup>160</sup> “Indirectly” would seem sufficient to cover the transfer of funds from banks to the New Hampshire Bar Foundation,<sup>161</sup> which then distributes the money to about twenty different legal service providers in the state and also to the state public television network; the largest share by far goes to New Hampshire Legal Assistance.<sup>162</sup>

The ambiguity of this particular post-*Kelo* amendment is the phrase “other private use,” and whether this means non-public purpose or use by private entities, as nearly all the entities receiving IOLTA funds are private nonprofits.<sup>163</sup> Linguistically, both interpretations are possible, and a court deciding the applicability of this state constitutional provision to an IOLTA taking would have to rely on other policy considerations to resolve the ambiguity in the language. The New Hampshire IOLTA program has not yet faced legal challenges.

### G. North Dakota

In a move similar to Nevada’s,<sup>164</sup> North Dakota also passed a terse, outright ban on takings where the property transfers to a private entity, except for two specific exceptions: “Private property may not be taken for the use of, or ownership by, any private individual or entity, unless that property is necessary for conducting a common carrier or utility business.”<sup>165</sup>

North Dakota’s amendments invite a somewhat different analysis than Nevada’s, not only because it lacks the phrase “or indirect transfer,” but also because it delineates two narrow and specific exceptions: common carriers and public utilities. The commonsense canon *expressio unius est exclusio alterius*<sup>166</sup> would require that these two specific allowances bar all others,

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*New Hampshire*, CASTLE COALITION, <http://www.castlecoalition.org/about/1358> (last visited Nov. 9, 2010).

<sup>159</sup> N.H. CONST. part 1, art. 12-a.

<sup>160</sup> *Id.*

<sup>161</sup> See N. H. B. FOUND., [http://www.nhbarfnd.org/Interest\\_On\\_Trust\\_Accounts.php](http://www.nhbarfnd.org/Interest_On_Trust_Accounts.php) (last visited Nov. 9, 2010).

<sup>162</sup> *IOLTA Grant History, (FY1996 - FY2010)*, N.H. B. FOUND., [http://www.nhbarfoundation.org/reports/IOLTAGrantsHistoryFY1996\\_2010.pdf](http://www.nhbarfoundation.org/reports/IOLTAGrantsHistoryFY1996_2010.pdf) (last visited Nov. 9, 2010).

<sup>163</sup> *Id.*

<sup>164</sup> For a discussion of reforms enacted by both North Dakota and Nevada, see Somin, *Limits of Backlash*, *supra* note 3, at 2144.

<sup>165</sup> N.D. CENT. CODE ANN. § 32-15-01(2) (2009); N.D. CENT. CODE ANN. § 32-15-01(3) (2009) (“[P]ublic use or a public purpose does not include public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health.”).

<sup>166</sup> Literally, “the enumeration of specific items implies the exclusion of all others;” if a law specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded. See 2A NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47.23 (5th ed. 1992). The North Dakota Supreme Court adheres to this traditional rule. See, e.g., *Ernst v. Burdick*, 687 N.W.2d 473, 478 (N.D. 2004); *Trade ‘N Post, L.L.C. v. World Duty Free Ams., Inc.*, 628 N.W.2d 707, 714 (N.D. 2001); but see *District One Republican Comm. v. District One Democrat Comm.*, 466 N.W.2d 820, 832 (N.D. 1991) (observing that *expressio unius* should not apply where it would produce an absurd result). For recent (albeit unreferenced) academic commentary on the

including the provision of legal services for the poor by private entities.

North Dakota's IOLTA program has not yet faced a challenge in court. Like most other states, IOLTA funds go directly from banks to a nonprofit foundation, in this case the North Dakota Bar Foundation,<sup>167</sup> an organization that also solicits private donations from the public.<sup>168</sup> It seems, however, that its post-*Kelo* enactments would not allow the IOLTA program to continue in its current form.

#### H. Arizona, Washington, and Wyoming

I have grouped these three states together at the end and out of alphabetical order because their takings enactments share a similar type of uncertainty in terms of applicability to IOLTA; they are less likely than the other states discussed to encounter problems, but somewhat more likely than states whose post-*Kelo* reforms do not address private-to-private transfers at all.

Arizona and Wyoming<sup>169</sup> adopted post-*Kelo* reforms that may pose legal problems for the state IOLTA programs, for reasons similar to those discussed in the previous section, but their language is less explicit on private-to-private transfers and therefore less applicable to IOLTA. While the state of Washington, whose IOLTA program was the subject of the Supreme Court's decision in *Brown*, has a constitutional provision<sup>170</sup> that seems applicable, especially in light of the holdings in *Phillips* and *Brown*, the provision actually predates *Kelo*.<sup>171</sup>

Arizona's constitution implicates private-to-private transfers by banning any "private use" of taken property.<sup>172</sup> To the extent that a court could construe "private use" as "use by private entities to help private individuals," it could apply to IOLTA. It seems more likely that Arizona courts would simply interpret "private use" as the opposite of "public purpose" and find

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*expressio unius* canon, see Note, *Textualism as Fair Notice*, 123 HARV. L. REV. 542, 559-60 (2009) (arguing that *expressio unius* is really a pattern of everyday parlance or interpersonal communication, and therefore fits well with a plain-language approach to statutory interpretation).

<sup>167</sup> See N.D. RULES OF PROF'L CONDUCT R. 1.15(d)(1) (2010); STATE B. ASS'N. OF N. D., <http://www.sband.org/Foundation> (last visited Nov. 9, 2010); *Phillips*, 524 U.S. at 160, n.1.

<sup>168</sup> STATE B. ASS'N. OF N. D., *supra* note 167.

<sup>169</sup> WYO. CONST. art. 1, § 32:

Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and for reservoirs, drains, flumes or ditches on or across the lands of others for agricultural, mining, milling, domestic or sanitary purposes, nor in any case without due compensation.

<sup>170</sup> WASH. CONST. art. I, § 16 ("Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes.").

<sup>171</sup> The Washington Constitution, adopted in 1898, contained an eminent domain provision that granted greater protections than its counterpart in the Fifth Amendment to the United States Constitution. Jas S. Dhillon, *Eminent Domain - The Seattle Popular Monorail Authority's Condemnation of a Private Parking Garage for the Purpose of Building A Monorail Station Does Not Violate the Eminent Domain Provision of the Washington Constitution*, 37 Rutgers L.J. 1251, 1255-56 (2006).

<sup>172</sup> ARIZ. CONST. art. II § 17 ("Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for mining, agricultural, domestic, or sanitary purposes.").

that IOLTA serves a well-known public purpose.<sup>173</sup> By itself, this would render the problem improbable enough to leave unmentioned. Even so, Arizona's statutory definition of "public use" is rather narrow and specific,<sup>174</sup> as are the permissible purposes for takings specified in the statute.<sup>175</sup> These delineated, specific lists of allowable purposes and public uses could make consideration of Arizona's IOLTA program susceptible to the same problem regarding the *expressio unius* canon<sup>176</sup> as some of the states above: the legislature arguably provided an exclusive, exhaustive, and specific list, implying that items omitted from the list are missing for a reason. Recently, an Arizona appellate court commented on its frequent reliance on this canon: "Arizona courts . . . have repeatedly used this canon of construction as a tool for determining legislative intent."<sup>177</sup>

In the case of Arizona, and perhaps some other states, another venerable canon of interpretation—*in pari materia*<sup>178</sup>—might counteract the *expressio unius* rule, because so many provisions of the applicable Arizona statutes refer to "real property" and "land use," rather than other types of personal property. Even here, however, there is a problem: a catch-all clause that appears to make the eminent domain provisions applicable to "[a]ll classes of private property not enumerated . . . ."<sup>179</sup> As a result, it remains unclear whether Arizona's newer statutes and

<sup>173</sup> Arizona courts have traditionally favored government takings or construed the governmental powers broadly. *See, e.g.*, *Phoenix v. Superior Court*, 671 P.2d 387, 391-93 (Ariz. 1983); Somin, *Limits of Backlash*, *supra* note 3, at 2124. For a more general overview of Arizona's post-*Kelo* reforms, see Jeffrey L. Sparks, Note, *Land Use Regulation in Arizona After the Private Property Rights Protection Act*, 51 ARIZ. L. REV. 211 (2009).

<sup>174</sup> ARIZ. REV. STAT. ANN. § 12-1136 (2010) defines "public use" as:

- (i) The possession, occupation, and enjoyment of the land by the general public, or public agencies;
- (ii) The use of land for the creation or functioning of utilities;
- (iii) The acquisition of property in a slum area to eliminate a direct threat to public health or safety caused by the property in its current condition, including the removal of a structure that is beyond repair or unfit for human habitation or use; or
- (iv) The acquisition of abandoned property.

(b) Does not include the public benefits of economic development, including an increase in tax base, tax revenues, employment or general wealth.

<sup>175</sup> *See* ARIZ. REV. STAT. ANN. § 12-1111 (2010) (listing the purposes for which eminent domain may be exercised).

<sup>176</sup> *See, e.g.*, *Sharpe v. Ariz. Health Care Cost Containment Sys.*, 207 P.3d 741, 749 (Ariz. Ct. App. 2009) ("Under the statutory interpretive principle of *expressio unius est exclusio alterius*, when the legislature makes a requirement in one provision of the statute but does not include it in another, we assume the absence of the requirement was intentional."); *In re Estate of Agans*, 998 P.2d 449, 452 (Ariz. Ct. App. 1999) ("The expression of one or more items in a class generally indicates an intent to exclude all items of the same class that are not expressed."); *Martens v. Indus. Com'n of Ariz.*, 121 P.3d 186, 188 (Ariz. Ct. App. 2005).

<sup>177</sup> *Gamez v. Industrial Com'n of Arizona*, 141 P.3d 794, 799 (Ariz. Ct. App. 2006).

