YOU CAN'T TOUCH THIS: A DISCUSSION OF THE PERILS OF *PHILLIPS V. WASHINGTON LEGAL FOUNDATION* AND THE DETRIMENTAL EFFECT TO INDIVIDUALS OF EXPANDING THE DEFINITION OF PROPERTY WITHOUT PROPER CONSIDERATION.

INTRODUCTION

Don Quixote had his windmills, Ponce de Leon took his cruise. It took Sinbad seven voyages to see that it was all a ruse.[1]

As students learn in every first year property class, the most effective weapon in the arsenal of the property owner is that: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken . . . without just compensation."[2] This sentence, known as the "takings clause" shields the individual from the government and prevents individuals from being forced to sacrifice their property to the government without some form of compensation being paid in return. More than once, the United States Supreme Court has articulated the protections offered to property owners by the takings clause.[3] In such decisions, individual property owners use the takings clause to stave off government attempts at restricting the uses of a person's property.[4] However, the protection offered by the takings clause has never been interpreted as absolute.[5] The government has sometimes been able to avoid the invalidation of such restrictions through a balancing test involving public interests,[6] or through the offering of just compensation.[7] As this Note discusses, "just compensation" is sometimes not a high enough price for the property that has been taken by the government. In fact, once an item previously outside the realm of property is brought in under the takings clause, just compensation offers very little comfort to the individual.

Recently, the Supreme Court has attempted to extend the takings clause to areas where it has never been applied before.[8] Some of these attempts have been unsuccessful,[9] while others have created new forms of takings that had

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1. WARREN ZEVON, LOOKING FOR THE NEXT BEST THING (Valgovind Music 1982).
2. U.S. CONST. amend V.
3. *See, e.g.*, Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).
4. *See generally Lucas*, 505 U.S.
5. *See infra* note 74.
6. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130 (1978).
7. As required by the Fifth Amendment. *See, e.g., Lucas*, 505 U.S. at 1003.
8. *See infra* note 10.
9. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1969) (stating that welfare benefits could not be considered property for purposes of the takings clause); Board of Regents of State Colleges v. Roth, 408

previously never been considered.[10] The most recent case in this line of newly created forms of takings is *Phillips v. Washington Legal Foundation.*[11] In *Phillips*, the Court, for the first time, found a property value in something that was not tangible either physically or financially.[12] This expansion of what the notion of property entails contradicts the earlier maxim that "[p]roperty interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."[13]

Phillips involved a debate over the constitutionality of the Interest on Lawyer's Trust Accounts (IOLTA) scheme for funding legal services in the State of Texas.[14] IOLTA was created in response to the need for legal services funding, as well as in response to a 1981 interpretation of 12 U.S.C. § 1832, which allowed law firms to take advantage of interest bearing Negotiable Order of Withdrawal (NOW) accounts to store client funds.[15] Originally, such accounts were "permitted only for deposits that 'consist[ed] solely of funds in which the entire beneficial interest is held by one or more individuals or by an organization which is operated primarily for religious, philanthropic, charitable, educational, political, or other similar purposes and which is not operated for profit.'"[16]

The "not operated for profit" language of 12 U.S.C. § 1832 (a)(2) originally barred lawyers from taking advantage of NOW accounts as a means of storing client funds.[17] This provided a financial burden on law firms that dealt with client retainers too small in value to qualify for other interest bearing accounts.[18] Such retainers were stored in accounts where what little

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U.S. 564 (1972) (holding that a college professor's job and reputation could not be considered property). Though *Roth* focused on alleged violations of the Due Process Clause, that case was one of the more noticeable attempts to expand the Takings Clause, which in turn expands the definition of property.

10. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (holding that a governmental invasion of a person's property was a taking even though that invasion increased the monetary value of the property). Other holdings stand in contrast to the previously mentioned decision in *Roth* due to differences in state law regarding the definition of property. *See generally* Perry v. Sindermann, 408 U.S. 593, 603 (1972) (holding that"a teacher has a property interest in re-employment).

11. Phillips v. Washington Legal Found., 524 U.S. 156 (1998).

12. *Id.* at 172.

13. *Roth*, 408 U.S. at 577. As mentioned before, this case revolved around a due process claim, but the attempted expansion of traditional notions of property is important for the current discussion. Anytime property is redefined, so is the scope of the takings clause.

14. *Phillips*, 524 U.S. at 160.

15. *See id.* at 160-61.

16. *Id.* at 161 (quoting 12 U.S.C. § 1832 (a)(2) (1994)).

17. *See id.*

18. *See* Kenneth Paul Kreider, Case Note, *Florida's IOLTA Program Does Not "Take" Client*

interest was gained was outweighed by service fees and maintenance costs.[19] This forced lawyers to pass higher costs on to their clients since small retainer accounts could not all be pooled together.[20] The Federal Reserve Board later solved this problem by concluding that such funds may be placed in NOW accounts if they were held in trust under a program where charitable organizations would have "exclusive right to the interest."[21]

This interpretation allowed lawyers to avoid high maintenance charges by pooling minor client accounts, while at the same time provided a solid base of funding for legal service programs and other such qualified organizations throughout the country.[22] Texas created its IOLTA program in 1984 by forming the Texas Equal Access to Justice Foundation (TEAJA) to distribute funds generated by the program.[23]

Respondents in *Phillips* included Michael Mazzone and William Summers.[24] Mazzone is an attorney in Texas who maintains an IOLTA account into which his clients' funds are deposited, and Summers is a Texas businessman who became aware that his funds were being held in an IOLTA account.[25] Mazzone, Summers, and the Washington Legal Foundation (a public-interest law policy center) claimed that the use of Summers' funds in the IOLTA program violated Summers' rights under the Fifth Amendment's Takings Clause.[26] Summers felt that the use of his client funds in an IOLTA account deprived him of his personal property without any compensation.[27] The Supreme Court agreed that Summers had a valid property interest, but refused to decide the question of whether or not a taking had occurred.[28] The takings question was remanded to the Fifth Circuit Court of Appeals.[29]

This decision represents a dramatic turn for the takings doctrine. It expands the definition of property for the purpose of takings to a person's

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Property for Public Use: Cone v. State Bar of Florida, 819 F.2d 1002 (11th Cir.), *cert. denied*, 108 S. Ct. 268 (1987), 57 U. CIN. L. REV. 369, 370 (1988).

19. *See id.*

20. *See id.* at 371.

21. *Phillips*, 524 U.S. at 161 (citing to Letter from Michael Bradfield, Federal Reserve Board General Counsel, to Donald Middlebrooks 1 (Oct. 15, 1991) (*reprinted in* Middlebrooks, *The Interest on Trust Accounts Program: Mechanics of its Operation*, 56 FLA. B. J. 115, 117 (Feb. 1982))).

22. *See* Kreider, *supra* note 18, at 371.

