1983

"Taking" a Constitutional Look at the State Bar of Texas Proposal to Collect Interest on Attorney-Client Trust Accounts

Thomas E. Baker
Florida International University College of Law

Robert E. Wood Jr.
Texas Tech University

TEXAS TECH LAW REVIEW

VOLUME XIV 1983 NUMBER 2

"TAKING" A CONSTITUTIONAL LOOK AT THE STATE BAR OF TEXAS PROPOSAL TO COLLECT INTEREST ON ATTORNEY-CLIENT TRUST ACCOUNTS

by
*Thomas E. Baker**
and
*Robert E. Wood, Jr.***

I. INTRODUCTION

In December 1981 a special committee of the State Bar of Texas was commissioned to study the possibility of instituting a program to generate interest on clients' trust accounts for the benefit of bar-related public service projects.[1] The committee was somewhat disarmingly called the "Client Protection Committee,"[2]

* Associate Professor of Law, Texas Tech University; B.S., Florida State University, 1974; J.D., Holland Law Center, University of Florida, 1977.

** Professor of Law and Associate Dean, Texas Tech University; B.A., Texas Tech University, 1965; J.D., Vanderbilt University, 1968.

1. The Client Protection Committee appointed by State Bar President Wayne Fisher was composed of: Edgar H. Keltner, Jr., Fort Worth (chairman); James W. Wray, Jr., Corpus Christi (vice-chairman); Robert H. Thomas, Dallas (board advisor); Tom Fleming, Brownsville (alternate board advisor); John Gilbert, Angleton; Bob Roberts, Austin; Pat Peyton, Beaumont; W. John Glancy, Dallas; John C. Akard, El Paso; Graham H. McCullough, Harlingen; Robert L. Byrd and Robert L. Sonfield, Jr., Houston; Robert E. Wood, Lubbock; and Richard B. Moore, San Antonio. Although coauthor Wood was a member of the committee, the views expressed here are the authors' alone.

2. There is some explanation for the seeming misnomer. In the original charge to the committee, the "Florida Plan" of interest on trust accounts was described as augmenting the Florida Bar's Clients' Security Fund. This was later found to be erroneous. Indeed, support of the fund was one of the purposes denied to the Florida plan. *See infra* note 23. Members of the committee originally understood that their purpose was to find a funding source for the Texas Client Security Fund. Soon, however, it became evident that the com-

but the focus of its attention soon became the Interest on Trust Accounts programs recently instituted in Florida[3] and California.[4] In its deliberations[5] on a Texas Interest on Trust Accounts Program (TEX-IOTA) the committee recognized the existence of numerous complex issues of tax law,[6] trust law,[7] professional responsibility,[8] constitutional law,[9] and even more complicated questions of politics,[10] public relations,[11] and practical implementation.[12] Nevertheless, on September 8, 1982, the committee unanimously endorsed a report recommending the adoption of a program under which interest on attorney-client trust accounts that are small in

---

mittee was to study the implementation of the interest on trust accounts program to support a variety of bar-related public service projects. The original misnomer is doubly ironic because the proposed Texas plan raises several difficult questions concerning the constitutional rights of clients.

3. *See In re* Interest on Trust Accounts, 402 So. 2d 389 (Fla. 1981); FLA. STAT. ANN., Integration Rule 11.02(4)(d) (West Supp. 1982). The Florida Plan is described from several points of view in the February 1982 issue of *The Florida Bar Journal. See also infra* Appendix B (comparing Florida plan with those of California, Idaho, and Maryland).

4. *See* CAL. BUS. & PROF. CODE §§ 6210-6228 (West Supp. 1982). *See also infra* Appendix B (comparing California plan with those of Florida, Idaho, and Maryland).

5. The committee met three times prior to the September 8, 1982, telephone conference call during which the report was adopted for submission to the Executive Committee of the Texas Bar. Membership on the committee changed slightly; Ed Keltner was unable to serve and Jim Wray became chairman and Robert E. Wood was appointed vice-chairman. Thomas H. Watkins became the new board advisor and John N. Jackson, Harold F. Kleinman, and Robert C. Morton, all of Dallas, were appointed as new members after the adoption of the September 8, 1982, report.

6. These include attribution of the income to the client under the assignment of income doctrine. *See* Helvering v. Horst, 311 U.S. 112, 117-20 (1940); Lyon & Eustice, *Assignment of Income: Fruit and Tree as Irrigated by the P.G. Lake Case*, 17 TAX L. REV. 293 (1962); Yohlin, *Assignment and Deflection of Income*, 20 INST. ON FED. TAX'N 147 (1962).

7. A potential conflict of interest problem exists when an attorney is forced to decide whether to place his client's funds in the IOTA account with interest going to the bar designate or in another interest-bearing account from which the client would receive the proceeds. *In re* Interest on Trust Accounts, 402 So. 2d 389, 399 (Fla. 1981) (Boyd, J., dissenting); Letter from Chief Justice Joseph Branch, Supreme Court of North Carolina, to John Wishart Campbell, President, North Carolina State Bar (April 13, 1982).

8. If the client has a constitutionally protected right in the interest on his funds, the attorney could not, of course, use them or direct their disbursal to the bar designate. *See supra* note 7; State Bar of Texas, Rules and Code of Professional Responsibility DR 9-102 (1973).

9. Due process and "taking" questions dominated the committee's concern.

10. Should the implementing authority be the supreme court or the legislature? Will the banks or the consumer bar oppose it?

11. How can the program be sold to the bar? To the legislature? To the public?

12. Should the program be voluntary or mandatory? What organization should be the recipient? What programs should be supported? What efforts would be needed to assure that existing bank-attorney relationships are not strained or altered?

amount or held for short duration would be paid to a charitable organization affiliated with the State Bar of Texas.[13] Despite the unanimous consent to the report, at least two members of the committee noted serious reservations concerning the constitutionality of the program as recommended.[14] We will consider the constitutional issues in this article.

II. IOTA DEVELOPMENT

TEX-IOTA[15] had its genesis long ago and far away. During the 1960s the search for sources to fund the operations of the organized bar and delivery of legal services led the bars of several Australian[16] and Canadian[17] jurisdictions to develop the IOTA concept.[18] In December 1976, after five years of study, the Florida Bar filed a formal petition with the Florida Supreme Court requesting the adoption of a program to utilize interest on clients' trust funds for public programs designed to improve the administration of justice.[19] After modifications dictated by legal obstacles

13. It was felt that neither the State Bar of Texas nor the Texas Bar Foundation would be an appropriate intermediary for the program because of federal tax problems. The vehicle suggested for preliminary investigation was Legal Services to the Poor in Texas, Inc., an essentially dormant nonprofit organization affiliated with the State Bar of Texas.

14. Vice-chairman Robert E. Wood and member Bob Roberts, the only members of a subcommittee appointed on February 19, 1982, to study the constitutional and statutory aspects of and property rights involved in the program, again raised their concern about constitutional issues, but approved the report.