<sup>178</sup> That is, courts should interpret statutory terms based on their context, how the word is used in statutes that cover the same subject—a commonsensical canon. *See Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 129 S.Ct. 1862, 1865-66 (2009); *Powerex Corp. v. Reliant Energy Serv., Inc.*, 551 U.S. 224, 229 (2007); *State v. Jones*, 218 P.3d 1012, 1016 (Ariz. App. Ct. 2009); *Premiere RV & Mini Storage, LLC v. Maricopa County*, 215 P.3d 1121, 1125 (Ariz. App. Ct. 2009) (*review denied* May 20, 2010); *County of Cochise v. Faria*, 212 P.3d 957, 960 (Ariz. Ct. App. 2009).

<sup>179</sup> ARIZ. REV. STAT. ANN. § 12-1114(6) (2010) ("All classes of private property not enumerated, including property for use in water or water rights, taken for public use when the taking is authorized by law.")

amendments pose a legal problem for its IOLTA program. The situation in Wyoming<sup>180</sup> and Washington<sup>181</sup> is nearly identical because of similarities to Arizona's statutory and constitutional verbiage.

This section has identified and analyzed potential problems in ten states regarding the clash of post-*Kelo* reforms and state IOLTA problems. Of course, given that IOLTA programs are popular enough to be operating in nearly every state, challenges to them are rare and may not emerge in many—or perhaps any—of these states. It would also be relatively easy for the states to amend their statutes or constitutions again to make an exception for IOLTA.

### III. TAKINGS OF NON-REAL PROPERTY AND PROCEDURAL ISSUES

Post-*Kelo* backlash focused on takings law and IOLTA forms a category by itself in the area of takings. The program is neither a taking of real property nor a true “regulatory taking;” it takes money rather than land, and is an actual confiscation rather than a diminution in value or use. Takings of private, non-real property are relatively rare as a group, but IOLTA is unique even among this type of taking, because IOLTA takings sidestep eminent domain procedures in every state.

IOLTA would not work at all, of course, if states needed to hold individual proceedings for each taking; and given that the compensation owed would always be zero, the original owners of the taken property cannot bring inverse condemnation actions, which are the usual *ex post* remedy for takings when the government proceeds without following *ex ante* procedures. Adjudicatory procedures are not a good fit for several other reasons. IOLTA affects a broad class of citizens and is prospective, not retrospective; in other words, the IOLTA rules are more like legislation than adjudication.<sup>182</sup> Even so, IOLTA programs commenced without standard administrative procedures for rulemaking; the rules came directly from the legislature or state supreme courts. This origin also makes IOLTA analytically unique, as “takings” generally do not come directly from the legislature<sup>183</sup> or judiciary (or at least we do not typically call property confiscations by these two branches a “taking,”<sup>184</sup>).

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<sup>180</sup> “Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and for reservoirs, drains, flumes or ditches on or across the lands of others for agricultural, mining, milling, domestic or sanitary purposes, nor in any case without due compensation.” WYO. CONST. art. 1, § 32.

<sup>181</sup> “Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes.” WASH. CONST. art. I, § 16.

<sup>182</sup> For a discussion of the dichotomy between legislative agency actions and adjudicatory actions, and how the latter trigger hearing rights, see *United States v. Florida E. Coast Ry. Co.*, 410 U.S. 224 (1973); *Califano v. Yamasaki*, 442 U.S. 682 (1979).

<sup>183</sup> *But see Georgia v. Chattanooga*, 264 U.S. 472, 483 (1924) (holding that takings were “legislative” in the narrow sense of making a universal determination about what constitutes “public use,” so that no notice need be given before a legislature passes an ordinance authorizing the exercise of eminent domain).

<sup>184</sup> *See, e.g., Maracalin v. United States*, 52 Fed. Cl. 736, 742 (2002) (noting that “courts distinguish between property taken for public use under the government’s eminent domain powers, which is civil in nature, and the forfeiture of property under the government’s police power, which is criminal in nature.”); *United States v. U. S. Coin & Currency*, 401 U.S. 715, 718 (1971) (“proceedings instituted for the purpose of declaring the forfeiture of a man’s property by reason of offences committed by him, though they may be civil in form, are in their nature criminal”) (emphasis in original) (quoting *Boyd v. United States*, 116 U.S. 616, 634 (1886)); *but see United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 65 (1913) (holding that legislative taking of riverfront lands requires

Returning to the absence of procedures, individualized proceedings would also seem inappropriate under a due process analysis, for IOLTA seemingly flouts the three factors of *Mathews v. Eldridge*.<sup>185</sup> The states' cost of providing millions of hearings for IOLTA takings would be exorbitant. The stakes for the individual claimant are zero and the risk of error in the current process is nearly zero because it merely involves the mechanical calculation of percentages of interest. Even so, from an administrative law perspective, IOLTA is somewhat anomalous since normal administrative procedures are absent.

#### A. Eminent Domain and Administrative Law

The difficulty of categorizing IOLTA highlights a small gap where the corners of property law, constitutional law, and administrative-procedural law meet. Takings cases, with rare exceptions, focus exclusively on constitutional law or property law, often ignoring the procedural and administrative law aspects.<sup>186</sup> It is a constitutional question when we analyze the coverage of the Takings Clause, and a property question when we are determining ownership or the value owed as compensation.<sup>187</sup> Even so, whether the government followed the statutory procedures when taking property is almost never a concern; the prevailing view by the courts seems to be that "just compensation" of the property owner can suffice, which makes procedural irregularities irrelevant. The eminent domain statutes are similarly pragmatic and anti-formalistic in providing both *ex ante* procedures (government condemnation actions) and *ex post* remedial procedures (inverse condemnation actions). This type of procedural mirroring may be necessary given the realities of land use and government activity, but it is an anomaly in administrative law. State action normally implicates due process concerns regardless of the compensation owed.

Administrative law otherwise treats procedural safeguards themselves as important personal rights.<sup>188</sup> Courts often force agencies to retrace their steps and redo the same action

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compensation, even though the flow of the water for those downstream does not). Admittedly, there is also a gray area between "takings" and civil asset forfeiture, as illustrated by the dispute in *D & D Landholdings, Limited Partnership v. United States*, 82 Fed. Cl. 329, 344 (2008) (distinguishing daily trespasses by border guards from cases concerning "asset forfeiture, seizure of contraband, and nuisance, rather than physical takings.").

<sup>185</sup> 424 U.S. 319 (1976). The Second Circuit applied the three-part test from *Mathews* in an eminent domain context in *Brody v. Village of Port Chester*, 434 F.3d 121, 134-35 (2d Cir. 2005) ("*Brody III*") (concluding that individualized hearings were for condemnations of particular parcels of land, but not for the question of whether the legislative decision about "public purpose" was correct).

<sup>186</sup> On the other hand, there are some cases where procedural failures on the part of the property owner, rather than the government, precluded a takings claim. The leading case in this area is *Williamson County Reg'l Planning Comm'n. v. Hamilton Bank*, 473 U.S. 172 (1985), where the property owner's failure to exhaust state remedies foreclosed judicial consideration of the constitutional claims. See also *Taylor Inv., Ltd. v. Upper Darby Twp.*, 983 F.2d 1285 (3rd Cir. 1993) (precluding federal takings claim for failure to exhaust state remedies). In another case, failure to preserve procedural claims for appeal prevented a court from considering them beyond dicta. *Fuller v. Town of Searsport*, 543 A.2d 361, 362-63 (Me. 1988) ("Although we disapprove of the apparent failure of the Town to conform to the statutory requirement to state in the warrant the specific amount of damages to be paid for the interest taken, because this issue was not pursued before the Superior Court, we deem it unpreserved for appellate review.").

<sup>187</sup> For a discussion of another puzzling feature of takings jurisprudence—the lack of compensation owed for intergovernmental takings—see John M. Payne, *Intergovernmental Condemnation as a Problem in Public Finance*, 61 TEX. L. REV. 949 (1983).

<sup>188</sup> See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).



according to protocol, even where the result will probably not change, at least from the individual claimant's *ex post* perspective.<sup>189</sup> Perhaps ironically, infringement of "property interests" by the government will trigger immediate procedural due process concerns or hearing rights; but the actual "taking of property" may not, as long as adequate compensation eventually occurs. Put another way, the remedy for any procedural violations incident to a taking is uncertain. The uncertainty is even greater with takings of personal property because most eminent domain statutes assume that land will be the subject of the condemnation, as is usually the case.

IOLTA sits within this gap of uncertainty, between takings and property on one hand—being a non-regulatory taking of intangible personal property but deserving zero compensation—and administrative and procedural law on the other, sidestepping eminent domain procedures, APA-type procedures, and due process concerns. From a strict statutory standpoint, it is not clear why IOLTA can or should sidestep the mandatory eminent domain procedures in most states,<sup>190</sup> apart from the feasibility concerns, but it is similarly unclear why procedural concerns are so lax and often ignored when it comes to takings generally. In addition, if the legislature or judiciary can authorize ongoing IOLTA takings without regard to the state administrative procedures act, this suggests that the underlying policy behind those procedures is not about protecting individual rights or liberties, but rather based on delegation concerns. If procedural due process is not a concern with IOLTA because it is a prospective rule of general applicability, then it is anomalous for it to have the legal status of a "taking" rather than being a "fee" or "tax," subject to constitutional rules for government appropriations.

### B. Takings of Non-Real Property

"Both real and personal property is subject to condemnation, although there is little reported use of eminent domain authority to acquire personal property independent of real property."<sup>191</sup> This makes sense because the state should be able to purchase goods and services on the open market or produce its own; land is special because each parcel has a unique location. In addition, the transaction costs for "taking" items of personal property would usually offset the items' value, although this apparently is not the case with civil asset forfeiture proceedings, which are popular. Asset forfeiture, for its part, may also lower the state's need to acquire personal property through eminent domain; states already acquire plenty of cars, weapons, and other valuable items through this venue.<sup>192</sup>

Apart from IOLTA, takings of personal property follow the statutory procedures for

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<sup>189</sup> Forcing agencies to redo adjudications, rulemakings, or other actions has the effect of deterring procedural violations in the first place, even if the agency is free to reach the same result on remand. Of course, remands by courts can lead the agency to abandon the course of action completely, either because the agency's resources run low after so much litigation, or because enough time elapses for a new Administration to come in and change course.

<sup>190</sup> While a few states actually use the phrase "real property" in their eminent domain statute, which would make it inapplicable to IOLTA, most do not.