23. *See Phillips*, 524 U.S. at 161-62 (citing TEX. STATE BAR RULE art. XI, §§ 3, 4; TEX. IOLTA RULE 9(a)).

24. *Phillips*, 524 U.S. at 162.

25. *See id.* at 162-63.

26. *See id.*

27. *See id.* at 163.

28. *See id.* at 172.

29. *See id.*

right to something which has absolutely no value, either physically or financially. The Supreme Court previously set the standard to measure takings as the "owner's loss, not the taker's gain."[30] In *Phillips*, however, this standard cannot be used, since nothing has been lost. Were Summers' funds to be put in a separate account, rather than a NOW account, no interest would be gained and Summers would actually incur a higher fee from Mazzone, because the maintenance fees required to sustain Summers' account would be passed on by Mazzone. Thus, what has been declared a property interest in *Phillips* is essentially the right to pay one's attorney more money. Perhaps this explains why the majority in *Phillips* was reluctant to decide the question of "the amount of 'just compensation,' if any, due respondents."[31]

In his dissent, Justice Souter was quick to recognize the fact that the majority had avoided the most important issue in their decision.[32] In the first of two dissents offered in *Phillips*, he noted "[i]n addressing only the issue of property interest, leaving the questions of taking and compensation for a latter day . . . the Court and the Court of Appeals [have] . . . postponed consideration of the most salient fact relied upon by petitioners in contesting respondents' Fifth Amendment claim."[33] In doing this, the Court has left a very wide door for the expansion of the takings doctrine by rendering a decision in *Phillips* that is half-hearted at best. As Justice Souter further mentions in his dissent:

> If it should turn out that within the meaning of the Fifth Amendment, the IOLTA scheme had not taken the property recognized . . . or if it should turn out that the "just compensation" for any taking was zero, then there would be no practical consequence for the purposes of the Fifth Amendment in recognizing a client's property right in the interest in the first place.[34]

By recognizing a property interest and noting the government's involvement in the IOLTA scheme, the Court sweeps the interest into the realm of takings but does not explain why it has chosen to do so. After all, what type of just compensation should be due when nothing of any value has been taken?

The paradox in *Phillips* extends far beyond what type of just compensation is due as a result of this newly created taking. A more

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30. United States v. Causby, 328 U.S. 256, 261 (1946).
31. *Phillips*, 524 U.S. at 172.
32. *See id.* at 172 (Souter, J., dissenting).
33. *Id.* at 173 (Souter, J., dissenting).
34. *Id.* at 174 (Souter J., dissenting).

important effect of *Phillips* is how the case actually undermines the takings clause in the name of expanding it. By creating a new form of property, *Phillips* has increased the reach of the government through expanding both the realm of the takings clause and eminent domain.[35] Prior to *Phillips*, the government could only take what was tangible. Compensation may be required in some instances, but the end result is the same; the government has the right to take property if it can afford to exercise that right.

In considering the proper definition of property, Justice Frankfurter has stated:

> Great concepts like . . . "liberty," [and] "property" were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.[36]

Following that notion, one realizes that as the concept of property expands, so do the concepts of takings and eminent domain.[37] Whenever anything new is deemed property, it is placed within the reach of the government if the price is right.[38] *Phillips* has given the government the power to reach that which is intangible and devoid of any value. The next expansion may be into areas encompassing that which does not even exist yet, such as intellectual property, ideas, and concepts.[39] The fear is that *Phillips* may have gone too far in an effort to gain compensation for something that was never considered property prior to its holding. Perhaps the best protection from the takings clause is not just compensation, but rather to not be considered property, and therefore out of the reach of possible takings altogether.

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35. The last time the Court made such a move, the concept of welfare rights was at issue. *See* Richard A. Epstein, *No New Property*, 56 BROOK. L. REV. 747 (1990).

36. National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting).

37. Since the Fifth Amendment uses the phrase "life, liberty, or property," a change in the definition of any of these words will alter the scope of Fifth Amendment protection. *See* Epstein, *supra* note 35, at 750.

38. *See id.* Richard A. Epstein sums this up best when he states:

> The hypothetical deal is not tentative or partial; there are no things so valuable that the individual citizen is able to keep them outside the social contract that leads to the formation of the state. Quite the opposite, the state can take what it needs of property, and perhaps liberty . . . insofar as they are needed to discharge its fundamental mission.

Epstein, *supra* note 35, at 751.

39. *See infra* Part IV.

I. BACKGROUND

A preliminary background of the takings doctrine is necessary before the potential results of *Phillips* can be understood. The "general rule" of takings was first used by Justice Holmes, who stated, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[40] This rule provided for a number of cases which followed in an attempt to determine when regulation of property did indeed go too far.[41] Eventually, a type of balancing test was reached where the Court considered the economic impact of the regulation in question, the character of the government action, and the public welfare.[42] This test allowed courts to consider a number of factors before deciding whether or not any given regulation had triggered the takings clause of the Fifth Amendment.[43]

The Court then sought to define the takings clause by offering a more structured rule as to whether a taking had occurred.[44] The first attempt to further delineate the takings clause noted that a taking had occurred whenever the government caused a physical invasion upon someone's property, even if that invasion caused an increase in the value of the property.[45] The Court then went on to expand takings to instances where the invasion was purely regulatory.[46] This new definition of a taking stated that the Fifth Amendment was triggered if a "regulation denies all economically beneficial or productive use of the land."[47] This new rule somewhat minimized the burden on a court of having to consider each takings claim on a case by case basis, as it could now automatically find there to be a taking in such cases.

The shift in *Phillips* stems from the fact that neither land nor regulation are at issue in terms of the central property interest in the case.[48] Instead, *Phillips* reads a property interest into group IOLTA accounts, which are a

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40. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

41. *Lucas* ended up being the culmination of this long line of cases and developed the first semblance of a "bright line" test for regulatory takings. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030 (1992).

42. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

43. *See id.* at 130-31.

44. *See Lucas*, 505 U.S. at 1024-26.

45. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 439-40 (1982).

46. *See, e.g.*, First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

47. *Lucas*, 505 U.S. at 1015.