15. In an interestingly subtle and probably subconscious fashion, the Florida Supreme Court changed from identifying the subject of the program as "interest on clients' trust funds," *In re* Interest on Trust Accounts, 356 So. 2d 799, 800 (Fla. 1978), to "interest on lawyers' trust accouts," *In re* Interest on Trust Accounts, 402 So. 2d 389, 389 (Fla. 1981). To avoid problems of semantics we have chosen the more neutral and now widely used term "interest on trust accounts" to describe the subject matter of these programs and have adopted TEX-IOTA as an acronym.

16. The Australian States of Victoria, New South Wales, South Australia, Queensland, and the Australian Capital Territory have developed programs. Comment, *A Source of Revenue for the Improvement of Legal Services, Part I: An Analysis of the Plans in Foreign Countries and Florida Allowing the Use of Clients' Funds Held by Attorneys in Non-Interest-Bearing Trust Accounts to Support Programs of the Organized Bar*, 10 ST. MARY'S L.J. 539, 542-43 (1979). Victoria was the first, in 1964. *Id.* at 543.

17. Ontario, Alberta, Manitoba, New Brunswick, Prince Edward Island, Nova Scotia, Saskatchewan, and British Columbia. *Id.* at 545 n.57.

18. For an excellent history of the development of IOTA programs and the Florida plan through the 1978 order, see generally *id.* at 550-63. *See also* England & Carlisle, *History of Interest on Trust Accounts Program*, 56 FLA. B.J. 101, 101-03 (1982) (developments up to 1981 revisions in Florida).

19. *In re* Interest on Trust Accounts, 356 So. 2d 799, 800 (Fla. 1978).

and public comment, a final plan was adopted in Florida, effective September 1, 1981.[20] The Florida plan provides that, on a voluntary basis, attorneys and law firms may establish interest-bearing checking accounts with clients' funds which are nominal in amount or to be held for a short period of time with the interest (net of charges) to be paid quarterly to the Florida Bar Foundation, Inc., for use in providing legal aid to the poor, funding student loans, and improving the administration of justice.[21] Necessary to implementation of the plan was procurement of regulatory approval in three critical areas: taxability of the income;[22] the charitable nature of the purposes to which the funds would be put;[23] and recognition that banks could open such NOW accounts.[24] The Internal Revenue Service provided the first two clearances[25] and the Board

---

20. *In re* Interest on Trust Accounts, 402 So. 2d 389, 397 (Fla. 1981). By October 1982 fewer than 2000 attorneys had joined the Florida plan, but $350,000 had been collected. Rinaman, *President's Page*, 56 FLA. B.J. 677, 677 (1982).

21. FLA. STAT. ANN., Integration Rule 11.02(4)(d) (West Supp. 1982). *See* Barker, *Dispersing the Revenue: Present Options and Needs*, 56 FLA. B.J. 122, 123-26 (1982).

22. The assignment of income doctrine provides that income from property is taxable to the owner of the property. The doctrine was unveiled in Lucas v. Earl, 281 U.S. 111 (1930), and protects against shrinkage of a tax base which might occur through attribution of taxable earnings to entities at a lower marginal tax rate. The key to determining tax liability is ascertaining who has control over the fund, who directs that the fund produce income, and who determines the recipient(s) of the disbursements. *See* Helvering v. Horst, 311 U.S. 112 (1940).

23. The Florida plan originally sought approval to use the funds for seven purposes: adequate delivery of legal services to all members of the public; augmentation of the Clients' Security Fund; funding of better grievance procedures; providing legal aid to the poor; providing student loans; improving the administration of justice; and such other programs for the benefit of the public as specifically approved by the court from time to time. *In re* Interest on Trust Accounts, 356 So. 2d 799, 811 (Fla. 1978). Upon receiving opposition from the Internal Revenue Service, the first three of the seven proposed uses were withdrawn. *See In re* Interest on Trust Accounts, 372 So. 2d 67, 68 (Fla. 1979).

24. NOW accounts were not widely available in 1978 when the Florida plan was first adopted. By September 1981 they became available in most instances when the "entire beneficial interest" in the account belonged to an individual or a nonprofit entity. *See infra* notes 28 & 39.

25. By removing client control and shifting the election to participate from the client to the attorney, the Florida Bar Foundation was able to obtain the desired tax treatment, namely, that the interest generated on these accounts was not includable in the gross income of the client. *See* Rev. Rul. 81-209, 1981-2 C.B. 16. Florida withdrew its request to use funds for the Clients' Security Fund, improvement of grievance procedures, and delivery of legal services to all members of the public. *See generally* Rev. Rul. 71-506, 1971-2 C.B. 233 (city bar association that primarily directs its activities to the promotion and protection of the practice of law may not be reclassified as an exempt charitable or educational organization under I.R.C. § 501(c)(3)); Rev. Rul. 71-504, 1971-2 C.B. 231 (city medical society that primarily directs its activities to promotion of common business purpose of members may

of Governors of the Federal Reserve System, construing regulations[26] under the new Depository Institutions Deregulation and Monetary Control Act,[27] provided the last.[28]

During the extended period of time between presentation and implementation of the Florida plan other states moved in the same direction.[29] In 1981 the California Legislature enacted a similar plan.[30] The California plan is mandatory with legal aid as the sole

---

not be reclassified as exempt educational or charitable organization under I.R.C. § 501(c)(3)). *But see* Virginia Professional Standards Review Found. v. Blumenthal, 466 F. Supp. 1164 (D.D.C. 1979) (nonprofit corporation established and performing services as professional standards review organization pursuant to Social Security Act is entitled to tax-exempt status); Kentucky Bar Found., Inc. v. Commissioner, 78 T.C. 65 (1982) (nonprofit organization created to accumulate funds to acquire land and construct building for bar associaton did not destroy tax-exempt status of bar foundation); Professional Standards Review Org., Inc. v. Commissioner, 74 T.C. 240 (1980) (nonprofit organization created to ensure economical health care and reduce unnecessary spending did not destroy tax-exempt status).

26. 12 C.F.R. § 217.157 (1982).

27. Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, §§ 303, 306, 94 Stat. 132, 146-47 (codified as amended at 12 U.S.C. § 1832(a) (Supp. IV 1980)).

28. Letter from Michael Bradfield to Donald M. Middlebrooks (October 15, 1981), *reprinted in* Middlebrooks, *The Interest on Trust Accounts Program—Mechanics of its Operation*, 56 FLA. B.J. 115, 117 (1982).