<sup>191</sup> M. Patrick Wilson, *Eminent Domain Law in Colorado—Part I: The Right to Take Private Property*, COLO. LAW. Sept. 2006, at 65, 67. Wilson adds that "[u]sually, there is no need to condemn personal property, because most types of personal property are fungible and can be purchased instead of condemned." *Id.* at 66.

<sup>192</sup> For an excellent, up-to-date discussion of civil asset forfeiture procedures, as well as the volume of property seized through this mechanism, see Eric Moores, Note, *Reforming the Civil Asset Forfeiture Reform Act*, 51 ARIZ. L. REV. 777 (2009).

eminent domain or inverse condemnation<sup>193</sup>—even in the celebrated cases of cities taking, or trying to take, professional sports teams by eminent domain, like the Oakland Raiders.<sup>194</sup> There are occasional cases about government takings of intellectual property like trade secrets<sup>195</sup> or patents.<sup>196</sup> Oysters have been the subject of a taking, although this was incidental to a governmental dredging project, not for the sake of “public use” of the oysters.<sup>197</sup> During wartime, military requisitions of both real and personal property have led to takings claims.<sup>198</sup> All of these disparate takings of personal property involved eminent domain procedures that the government followed, except for the cigarette trade secrets case in the First Circuit, which included a due process claim that the court declined to reach after it enjoined the state from proceeding with the taking.<sup>199</sup> Even so, these takings of personal property are incidental, isolated occurrences.<sup>200</sup>

IOLTA, on the other hand, is now the most pervasive and frequent taking in the nation—it occurs every business day in all fifty states. Even so, it operates outside every statutory rule about eminent domain, even though there is no explicit judicial or legislative authority for this exemption.

<sup>193</sup> See Eduardo Moisés Peñalver, *Regulatory Takings*, 104 COLUM. L. REV. 2182, 2206 (2004) (“[T]he Court’s eminent domain jurisprudence . . . has always been understood to require compensation for the condemnation of both personal property and land.”); Brian C. Smith, Note, *Private Property for Public Use: The Federal Trademark Dilution Act and Anticybersquatting Consumer Protection Act as Violations of the Fifth Amendment Takings Clause*, 11 J. INTELL. PROP. L. 191, 201 (2003) (“Virtually every kind of real or personal property and every type of interest in property may be taken under the power of eminent domain.”).

<sup>194</sup> *City of Oakland v. Oakland Raiders*, 646 P.2d 835, 843 (Cal. 1982) (upholding the city’s taking of the professional football team franchise); see also *Mayor of Balt. v. Balt. Football Club, Inc.*, 624 F. Supp. 278, 289 (D. Md. 1985) (disallowing the taking because the team had already moved to another state, not because the franchise could not be seized). For more discussion and analysis of governmental takings of sports franchises, see Steven M. Crafton, Comment, *Taking The Oakland Raiders: A Theoretical Reconsideration of the Concepts of Public Use and Just Compensation*, 32 EMORY L.J. 857 (1983). For a more recent, post-*Kelo* analysis, see Aaron Mensh, Note, “Upon Further Review”: *Why a Sports Stadium Can Justify an Eminent Domain Taking*, 40 CONN. L. REV. 1623 (2008).

<sup>195</sup> See, e.g., *Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 46 (1st Cir. 2002) (invalidating Massachusetts law requiring cigarette sellers to disclose their secret formulas for public dissemination, partly on the grounds that this would be a physical taking rather than a regulatory taking).

<sup>196</sup> See *Zoltek Corp. v. United States*, 58 Fed. Cl. 688, 700 (2003) (“patent rights are property that may be taken by eminent domain pursuant to §1498”); see also Matthew S. Bethards, *Condemning a Patent: Taking Intellectual Property by Eminent Domain*, 32 AIPLA Q.J. 81 (2004); S. Scott Pershern, Comment, *Taking Inventors’ Lunch Money: Provide Incentives for Sensitive Technology Research Under the Patriot Act*, 29 HOUS. J. INT’L L. 697, 724 (2007) (explaining that when the U.S. Patent Trade Office denies patents for national security reasons, compensation is available “for research that ultimately leads to a patentable invention,” and arguing that the Takings Clause could require compensation for thwarted research as well).

<sup>197</sup> *Town of Cape Charles v. Ballard Bros. Fish Co., Inc.*, 107 S.E.2d 436, 440 (Va. 1959) (“Ballard’s oysters are its personal property and if taken or damaged in eminent domain proceedings, just compensation must be rendered therefor.”).

<sup>198</sup> *Kimball Laundry Co. v. United States*, 338 U.S. 1, 16 (1949) (Military requisitioning of laundry facility during World War II, using the machinery but returning everything to the owner after the war with just (but not generous) compensation); but see *Omnia Commercial Co., Inc. v. United States*, 261 U.S. 502, 514 (1923) (denying compensation for contracts thwarted by the government requisitioning of steel plants throughout World War I).

<sup>199</sup> *Philip Morris*, 312 F.3d, at 47.

<sup>200</sup> For more analysis of governmental takings of business, with numerous historical examples, see Shelley Ross Saxon, *Government Power Unleashed: Using Eminent Domain to Acquire a Public Utility or Other Ongoing Enterprise*, 38 IND. L. REV. 55 (2005).

### C. Administrative Procedural Concerns and Takings

Analyzing the discrepancy between IOLTA procedures and state eminent domain laws highlights a general incongruity between the doctrines of administrative law and the real-world mechanics of government takings. Administrative law contains longstanding procedural absolutes for government infringements of property interests, but the flexibility of eminent domain procedures sidesteps these rules. It is puzzling that the government takings of property itself, as opposed to mere property interests, would bear so little connection to constitutional due process guidelines.

In the rare cases where courts do address procedural violations of eminent domain statutes, the treatment varies. Some state courts provide a special writ for these cases<sup>201</sup> while others assume the statutory inverse condemnation procedures are the entire remedy. Still other state courts acknowledge confusion among the courts about whether the procedures matter, especially in the recent eminent domain cases pertaining to the construction of the border fence in Texas.<sup>202</sup> A few cases take the procedural deviations seriously enough to find a constitutional due process violation. For example, in *Brody v. Village of Port Chester* (“*Brody III*”), the Second Circuit held that the municipality’s failure to provide reasonable notice to the property owner of the eminent domain hearing was a constitutional violation.<sup>203</sup> On remand, the district court focused on whether the condemnee had received “actual notice,” and again concluded that the municipality had violated his procedural due process rights.<sup>204</sup>

Another case, *Daniels v. Area Plan Commission*, is more analogous to IOLTA because there was no compensation owed to the property owner.<sup>205</sup> In *Daniels*, a federal district court in Indiana found that a municipality’s procedural deficiencies in vacating a restrictive covenant rendered the relevant eminent domain statute unconstitutional, both facially and as applied.<sup>206</sup> On appeal, the Seventh Circuit agreed that the government action was unconstitutional as applied in this case.<sup>207</sup>

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<sup>201</sup> See, e.g., *State ex rel. Henson v. W. Va. Dept. of Transp., Div. of Highways*, 506 S.E.2d 825, 828 (W.Va. 1998) (“Should the state fail to initiate eminent domain procedures to provide compensation for taken property, then the property owner may seek a writ of mandamus to compel the state to institute eminent domain proceedings.”); *Heller v. S. Williamsport Borough*, 74 Pa. D. & C.2d 795, 797 (Pa. Com. Pl. 1976) (“Where the condemnor proceeds with a de facto condemnation, the condemnee clearly has a right to seek equitable relief from the court in the form of an order requiring the agency to follow the eminent domain procedures.”)

<sup>202</sup> See, e.g., *United States v. 1.04 Acres of Land*, 538 F.Supp.2d 995, 1000 (S.D.Tex. 2008):

There are two competing standards relating to a court’s review of whether the United States complied with the necessary procedures in a condemnation action. The first requires strict construction when applying eminent domain procedures; the second grants liberal construction to eminent domain procedures to effectuate the purpose of the taking . . . .

When federal condemnation actions were based on a multitude of state-law procedures, several federal courts required strict compliance with those procedures.

<sup>203</sup> 434 F.3d 121, 130-32 (2d Cir. 2005).

<sup>204</sup> *Brody v. Village of Port Chester*, 509 F.Supp.2d 269, 282 (S.D.N.Y. 2007) (“*Brody V*”).

<sup>205</sup> 125 F.Supp.2d 338 (N.D. Ind., 2000).

<sup>206</sup> *Id.*

<sup>207</sup> *Daniels v. Area Plan Comm’n*, 306 F.3d 445, 468 (7th Cir. 2002). At the same time, the Circuit court upheld the facial constitutionality of the statute, speculating that it could be applied in a legitimate way under other circumstances. *Id.*

The *Daniels* case first came into federal court as a §1983 action, rather than using Indiana's inverse condemnation statute, which is part of its eminent domain procedures.<sup>208</sup> This became the basis of the government's main argument throughout the litigation: the homeowners had technically failed to exhaust their state remedies, which the Supreme Court found fatal to a takings claim in *Williamson County Planning Commission v. Hamilton Bank*.<sup>209</sup> In other words, the procedural requirements ultimately worked against the condemnees, not against the government that had arguably skirted some of the statutory procedural requirements in the first place. The Seventh Circuit in *Daniels* distinguished *Williamson County* because the plaintiffs were not seeking financial compensation. One section of the court's reasoning is particularly relevant to the IOLTA discussion:

In this case, the Daniels did not seek redress in state court for either equitable relief or compensation after the Plan Commission issued its decision on the plat vacation. They claim that they bypassed state court first because they were not seeking monetary compensation, which is the only remedy available through the state's inverse condemnation procedure, and second, state court relief is not mandated in Takings Clause cases where plaintiffs are only seeking equitable remedies. Instead, the Daniels proceeded to federal court by filing a claim under 42 U.S.C. § 1983.<sup>210</sup>

This case is pertinent to the IOLTA situation in two ways. First, the Supreme Court has already held in *Brown* that the compensation owed for an IOLTA taking is zero. In *Daniels*, the plaintiffs were challenging the vacatur of a restrictive covenant prohibiting commercial use regarding other uninhabited, presumably shabby homes in their neighborhood, and sought no monetary compensation, the level of which would have been doubtful in any case.<sup>211</sup> Second, the plaintiffs in *Daniels* based their challenge on the procedural problems with the Planning Commission's governing statute and how the Commission made its decision.<sup>212</sup> Problematic post-*Kelo* statutes and procedural requirements were the subject of the IOLTA discussion in the previous section of this article.<sup>213</sup> Of course, the *Daniels* case has no direct bearing on IOLTA, as none of the problematic post-*Kelo* statutes considered in the previous section fall within the Seventh Circuit; the *Daniels* case is really about Indiana's Planning Commission statute. The case is at best analogous to the situation with IOLTA. Nevertheless, it does suggest that the "zero compensation" holding of *Brown* does not necessarily end the legal analysis for IOLTA. Statutory procedural issues could become the crux of litigation over IOLTA takings in the future.