48. Phillips v. Washington Legal Found., 524 U.S. 156, 172 (1998).

primary source of funding for legal aid organizations nationwide.[49] IOLTA accounts exist in all states, except Indiana, and use certain client funds to generate interest which then becomes funding for various legal services programs.[50] It is this interest which is the focus of the *Phillips* decision. In order to fully understand why the attachment of a property interest to the interest involved in an IOLTA account is an awkward use of the term "property," emphasis should be placed on the fact that the interest generated by an IOLTA account is a product of grouping individual client funds, not a direct result of the funds of any one individual and thus, does not really belong to any one person.[51] The interest generated by an IOLTA account cannot be attributed to any one client's funds, but rather is the result of a combination of client funds which, on their own, are incapable of being a positive source of interest revenue.[52]

Phillips, then, attached an individual property interest to the product of grouping multiple client funds.[53] Justice Breyer noted the awkwardness of this reasoning in his dissent, stating, "in the absence of IOLTA intervention, the client's principal would earn nothing."[54] If the client's funds were individually placed in regular NOW accounts, no interest would be earned, and in fact the client would have to pay higher maintenance fees to his/her attorney.[55] This concern was a factor when IOLTA programs were first created, and some states went so far as to say that lawyers in fact had a duty to place client funds, no matter how minute in value, into an interest bearing account of some sort (IOLTA or otherwise).[56] The takings issue was carefully considered by each state that adopted the IOLTA program.[57] The general lack

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49. *See id.* at 160, 172.

50. *See id.* at 159-60 n.1.

51. *See* Terence E. Doherty, *The Constitutionality of IOLTA Accounts*, 19 WHITTIER L. REV. 487, 491 (1998).

52. *See id.* at 494.

53. *Phillips*, 524 U.S. at 172.

54. *Id.* at 182 (Breyer, J., dissenting).

55. *See* Kristin A. Dulong, *Exploring the Fifth Dimension: IOLTA, Professional Responsibility, and the Takings Clause*, 31 SUFFOLK U.L. REV. 91, 94 (1997).

56. *See, e.g., In re* New Hampshire Bar Ass'n, 453 A.2d 1258, 1261 (N.H. 1982) (holding that "[b]asic principles of the law of agency and trusts seem to compel the conclusion that at some point it would be irresponsible for an attorney not to deposit a client's funds in an interest-bearing-trust account."); *In re* Massachusetts Bar Ass'n, 478 N.E.2d 715 (Mass. 1985).

57. *See* W. Frank Newton & James W. Paulson, *Constitutional Challenges to IOLTA Revisited*, 101 DICK. L. REV. 549 (1997). "A number of constitutional concerns were addressed by state courts in written administrative orders accompanying the creation of IOLTA programs or in more traditional adversary proceedings. These state rulings ... resulted in a largely consistent series of opinions confirming the constitutional validity of IOLTA programs. Legal commentators generally concurred." *Id.* at 550-51.

of actual attributable individual interest in the profits of IOLTA accounts was a primary reason for the dismissal of possible constitutional claims.[58]

The Fifth Circuit Court of Appeals gave validity to such claims, however, when it ruled that the IOLTA funding scheme, as used in the State of Texas, violated the Takings Clause of the Fifth Amendment.[59] This decision rested heavily on the maxim that "interest follows principal," and the reasoning that since the principal in question belonged to the individual clients, so must the interest.[60] Once the Fifth Circuit split with a consistent line of reasoning upholding the constitutionality of IOLTA accounts, the Supreme Court agreed to hear the case and affirmed the ruling of the Fifth Circuit.[61] *Phillips,* in its radical re-defining of what constitutes a property interest, stopped short of deciding whether or not the IOLTA scheme constitutes an actual taking under the Fifth Amendment.[62] However, by stating that a property interest does in fact exist and that the government is involved in the infringing of that property interest, the Court has essentially answered the question which it refused to ask. If the lower courts use the reasoning set forth in *Phillips* in situations involving other sorts of intangible "property," the takings doctrine will be expanded to a level it has never reached before. This will force the Supreme Court to deal with the questions it chose to avoid in *Phillips*. Though the initial reaction of the individual property owner might be one of joy, such a reshaping of the takings doctrine may well do more harm than good for the purposes of individual rights.

II. *PHILLIPS, GOLDBERG V. KELLY,* AND THE EFFECTS OF RECENT EXPANSIONS OF THE TAKINGS DOCTRINE

In leaving the takings issue for lower courts to decide, the Supreme Court also avoided the question of what type of compensation, if any, would be owed for the infringement of the petitioner's "property interest."[63] The Court declined to reach the takings issue because it would have led immediately to the question of just compensation.[64] Just compensation is generally thought

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58. *See id.*

59. *See generally* Washington Legal Found. v. Texas Equal Access to Justice Found., 94 F.3d 996 (5th Cir. 1996). The court held that not considering IOLTA accounts as property "flies in the face of reason." *Id.* at 1003.

60. *See id.* at 1000.

61. *See Phillips,* 524 U.S. at 163, 172.

62. *Id.* at 172.

63. Phillips v. Washington Legal Found., 524 U.S. 156, 172 (1998).

64. *See* First English Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 315

to mean that which would place the aggrieved party in "as good a position pecuniarily as if his property had not been taken."[65] The IOLTA property interest defined in *Phillips* is such that no compensation is required in order to place the aggrieved party back in their original position.[66] This lack of any actual compensation, in the event a taking were to be found, led Justice Souter to bluntly comment as to whether or not this was an effective use of the Court's time, regardless of the outcome of the takings debate.[67]

A traditional calculation of what type of just compensation would flow from the "property" lost as a result of the IOLTA scheme would focus on the amount of interest owed to the claimant in the absence of the IOLTA program altogether.[68] In this case, the amount of interest lost by the claimant both before and after the IOLTA program is zero.[69] To separate the issue of just compensation from the question of takings is something that has been considered before when Chief Justice Rehenquist (in the majority in *Phillips*) warned against the dangers of such a line of thinking.[70] It is hard to believe

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(1987) ("This basic understanding of the [Fifth] Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking."). Thus, once a taking has been established, the question of just compensation must be immediately addressed.

65. United States v. 564.64 Acres of Land, More or Less, 441 U.S. 506, 510 (1979).

66. *Phillips*, 524 U.S. at 181 (Breyer, J., dissenting).

67. *See id.* at 175 (Souter, J., dissenting). In his dissent, Justice Souter states:

> It thus makes good sense to consider what is property only in connection with what is a compensable taking, an approach to Fifth Amendment analysis that not only would avoid spending time on what might turn out to be an entirely theoretical matter, but would also reduce the risk of placing such undue emphasis on the existence of a generalized property right as to distort the taking and compensation analyses that necessarily follow before the Fifth Amendment's significance can be known.

Id.

68. This proposition can be traced back to the early part of this century in the case of *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189 (1910). There, Justice Holmes stated "the Constitution does not require a disregard of the mode of ownership . . . . It deals with persons, not with tracts of land. And the question is what has the owner lost, not what has the taker gained." *Id.* at 195.