29. During this period the state bars in Georgia, Hawaii, Idaho, Illinois, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, Ohio, and Pennsylvania appointed committees to study the IOTA concept. ABA STAFF TASK FORCE, INTEREST ON CLIENT TRUST FUNDS, CHRONOLOGICAL SUMMARY OF INTEREST ON CLIENT TRUST FUNDS (December 1, 1981) [hereinafter cited as CHRONOLOGICAL SUMMARY]. Massachusetts and New Jersey recommended that no program be implemented because computer technology was available to permit allocation of interest to individual clients. *Id.*

North Carolina is the only state thus far to reject IOTA on the basis of unconstitutionality. The North Carolina Supreme Court refused to certify proposed amendments to Canon 9 of the Code of Professional Responsibility and the Rules of the North Carolina State Bar on the grounds that without notice to the clients the regulations could be:

> (1) in conflict with the taking of property clause of the Fifth Amendment to the United States Constitution, which is made applicable to the states by the Fourteenth Amendment, under the holding of the United States Supreme Court in Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980);
>
> (2) in conflict with the taking of property provision contained in Article I, Section 19 of the North Carolina Constitution, under the holding of the Supreme Court of North Carolina in McMillan v. Robeson County, 262 N.C. 413 (1964); and
>
> (3) contrary to public policy relating to the fiduciary relationship between attorney and client, under the holding of the Supreme Court of North Carolina in Hall v. Shippers Express, 235 N.C. 38 (1951).

Letter from Chief Justice Joseph Branch, Supreme Court of North Carolina, to John Wishart Campbell, President, North Carolina State Bar, at 12 (April 13, 1982).

30. CAL. BUS. & PROF. CODE §§ 6210-6228 (West Supp. 1982).

recipient.[31] While the ABA has not officially taken a position on these programs, an ABA Staff Task Force on Interest on Client Trust Funds has been formed and is monitoring and supporting proposals of other state and local bar associations.[32] A recent Formal Opinion of the ABA Standing Committee on Ethics and Professional Responsibility concluded that the Model Code of Professional Responsibility permits lawyers to participate in such programs.[33]

After reviewing the plans used in other jurisdictions, the Texas Client Protection Committee made seven specific recommendations to the Executive Committee of the State Bar in September 1982:[34]

(1) Under the program, each attorney would decide, as is presently the case, whether trust funds are to be invested at interest for a client. Only funds that are sufficiently small in amount or to be held for such a short period that they could not reasonably be invested for the benefit of the client would be included in the program.

(2) The program should be created by rule of the Supreme Court of Texas as done by the Supreme Court of Florida. In the alternative, the program should be enacted by the Texas Legisla-

---

31. *Id.* For a comparison of the plans now in effect in California, Florida, Idaho, and Maryland, see Appendix B.

32. A report to the Board of Governors of the American Bar Association dated July 26, 1982, offers the following breakdown of action by the states:

SUMMARY STATUS RECAP July 15, 1982

Approved by court/legislature	Cal., Fla., Idaho, Md.
Endorsed by bar	Colo., Hawaii, Ill., Me., Mass., Minn., N.Y., Or., Va.
No action	La., Miss., Utah, Vt.
Disapproved	Ga., N.C., W.Va., N.J.
Under study	Alaska, Ark., Ariz., Conn., Del., Ind., Iowa, Kan., Ky., Mich., Mo., Mont., Neb., Nev., N.D., N.J., N.M., N.Y., Ohio, Okla., Pa., R.I., S.C., S.D., Tenn., Tex., Wash., Wis., Wyo.

ABA TASK FORCE AND ADVISORY BOARD, INTEREST ON LAWYER TRUST ACCOUNTS, REPORT TO THE BOARD OF GOVERNORS app. C (July 26, 1982). New Jersey rejected the idea in October 1979 because of available technology, but is now restudying. *See id.* at C-3; CHRONOLOGICAL SUMMARY, *supra* note 29.

33. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 348 (1982).

34. The vote on the recommendations was made by conference telephone call before the report had been fully circulated. At least one conferee, vice-chairman Robert E. Wood, received a copy of the report only as the conference call was being placed.

ture as was done by the California Legislature.[35]

(3) If possible, the program should be mandatory for all attorneys. Under a mandatory program, an attorney who did not place client trust funds in an account bearing interest for the benefit of the client would be required to place trust funds in an interest-bearing NOW account with the proceeds paid to a charitable organization described in paragraph (5) below. If it is not possible to establish a mandatory program, the program should be voluntary with the State Bar actively encouraging participation.

(4) There should be an exception for trust funds that arise from the deposit of drafts that are not fully credited within a short period (under Federal Reserve or other comparable rules) to the bank in which the drafts are deposited. Once such drafts have been fully credited, the resulting trust funds (if they have not already been paid out) should be subject to the program.

(5) The recipient of the interest payments on the trust funds should be a tax-exempt charitable organization controlled by a board of directors comprised of the Chief Justice of the Texas Supreme Court, the President of the State Bar, and other members appointed by the President of the State Bar and approved by the Board of Directors of the State Bar.

(6) Funds generated under the program should be used for three purposes: (a) to provide legal services to the poor; (b) to provide funds for the client security fund; and (c) to improve grievance procedures.[36]

(7) The program should be implemented only after receiving a private ruling from the Internal Revenue Service that clients will

---

35. The Executive Committee of the State Bar later decided that implementation through the supreme court would be impracticable, and the matter was referred to the State Bar staff to draft legislation for inclusion in the State Bar's legislative package for the 1983 Legislature. The proposed draft, attached as Appendix A, was for legislative enactment with supreme court implementation. It also changed the purposes for which funds could be used. *See infra* note 36. The changes, made after this article was submitted for publication, are not fully incorporated herein; however, they do not affect the article's constitutional analysis in any substantial way.

36. After submission of this article, a proposed draft of legislation enacting TEX-IOTA was presented to the State Bar Board of Directors. *See infra* Appendix A. It requires the supreme court to promulgate rules and regulations to implement the program. The bill follows the committee recommendations except it defines as its purposes: (a) legal services to the indigent in civil matters, (b) improvement of the administration of justice, and (c) other law-related programs for the benefit of the public as are expressly approved from time to time by the supreme court for exclusively public purposes. *Id.*

not incur tax liability on the interest involved. It is expected that this ruling can be obtained since the Internal Revenue Service has already issued a published ruling to this effect regarding the Florida program.[37]

This is the present status of TEX-IOTA. We believe that there are three critical issues essential to the operation of TEX-IOTA to which the committee did not give sufficient attention. The first concerns the theoretical underpinnings of the plan—the inability or impracticability of allocating small amounts of interest to the individual client.[38] The second issue involves the legal avail-

---

37. The committee also recognized that an additional ruling should be obtained because the last two charitable purposes proposed in paragraph (6) were not approved in the Florida program.

38. As represented to the Florida Supreme Court in 1982:

> The basic premise underlying the Court's adoption of the Interest on Trust Account Program is that lawyers' commingled trust accounts are largely made up of multiple deposits which are held for a short period of time and are so small in amount that it is not practicable to allocate earnings on the account to the individual client.

Response Brief of the Florida Bar Foundation to the Written Submissions of Interested Persons at 2, *In re* Interest on Trust Accounts, 402 So. 2d 389 (Fla. 1981). Advances in technology may undermine this premise. Indeed, some jurisdictions have concluded that the present availability of just this capacity is sufficient reason to reject the IOTA program. Maryland, Massachusetts, and New Jersey, as early as 1978, concluded that computerized subaccounting was possible to allocate interest to individual clients. *See supra* note 32.