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<sup>208</sup> *Id.* at 452.

<sup>209</sup> 473 U.S. at 200.

<sup>210</sup> *Daniels*, 306 F.3d at 452. The circuit court noted, as had the district court, that exhaustion of state remedies is not a requirement for §1983 actions. *Id.* at 452-53. This rule comes from *Patsy v. Board of Regents*, 457 U.S. 496 (1982), and stands in contrast to the *Williamson County* rule, which requires exhaustion of state remedies for federal takings claims under the Fifth Amendment of Fourteenth Amendment due process clause.

<sup>211</sup> *Daniels*, 306 F.3d at 456-57.

<sup>212</sup> *Id.* at 451.

<sup>213</sup> Section II, *supra*.

#### IV. INHERENT TENSIONS WITH STATE FUNDING FOR LEGAL SERVICES

Previous sections described some looming legal problems for IOLTA: eventual unraveling of the Supreme Court's justifications in the *Brown* decision, post-*Kelo* reforms that inadvertently made IOLTA illegal in several states, and an ongoing contradiction between the procedural absolutes in administrative law and the flexibility of eminent domain law, a contradiction made more evident by post-*Kelo* legislation.

Confronting these legal issues provides an opportunity to rethink IOLTA and address some longstanding policy problems with the programs. This section focuses on these theoretical puzzles and tensions inherent in IOLTA programs. Some of the points are merely ancillary to the question of whether post-*Kelo* reforms affect IOLTA, and other points are more directly pertinent. The related matters, however, constitute an important and neglected part of the policy discussion about using IOLTA funds to support legal services. This section offers a more normative analysis of IOLTA itself, as opposed to the previous descriptive sections.

##### A. Crowding Out Effects

Economists have long debated about whether government funding for nonprofits has a "crowding out" effect that reduces private donations to the funded organization.<sup>214</sup> Both theoretical models and empirical evidence have pointed in different directions on this issue, depending on the framing of the question.<sup>215</sup> The modern consensus seems to be a nuanced view:<sup>216</sup> public funding causes partial crowding out of private donations, but the effect varies

<sup>214</sup> See AMIHAI GLAZER & LAWRENCE S. ROTHENBERG, *WHY GOVERNMENT SUCCEEDS AND WHY IT FAILS* 102-06 (Harv. Univ. Press 2001); Dennis Coates, *A Diagrammatic Demonstration of Public Crowding-Out of Private Contributions to Public Goods*, 27 J. ECON. EDUC. 49 (1996) (providing a clear visual/graphic presentation of the crowding out phenomenon).

<sup>215</sup> For the classic argument in favor of the crowding out hypothesis, see Burton A. Abrams & Mark D. Schmidtz, *The Crowding-Out Effect of Governmental Transfers on Private Charitable Contributions*, reprinted in *THE ECONOMICS OF NONPROFIT INSTITUTIONS: STUDIES IN STRUCTURE AND POLICY* 303 (Susan Rose-Ackerman, ed. 1986). See also Gary E. Bolton & Elena Katok, *An Experimental Test of the Crowding Out Hypothesis: The Nature of Beneficent Behavior*, 37 J. ECON. BEHAV. & ORG. 315 (1998), ("[w]e find extensive but incomplete crowding out"); Jane K. Dokko, *Does the NEA Crowd Out Private Charitable Contributions to the Arts?*, (Finance & Econ. Discussion Series Working Paper 2008-10, Nov. 2007), available at <http://www.federalreserve.gov/pubs/feds/2008/200810/200810pap.pdf>. For a more skeptical view of the crowding-out hypothesis, or at least a more nuanced version, see Thomas A. Garrett & Russell M. Rhine, *Government Growth and Private Contributions to Charity*, 143 PUB. CHOICE 103, 115-16 (2009) ("Thus, charitable giving to education appears to influence federal education spending but not state and local government spending, and federal education spending does not influence education giving but state and local education spending does influence education giving."); Susan Rose-Ackerman, *Do Government Grants to Charity Reduce Private Donations?*, reprinted in *THE ECONOMICS OF NONPROFIT INSTITUTIONS: STUDIES IN STRUCTURE AND POLICY* 313 (Susan Rose-Ackerman, ed. 1986) (modeling at least three scenarios where government grants would increase private donations, but acknowledging crowding out in other circumstances).

<sup>216</sup> See GLAZER & ROTHENBERG, *supra* note 214, at 104-05; Arthur C. Brooks, *Public Subsidies and Charitable Giving: Crowding out, Crowding in, or Both?*, 19 J. POL'Y ANALYSIS & MGMT 451 (2000) (modeling how lower levels of government subsidies may increase private donations (crowding in), but higher levels crowd out, and concluding that nonprofits cannot maximize private donations and government subsidies at the same time); J. Stephen Ferris & Edwin G. West, *Private versus Public Charity: Reassessing Crowding out from the Supply Side*, 116 PUB. CHOICE 399 (2003) (arguing that incompleteness in crowding out of charity by government subsidies is attributable to transaction costs inherent in government action).

significantly depending on the type of nonprofits, whether education, arts, poverty relief, etc., and depending on whether the public funding comes from the federal, state, or local government. For example, dramatic crowding out occurs with the National Endowment for the Arts (NEA); private donations for the arts have increased when NEA funding decreased, and vice-versa.<sup>217</sup> For education, federal funding does not crowd out private support, but state and local funding does as federal funds go for mostly research grants and local funds are direct appropriations for general operating costs.<sup>218</sup> A decrease in state or local school funding causes visible deterioration in facilities and teacher shortages, which garner more donors' attention. Moreover, school administrators have more incentive to solicit private donations when operations are in jeopardy.<sup>219</sup> Perhaps most significantly, some empirical studies show nearly complete crowding out in the area of direct financial assistance to the poor; this form of charity, once commonplace in the United States, virtually disappeared in the years following the New Deal and the advent of widespread welfare programs.<sup>220</sup> A similar pattern of government support completely supplanting private charity is visible in the field of providing medical care to the indigent.<sup>221</sup>

Public funding can also cause "crowding in" effects in special circumstances where would-be donors feel uncertain about the legitimacy of a particular charity, and government funding operates as an endorsement or signal to donors of the nonprofit's value.<sup>222</sup> Similarly, where the government provides a necessary input for the production of a public good—perhaps in the form of infrastructure, access, or development of new technologies—the government provision can complement private charity and encourage more or greater contributions.<sup>223</sup>

<sup>217</sup> See generally Dokko, *supra* note 215. For more background, see *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 572-73 (1998) (upholding the constitutionality of NEA rule "taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.").

<sup>218</sup> Garrett & Rhine, *supra* note 215, at 111-17.

<sup>219</sup> *Id.* at 117:

Traditionally, roughly 80% to 85% of federal funds was allocated to higher education (not including student loans) in the form of earmarked research grants and contracts, whereas between 90% and 95% of state government funds to higher education was spent on general appropriations. Also, federal funds to primary and secondary schools, libraries, etc. are in the form of grants. Applying for grant monies requires much time and effort on the part of the potential recipient, whereas legislatively appropriated funds are allocated to the institution. State and local government revenue is a much greater percentage of total (primary, secondary, and post secondary) education revenues than is revenue from the federal government, and state and local governments spend larger percentages of their budgets on all levels of education than does the federal government. Thus, educational institutions are much more sensitive to changes in state and local education expenditures (changes in appropriations) than they are to federal education expenditures (changes in grants). As more private contributions flow to the institution from increased fundraising efforts, institutions reduce their efforts to obtain federal grants and future federal funds to the institution then decrease.

(internal citations omitted).

<sup>220</sup> See Russell D. Roberts, *A Positive Model of Private Charity and Public Transfers*, 92 J. POL. ECON. 136 (1984); GLAZER & ROTHENBERG, *supra* note 214, at 104.

<sup>221</sup> See Kenneth E. Thorpe & Charles E. Phelps, *The Social Role of Not-for-Profit Organizations: Hospital Provisions of Charity Care*, 29 ECON. INQUIRY 472 (1991); GLAZER & ROTHENBERG, *supra* note 214, at 104.

<sup>222</sup> Rose-Ackerman, *supra* note 215, at 319, 321; see also GLAZER & ROTHENBERG, *supra* note 214, at 105 (listing four factors that limit or offset crowding out of philanthropy).

<sup>223</sup> An example of this would be protection of aid workers by police or military personnel in the wake of

Crowding out happens for several reasons. First, there is often a declining marginal value, either for the nonprofit or the donor or both, in each dollar given to a particular charity,<sup>224</sup> at least after the charity establishes its operations and moves beyond its startup costs.<sup>225</sup> A first-time donor feels more significance in her initial hundred-dollar contribution to a charity than in her fifth donation of the same amount.<sup>226</sup>

The same is true from the organization's perspective. For example, a \$10,000 donation to a small charity, with say a \$100,000 annual budget, can have a much greater impact than the same donation would for a huge, international organization with a \$100 million budget. In the latter case, \$10,000 might be a drop in the bucket. A small agency may be able to expand its charitable services significantly with such a donation; the \$100 million organization will probably do nothing different than it would without that new revenue.<sup>227</sup> This kind of crowding can lead to entry barriers for new agencies, a point discussed below in connection with IOLTA and legal services.