69. This fact led the Fifth Circuit to describe the IOLTA scheme as a modern day attempt at "alchemy." Washington Legal Found. v. Texas Equal Access to Justice Found., 94 F.3d 996, 1000 (5th Cir. 1996). In the lower court decision, Judge Wisdom noted, "[i]t has been suggested that the IOLTA program represents a successful, modern-day attempt at alchemy. While legends abound concerning the ancient, self-professed alchemists who worked tirelessly towards their goal of changing ordinary metal into precious gold, modern society generally scoffs at this attempt to create 'something from nothing.'" *Id.*

70. *See* Almota Farmers Elevator and Warehouse Co. v. United States, 409 U.S. 470, 482-83 (1973). Justice Rhenquist in his dissent notes, "While the inquiry as to what property interest is taken by the condemnor and the inquiry as to how that property interest shall be valued are not identical ones, they cannot be divorced without seriously undermining a number of rules dealing with the law of eminent domain . . . ." *Id.*

that the Chief Justice and the others in the *Phillips* majority did not see the just compensation inquiry coming, and as a result left the entire question of whether a taking had occurred to be remanded back to the Fifth Circuit.

By avoiding the issue of just compensation, the Supreme Court has redefined property interests in a dangerously abstract manner. Previously, the Court has noted that the only value which should be of concern in the taking of property is that which can be measured and transferred from owner to taker.[71] Thus, for something to be properly affected through takings, there must be some sort of compensation owed.[72] By considering something with no ascertainable value as property, the Supreme Court has broadened the range of what can be reached through the takings clause.[73] Once something is considered "protected" through the takings clause, it is, by implication, susceptible to the governmental power of eminent domain.[74]

Admittedly, the power of eminent domain cannot be exercised that simply. However, by expanding the definition of what property entails, the possibilities for the use of eminent domain are also greatly expanded.[75] One of the last shifts in the definition of property occurred in the case of *Goldberg v. Kelly*.[76] In *Goldberg*, Justice Brennan's majority opinion expanded the definition of property to include the receipt of governmental benefits.[77] Oddly enough, this radical redefinition of what should be considered as property came in the form of a footnote and is not easily noticed in the context of the

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71. *See* Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1949). Justice Frankfurter explains:

> In view, however, of the liability of all property to condemnation for the common good, loss to the owner of nontransferable value deriving from his unique need for property or idiosyncratic attachment to it, like loss due to an exercise of the police power, is properly treated as part of the burden of common citizenship.

Id. at 5.

72. Unless, of course, a "permanent physical occupation" of real property has occurred. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

73. Richard A. Epstein describes the dilemma brought on by this expansion of what is considered property when he asks: "[H]ow can we admit new types of interests into the common law system of property rights without having to accept the proposition that the state has untrammeled discretion to create, and by implication, to abolish, all forms of property rights by legislative decree?" Epstein, *supra* note 35, at 752.

74. In layman's terms, the only protection really offered here is the consolation that the government has to come up with an appropriate sum of money before it can take an individual's property. In all of the famous takings cases, the government has always ended up with the property in question, if it felt that the price was fair. *See generally* Richard A. Epstein, *Proceedings of the Conference on Takings of Property and the Constitution*, 41 U. MIAMI L. REV. 49 (1986) (considering the numerous perspectives on takings described, all agreed that if the government wants a piece of property, it will acquire it).

75. *See* Epstein, *supra* note 35, at 751.

76. Goldberg v. Kelly, 397 U.S. 254 (1969).

77. *Id.* at 262.

rest of the opinion.[78] The rest of the *Goldberg* opinion focused mainly on the issue of how much due process is required before the deprivation of government benefits can take place.[79] What should be noted, though, is the Court's tendency to redefine notions of property even while focusing on other legal issues.[80]

While it may seem like a minor point, redefining welfare benefits as property may actually defeat the very interests that the program claims to represent.[81] Furthermore, though it may seem unlikely, allowing welfare benefits to be considered as property does give the government power to take such property away.[82] It is hard to imagine why the government would choose to exercise its power of eminent domain over an individual citizen's (or a class of citizen's) welfare benefits. However, there are plausible reasons as to why such a scenario may occur. For instance, it may be that it would be easier for the government to simply provide "just compensation" to indigent individuals as opposed to the multitude of other services that accompany welfare payments, such as job placement, family planning programs, educational opportunities, etc.[83]

It is the very possibility, rather than the remote probability, of governmental action that makes an expansion of property interests a disadvantage to the individual citizen. The *Goldberg* case could have easily reformed the procedures for termination of welfare benefits without classifying such benefits as property.[84] Welfare recipients gain a very illusory

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78. *See id.* Specifically, Justice Brennan reasoned, "[i]t may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.'" *Id.* at 262 n.8.

79. *Id.* at 266-71.

80. It should be further noted that neither *Goldberg* nor *Phillips* went into any detail as to why it was necessary for the court to redefine "property" at that time, nor was any attention given to the potential consequences of such a redefinition. *See* Epstein, *supra* note 35, at 751.

81. *See id.* at 762-63. If welfare benefits are property for purposes of the takings clause, does this infringe upon the state's ability to condition the ability to receive welfare upon attributes such as "willingness to avoid crime or drunkenness, to seek work, to furnish various reports, to produce identification cards, or to satisfy a host of other requirements?" *Id.* at 762. Epstein aptly calls this "a persistent analytical sore point under modern American constitutional law." *Id.* at 762-63.

82. *See id.* at 761. Epstein goes on to ask:

> Do we want to create eminent domain protection for the set of welfare benefits at issue in *Goldberg v. Kelly*? Is it possible to say that once the state institutes a system of welfare that promises to pay the recipient $100 per week, thereafter it may eliminate that benefit payment only if it pays the recipient an equivalent capital sum sufficient to fund the purchase of a $100 per week lifetime annuity?

Id.

83. *See id.*

84. *Goldberg* could have been decided solely on other grounds, as Justice Brennan noted in his majority decision: "In almost every setting where important decisions turn on questions of fact, due process

advantage from their benefits being classified as property. All that is gained is an unwelcome, albeit also unlikely, exposure to the government's power of eminent domain which is cloaked in a veil of security. Thus, the "protection" that was hailed as a result of the *Goldberg* decision is quite deceptive in nature.[85] Welfare recipients are indeed entitled to the cash value of the benefits they receive, but anything else may be stripped away by eminent domain, should the government ever feel the need to do so. The "protection" offered in *Phillips*, by contrast, is even more illusory. The cash value of the interest at stake is non-existent to the individual claimant.[86]

Like *Goldberg*, *Phillips'* major effect on society will be its redefinition of what constitutes a property interest under federal law.[87] This redefinition brings forth a troubling aspect of the concept of property, which does not serve to protect the individuals in society as much as some might think.[88] *Phillips* may prevent interest generated from IOLTA accounts from ever reaching Legal Aid offices, but on an individual level, the claimant receives no monetary satisfaction.[89] All that is won is the abstract satisfaction in denying charitable organizations funds that they need to subsist. This being the case, such an abstraction has previously not been seen as enough to warrant a valid claim of governmental interference with one's "property rights."[90] Under a takings analysis, *Phillips* allows the government to use eminent domain to get "nothing" for "nothing."[91] As a side effect, though, the realm of intangible property open to the government through takings, is once

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requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg*, 397 U.S. at 269.