Almost no investigation was done by the Texas Client Protection Committee on this issue, even though it was raised on at least three occasions. The matter of technological elimination of the allocation difficulties was raised at the second meeting of the Client Protection Committee in Austin on April 30, 1982. Then-president-elect of the State Bar Orrin Johnson suggested that the committee expedite its proposal because technology could undo the program sometime in the near future. It was raised again in a letter of May 3, 1982, from Robert E. Wood to James W. Wray with copies to the committee. The letter read, in part:

> I submit to you that we have done precious little investigation to ascertain if that premise is correct. It would be embarrassing to all concerned if we got deeply into this project only to have a series of bankers testify that technology has already rendered this basic premise false. In 1978, the Maryland Bar Association studied the possibility of implementing an IOTA program and concluded that the technology was then available. In fact, detailed plans were submitted by banks and savings and loan associations. If I heard Orrin Johnson correctly, he suggested at the very least that we'd better hurry because technology could undo the program sometime in the near future.

Letter from Robert E. Wood to James W. Wray, Jr. (May 3, 1982). No one was commissioned to study the matter. At the committee's meeting in Austin on May 26, 1982, information from a major bank holding company in Texas that the technology was available was discounted as inconclusive, without any new or comprehensive research being commissioned.

This impracticability justification resembles the common-law property doctrine of confusion, defined as an intermixture of goods in which the property can no longer be identified with an owner. Unlike the common-law concept which gave each owner a pro rata share of

ability of interest-bearing NOW accounts to serve as vehicles for the plan.[39] The third issue concerns constitutional rights of the cli-

---

the mixture, the Bar would give all to a third party. Furthermore, the doctrine (not the justification) has no application to money. R. BROWN, THE LAW OF PERSONAL PROPERTY § 6.8, at 62-63 (1975). *See also* Farrow v. Farrow, 238 S.W.2d 255 (Tex. Civ. App.—Austin 1951, no writ) (commingling of money not possible when amount owned by each claimant is known).

39. Obviously, an interest-bearing account with demand-like features is essential to the establishment of IOTA. Florida obtained an opinion of General Counsel for the Board of Governors of the Federal Reserve System that their program was eligible for NOW accounts. *See supra* note 28. The conclusion contained in that opinion that "[s]ince no entity other than the foundation has any interest to the income derived from funds maintained under the Program, it would appear that . . . the Foundation hold [sic] the entire beneficial interest to the funds" is not one which is easily reconciled with statutory language and policy. *See id.*

Since the post-depression amendments of the Federal Reserve Act and the creation of the Federal Deposit Insurance Corporation, insured banks (most banks in the United States) have been proscribed from paying interest on checking accounts. *See* 12 U.S.C. §§ 371a, 1828(g)(1) (Supp. IV 1980). This was one of the historic distinctions between commercial banks and savings or thrift institutions: the widespread offering of demand accounts by banks and the general absence of third party devices in the savings or thrift institutions. In 1970 Consumers Savings Bank of Worcester, Massachusetts, developed an account which would allow its customers to transfer money from their *savings* account to third party payees by means of a negotiable order of withdrawal. Consumers Sav. Bank v. Commissioner of Banks, 361 Mass. 717, 282 N.E.2d 416 (1972). In mid-1973 Connecticut became the first state to allow "thrifts" to offer checking accounts by legislative action. *See* CONN. GEN. STAT. ANN. § 36-104d (West 1981). Other New England states followed. To meet this challenge 12 U.S.C. § 1832 was adopted in 1973 to permit NOW accounts by insured institutions in Massachusetts and New Hampshire. Pub. L. No. 93-100, § 2, 87 Stat. 342 (1973), *amended by* Pub. L. No. 96-221, §§ 303, 306, 94 Stat. 132, 146-47 (1980). Connecticut, Rhode Island, Maine, and Vermont were included in 1976. Pub. L. No. 94-222, § 2(a), 90 Stat. 197 (1976), *amended by* Pub. L. No. 96-221, §§ 303, 306, 94 Stat. 132, 146-47 (1980). The provision subsequently was extended to New York, Pub. L. No. 95-630, § 1301, 92 Stat. 3712 (1978), *amended by* Pub. L. No. 96-221, §§ 303, 306, 94 Stat. 132, 146-47 (1980), and New Jersey, Pub. L. No. 96-161, § 106, 93 Stat. 1235 (1979), *amended by* Pub. L. No. 96-221, §§ 303, 306, 94 Stat. 132, 146-47 (1980). This privilege was subsequently extended nationwide, effective December 31, 1980. *See* Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, §§ 303, 306, 94 Stat. 132, 146-47 (1980) (codified as amended at 12 U.S.C. § 1832 (Supp. IV 1980)). The statute specifies that the NOW account privilege "shall apply only with respect to deposits or accounts which consist solely of *funds in which the entire beneficial interest* is held by one or more individuals or by an organization which is operated primarily for religious, philanthropic, charitable, educational, or other similar purposes and which is not operated for profit." 12 U.S.C. § 1832(a)(2) (Supp. IV 1980) (emphasis added).

Does the conclusion reached by the Federal Reserve that IOTA funds may be maintained in NOW accounts suggest that the client has no beneficial interest in the account? Such a result would be suspect. The Florida Attorney General appears to have indulged in the same *ipse dixit* technique rejected by the United States Supreme Court in Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980), in concluding that the Foundation is the owner of the beneficial interest because it has the right to income, and it

ents. We are confident that in the political arena the first two issues will play a prominent part in the TEX-IOTA debate. We are not so sure about the constitutional issues. In this article, we hope to begin to give them the attention that issues of such importance deserve.

III. CONSTITUTIONAL ANALYSIS OF TEX-IOTA

In taking a constitutional look at the Bar's proposal to collect interest on attorney-client trust accounts, our looking glass is federal, not state, constitutional law.[40] Within the federal perspective, we will describe general constitutional restraints in passing fashion and focus chiefly on the applicable "taking" analysis. Our theme is not that TEX-IOTA's scheme is constitutional or unconstitutional. Our limited purpose is to identify and describe the constitutional issues which should be an important part of any thorough evaluation of such a proposal. These issues largely have been overlooked in other jurisdictions and we are concerned that Texas should not follow similar shortcuts. Justice Holmes' warning seems most apposite: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[41]

---

has the right to income because the program so provides.

One interesting aspect of this is worthy of note. If the Board of Governors will approve NOW accounts where the interest is to be paid to a nonprofit organization, then a new method of charitable giving has been created. Any partnership or corporation for profit could place its transaction accounts in NOW accounts with a charitable donee designated for the interest generated thereon. Income would be attributable to the business owner of the account, but a concomitant charitable deduction generally would be available. The effect would be to transfer the interest from the banks (which would otherwise be paying none) to the charity.