Crowding out can also manifest itself when the public funds for charities are coming from increased tax revenue, to the extent that higher taxes deplete the disposable income for some of the donors.<sup>228</sup> As more donors feel pinched by higher tax rates, their willingness and ability to give declines.<sup>229</sup> In some cases, therefore, increased government funding for certain nonprofits can lead to a huge drop-off in private donations. The nonprofits in these cases may be no better

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natural disasters or war devastation. For a discussion of other examples, see GLAZER & ROTHENBERG, *supra* note 214, at 105-06.

<sup>224</sup> Abrams & Schmitz, *supra* note 215, at 305-06 (modeling this phenomenon and noting that private charitable donations do not grow as federal funding for charities grows).

<sup>225</sup> Rose-Ackerman, *supra* note 215, at 316-17.

<sup>226</sup> See Abrams & Schmitz, *supra* note 215, at 305-06.

<sup>227</sup> Of course, donors may still prefer the larger organization, as it can obtain much greater economies of scale, and there may be a "knee of the curve" in terms of the social impact charities can have in relation to their size. A multi-jurisdictional organization not only has economies of scale, but can address more widespread problems, shift resources from areas of surplus to areas of need, etc. From donors' perspectives, large organizations have a brand-name advantage, signaling more legitimacy, oversight, and support from a broad base of other donors. See, e.g., Garrett & Rhine, *supra* note 215, at 118 (discussing rational ignorance on the part of the donors, albeit in the context of arguing against the crowding-out effect, and stating:

Rational ignorance may explain the relatively few significant giving and spending relationships. Fiscal illusion assumes that officials can mislead citizens regarding the taxation and spending activities of government. One way citizens can be misled is if they do not take the time to learn about the taxing and spending activities of government because the time cost of doing so is greater than the benefit, that is, citizens are rationally ignorant. Thus, if people are rationally ignorant about the size and activities of government, regardless of whether officials attempt to hide their activities, then one would expect there to be no statistical relationship between government spending and charitable contributions.

(internal citations omitted)).

<sup>228</sup> Abrams & Schmitz, *supra* note 215, at 305-06.

<sup>229</sup> *Id.* Of course, a serious economic recession has the same effect and causes many charities to downsize or shut down. For an experimental study that challenges the notion of lump-sum taxation crowding out completely, see James Andreoni, *An Experimental Test of the Public-Goods Crowding-Out Hypothesis*, 83 AM. ECON. REV. 1317, 1326 (1993) (finding up to seventy percent crowding out in certain circumstances, but arguing that this is an incomplete picture and may have an offset from increased crowding-in effects of the same government programs).

off than they were before if the government funding has merely replaced the private donations. Overall, however, this crowding factor does not seem relevant to the IOLTA discussion. The impetus for starting IOLTA programs was the enormous gap in legal services for the poor; the programs helped fill a void, rather than crowding out something that was already there. There is no empirical evidence, at least to date, that IOLTA supplanted previous private funding for legal services, but future empirical research in this area would be helpful.

Another type of crowding out occurs because of the effects that government funding can have on the behavior of directors or managers of the nonprofits. Given that government funding often comes with restrictions on use, or at least greater monitoring and reporting of use, nonprofits may shift their efforts toward those expected by the government or away from forbidden activities. This shift, in turn, can alienate private donors if they disagree with the change, but it can also have a crowding-in effect.<sup>230</sup> A clear example of funding restrictions are LSC's bans on recipient agencies bringing class actions,<sup>231</sup> lobbying, handling criminal or immigration matters, etc.,<sup>232</sup> which led many legal aid entities to eschew these activities.<sup>233</sup>

Similarly, empirical studies show that nonprofit directors may engage in more fundraising when government funding declines,<sup>234</sup> and less fundraising when government grants increase.<sup>235</sup> Some would consider it a desirable effect of crowding out for the agency to spend less of its time and resources on fundraising—this was one of Federal Reserve Governor Jane Dokko's points regarding the NEA.<sup>236</sup> On the other hand, to the extent that government funding is unstable or fluctuates dramatically year to year, as is the case with IOLTA, recipient organizations become more susceptible or vulnerable to financial crises, cyclical downsizing, or curtailing of services and outreach.<sup>237</sup> In addition, the increased time managers spend on preparing the necessary reports for government funding can offset the savings in time and resources previously spent on fundraising. This has certainly been true with LSC funding, where

<sup>230</sup> Rose-Ackerman, *supra* note 215, at 325.

<sup>231</sup> Diller & Savner, *supra* note 26, at 695-705; Blake, *supra* note 28, at 455-57; Henry Rose, *Class Actions and the Poor* 6 PIERCE L. REV. 55 (2007).

<sup>232</sup> Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-53 (codified as amended at 45 C.F.R. §§ 1612-1637); Alan W. Houseman, *Restrictions by Funders and the Ethical Practice of Law*; 67 FORDHAM L. REV. 2187, 2188-89 (1999). For more background, see *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), cert. denied, 532 U.S. 903 (2001) (finding a restriction on Legal Services Corporation attorneys challenging existing welfare laws as unconstitutional).

<sup>233</sup> Robert L. Bach, *Building Community Among Diversity: Legal Services for Impoverished Immigrants*, 27 U. MICH. J.L. REFORM 639, 643 (1994).

<sup>234</sup> See generally Dokko, *supra* note 215, (discussing a twenty-five percent increase in fundraising expenditures by artistic charities after being defunded by the NEA in the late 1990's).

<sup>235</sup> See Katherine O'Regan & Sharon M. Oster, *Does Government Funding Alter Nonprofit Governance? Evidence from New York City Nonprofit Contractors* 21 J. POL'Y MGMT. ANALYSIS 359 (2002) (discussing recent empirical studies showing that government funding in New York changes the behavior of nonprofit managers—the boards engage in substantially less fundraising and more meticulous reporting). See also Frank H. Stephen, Giorgio Fazio, & Cyrus Tata, *Incentives, Criminal Defence Lawyers and Plea Bargaining*, 28 INT'L REV. L. & ECON. 212 (2008) (documenting that changes in government funding for criminal defense lawyers from hourly rates to per-case fees alters lawyer behavior and significantly reduces the time spent on each case).

<sup>236</sup> Dokko, *supra* note 215, at 4.

<sup>237</sup> O'Regan & Oster, *supra* note 235, at 19-20.



Legal Aid agencies have been distracted by comprehensive LSC audits.<sup>238</sup>

### 1. Crowding Out by IOLTA

Crowding out can also occur because public perceptions that the government already has an area “covered;” this, in turn, makes private donations, at least for that particular service, seem unnecessary.<sup>239</sup> This type of crowding may be occurring with IOLTA in relation to pro bono work by regular attorneys and the donation of their time and skills.<sup>240</sup> Pro bono efforts are rather low; this may be due to a perception among lawyers that: 1) legal aid lawyers are already addressing the needs and are specialists, and 2) the lawyers themselves are already “helping” by participating in the IOLTA program, which involves some transaction costs for the lawyers and risks of disciplinary actions for mistakes. In fact, IOLTA probably has this effect much more than LSC funds would, because lawyers are more accurately aware of IOLTA; LSC does not require their participation or attention. Little empirical research is available on the crowding out of volunteer activities,<sup>241</sup> and none appears to have focused on legal services, which would be particularly relevant for the discussion of IOLTA. There is still a huge gap in legal representation for the poor,<sup>242</sup> and there are constant pleas from the state bar associations for more pro bono

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<sup>238</sup> Margaret Graham Tebo, *A Privilege To Serve*, 6 No. 6 A.B.A J. E-REP. 5 (2007); Matthew Diller, *Constitutional Issues Panel*, 25 FORDHAM URB. L.J. 345, 353 (1998); Bach, *supra* note 233, at 643; 42 U.S.C. § 2996g (1988); 45 C.F.R. § 1612.12(c)(3) (1989) (stating that LSC is authorized to audit legal services offices and require reports).

<sup>239</sup> Arguably, this is an extreme version of the diminishing marginal value type of crowding, except that it is “complete.” Others would characterize this as a free-rider problem. GLAZER & ROTHENBERG, *supra* note 215, at 104.

<sup>240</sup> *But see* Andreoni, *supra* note 229, at 1325 (arguing that some government provisions of public goods may “seed” the system and promote more charity or philanthropy). Andreoni does not address, however, whether his suggestion would apply to volunteer labor to the same extent as donations of funds; his experiment focused on donated money.

<sup>241</sup> For the only study I have found devoted to crowding-out of volunteerism by government provisions of services, see Kathleen M. Day & Rose Anne Devlin, *Volunteerism and Crowding Out*, 29 CANADIAN J. ECON. 37 (1996) (studying data limited to Canada). Their conclusions related to legal services are discussed in note 249, *infra*.

<sup>242</sup> See Earl Johnson, Jr., *Justice for America’s Poor in the Year 2020: Some Possibilities Based on Experiences Here and Abroad*, 58 DEPAUL L. REV. 393, 395-96 (2009):

Applying that more generous and probably more realistic test of who cannot afford counsel in most cases in most courts, ninety million Americans—almost a third of the nation’s population—are in need of government-funded legal counsel.

For those fifty or ninety million people, there are approximately 6500 civil legal aid lawyers in the entire country—funded by a combination of federal and state governments, IOLTA, private foundations, and charitable donations (mainly from lawyers). That is only one lawyer for every 6861 eligible people, or one for every 13,000, depending on where the line is drawn. In contrast, there is approximately one lawyer for every 525 people in the rest of the population.

Those 6500 civil legal aid lawyers represent less than .65% of the nation’s lawyers. Yet they are expected to serve as much as one third of the nation’s population. Moreover, the combined budgets of all the programs employing these lawyers is less than one half of a percent of what the country spends on lawyers.

(internal citations omitted).

work.<sup>243</sup> IOLTA funds and LSC funds are always insufficient to staff legal aid adequately.<sup>244</sup> Unlike other areas of volunteer work, legal pro bono resources will always have a limited pool because only lawyers admitted to the bar in a state can offer free legal services there. Volunteer legal work is perhaps less mobile than any other type of volunteer activities. Of course, states could make pro bono work mandatory for retention of a law license, but coerced public service raises a host of other issues outside the scope of this article.