85. Indeed, Justice Brennan defended his decision in *Goldberg* before the Association of the Bar of the City of New York in 1987, and social service organizations still hail the decision as landmark. *See* Epstein, *supra* note 35, at 771-72.

86. *See Phillips*, 524 U.S. at 170.

87. *See id.* at 178 (Souter, J., dissenting).

88. The paradox is best summed up by Jeanne L. Schroeder, when she states "although property is necessary for the actualization of human freedom, property is ill-suited for the role traditionally ascribed to it by liberal philosophies to 'serve[ ] . . . in the office of a wall, or as a moat defensive to a house,' protecting private rights from government oppression." Jeanne L. Schroeder, *Never Jam To-Day: On the Impossibility of Takings Jurisprudence*, 84 GEO. L.J. 1531, 1567 (1996).

89. *Phillips*, 524 U.S. at 176 (Souter, J., dissenting).

90. Hooker v. Burr, 194 U.S. 415, 420-21 (1904). If there is nothing that would warrant a positive amount of just compensation, any taking would be an "abstract proposition." *Id.* at 422.

91. This is an admittedly vague notion. To be more precise, if the government wants to take the claimant's interest by way of the IOLTA scheme, it can use eminent domain to do so. In return, the claimant will get exactly what the interest was worth, nothing.

again expanded.[92] This, when weighed against the prospect of denying legal services to the poor, makes *Phillips* somewhat of a hollow victory.

III. SETTING THE STAGE: THE CONCEPT OF "INTEREST FOLLOWS PRINCIPAL" AS DEVELOPED IN *WEBB'S FABULOUS PHARMACIES INC. V. BECKWITH*

Even the most cursory of glances at the reasoning in both the Fifth Circuit opinion and the Supreme Court opinion in *Phillips* reveals a heavy reliance on the recent case of *Webb's Fabulous Pharmacies, Inc. v. Beckwith.*[93] The *Webb's* case can be summed up in the simple phrase "interest follows principal."[94] Factually, *Webb's* involved interest generated by funds deposited in an interpleader account with the circuit court of Seminole County, Florida.[95] Funds deposited in the account generated interest in excess of $90,000.[96] Upon learning of this, the receiver for Webb's Fabulous Pharmacy requested the return of the interest generated on the fund, but was denied by the circuit court.[97] The Supreme Court of Florida found that keeping the interest was constitutional, noting that "interest earned on the clerk of the circuit court's registry account is not private property."[98] The Supreme Court of the United States saw things differently and reversed the decision.[99]

There are similar themes on the surface of both *Webb's* and *Phillips*. Both involve interest generated on funds of one sort or another and both revolve around a claim of private monies unjustly being put towards public

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92. The government has already made some headway into this realm of property. *See, e.g.*, Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984); Perry v. Sindermann, 408 U.S. 593 (1972).

93. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980); *see also* Phillips v. Washington Legal Found., 524 U.S. 156 (1998); Washington Legal Found. v. Texas Equal Access to Justice Found., 94 F.3d 996 (5th Cir. 1996).

94. Actually, the foundation for this reasoning is well over a century old at this point. *See, e.g.*, Branch v. United States, 100 U.S. 673 (1888) (establishing that principal is private property, even when deposited). Later in the 1970's, the Fifth Circuit found that any interest follows principal and should be allocated to the owner(s) of said principal. *See* James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451 (5th Cir. 1971).

95. *Webb's Fabulous Pharmacies*, 449 U.S. at 155.

96. *See id.* at 158.

97. *See id.*

98. *Id.* at 158-59.

99. *See id.* at 164-65. Justice Blackmun concluded the opinion by noting, "a State, by *ipse dixit*, may not transform private property into public property without compensation . . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent." *Id.* at 164.

uses.[100] However, as obvious as these similarities might be, the differences in the cases are even more noticeable. Most striking is the fact that the account in *Webb's* generated over $90,000 worth of interest and was made up of nearly two million dollars of the petitioner's funds, while *Phillips* involves interest generated as a result of individual amounts of funds too small to warrant being given their own interest bearing account.[101] Furthermore, the interest in *Webb's* was generated based solely on the amount of funds in question, while in *Phillips* the IOLTA program is the only reason that the interest in question exists.[102]

Regardless of these stunning differences, *Webb's* is an integral part of the foundation of the majority opinion in *Phillips*.[103] The *Phillips* Court did not look at the mechanism by which the interest is generated, but instead focused only on the fact that interest actually is generated.[104] Only one paragraph later, the Court demonstrated its blatant disregard for the mechanism by which the interest in question is generated, demonstrated by its quote of Texas IOLTA Rule 6.[105] This alone is enough to make the reliance on *Webb's* questionable. In *Webb's*, a positive economic value could be attached to the interest in question (specifically, $90,000 of positive economic value), while in *Phillips*, the interest in question had no ascertainable positive economic value and may in fact have a negative economic impact on the claimant.[106]

The Court seeks to rationalize this distinction from *Webb's* by noting: "We have never held that a physical item is not 'property' simply because it lacks a positive economic or market value," using the *Loretto* case for

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100. *See id.*; *Phillips*, 524 U.S. at 163.

101. See *Webb's Fabulous Pharmacies*, 449 U.S. at 158-59 as compared with *Phillips*, 524 U.S. at 160-61.

102. See *Webb's Fabulous Pharmacies*, 449 U.S. at 158-59 as compared with *Phillips*, 524 U.S. at 159-60.

103. *See Phillips*, 524 U.S. at 166.

104. *See id.* Justice Rehnquist admits as much when he states, "regardless of whether the owner of the principal has a constitutionally cognizable interest in the *anticipated* generation of interest by his funds, any interest that *does* accrue attaches as a property right incident to the ownership of the underlying principal." *Id.* at 168.

105. *See id.* at 162. Texas IOLTA Rule 6 states that funds deposited in IOLTA accounts should be insufficient to "offset the cost of establishing and maintaining the account, service charges, accounting costs and tax reporting costs which would be incurred in attempting to obtain the interest on such funds for the client." *Id.* (quoting Texas IOLTA Rule 6).