40. Provisions in the various state constitutions, similar to the United States Constitution, are given different meanings. *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950); Note, *State Constitutional Limitations on the Power of Eminent Domain*, 77 HARV. L. REV. 717 (1964). In most relevant aspects, corresponding provisions of the Texas Constitution coincide with the federal version. *See* TEX. CONST. art. I, §§ 17, 19. The procedure is different but the substantive principles are much the same. *See* Trinity River Auth. v. Chain, 437 S.W.2d 887 (Tex. Civ. App.—Beaumont 1969, writ ref'd n.r.e.).

41. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

A. *State Action*

The most important constitutional guarantees of individual rights protect against governmental action, state or federal.[42] The doctrine of state action has been described as "a conceptual disaster area"[43] and we need not launch a long exploration of that fourteenth amendment terrain. From the beginning, the Supreme Court has held that only state action triggered the protections of section one of that amendment.[44] For our purpose, modern state action may be assessed by inquiring whether the role of the state rule being challenged is positive, negative, or neutral.[45]

---

42. The three most notable exceptions to this proposition are the protections afforded one individual against other individuals by the thirteenth amendment, the federal government's responsibilities for federal elections, and the right to travel. J. WILLIAMS, CONSTITUTIONAL ANALYSIS 42-45 (1979). Except perhaps for a bizarre and hypothetical claim that the right to travel is somehow hampered by the present proposal, these protections are obviously irrelevant to our discussion.

43. Black, *The Supreme Court 1966 Term—Forward: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967).

44. *See* Civil Rights Cases, 109 U.S. 3, 17-18 (1883). *See also* United States v. Harris, 106 U.S. 629, 638 (1883) (purpose of first section of the fourteenth amendment is to place a restraint upon the action of the states); *Ex parte* Virginia, 100 U.S. 339, 346 (1880) (prohibitions of the fourteenth amendment are directed to the states and Congress is empowered to enforce them against state action); Virginia v. Rives, 100 U.S. 313 (1880) (prohibitions of fourteenth amendment have exclusive reference to state action); United States v. Cruikshank, 92 U.S. 542, 554 (1876) (fourteenth amendment adds nothing to the rights of one citizen as against another). *See generally* Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221, 221 (Bill of Rights and fourteenth amendment apply only to those acts connected to state action).

45. An intellectual debt for much of this state action analysis is owed Professor Laurence H. Tribe and his course "Advanced Constitutional Law I—Law and Litigation: Emerging Theories," part of the curriculum at the Harvard Law School 1982 Program of Instruction for Lawyers. Professor Tribe has turned analytical frustration into a framework of analysis. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 18-1, at 1149 (1977).

In addition to the requirement of state action, the Constitution requires that the challenger have standing. The state court standing of clients as owners of the property affected by TEX-IOTA can scarcely be contested. It is usually required only that the plaintiff be a "person aggrieved," a person whose interests are adversely affected, or a person having a special interest in the matter. *See* Scott v. Board of Adjustment, 405 S.W.2d 55 (Tex. 1966); City of San Antonio v. Stumburg, 70 Tex. 366, 7 S.W. 754 (1888); San Antonio Conservation Soc'y v. City of San Antonio, 250 S.W.2d 254 (Tex. Civ. App.—San Antonio 1952, writ ref'd). *Cf.* Davis, *Standing to Challenge Governmental Action*, 39 MINN. L. REV. 353, 359 (1955) (analyzing model state standing requirements in challenges to governmental action); Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 289-95 (1961) (canvassing state standing requirements for judicial review of governmental action). Even the attorney may have sufficient involvement to establish a justiciable interest in litigating the constitutionality of TEX-IOTA. *See* Touchy v. Houston Legal Found., 432 S.W.2d 690 (Tex. 1968) (attorney has standing to enjoin conduct of nonlawyers which is

In a direct challenge of the state statute which establishes TEX-IOTA and works the damage, state action is obvious and no formal inquiry into the issue is required.[46] Arguably, state action is somewhat less apparent when the state statute is a positive rule on which private actors rely. Although the state action issue often is ignored when the validity of the relevant statute is not a serious issue, the existence of the statute alone may establish state action even when the ultimate injury is done by a private individual.[47] Viewing TEX-IOTA as a positive rule which merely would encourage and facilitate private action by the designated private foundation and attorneys is sufficient to satisfy the state action requirement when the rule itself is challenged. The state may not be responsible for the private action of the attorney, which the statute merely facilitates or enforces, especially if TEX-IOTA is not mandatory. Nevertheless, the facilitation or enforcement is the action of the state along with the enactment itself. Thus, a facial or an as applied constitutional challenge of the TEX-IOTA statute would reach the fourteenth amendment merits.[48]

Second, TEX-IOTA may be viewed along the negative axis of state action calculus. Just as a positive tilt in the state rule may be state action, a negative tilt may engage the fourteenth amendment if the tilt is the object of the challenge. When the injurious act is performed by a private party who has been threatened or coerced into acting, the threat or coercion itself may be challenged.[49] If

---

demeaning to the legal profession). *Accord* Depew v. Wichita Retail Credit Ass'n, 141 Kan. 481, 42 P.2d 214 (1935); Dworken v. Apartment House Owner's Ass'n, 38 Ohio Ct. App. 265, 176 N.E. 577 (1930).

46. *See* Brown v. Board of Educ., 347 U.S. 483 (1954).

47. *See* Harris v. McRae, 448 U.S. 297 (1980) (federal statute was state action and upheld); Martinez v. California, 444 U.S. 277 (1979) (state statute was state action and upheld).

48. The same conclusion would follow if the Texas Supreme Court were the state actor that promulgated TEX-IOTA, so long as the challenge targeted the rule. *See supra* note 35. *Cf.* Shelley v. Kraemer, 334 U.S. 1 (1948) (state court enforcement of enforceable common-law private arrangement was state action). *But see* Armenta v. Nussbaum, 519 S.W.2d 673, 677 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.) (self-help is not state action and cannot be brought within fourteenth amendment).

49. *See* Little v. Streater, 452 U.S. 1 (1981). The state's refusal to pay for indigent putative father's blood test in *Little* might have passed constitutional muster in and of itself. *Cf.* Harris v. McRae, 448 U.S. 297 (1980). The negative state tilt which also provided that the illegitimate's mother must bring a paternity action to qualify for welfare benefits, however, went too far. *Compare* Blum v. Yaretsky, 102 S. Ct. 2777 (1982) (nursing home's decision to discharge or transfer Medicaid patients to lower level of care not state action)

TEX-IOTA is mandatory, the negative tilt could be challenged by suing the state entity charged with enforcement, objecting to the statutory coercion of and threatened disciplinary action against attorneys.

The most ambiguous of the three state action roles occurs when the state rule lurks in the background of a regime of private action. Such neutral rules may be held void on their face[50] or as applied within the appropriate state-created context,[51] or upheld facially and in application.[52] The neutral rule may be sufficient state involvement to allow a plaintiff to invoke the fourteenth amendment in at least two situations. To show that the seemingly neutral rule of dubious validity is the basis of the cause of action, the notion that the injurious act is really private must be contested.[53] In our context, the injurious act will not be really private since the attorney's decision will be foreordained by the state decision to make TEX-IOTA mandatory. Alternatively, the act may be attributed to the state on the basis of the private actor's position, his state connection, and the function being performed—the private actor is the state in sheep's clothing.[54] Either the private attorney who sets up the account or the designated private foundation that receives the interest may be viewed as a state functionary.[55]

---

with Lugar v. Edmondson Oil Co., 102 S. Ct. 2745 (1982) (statutory scheme for prejudgment attachment was state action although private party's misuse of state law was not).