A study by professors Day and Devlin about crowding-out of volunteer activity in Canada suggests that government investment in legal aid actually encourages law-related volunteer work. As opposed to other types of government provisions of social services, a reduction in IOLTA funds, their model predicts, would cause a reduction in lawyers offering pro bono services.<sup>245</sup> At the same time, their data and modeling suggests that funding for legal aid would have no effect on the actual pro bono hours donated by lawyers—it affects only the number of lawyers involved. Their study, however, does not focus at all on lawyers or legal services, but rather on volunteer activities in general in Canada, and their main conclusion is that crowding effects vary significantly depending on the nature of the public good, meaning more research is needed in this area.<sup>246</sup>

## 2. Proposals to Offset the Negative Impact of Crowding Out

Two simple regulatory changes could increase the pool of non-coerced pro bono lawyers and offset any crowding effect from IOLTA. First, states should allow out-of-state attorneys to do pro bono work without obtaining a new license, which would be a state rule change. Second, the federal government should permit lawyers or firms to claim a federal income tax credit or deduction for donated legal services, a very modest change that would nevertheless require an act of Congress.<sup>247</sup>

Regarding the former proposal—allowing automatic cross-jurisdictional acceptance for pro bono lawyers—will probably elicit the objection that lawyers who neglect pro bono work in their home state will not travel to another state to do it. Nevertheless, many lawyers live right across state lines from a major urban center (e.g., southern Connecticut and New York City), where there may be an efficient pro bono program in place to make it easier for lawyers to “walk in” and help someone who is already waiting for representation. Lawyers wanting to relocate to another state could do pro bono cases to build a local reputation before they move or before obtaining their license in the new state. Charitable organizations could arrange trips that bring lawyers from Chicago or the Northeast to sunny tourist destinations in winter, like Florida or San

<sup>243</sup> See, e.g., Minn. Legal Servs. Planning Comm’n Drafting Comm., *Recommendation of the Minnesota Legal Services Planning Commission on the Configuration of LSC-Funded Programs*, 26 HAMLIN J. PUB. L. & POL’Y 265 (2005) (suggesting increasing attorney registration fees and real estate filing surcharges as additional revenue sources).

<sup>244</sup> See generally Diller & Savner, *supra* note 26, at 688-92 (discussing how LSC funding restrictions deprive already underfunded legal aid entities of necessary resources).

<sup>245</sup> Day & Devlin, *supra* note 241, at 49, 51-52.

<sup>246</sup> *Id.* at 51-52.

<sup>247</sup> See generally Adam R. Pearlman, Valuing Volunteers: The Case for a Community Service Tax Benefit (Jan. 9, 2011) (unpublished manuscript, on file with the Journal of Law and Social Change) (proposing that Treas. Reg. § 1.170A-1 be amended to allow tax benefits for community service).

Diego, with a few hours per day being spent on legal representation of the poor in that area.<sup>248</sup>

The latter proposal, whether as a deduction or tax credit, would have a clear effect on the incentive of lawyers to donate their time; the lost tax revenue would be offset by a public good.<sup>249</sup> Currently, the tax code does not permit individuals or corporations to claim deductions for donated services or time volunteered to charities.<sup>250</sup> The Federal Tax Court has held twice that § 1.170A-1(g) of the Tax Code prohibits lawyers from claiming deductions for the value of their time or services donated as pro bono hours.<sup>251</sup> It would require a significant but modest legislative or regulatory change, therefore, to allow lawyers to take credits or deductions for legal services rendered to the poor.<sup>252</sup> The historical rationale against tax deductions for volunteer services is that there is no taxed income to offset with such a deduction, as is otherwise the case when taxpayers claim deductions for donations of money or property.<sup>253</sup> A tax credit would be less problematic conceptually, avoiding the issue of no offsetting income, and would provide greater incentive for lawyers. On the other hand, a tax credit represents a greater depletion in tax revenue than a tax deduction, and therefore may be less viable politically. Either alternative would accomplish the purposes set forth here: to encourage more pro bono work by attorneys without using coercion.

The ban on deductions for services donated to charity is an entrenched doctrine, but it is certainly not necessary for the effective administration of the federal income tax system. The Revenue Service could easily establish a fixed amount—perhaps \$75 or \$100 per hour, far below the current market rate for billable hours—that would still help incentivize lawyers while minimizing the revenue impact for the treasury. A modest, fixed amount would also streamline reporting issues. The hours would have to be performed for or via a 501(c)3 entity, such as a legal aid clinic, which would provide the attorney with a receipt for the hours volunteered. This arrangement is no different than the current regime for obtaining documentation of financial

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<sup>248</sup> For more discussion of the incentives and self-interest of lawyers in doing pro bono work, see Stephen Daniels & Joanne Martin, *Legal Services For the Poor: Access, Self-Interest, and Pro Bono*, in 12 ACCESS TO JUSTICE: SOCIOLOGY OF CRIME LAW AND DEVIANCE 145 (Rebecca L. Sandefur ed., Emerald Group Publishing Ltd. 2009).

<sup>249</sup> I believe this would have a “crowding-in” effect and draw even more attorneys into public interest law, because government inducements toward individual behavior by private actors (as opposed to direct government provision or funding of goods) often generates crowding-in pressures that prompt others to imitate or follow suit. For more discussion of this concept, see GLAZER & ROTHENBERG, *supra* note 214, at 142. This conclusion also finds some support in the study done by Day and Devlin, *supra* note 241, at 51-52. In contrast, Patrick Francois has argued that more people will feel motivated to donate labor (in general, not just pro bono lawyers) if there is no performance-related compensation involved. Francois, *supra* note 57, at 728-29. I believe a tax deduction for donated professional services avoids the problem he discusses because it mostly functions as an offset for the opportunity cost or lost time for the lawyer and gives a less direct incentive to the attorneys; a lawyer could always come out better financially by spending the time on paying clients.

<sup>250</sup> Treas. Reg. § 1.170A-1(g) (2010); 8 MERTENS LAW OF FED. INCOME TAX’N § 31:85 (“No Deduction for Services Contributed”) (2009).

<sup>251</sup> Levine v. Comm’r, 1987 WL 40484, at \*2 (Tax Court 1987); Grant v. Comm’r, 84 T.C. 809, at \*816 (1985), *aff’d* Grant v. Comm’r, 800 F.2d 260 (Table) (4th Cir. 1986).

<sup>252</sup> For two well-developed arguments in favor of a tax credit for pro bono work (presenting alternative proposals), see Jason M. Thiemann, *The Past, the Present, and the Future of Pro Bono: Pro Bono as a Tax Incentive for Lawyers, not a Tax on the Practice of Law*, 26 HAMLINE J. PUB. L. & POL’Y 331, 370-83 (2005), and Chris Sanders, *Essay, Credit Where Credit Is Due*, 74 TENN. L. REV. 241, 246-57 (2007).

<sup>253</sup> See Levine, T.C. Memo. 1987-413, at \*3; Grant, 84 T.C., at \*816-818.

donations to charity.<sup>254</sup>

Both pro bono lawyers and IOLTA-funded agencies present issues of what economists call “cream skimming,”<sup>255</sup> that is, taking the “easy” cases in order to help more clients in less time, which of course leaves some of the neediest clients unrepresented. IOLTA fund recipients may not worry as much about the volume of individuals they serve, and the directors may be freer to focus on “difficult” cases. This could work in a complimentary-crowding way with pro bono programs, where the pro bono lawyers take the clients with simpler problems and leave those requiring more expertise in poverty law to the legal aid agencies. On the other hand, the cream-skimming phenomenon could exacerbate unwanted and unintended competition between IOLTA funded agencies and pro bono lawyers if both are focusing on helping as many clients as possible.

The crowding out issues for IOLTA are particularly complex because of the multi-tiered government funding for legal services, that is, federal LSC, state IOLTA, and some county or municipal grants,<sup>256</sup> and because of the lateral relationship with volunteer services (pro bono), especially from a limited pool of volunteers who must participate in IOLTA already. This is an area for further study. In general, federal funding of local activities (such as legal aid) tends to crowd out state and local expenditures, although the crowding tends to be incomplete or partial.<sup>257</sup> Adding to the complexity is the fluctuating nature of IOLTA revenues compared to its federal counterpart, the LSC, whose funds are a Congressional apportionment. At the same time, IOLTA itself may have caused some political crowding out in regards to the LSC; Democrat-controlled Congresses have repeatedly passed on the rather obvious opportunity to repeal the onerous LSC restrictions imposed during previous Republican-controlled sessions. Presumably, the widespread availability of state IOLTA funds as a workaround for these restrictions has reduced the political impetus or urgency to fix the LSC problem.

A final crowding effect, not yet studied, is the growing trend of states to provide “civil *Gideon*” for parental custody matters.<sup>258</sup> Courts appoint attorneys for certain poor clients, in a similar way to court-appointed criminal defense lawyers, that is, regular *Gideon* for parents whose children the state seeks to remove from their custody. Presumably, legal aid agencies that have been doing this work will shift to other types of cases as regular attorneys sign up to be court appointed lawyers in these cases. Most of the new programs are not funded by IOLTA, but rather

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<sup>254</sup> See Miriam Galston, *Civic Renewal and the Regulation of Nonprofits*, 13 CORNELL J.L. & PUB. POL’Y 289, 365-67 (2004) (responding to the “administrative cost” argument for disallowing tax deductions for volunteering); Brian Dorini, Book Note, 9 HARV. J.L. & TECH. 231, 235 (1996) (reviewing JEREMY RIFKIN, *THE END OF WORK: THE DECLINE OF THE GLOBAL LABOR FORCE AND THE DAWN OF THE POST-MARKET ERA* (G. P. Putnam’s Sons 1995)) (discussing Rifkin’s proposal of a tax deduction—called a “shadow wage”—for volunteer services to public charities).

<sup>255</sup> See Rose-Ackerman, *supra* note 215, at 322-25.

<sup>256</sup> See Helaine M. Barnett, *An Innovative Approach to Permanent State Funding of Civil Legal Services: One State’s Experience—So Far*, 17 YALE L. & POL’Y REV. 469, 469-70 (1998) (describing a successful program in New York where abandoned property is used as the funding source for civil legal services).