106. *See Webb's Fabulous Pharmacies*, 449 U.S. at 158; *Phillips*, 524 U.S. at 170. To elaborate, if the individual funds to be placed in an IOLTA account were miniscule enough, the charges that would be incurred as a result of placing such funds in an individual account may surpass the actual value of the funds themselves and lead to a higher attorney's bill for the claimant. *See supra* note 101. Thus, the property "interest" protected here would be the right to pay one's lawyer a higher fee.

support.[107] *Loretto*, however, is easily distinguished on two separate grounds. First, the "permanent physical" nature of the intrusion in question automatically led the *Loretto* Court to the conclusion that property rights had been infringed.[108] In *Phillips*, there is nothing "permanent" or "physical" about the nature of the property rights in question. The rights would have never existed were it not for the IOLTA program itself.[109] The second distinction from *Loretto* is brought out in the text of the *Phillips* opinion when the Court notes that the property right at issue in *Loretto* "*increased* the market value of the property at issue."[110] In the IOLTA scheme, nothing of the claimant's has increased in value from the point of view of the claimant. If the IOLTA account were not in place, the claimant's principal would gain no interest on its own. The interest generated by the IOLTA account, conversely, also cannot be attributed to the claimant's principal, but rather to the sum created by the combination of the claimant's principal with other funds.[111]

In treating *Webb's* and *Phillips* as like situations, *Phillips* conflicts with previous decisions that commented on whether or not an ownership right exists with regard to "property" which has no productive use.[112] Justice Breyer brings the Court's attention back to these decisions in the text of his *Phillips* dissent.[113] The first contradiction that Justice Breyer makes note of is the use of property which has been taken in *Webb's* versus that which has supposedly been taken in *Phillips*.[114] In *Webb's* the use taken was the right to a benefit legitimately created by the claimant's principal, whereas in *Phillips* no such benefit ever existed.[115] In the Court's previous decisions regarding takings issues, property rights have been infringed only when the beneficial

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107. *Phillips*, 524 U.S. at 169 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)).

108. *Loretto*, 458 U.S. at 426.

109. *See Phillips*, 524 U.S. at 160-61.

110. *Id.* at 170.

111. Again, the *Phillips* Court acknowledges this, stating, "While the interest income at issue here may have no economically realizable value to its owner, possession, control, and disposition are nonetheless valuable rights that inhere in the property." *Id.* However, there seems to be no realization, once again, of the fact that this is taking property rights to a place where they have never before existed.

112. *See, e.g.*, National Bd. of YMCA v. United States, 395 U.S. 85 (1969); United States ex rel. T.V.A. v. Powelson, 319 U.S. 266 (1943); United States v. Twin City Power Co., 350 U.S. 222 (1956). This is an awkward string of cases, to be sure, which proves once again that the Court does not approach decisions which alter the fundamental notions of property with the utmost scrutiny. Often such decisions are made incidental to other legal issues.

113. *Phillips*, 524 U.S. at 180-81 (Breyer, J., dissenting).

114. *See id.* (Breyer, J., dissenting).

115. *See id.* (Breyer, J., dissenting).

use of property in question legitimately existed before the interference in question occurred.[116]

Moving further along this line of reasoning, the Court has also previously noted that a property owner cannot lay claim to benefits that (s)he could not have created absent government intervention.[117] This is another crucial distinction between *Webb's* and *Phillips*. The interest in *Webb's* could have been created through the claimant's own efforts, absent any governmental intervention.[118] *Phillips* presents an entirely different situation, where the government is solely responsible for the interest created, and the claimant is attempting to assert a property interest in something that he had no part in creating.[119] Finally, Justice Breyer warns that following *Webb's* reasoning, despite these distinctions, is to rely upon a line of reasoning which is simply not applicable given the case at hand.[120]

The Court's over-reliance on *Webb's* is an attempt to pigeonhole a unique situation into a class where it simply does not belong. In doing this, the Court not only misapplies the concept of "interest follows principal," but also unwittingly changes the concept of what property entails.[121] Furthermore, the Court defies a limit that it set for itself earlier in the *Roth* case by disregarding state definitions of property and enforcing a federalized notion of what property entails.[122] On the one hand, the Court has claimed deference for the decisions of the state courts with regard to what property entails, while on the other hand *Phillips* does nothing less than to tell those same state courts that the Court has a better notion of what property is.[123]

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116. *See, e.g., National Bd. of YMCA*, 395 U.S. at 93.

117. *See United States ex rel. T.V.A.*, 319 U.S. at 276-77.

118. *Webb's Fabulous Pharmacies*, 449 U.S. at 155-56.

119. *Phillips*, 524 U.S. at 160-61.

120. *See id.* at 180 (Breyer, J., dissenting). Justice Breyer wryly notes, "The slogan 'interest follows principal' no more answers [the] question than does King Diarmed's legendary slogan, '[T]o every cow her calf.'" *Id.* at 181-82 (Breyer, J., dissenting).

121. Many states, in examining their various approaches to the IOLTA program, dismissed the idea that any property right existed within the scheme of the program. The New Hampshire Supreme Court specifically contrasted IOLTA with the *Webb's* decision, noting: "unlike the *Webb's* case, no client would be unjustly deprived by the state of any property right. Inasmuch as the proposed trust program created a source of income that, as a practical matter, would not have been available for return to clients nor would otherwise exist." *In re* New Hampshire Bar Ass'n, 453 A.2d 1258, 1261 (N.H. 1982).

122. *See* Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972). Note Justice Stewart's oft quoted passage, "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." *Id.* at 577.

123. For another example of a state's definition of property that does not include the interest earned on IOLTA accounts, see *In re Massachusetts Bar Ass'n*, 478 N.E.2d 715, 718 (Mass. 1985) (internal citations omitted), noting: "'At present, the earnings of fund held in trust accounts can benefit neither the

Phillips represents extreme over-reliance on a misplaced one line maxim that states "interest follows principal."[124] Justice Cardozo warned against the dangers of this type of devotion to legal "one-liners."[125] The Court should have heeded his warning in its consideration of *Phillips*. By refusing to acknowledge the differences between *Phillips* and *Webb's*, the Court has expanded the realm of property into places where states had previously determined that such interests could not exist. This not only raises federalism concerns, but also expands the reach of the government under the guise of concern for the interest of individual property owners.[126] Perhaps the most disturbing element here is that given the language of the *Phillips* decision, the Court really does not know just how much damage has been done. Indeed, by adhering to the maxim of "interest follows principal," the Court convinces itself that it is striking a blow for, rather than against, the rights of individual property owners. However, by giving individuals an interest in something that they have never possessed, what the Court succeeds in doing is increasing the amount of the individual's being, which is open to takings by the government.

IV. THE HARM OF *PHILLIPS* AS SHOWN THROUGH *MOORE V. REGENTS OF THE UNIVERSITY OF CALIFORNIA*

Jeremy Bentham once noted "property and law are born together, and die together."[127] Another prominent scholar in the field of property law offered an excellent follow-up to Bentham's assertion. Margaret Radin commented, "[p]roperty is damnation as well as salvation."[128] Taking both assertions into account, one realizes the need for predictability in a system of property rights.[129] Predictability does not necessarily mean a broad notion of what

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attorney nor the client, but simply redound to the benefit of the depository institution.' In other words, '[t]here is simply no 'property' now in existence that would be taken.'" Perhaps the banks where the money is being kept, rather than the lawyers and clients involved in the creation of the IOLTA accounts, are the ones who should be suing.