50. *See* Anderson v. Martin, 375 U.S. 399 (1964).

51. *See* Little v. Streater, 452 U.S. 1 (1981). *Compare* Lugar v. Edmondson Oil Co., 102 S. Ct. 2745 (1982) (corporate creditor and president acted under color of state law in depriving debtor of his property) *with* Flagg Bros. v. Brooks, 436 U.S. 149 (1978) (state's mere acquiescence in a private action does not convert such action into that of the state).

52. *See* Martinez v. California, 444 U.S. 277 (1979); Armenta v. Nussbaum, 519 S.W.2d 673 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.).

53. Generally, this depends on how the court views the record. *See* Blum v. Yaretsky, 102 S. Ct. 2777, 2791-94 (1982) (Brennan, J., dissenting).

54. *See* Screwes v. United States, 325 U.S. 91 (1945). Often it is difficult to discern when there is sufficient state involvement in the background. For a time, a symbiotic relationship between the private actor and the state went a long way toward establishing state action. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961). It is unclear how much of this theory survives. *See* Blum v. Yaretsky, 102 S. Ct. 2777 (1982); Rendell-Baker v. Kohn, 102 S. Ct. 2764 (1982).

55. There is a corollary to the neutral rule of state action which probably does not apply and may be of doubtful validity today. When a private actor who is not the state in disguise is privately motivated and there is neither a positive nor negative state tilt there is no state action. The Constitution may still apply, however, because of a subsequent state imprimatur placed on the private act. *See* Barrows v. Jackson, 346 U.S. 249 (1953); Shelley

B. *General Substantive Protections*

Just as there are alternative bases for invoking the fourteenth amendment, once invoked there are alternative substantive protections that could apply to TEX-IOTA. Each substantive protection of the fourteenth amendment has its own version of judicial review.[56] Our limited purpose is to identify the constitutional issues which TEX-IOTA raises and summarily describe the appropriate judicial analysis. TEX-IOTA raises potential issues under the privileges and immunities, due process, and equal protection clauses which deserve at least brief attention.[57] Our emphasis, however, will be on the "taking" issue.

1. Privileges and Immunities

The privileges and immunities clause of the fourteenth amendment[58] is no longer regarded too seriously and merits minimal attention. The clause does not protect all individual rights or even all those specified in the Bill of Rights.[59] In fact, the Supreme Court has held that the right to deposit money in banks is not

---

v. Kraemer, 334 U.S. 1 (1948). Obviously, the private actors, the attorney and designated foundation, have little if any purely private motive to collect the interest for public works. TEX-IOTA seems so obvious an example of a positive or negative tilt, however, that it is unnecessary to reach this corollary.

56. The paradox that the theory of judicial review establishes and, in turn, is established by the substantive protections is a principle at once so basic and so unsettled that it has plagued succeeding generations of scholars. Ours is no exception. *See* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980); J. ELY, DEMOCRACY AND DISTRUST (1980). For some insights into the theory of judicial review in the presently considered context, see generally Dunham, *Griggs v. Allegheny County In Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63; Kratovil & Harrison, *Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596 (1954); Lavine, *Extent of Judicial Inquiry into Power of Eminent Domain*, 28 S. CAL. L. REV. 369 (1955).

57. These constitutional provisions play a secondary role in expropriation law. *See* Dunham, *supra* note 56, at 69-70. The constitutional values underlying these clauses assume a more significant role in the policy and application of expropriation law. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1182, 1195 (1967).

58. U.S. CONST. amend. XIV, § 1. The article IV privileges and immunities is best understood as "a specialized type of equal protection provision which guarantees that all classifications which burden persons because they are not citizens of the state must reasonably relate to legitimate state or local purposes." J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 378 (1978) [hereinafter cited as J. NOWAK].

59. Maxwell v. Dow, 176 U.S. 581, 584-88 (1900); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 74-81 (1872).

within the protection of the clause.[60] Thus, clients could not invoke the privileges and immunities clause with much hope of success.

2. Equal Protection

The development of the equal protection clause has been the converse of the privileges and immunities clause. A half century ago, Justice Holmes called an equal protection claim "the usual last resort of constitutional arguments."[61] Yet, "[t]oday [the] equal protection doctrine has become the Court's chief instrument for invalidating state laws."[62] Any transfer of private property to the government affects only that particular property. Because each such transfer thus necessarily discriminates,[63] equal protection is a common alternative argument in expropriation cases.[64]

TEX-IOTA creates neither "suspect" or "quasi-suspect" classifications[65] nor encroaches on fundamental rights[66] and traditional

---

60. *See* Madden v. Kentucky, 309 U.S. 83, 92-93 (1940) (overruling Colgate v. Harvey, 296 U.S. 404 (1935)). *See also* Kirtland v. Hotchkiss, 100 U.S. 491 (1879) (citizens are not entitled to relief from enforcement of state laws prescribing the mode and subject of taxation if tax does not violate federal statutory or constitutional law). Thus, there could be no colorable claim that taking interest on litigation advances in trust accounts somehow frustrated a privilege of access to the courts. *But see* Appellant's Brief at 37, Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980). Furthermore, corporate clients may not claim the protection of the clause. Grosjean v. American Press Co., 297 U.S. 233, 244 (1936).

61. Buck v. Bell, 274 U.S. 200, 208 (1927).

62. Zablocki v. Redhail, 434 U.S. 374, 395 (1978) (Stewart, J., concurring). The Texas constitutional equivalent of "equal protection" speaks in terms of "equal rights." *See* TEX. CONST. art. I, § 3. Cases construing the section draw substantively upon federal constitutional standards. *See, e.g.*, Rucker v. State, 342 S.W.2d 325, 326-27 (Tex. Crim. App. 1961).

63. Dunham, *supra* note 56, at 69-70. *See generally* 2 J. SACKMAN, NICHOLS ON EMINENT DOMAIN § 5.1[4], at 5-24 to 5-28 (3d ed. 1981).

64. *See, e.g.*, Texaco, Inc. v. Short, 102 S. Ct. 781, 797 (1982); Fountain v. Metropolitan Atlanta Rapid Transit Auth., 678 F.2d 1038, 1045 n.13 (11th Cir. 1982); Kinzli v. City of Santa Cruz, 539 F. Supp. 887, 894 (N.D. Cal. 1982); Rowe v. Fauver, 533 F. Supp. 1239, 1247 (D.N.J. 1982).