<sup>257</sup> See GLAZER & ROTHENBERG, *supra* note 214, at 104; James R. Hines, Jr. & Richard H. Thaler, *The Flypaper Effect*, 9 J. ECON. PERSP. 217, 218 (1995); Richard Steinberg, *Voluntary Donations and Public Expenditures in a Federalist System*, 77 AMER. ECON. REV. 24, 25, 32 (1987). For a rebuttal to Steinberg’s model, arguing instead that federal expenditures can indeed create “complete” crowding out, see Robert McClelland, *Voluntary Donations and Public Expenditures in a Federalist System: Comment and Extension*, 79 AMER. ECON. REV. 1291 (1989).

<sup>258</sup> Laura K. Abel, *supra* note 12, at 1088-1089 (describing these programs in Alabama, Arkansas, Connecticut, Florida, Hawaii, Louisiana, Montana, New York and Texas).

by court filing fees or government apportionments,<sup>259</sup> meaning the crowding effect on IOLTA, or IOTLA-funded agencies, could become even more complex with more lateral shifting of casework.

### B. Monopolies and Monopsony

In his dissenting opinion in *Brown*, Justice Kennedy raised a theoretical problem with IOLTA that is separate from the property-rights/takings issue that was the focus of the plaintiff's actual case:

By mandating that the interest from these accounts serve causes the justices of the Washington Supreme Court prefer, the State not only takes property in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States but also grants to itself a monopoly which might then be used for the forced support of certain viewpoints. Had the State, with the help of Congress, not acted in violation of its constitutional responsibilities by taking for itself property which all concede to be that of the client, the free market might have created various and diverse funds for pooling small interest amounts. These funds would have allowed the true owners of the property the option to express views and policies of their own choosing. Instead, as these programs stand today, the true owner cannot even opt out of the State's monopoly.<sup>260</sup>

The "monopoly" effects that Justice Kennedy highlights are another analytical puzzle with IOLTA, but he seems to blur the concepts of monopoly and monopsony. Kennedy was concerned only with anticompetitive effects for the marketplace of ideas or viewpoints, but there are other serious policy issues related to a single payer (the state IOLTA foundation) and a handful of suppliers of legal services in each state. Edward Rubin recently observed that government outsourcing for welfare services, which would include legal aid for the poor, present three interrelated problems: monopolies, monopsony, and a disjunction between the users and purchasers of a public good.<sup>261</sup> Each of these problems is present to some extent with IOLTA.

#### 1. Monopolies

Perfect market efficiency depends on many buyers and many sellers for a product or service. Service providers compete by lowering their prices or increasing the quality or value of the proffered service.<sup>262</sup> Even where one of the buyers is the government, everyday services or commodities, like window washing or office supplies, sell to the government at something close to the market price, as there is a huge established marketplace for these things. Sometimes,

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<sup>259</sup> *Id.* at 1093, 1099, 1101, 1105, 1107.

<sup>260</sup> *Brown*, 538 U.S. at 253 (Kennedy, J., dissenting) (internal citations omitted).

<sup>261</sup> Edward Rubin, *The Possibilities and Limitations of Privatization*, 123 HARV. L. REV. 890, 918-25 (2010) (book review).

<sup>262</sup> *Id.* at 918-19.

however, the government needs unusual items or services, like nuclear submarines or free lawyers for the poor. These things have analogs in the regular market, like seafaring vessels or fee-charging lawyers, but the government often needs a specific type of good or service that is rare. As Rubin points out, only the government buys nuclear submarines,<sup>263</sup> which means there will often be a dearth of manufacturers for these items, and sometimes only one. This gives the manufacturer of nuclear submarines monopoly power, or at least oligopoly power.<sup>264</sup>

With state funding for legal services, the agencies in a given state compete only partially for the state's IOLTA funds in a zero-sum game. This occurs on the state level, with centralized IOLTA distribution decisions, that is, a single payer system or monopsony, discussed below. The agencies tend not to compete with each other in providing services, instead serving different locales (rural vs. urban, or City A vs. City B), or do completely different types of legal work (e.g., domestic violence victims vs. children with disabilities). In other words, the legal aid providers in a state function either as an oligopoly, or as a set of regional monopolies. This also applies to LSC funding, albeit on a broader, federal level, as its conditions narrow the field of potential providers and increase the stakes for those remaining.<sup>265</sup>

Legal services providers typically have a monopoly for representing poor people in a small geographic area.<sup>266</sup> This disconnects performance from funding, in the natural market sense.<sup>267</sup> The extent to which IOLTA program administrators scrutinize the reports of recipient

<sup>263</sup> *Id.* at 919.

<sup>264</sup> *Id.*

<sup>265</sup> For a related observation pertaining to the government provision, or funding, of social services in general, as compared to privately-funded charities that perform the same functions, see Dwight R. Lee & Richard B. McKenzie, *Second Thoughts on the Public-Good Justification for Government Poverty Programs*, 19 J. LEGAL STUD. 189, 190 (1990):

A private charity has to acquire its resources through voluntary donations in competition with other private charities. And although few donors will take the trouble to monitor the effectiveness of the private charities they contribute to, some will. Certainly, a private charity has to be concerned that poor performance will be publicized and, as a consequence, its donors will redirect their generosity. A public transfer agency has far less reason than a private charity to be concerned that its budget will be threatened by poor performance.

While this describes a zero-competition situation for the government welfare agencies, legal aid agencies competing for IOLTA grants pose an analogous, perhaps oligopolistic, problem. Instead of having to cull and retain donors from the general population (which would require impressing them with the agency's use of the contributed funds), the agencies have to impress only one grantmaker—the IOLTA administration for that state—and have a small set of competitors for the grants.

<sup>266</sup> See Rose-Ackerman, *supra* note 215, at 319 (noting that government funding for charity can lead to a “more concentrated charitable sector”). There may be some competition with pro bono lawyers in the same area, but not enough to distort the matter being discussed here. Lee and McKenzie make a similar point about competition among the recipients of social services, which seems applicable here, noting that privately-funded charities reduce the recipients' ability to “exploit” or grow dependent on the programs. Agencies that need to solicit and retain private donations, they argue, have an inherent incentive to focus on helping recipients who will use the aid to become productive and self-sufficient. “As charity becomes increasingly the function of government, the recipient's ability to exploit relief payments becomes greater since those who distribute the payments realize that the individual who is denied aid has fewer alternative sources of help.” Lee & McKenzie, *supra* note 265, at 200. The IOLTA funding programs seem to implicate the same problem, in terms of beneficiary competition concerns, as direct provisions of government social services.

<sup>267</sup> See Lee & McKenzie, *supra* note 265 (arguing that increased competition makes private charities more effective than government-provided social services).

organizations year to year may constitute a proxy for market selection, but it is certainly an imperfect proxy. The report writers' skill and honesty affects the grantmaking decisions, and more likely, path dependence emerges, as it does with private foundations and their pet charities. The grant recipients become entrenched and the distribution proportions are generally constant year to year. This appears to be the case, if one views the grant histories on each state's IOLTA website.

There are a handful of legal aid offices in a state, usually between five and ten, despite the unmet demand by users of legal services.<sup>268</sup> This is not to say that these legal aid oligopolists are enjoying "rents," in the typical sense. Rather, the paucity of providers means an absence of usual market forces to innovate, to expand their clientele or reach in the community, or to do anything to maximize the returns on each IOLTA dollar spent. Since there are limited funds in the IOLTA reserve, there is no external incentive to do more; "rents" take the form of maintaining the status quo. The legal aid lawyers or their managers may feel internal, altruistic motivation to help as many poor people as possible, or to be as effective as possible, but these are not market forces and may not respond to varying incentives created by IOLTA funds. Ultimately, the state IOLTA administrators have very limited choice about how or where to distribute the collected funds. Very rarely do new entities around the country bid for IOLTA funds. This may be an unavoidable feature of government funding for poverty lawyers.<sup>269</sup> Even so, it is a significant policy consideration to weigh against the alternatives of fostering more pro bono legal work for the poor, or "civil *Gideon*" programs, where each court hires individual private attorneys to represent indigent parties.

## 2. Monopsony

IOLTA programs also create a situation where the government is the sole purchaser of legal services for the indigent, which is effectively a monopsony. Monopsony is a type of market failure where there is a single buyer of the goods or services.<sup>270</sup> This forces down the price of the purchased goods or services and often lowers the quantity produced. Rubin explains that whereas government monopsony might intuitively seem to benefit taxpayers, as the government is in a position to demand the lowest possible price for a service when it is the sole purchaser, monopsony can backfire.<sup>271</sup> Monopsony with government funding for private entities encourages the service providers to manipulate the state officials into funding unnecessary services and to stick with familiar entities rather than newcomers.<sup>272</sup> Rubin observes that ultimately, "government monopsony breeds contractor monopoly,"<sup>273</sup> and the monopsony and monopoly effects "reinforce each other."<sup>274</sup> The state agencies funding the private entities are "subject to concerted efforts from each potential contractor interested in persuading it to adopt a program

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<sup>268</sup> See generally Romerdahl, *supra* note 25, at 1120-21 (demonstrating that there is a growing gap between the number of Americans who need pro bono legal assistance and the number of Americans who receive it).

<sup>269</sup> See Rubin, *supra* note 261, at 923 (arguing in part that governments should not outsource welfare programs for the poor to private corporations).

<sup>270</sup> *Id.* at 920-21.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* at 921.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

design that only the contractor can fulfill.<sup>275</sup>

These predictions seem to come true with legal aid providers who receive their funding from IOLTA programs, even though they are not the profit-seeking government contractors that Rubin discusses. The number of legal aid clinics is small enough that the managers can become personal acquaintances of one another and the IOLTA administrator for their state, and the relationships become cozy (in the market sense). The number of clinics does not grow, the number of clients served does not seem to grow, and the legal aid grant-writers can apply for funding for programs or initiatives they themselves pitched to the administrators.