124. *Phillips*, 524 U.S. at 165.

125. *See* Berkey v. Third Ave. Ry. Co., 155 N.E. 58 (N.Y. 1926). Justice Cardozo warned: "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." *Id.* at 61.

126. This hearkens back to the warnings of Richard A. Epstein, *supra* note 35. Also, Jeanne L. Schroeder notes, "Citizens, therefore, must be in a state of constant diligence, watching the government so that it does not (self-defeatingly) crush human freedom." Schroeder, *supra*, note 88, at 1568.

127. JEREMY BENTHAM, THE THEORY OF LEGISLATION 69 (1975).

128. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 961 (1982).

129. Richard A. Epstein notes,

> Permanence, stability and certainty are all regarded as virtues of a system of property rights. Indeed, David Hume, in offering his justification for the institution of

property entails, and certainly does not mean such a notion should be ever-changing. Expansion of the doctrine of property in unannounced and unpredicted bursts, such as in the *Phillips* decision, actually does more harm than good.[130] On a very basic level, the individual property owner could find it impossible to realize all of the things in which the Court declares (s)he actually has a property interest. This is disadvantageous in a number of ways, but most notably it clouds the issue of which aspects of a person's life are exposed to the government's power of eminent domain.[131]

Prior to *Phillips*, the Court took special care to recognize that the federal government did not have the power to redefine property rights.[132] *Phillips* ignores this warning and creates a property interest where one never before existed. An intriguing parallel to the situation in *Phillips* can be found in the case of *Moore v. Regents of the University of California*.[133] Both cases involve an attempt to attach a property interest to something which was created independent of the individual claiming the interest. In *Moore*, the claimant attempted to assert a property interest over a cell-line used for research that originated from blood and tissue samples taken from him during an operation.[134] The tissue samples were removed from the claimant as a routine part of the operation which he was undergoing at the time.[135] Subsequent to the removal of the tissue, the hospital informed Moore that the

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> property, spoke of the need for the stability of possession as one of its central features. Where the legal system contains clear rules, then private parties need only take into account the inherent business risks of a given transaction. They need not worry that the state will 'redefine' property rights in a way that will leave them penniless.

Richard A. Epstein, *The Seven Deadly Sins of Takings Law: The Dissents in* Lucas v. South Carolina Coastal Council, 26 LOY. L.A. L. REV. 955, 976 (1993).

130. *See generally* Epstein, *supra* note 35 (noting another such unexpected expansion of property interests—into the realm of welfare benefits).

131. *See* Richard A. Epstein, *supra* note 74. Epstein questions:

> Now why do I passionately resist the idea that somehow or other as we know more about the interactions of various kinds of natural behavior and phenomena, we should feel free to 'redefine the underlying property rights?' The answer, I think is clear from what I have said before: somebody is going to have to do the redefining.

Id. at 54.

132. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 439 (1982) (holding that "the government does not have unlimited power to redefine property rights"). In *Loretto*, ironically, Justice Marshall cites to *Webb's* for support. *Id.*

133. Moore v. Regents of the Univ. of Cal., 793 P.2d 479 (Cal. 1990).

134. *Id.* at 482.

135. *See id.* at 481.

tissue would be used for research and developed a cell-line from Moore's tissue which met with significant commercial success.[136]

Moore's claim to exert ownership over his discarded tissue was rejected by the Supreme Court of California for a number of reasons.[137] In contrast to *Phillips*, the court noted that the legislature is a better place for the redefinition of property to occur, that there are implications of extending property interests over Moore's cells, and that there is a uniqueness of the end-product resulting from the research from Moore's original tissue.[138] In noting that the state legislature should be the place where property definitions are to be defined (if they are defined at all),[139] the California Supreme Court obeyed limits previously set by the U.S. Supreme Court which are ignored in *Phillips*.[140] Also, the California Supreme Court took care to note the implications of extending the domain of property interests over a person's discarded tissue showing a concern for maintaining a stable definition of property which was nonexistent in the *Phillips* opinion.[141] Finally, the recognition of a unique end-product which is independent from the claimant in *Moore*[142] provides the basis on which the interest earned as a result of the IOLTA accounts in *Phillips* should not be considered property. The IOLTA interest is as factually and legally distinct as the patented cell line in *Moore*. Just as the cell line was the product of physician research and not of any effort whatsoever by Moore, the interest on the IOLTA accounts is solely the product of the IOLTA program and not of any individual client principal. Left by itself, the individual client principal is as unproductive as Moore's discarded tissue.

Though the facts in *Moore* are quite distinct from those in *Phillips*, *Moore* provides an example of the type of caution that should have been used

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136. *See id.*

137. *See id.* at 483.

138. *See id.* at 488-89.

139. *See id.* at 498 (Arabian, J., concurring) ("Where then shall a complete resolution be found? Clearly the legislature . . . is the proper deliberative forum.").

140. *See* Board of Regents of State Colleges v. Roth, 408 U.S. 564, 576-77 (1972).

141. *See Moore*, 793 P.2d at 488. Justice Arabian in his concurrence stated that:

> The ramifications of recognizing and enforcing a property interest in body tissues are not known, but are greatly feared—the effect on human dignity of a marketplace in human body parts, the impact on research and development of competitive bidding for such materials, and the exposure of researchers to potentially limitless and uncharted tort liability.

Id. at 498 (Arabian, J., concurring).

142. *See id.* "Finally, the subject matter of the Regents' patent—the patented cell line and the products derived from it—cannot be Moore's property. This is because the patented cell line is both factually and legally distinct from the cells in Moore's body." *Id.* at 492.

when considering whether or not to extend the definition of property in *Phillips*. Even at the state level, the court in *Moore* realized the dangers of altering the established definitions of property.[143] Had the court in *Moore* allowed there to be a property interest in the discarded tissue, it may have seemed like a victory for Moore at first. However, this would have put Moore's cells within the reach of eminent domain, and though it may seem unlikely, the cells could have been made property of the government through that power.[144] It should also be noted that under eminent domain, Moore would receive only the value of his discarded tissue (which is not likely to be very much), and not the worth of the finished research line.[145]

Moore represents the type of cautious approach which the Court should take when considering the expansion of traditional property interests into realms where they have not previously existed. It is only through this type of careful approach to the concept of property that the rights of the individual will be protected against the often overbearing needs of the state. Until *Phillips*, the Court has been somewhat careful in guarding against expanding the realm of property, though there have been occasions where "new property" has been created.[146] However, *Phillips* disturbs this delicate approach to the boundaries of property law when it finds a property interest in something that is not only intangible, but also has no positive monetary value and could not have been created but for the presence of a federal banking law.[147]

The haphazard approach to property rights in *Phillips* weakens the property rights of individuals, rather than protecting them. The strength of

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143. *Moore*, 793 P.2d at 488.