65. No stretch of the imagination can subject TEX-IOTA to the strictest level of scrutiny reserved for suspect classifications, which has been described as "strict in theory and fatal in fact." Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

In the absence of some improper application of TEX-IOTA, we cannot foresee a discrimination which would trigger an intermediate scrutiny. *See generally* Craig v. Boren, 429 U.S. 190, 210 n.* (1976) (Powell, J., concurring) (applying intermediate scrutiny to gender classifications); Gunther, *supra* (discussing the development of equal protection analysis). At most, viewed out of focus, TEX-IOTA may be a reverse wealth discrimination in which those with more wealth, or at least wealth in a particular form, must pay a bounty. Presumably, such a reverse discrimination would be evaluated at the same level as the corresponding positive discrimination. *Cf.* Fullilove v. Klutznick, 448 U.S. 448 (1980) (applying the

equal protection analysis would apply the "rational basis" test.[67] Under this "relatively relaxed" or "minimal scrutiny" standard, TEX-IOTA would be upheld if it "classif[ies] the persons it affects in a manner rationally related to legitimate governmental objectives."[68] The legitimate governmental objectives of TEX-IOTA are: (1) to provide legal services to the poor; (2) to provide funds for the client security fund; and (3) to improve grievance procedures.[69] The purposes plainly are constitutional, even laudable, but proponents mistakenly have concluded that this is enough.

The real equal protection issue is whether the *means* chosen are rationally related to these legitimate purposes. TEX-IOTA would not affect all litigants or even all litigants who have hired an attorney. Rather, a certain class of client is singled out: those who pay advances to their attorney. The key inquiry is whether this narrow discrimination is a rational means to achieve the state's purpose. The existence of other measures, better suited to the spe-

---

rational basis test to attack "minority business enterprise" as reverse wealth discrimination). Thus, "rationality" would be the rule. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

66. *See* W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW 535-53 (1980). *See generally* Hernandez v. Houston Indep. School Dist., 558 S.W.2d 121 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.) (states encroaching on "fundamental rights" are subjected to "strict scrutiny"). Arguably, TEX-IOTA would implicate the fundamental right of access to the courts. Brief of Appellants at 37, Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980). A line of cases describes such access in criminal matters to be fundamental. *See* Bounds v. Smith, 430 U.S. 817 (1977); Douglas v. California, 372 U.S. 343 (1963); Griffin v. Illinois, 351 U.S. 12 (1956). A surcharge on a litigant's pecuniary advances has only a potential chilling effect unlike a burden on access which leaves some frozen out of court. Furthermore, these precedents do not translate well to civil proceedings. *Compare* Boddie v. Connecticut, 401 U.S. 371 (1971) (recognizing indigent's right of access to the courts in a divorce action) *with* Ortwein v. Schwab, 410 U.S. 656 (1973) (refusing to recognize a right of access to the courts in order to challenge a reduction in welfare benefits) *and* United States v. Kras, 409 U.S. 434 (1973) (refusing to recognize a right of access in a bankruptcy proceeding).

67. *E.g.*, United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980); Harrah Indep. School Dist. v. Martin, 440 U.S. 194 (1979).

68. Schweiker v. Wilson, 450 U.S. 221, 230-34 (1981). *See also* Zobel v. Williams, 102 S. Ct. 2309 (1982) (applying the rational test to hold the retrospective aspect of Alaska's dividend distribution program violative of equal protection); G.D. Searle & Co. v. Cohn, 102 S. Ct. 1137 (1982) (applying the rational test to review state's corporation law); Texaco, Inc. v. Short, 102 S. Ct. 781 (1982) (recognizing the state's power to legislate in the area of mineral interests and upholding such legislation in the absence of arbitrary action). For an extended discussion of the rationality review, see generally Leedes, *The Rationality Requirement of the Equal Protection Clause*, 42 OHIO ST. L.J. 639 (1981).

69. *See supra* text accompanying note 36.

cific goals, does not void the proposal so long as TEX-IOTA is a reasonable means. Even when viewed as a narrow discrimination, TEX-IOTA may satisfy equal protection because the Constitution is concerned only if the measure is rational—not how rational.[70]

3. Due Process

The Janus-faced due process clause of the fourteenth amendment encompasses two distinct and general limitations on government power: the somewhat redundantly named procedural due process and the somewhat paradoxically named substantive due process. Since it is well settled that a state may not take private property without affording the owner both due process guarantees, each would apply to TEX-IOTA.[71] Of the two, procedural due process is less of a limitation because the narrow "judicial evaluation focuses on the decision-making process wholly apart from the fairness of the underlying rule being applied."[72] Assuming arguendo that TEX-IOTA would cause a deprivation of property, the issue becomes whether the procedure afforded is adequate.

While the procedural minima of notice and an opportunity to be heard must be meaningful, the specific dictates of procedural due process are determined by a juggling of three factors: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative

---

70. *See In re* Interest on Trust Accounts, 402 So. 2d 389 (Fla. 1981). After all, the most scintillating recent debate under this standard has concerned just how "toothless" the equal protection review is in such cases. *See* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980).

71. *See* Boddie v. Connecticut, 401 U.S. 371, 378-80 (1971) (substantive due process); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-15 (1950) (procedural due process). The Texas Constitution requires "due course of the law of the land." TEX. CONST. art. I, § 19. Courts have consistently held that this language brings to bear the same restrictions on the power of the state encompassed by the term "due process." *See, e.g.*, Mellinger v. City of Houston, 68 Tex. 37, 44, 3 S.W. 249, 252 (1887); *Ex parte* Young, 418 S.W.2d 824, 826 (Tex. Crim. App. 1967); Masonic Grand Chapter of Order of E. Star v. Sweatt, 329 S.W.2d 334, 337 (Tex. Civ. App.—Fort Worth 1959, writ ref'd n.r.e.); State *ex rel.* Pan Am. Prod. Co. v. Texas City, 295 S.W.2d 697, 704 (Tex. Civ. App.—Galveston 1956), *aff'd*, 303 S.W.2d 780 (Tex. 1957).

72. Baker, *Constitutional Law, Fifth Circuit Symposium*, 27 LOY. L. REV. 805, 832 (1981).

burdens that the additional or substitute procedural requirement would entail."[73] Although it is frequently invoked in expropriation litigation,[74] procedural due process is not much of a facial challenge to a statute like TEX-IOTA.[75] The legislative process, including public hearings on the proposed bill, satisfies the requirement.

The critical inquiry narrows to an evaluation of the procedures TEX-IOTA provides affected individuals. Elaborate procedures may be ensconced with a flourish and meticulously observed[76] or may be magically waived so long as the magic is constitutional. Of course, the client may waive constitutional rights, including any procedural protections.[77] The problem posed for TEX-IOTA is that the owner/client must waive the entitled due process knowingly, voluntarily, and intelligently.[78] The initial 1978 Florida proposal required that an attorney obtain the client's consent before deposit of the funds.[79] This would have assumed the necessary constitutional waiver from the failure of the client to object to a somewhat vague and incomplete mailed notice. This scheme raised a "serious constitutional question" even for some proponents of

---

73. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

74. *See generally* 1 J. SACKMAN, *supra* note 63, §§ 4.1-4.14, at 4-1 to 4-232 (discussing constitutional rights and limitations).