Monopsony is an area of growing interest in the field of antitrust law,<sup>276</sup> especially in light of a recent Supreme Court case on the subject.<sup>277</sup> Antitrust law is far outside the scope of this article. Of more interest is the scholarly literature about monopsony in the provision of public goods, which would apply more directly to legal services for the poor. In the early 1970's, Bish and O'Donoghue demonstrated that when the government becomes a monopsonist purchaser of public goods, and there are increasing costs involved, the result is too little consumption of the public goods and a commensurate decrease in social welfare.<sup>278</sup> In the context of legal services for the poor, this could help explain why most indigent litigants continue to lack legal representation, despite the presence of IOLTA-funded clinics in the state.

A single buyer in a market (the monopsonist) unavoidably affects the price for the good or service in question; paying for one more unit of the service raises the demand correspondingly, and therefore the price. Buying or funding one additional unit of services costs the monopsonist a higher price than before; monopsonists therefore tend to constrict the market in order to keep the price as low as possible.<sup>279</sup> IOLTA programs provide a vivid example, as the available funds create an artificial cap on the amount of legal services available to the poor in the state. It is very hard to measure the effects of monopsony,<sup>280</sup> so it is nearly impossible to quantify the extent to which this factor is hindering the access of the poor to legal representation.<sup>281</sup> It does seem,

<sup>275</sup> Rubin, *supra* note 261, at 923.

<sup>276</sup> See generally Natalie Rosenfelt, *The Verdict on Monopsony*, 20 LOY. CONSUMER L. REV. 402 (2008); Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297 (1991).

<sup>277</sup> *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 549 U.S. 312 (2007) (applying doctrine of predatory-pricing from monopoly laws to "predatory bidding" practices in monopsony situations, based on the analytical similarity between monopoly and monopsony).

<sup>278</sup> Robert L. Bish & Patrick D. O'Donoghue, *A Neglected Issue in Public-Goods Theory: The Monopsony Problem*, 78 J. POL. ECON. 1367 (1970); Hirofumi Shibata, *Public Goods, Increasing Cost, and Monopsony: Comment*, 81 J. POL. ECON. 223 (1973); Robert L. Bish & Patrick D. O'Donoghue, *Public Goods, Increasing Cost, and Monopsony: Reply*, 81 J. POL. ECON. 231 (1973).

<sup>279</sup> GRAHAM BANNOCK, R.E. BAXTER, & EVAN DAVIS, *THE PENGUIN DICTIONARY OF ECONOMICS* 263 (7th ed. Penguin Books 2003).

<sup>280</sup> Charles E. Hyde & Jeffrey M. Perloff, *Can Monopsony Power Be Estimated?*, 76 AM. J. AGRIC. ECON. 1151 (1994).

<sup>281</sup> Similarly, cutbacks in federal provisions of public services, such as the cutbacks of LSC funding in the 1980s and 1990s, generally leave a gap that local governments and private donors do not completely fill. See Steinberg, *supra* note 257, at 32 (concluding that

whether donations rise or fall in response to an exogenous federal cutback, it is likely that the total of donations and local government expenditure will rise, but only by some fraction of the cutback. One should not count on the local and private sectors to replace the federal government's role in a social service provision.).



however, that Rubin is correct in the assertion that government monopsony for funding outside welfare services engenders monopoly effects among the service providers, limiting the field and thus the availability of the services.

Monopsony effects are not present with alternatives for providing legal representation to the poor. An increase in pro bono work by ordinary lawyers avoids the price trap of monopsony and therefore the correlated constriction in services. Similarly, a “civil *Gideon*” approach, which works like our established court-appointed criminal defense system, avoids monopsony problems because the court-appointed lawyers are also available for fee-paying clients. The government purchases their services as one participant in a broad legal market, analogous to a government agency procuring standard office supplies from a vendor. While IOLTA-funded clinics provide a forum for some attorneys to specialize as poverty lawyers, the monopsony effects may offset the net gains to social welfare from this specialization.

### 3. Some Proposed Reforms

If indeed the monopoly, monopsony, and disjunctive effects of IOLTA are limiting the expansion of legal representation for the poor, there are some ways to mitigate this effect, at least partially. The following are a few modest proposals.

On the funding side, IOLTA and LSC administrators could recognize the problem and earmark a certain percentage of the funds each year for grant recipients who would open new offices or agencies and who need help with startup costs.<sup>282</sup> Alternatively, if there is not necessarily a need to open new offices each year, at least in years of IOLTA fund abundance, whenever the fund surpasses a certain level, the “surplus” should automatically go toward setup or startup costs for new entities that year, while the regular funding could still go to the existing entities that depend on it.<sup>283</sup> The state bar associations also need to take the lead in finding new sources of funding for legal aid, which is not a terribly popular charity for private or corporate donors. Given the “public good” nature of legal services and the huge unmet needs, an argument could be made for allowing corporate donations (monetary) to legal aid entities—at least donations from law firms—to be claimed as an exemption or partial corporate tax credit rather than as a mere deduction.

On the cost side, there may be ways to lower the overhead expenses of charities like legal aid. Earlier sections mentioned the need to tweak our tax laws so that both firms and private attorneys could claim a tax deduction or exemption for the donation of their professional services (pro bono), perhaps at a universal, minimal lodestar rate like seventy-five dollars per hour. Allowing attorneys to practice as pro bono lawyers anywhere in the country would also increase the potential pool of pro bono lawyers or lawyers volunteering at legal aid clinics;<sup>284</sup> states could

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*See also* McClelland, *supra* note 256, at 1292-95.

<sup>282</sup> *See generally* James Andreoni, *Toward a Theory of Charitable Fund-Raising*, 106 J. POL. ECON. 1186 (1998) (modeling the tremendous value and necessity of government-provided “seed” money for private charities in their capital campaigns).

<sup>283</sup> *Id.*

<sup>284</sup> To suggest a more radical idea, which is probably unrealistic to set forth as a “modest proposal,” we should consider allowing certain disbarred attorneys to perform pro bono legal work. We could do this at least in cases where the disbarment was unrelated to actions that would cause concern about potential harm to the pro bono clients themselves. This would increase the pool of pro bono lawyers at the same time as helping to rehabilitate lawyers who violated rules that do not relate to their ability to help the poor with simple legal matters.

easily issue special licenses or juris numbers for out-of-state pro bono lawyers.

Free office space would also lower setup costs and entry barriers, especially in urban centers. The state bar association could take the initiative to persuade owners of unrented commercial or office space, some of which sits unused for years at a time, to make some space available for legal services on a half-year to half-year basis, until paying renters come forward. The federal tax code currently forbids deductions for donated facility space (i.e., free rent). Changing this rule, even as a specific exception for donated space to legal services, would help incentivize metropolitan landowners to let legal aid use a portion of their space, perhaps one unit in a complex, for free. Some municipalities allow landlords an exemption from property taxes on space leased to nonprofit organizations, on a pro rata basis; if more municipalities did this, it could help lower overhead costs for charities. This would be especially true if the exemption were conditional upon the nonprofit having free or deeply discounted rent, but I am not aware of any municipalities that have such a rule. Legal aid is different from other charities, as explained in the foregoing paragraphs—the paucity of legal aid clinics, despite the relatively modest startup costs, indicates high artificial entry barriers, caused by the single-payer system. It is reasonable, therefore, to give legal aid special treatment in the laws compared to other charities.

## V. CONCLUSION

The purpose of this article was not to criticize IOLTA or to furnish the basis for new attacks on the program, but rather to confront some looming problems that have been ignored or overlooked until now. Now that IOLTA has gained nationwide acceptance and has a proven record in helping fund legal services for the poor, we can take the next step in our analysis of the programs and our policy planning. Ideally, this will lead to a maturing of our approach in the provision of legal representation for the poor.

The popularity of IOLTA programs is evident from the fact that they now operate in every state. As a result, however, IOLTA has become the most frequent and widespread instance of government takings of private property in America. The post-*Kelo* era is a period of increasing legislative restrictions on takings, and these restraints now implicate the IOLTA programs in several states, even though the issue has not yet generated litigation. IOLTA takings continue for now, but the post-*Kelo* reforms could furnish the basis for a completely new legal challenge to the IOLTA programs. Furthermore, with the lingering problems in *Brown*, the program could collapse altogether as technology improves and interest rates increase.

The IOLTA takings also pose administrative procedural problems, as these transfers of accrued interest do not fall into either of the traditional categories for takings, that is, eminent domain over real property and regulatory takings. By creating a category all to itself, IOLTA sidesteps eminent domain procedures in every state, without a clear legal basis for this discrepancy. This discrepancy seems incongruous with well-established due process doctrines in administrative law.

Even apart from IOLTA's looming legal and financial problems, some inherent conceptual difficulties with the program have gone unaddressed up to now, and these points are ripe for consideration and discussion. IOLTA appears to be a good candidate for the crowding-out syndrome that economists have identified and documented with other government provisions of funds or services; we should devote more attention to the possibility that IOLTA is crowding out pro bono endeavors by non-legal aid attorneys. We should also consider whether it creates a disincentive for lawmakers to ease the restrictions placed on LSC funding in the 1990s. In addition, Justice Kennedy's concern in his dissenting opinion in *Brown*—the possibility that

IOLTA ultimately causes monopoly-type effects and artificially reduces the number of legal aid entities in each state—deserves more attention. Both crowding-out effects and market concentration/entry barriers would be less intense, I propose, if we allowed small tax credits or tax deductions for the donation of legal services to charity, i.e., pro bono work done through or for a charitable entity. Creating tax incentives for commercial property owners to offer free use of facilities by legal service providers would foster more public-benefit legal representation, as would a rule relaxing the jurisdictional limits on lawyers performing pro bono work. On a more positive note, empirical evidence from various pilot projects for “civil *Gideon*” indicates that government provision of free lawyers does not pose the same moral hazard problem inherent in other welfare programs. The presence of more lawyers representing the poor appears to reduce spurious and unnecessary court filings and hearings, fosters settlement, and facilitates the inflow of federal welfare funds and overdue child support money into impoverished locales.

IOLTA serves an important purpose: it has a proven record in helping fund legal services for the poor. Given the changes in takings law after the post-*Kelo* reforms, a new round of legal challenges for the IOLTA programs looms on the horizon in several states. This development presents an opportunity to confront some underlying problems that we have ignored or overlooked up to now.