SUPREME COURT OF THE UNITED STATES

No. 96–1578

THOMAS R. PHILLIPS, ET AL., PETITIONERS *v.* WASHINGTON LEGAL FOUNDATION ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 15, 1998]

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER and JUSTICE GINSBURG join, dissenting.

The Question Presented is whether "interest earned on client trust funds," which funds would "not earn interest" in the absence of a special "IOLTA program," amounts to a "property interest of the client or lawyer" for purposes of the Fifth Amendment's Takings Clause. Brief for Petitioners i; Brief for Respondents i; see U. S. Const., Amdt. 5 ("nor shall private property be taken for public use, without just compensation").

The Question Presented is premised on four assumptions: First, that lawyers sometimes hold small amounts of clients' funds for short periods of time; second, that because of federal tax and banking rules and regulations, such funds normally could not earn interest during that time; third, that state IOLTA rules require lawyers to place such funds in a special account where, mixed with other funds, they will earn interest; and fourth, that IOLTA rules require that interest earned on these funds is distributed to groups that represent low-income individuals rather than to the lawyers or their clients who own the funds.

Insofar as factual circumstances such as these raise a Fifth Amendment question, I agree with JUSTICE SOUTER

that the question is whether Texas, by requiring the placing of the funds in special IOLTA accounts and depriving the funds' owners of the subsequently earned interest has temporarily "taken" what is undoubtedly "private property," namely, the client's funds, *i.e.*, the principal, without "just compensation." To answer this (appropriately framed) question, the parties and the lower courts would have to consider whether the use of the principal in the fashion dictated by the IOLTA rules amounts to a deprivation of a property right, and, if so, whether the government's "taking" required compensating the owner of the funds, where it did not deprive the funds' owners of interest they might have otherwise received. But the Court of Appeals did not address this latter question. See *ante*, at 8 (SOUTER, J., dissenting).

Although I believe it wrong to separate Takings Clause analysis of the property rights at stake from analysis of the alleged deprivation, I have considered the Question Presented on its own terms. And, on the majority's assumptions, I believe that its answer is not the right one. The majority's answer rests upon the use of a legal truism, namely, "interest follows principal," and its application of a particular case, namely, *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155 (1980). See *ante*, at 8–9, 13–14. In my view, neither truism nor case can answer the hypothetical question the Court addresses.

The truism does not help because the Question Presented assumes circumstances that differ dramatically from those in which interest is ordinarily at issue. Ordinarily, principal is capable of generating interest for whoever holds it. Here, by the very terms of the question, we must assume that (because of pre-existing federal law) the client's principal could not generate interest without IOLTA intervention. That is to say, the client could not have had an expectation of receiving interest without that intervention. Nor can one say that IOLTA rules excluded,

or prevented, the client's use of his principal to generate interest that would otherwise be his. Under these circumstances, what is the property right of the client that IOLTA could have "confiscat[ed]"? *Ante*, at 9.

The most that Texas law here could have taken from the client is not a right to use his principal to create a benefit (for he had no such right), but the client's right to keep the client's principal sterile, a right to prevent the principal from being put to productive use by others. Cf. *National Bd. of YMCA* v. *United States*, 395 U. S. 85, 92–93 (1969) (noting that government deprivation of property requiring compensation normally takes from an owner *use* that the owner may otherwise make of the property). And whatever this Court's cases may have said about the constitutional status of such a right, they have *not* said that the Constitution forces a State to confer, upon the owner of property that cannot produce anything of value for him, ownership of the fruits of that property should that property be rendered fertile through the government's lawful intervention. Cf., *e.g.*, *United States ex. rel. T.V.A.* v. *Powelson*, 319 U. S. 266, 276 (1943) (no need to pay for value that the "power of eminent domain" itself creates); *New York* v. *Sage*, 239 U. S. 57, 61 (1915) (city need not pay for value added by unifying parcels where unification impracticable absent eminent domain); *United States* v. *Twin City Power Co.*, 350 U. S. 222, 228 (1956) (to require payment for value created by government "would be to create private claims in the public domain"). Thus the question is whether "interest," *earned only as a result of IOLTA rules* and earned upon otherwise *barren* client principal "follows principal." The slogan "interest follows principal" no more answers *that* question than does King Diarmed's legendary slogan, "[T]o every cow her calf." A. Birrell, Seven Lectures on The Law and History of Copyright in Books 42 (1889) (internal quotation marks omitted). Cf. *Berkey* v. *Third Avenue Railway Co.*, 244 N. Y. 84, 94, 155

N. E. 58, 61 (1926) (Cardozo, J.) ("Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it").

Nor can *Webb's Fabulous Pharmacies* answer the Question Presented. But for state intervention the principal in that case could have, and would have, earned interest. See 449 U. S., at 156–157, and nn. 1, 2 (state law required party to deposit funds with court, authorized court to hold the funds in an interest-bearing account, and allowed the court to claim the interest as well as a fee). Here, federal law ensured that, in the absence of IOLTA intervention, the client's principal would earn nothing. *Webb's Fabulous Pharmacies* holds that a state law which places *that* ordinary kind of principal in an interest-bearing account (which interest the State unjustifiably keeps) takes "private property . . . . for public use without just compensation." That holding says little about *this* kind of principal, principal that otherwise is barren. Nor do cases that find a private interest in property with virtually no economic value tell us to *whom* the fruits of that property belong when that property bears fruit through the intervention of another. *Ante*, at 12 (citing *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419 (1982); *Hodel* v. *Irving*, 481 U. S. 704, 715 (1987)).

If necessary, I should find an answer to the Question Presented in other analogies that this Court's precedents provide. Land valuation cases, for example, make clear that the value of what is taken is bounded by that which is "lost," not that which the "taker gained." *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 195 (1910) (opinion of Holmes, J.); see also *United States* v. *Miller*, 317 U. S. 369, 375 (1943) ("[S]pecial value to the condemnor . . . must be excluded as an element of market value"); *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 75–76 (1913). This principle suggests that the government must pay the current value of condemned land, not

the added value that a highway it builds on the property itself creates. It also suggests that condemnation of, say, riparian rights in order to build a dam, must be followed by compensation for these rights, not for the value of the electricity that the dam would later produce. Cf. *id.*, at 76; *Twin City Power Co.*, *supra*, at 226–228; *United States* v. *Appalachian Elec. Power Co.*, 311 U. S. 377, 423–424, 427 (1940). Indeed, no one would say that such electricity was, for Takings Clause purposes, the owner's "private property," where, as here, in the absence of the lawful government "taking," there would have been no such property.

These legal analogies more directly address the key assumption raised by the Question Presented, namely, that "absent the IOLTA program," no "interest" could have been earned. I consequently believe that the interest earned is *not* the client's "private property."

I respectfully dissent.