144. *See generally* Epstein, *supra* note 35 (noting that expanding the concept of property only leads to greater regulation). Once again, the idea of "No New Property" seems to be the best way to guarantee the rights of the individual.

145. *See* United States v. 564.54 Acres of Land, 441 U.S. 506, 510 (1979). When determining just compensation, a court will seek to put the owner in "as good a position pecuniarily as if his property had not been taken." *Id. See also* Olson v. United States, 292 U.S. 246, 255 (1934) (finding that the owner of the property at issue "must be made whole but is not entitled to more").

146. For example, in the same year that the *Roth* case was decided, the Court also decided *Perry v. Sinderman*, 408 U.S. 593 (1972), where it found that a property interest may in fact exist in the same type of situation where one was found not to exist in *Roth* (*Perry* focused on free speech concerns). *See also* Ruckelshaus v. Monsanto, 497 U.S. 986 (1984) (holding that property rights were extended to trade secrets, paving the way for eminent domain to come in and make said secrets property of the government). Finally, the state of Massachusetts recently decided to allow a takings claim to proceed on behalf of tobacco companies, stating that laws requiring disclosure of cigarette ingredients constitute a taking. *See* Phillip Morris, Inc. v. Harshbarger, 1998 WL 764409 (1st Cir. 1998). Once again, should a takings claim be found valid, it may well turn out to be a false sense of protection for the plaintiffs. The government will merely have to pay for disclosure of the ingredients rather than being barred from the information altogether.

147. *See* Phillips v. Washington Legal Found., 524 U.S. 156, 160-62 (1998).

property rights comes from the nature in which they are defined.[148] Prior to *Phillips*, state courts carefully considered the issue of takings with regard to the IOLTA program.[149] The *Phillips* decision undercuts the reasoning of the state courts and forces them to re-examine IOLTA programs in light of the newfound property interest identified in the majority's opinion.[150] Though this may seem to be a blow for the individual property owner, the *Phillips* decision shows just how frail property rights are in these politically charged times. The individual does not even enjoy the security of the democratic process in deciding exactly what is and is not considered to be property. Rather, the decision is left to the judiciary, and not necessarily the judiciary of the state, but to the whims of the Supreme Court.

A close examination of *Phillips* reveals that there are absolutely no individual rights threatened by the IOLTA funding scheme.[151] However, in a recent press release, Washington Legal Foundation Chief Counsel Richard Samp described the *Phillips* decision by stating: "Today's decision is a major victory for property owners everywhere. Government at all levels, as well as lawyers handling client money, are now on notice that private property rights must be respected."[152] Samp's assertions are short-sighted. IOLTA programs could be sustained quite easily under a takings analysis identical to that of *Penn Central Transportation Company v. City of New York*.[153] Thus, what has been achieved is a greater realm in which the government can utilize its power of eminent domain. True, the takings clause will provide "just compensation"

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148. Once again, Jeremy Bentham provides perspective: "As regards property, security consists in receiving no check, no shock, no derangement to the expectation founded on the laws." BENTHAM, *supra* note 127, at 69. If one does not know exactly what property entails, it is hard to be secure in one's property rights.

149. *See, e.g.*, *In re* Interest on Trust Accounts, 356 So. 2d 799 (Fla. 1978); *In re* Minnesota State Bar Ass'n, 332 N.W.2d 151 (Minn. 1982); *In re* Massachusetts Bar Ass'n, 478 N.E.2d 715 (Mass. 1985); *In re* New Hampshire Bar Ass'n, 453 A.2d 1258 (N.H. 1982). See also *Washington Legal Found. v. Massachusetts Bar Found.*, 993 F.2d 962 (1st Cir. 1993) and *Cone v. State Bar of Florida*, 819 F.2d 1002 (11th Cir. 1987) for examples of courts rejecting property interest claims similar to those in *Phillips*.

150. *See Phillips*, 524 U.S. at 172.

151. *See* Brennan J. Torregrossa, Washington Legal Foundation v. Texas Equal Access to Justice Foundation: *Is There an Iota of Property Interest in IOLTA?*, 42 VILL. L. REV. 189 (1997). "A recognized property interest sufficient to sustain a constitutional challenge could not possibly attach at any stage because the interest was never generated in the first place, and consequently, the clients had no reasonable expectation to earn such interest." *Id.* at 218.

152. Washington Legal Foundation, *Litigation Update*, June 15, 1998.

153. Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978). Since the actual economic impact of the "taking" is minimal on the client, there are no investment-backed expectations for the principal at issue, and the public welfare concerns of maintaining effective legal services for the indigent are great, finding a property interest for the client becomes moot in light of the *Penn Central* test. *See id.* at 127.

whenever an individual falls victim to this power. However, when the "property" at issue is negligible from a fiscal standpoint, the just compensation requirement offers little solace in terms of protection for the rights of the individual.

CONCLUSION

This discussion would be incomplete without some attention to the effects which *Phillips* will have on the provision of effective legal services to the indigent. IOLTA accounts provide a significant amount of funding each year to Legal Aid offices throughout the nation.[154] *Phillips* could very easily cripple the nationwide funding scheme for these Legal Aid offices. This, to be sure, is a steep price to pay for the satisfaction of knowing that the government will not use a negligible amount of interest for any purpose whatsoever. However, as mentioned, the overwhelming need for IOLTA programs would probably allow such interest to be taken in light of *Penn Central*.[155] Thus, while a new "property interest" has been created, it does not stand much of a chance of being protected from governmental infringement.

While limiting government is an admirable and worthwhile goal, it is one that must be approached with extreme caution. The contract between the individual and the state is a tenuous one indeed, and what may seem to benefit the individual at first may actually be detrimental in the long run.[156] Perhaps it would have been better for the Supreme Court to believe in "alchemy" and admit that through IOLTA the government actually did create "something from nothing."[157] By looking the "gift horse" of IOLTA in the mouth, the Washington Legal Foundation has shaken the fundamental definitions of property and set the Court on a road that may well lead to the notion that the government can "take" whatever it needs, so long as it can afford the price, which in the case of *Phillips* was nothing at all.

Nick Goldstein

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154. *See* W. Frank Newton & James W. Paulson, *Constitutional Challenges to IOLTA Revisited*, 101 DICK. L. REV. 549 (1997). "Nationwide, the programs currently generate about $100 million a year, second only to federal Legal Services Corporation (LSC) grants as a source of funding for legal services to low-income Americans. IOLTA funds help provide basic legal services to some 1,700,000 Americans in a given year." *Id.* at 550.

155. *See generally* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

156. It all comes back to "no 'new property'." Epstein, *supra* note 35, at 747-48.

157. Washington Legal Found. v. Texas Equal Access to Justice Found., 94 F.3d 996, 1000 (5th Cir. 1996).