75. *See* Hulen, *Abusive Exercises of the Power of Eminent Domain—Taking a Look at What the Taker Took*, 44 WASH. L. REV. 200, 212 (1968).

76. Procedural due process shares with its fourteenth amendment twin the fundamental policy of protecting against arbitrary, capricious, and unreasonable governmental action. Depending on what is at stake in the context between government and individual, the *Mathews* factors, *supra* text accompanying note 73, may require such procedures as follow in rough order of importance: (1) "an unbiased tribunal"; (2) "notice of the proposed action and the grounds asserted for it"; (3) "an opportunity to present reasons why the proposed action should not be taken"; (4), (5), and (6) "the rights to call witnesses, to know the evidence against one, and to have decision based only on the evidence presented"; (7) "counsel"; (8) and (9) "the making of a record and a statement of reasons"; (10) "public attendance"; and (11) "judicial review." Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267, 1279-95 (1975). Although in the rare situation procedures must be provided before governmental action, Goldberg v. Kelly, 397 U.S. 254 (1970), a party is not entitled to a comprehensive pretaking hearing if there are adequate post hoc judicial remedies. Fountain v. Metropolitan Atlanta Rapid Transit Auth., 678 F.2d 1038, 1045 n.13 (11th Cir. 1982) (citing Cherokee Nat'l v. Southern Kan. Ry., 135 U.S. 641, 649-50 (1890); Stringer v. United States, 471 F.2d 381, 383 (5th Cir. 1973)).

77. *See* D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 185-87 (1972).

78. *Id. See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

79. *See In re* Interest on Trust Accounts, 356 So. 2d 799, 811 (Fla. 1978).

TEX-IOTA.[80] The present Florida program[81] and TEX-IOTA[82] go further and completely eliminate client participation in the investment decision. This may amount to the attorney pulling the rabbit out of the client's hat without the client saying the magic constitutional words. The procedural due process issue has not been afforded adequate attention. As Judge Aldisert so succinctly put the issue: "The question presented in any of these cases is straightforward and unsophisticated: how seriously is the complainant being hurt and how much will it cost to afford him or her a more effective procedure?"[83] An argument based on the shibboleth *de minimis non curat lex* might be wide of the mark.[84] Justice Stewart seemed to suggest as much in *Fuentes v. Shevin*:[85]

> The Fourteenth Amendment speaks of "property" generally. And, under our free-enterprise system, an individual's choices in the marketplace are respected, however unwise they may seem to someone else. It is not the business of a court adjudicating due process rights to make its own critical evaluation of those choices and protect only the ones that, by its own lights, are "necessary."[86]

There is no question, however, that the degree of injury plays a critical role in determining what process is due.[87] The issue must

---

80. *See* Comment, *supra* note 16, at 539, 557-59; Comment, *A Source of Revenue for the Improvement of Legal Services, Part II: A Recommendation for the Use of Clients' Funds Held by Attorneys in Non-Interest-Bearing Trust Accounts to Support Programs of the Texas Bar Association and an Analysis of the Federal Income Tax Ramifications*, 11 ST. MARY'S L.J. 113, 129-31 (1979).

81. *See In re* Interest on Trust Accounts, 402 So. 2d 389, 395, 398 (Fla. 1981). Justice Boyd objected that the elimination of notice would create a potential for a conflict of interest and result in a harm to the reputation of the profession. *Id.* at 399 (Boyd, J., dissenting).

82. *See supra* text accompanying notes 34-37; *infra* Appendix A. A form waiver on a receipt given the client who pays advances might suffice. *See* D.H. Overmeyer Co. v. Frick Co., 405 U.S. 174, 186 (1972). Such a routine might jeopardize TEX-IOTA's favorable tax treatment. *See supra* note 22. Lack of client control over the creation or destiny of earnings produced by attorney-held funds is the keystone of the tax treatment which makes the IOTA programs work. If the client has no control over the placement of funds in interest-bearing accounts and no participation in the decision-making in that regard, then the income produced is not attributable to the client. *See In re* Interest on Trust Accounts, 402 So. 2d 389, 390, 391 (Fla. 1981); Rev. Rul. 81-209, 1981-2 C.B. 16, 17. Resolution of the tax problem contributes to the constitutional questions.

83. Finberg v. Sullivan, 634 F.2d 50, 84 (3d Cir. 1980) (en banc) (Aldisert, J., dissenting), *sur motion for vacation of judgment*, 658 F.2d 93 (1981).

84. *See* Chrysler Corp. v. Fedders Corp. 519 F. Supp. 1252 (D.N.J. 1981).

85. 407 U.S. 67 (1972).

86. *Id.* at 90.

87. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976). *See also supra* text accompa-

be addressed within that framework. In Texas the issue has been overlooked in large part.

The substantive face of fourteenth amendment due process is nothing more than equal protection rational analysis sans classification.[88] Substantive due process is characterized by such near complete judicial deference that statutes are upheld for "virtually no substantive reason at all . . . except where constitutional provisions much more explicit . . . [are] in jeopardy."[89] Despite the recognition that substantive due process analysis is colored by the context of government action[90] and may be more vibrant in situations which resemble takings,[91] the test still is reasonableness considering what is taken, why, and how.[92] If TEX-IOTA is reasonable enough to meet the equal protection standard, substantive due process is satisfied. Nevertheless, the issue should be faced squarely and disposed of with an appropriate explanation.[93]

C. *The Taking Clause*

Wholly apart from the procedural and substantive aspects which stand on their own bottom, the due process clause has a third meaning, which in the present context eclipses the other two. Historically, the fifth amendment provision that private property shall not be taken for public use without just compensation[94] was a tacit recognition of the preexisting taking power[95] but initially limited only the federal government.[96] Rather than depending on nat-

---

nying note 73.

88. *See* Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting); Railway Express Agency, Inc. v. New York, 336 U.S. 106, 111 (1949) (Jackson, J., concurring); Nebbia v. New York, 291 U.S. 502, 525 (1934).

89. L. TRIBE, *supra* note 45, § 8-7, at 450-51 (citing Ferguson v. Skrupa, 373 U.S. 726 (1963)).

90. *See* Manley v. Georgia, 279 U.S. 1 (1929); Mumme v. Marrs, 120 Tex. 383, 40 S.W.2d 31 (1931).

91. Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L. REV. 165, 212 n.122 (1974); Hulen, *supra* note 75, at 220-32; Michelman, *supra* note 57, at 1182, 1195.

92. 1 J. SACKMAN, *supra* note 63, § 4.4[1], at 4-14 to 4-15.

93. *See In re* Interest on Trust Accounts, 356 So. 2d 799, 805-07 (Fla. 1978).

94. U.S. CONST. amend. V.

95. United States v. Carmack, 329 U.S. 230, 241-42 (1946). The corresponding provision in the Texas Constitution provides: "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person . . . . " TEX. CONST. art. I, § 19.

96. Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833).

ural law to give content to the fourteenth amendment in takings,[97] the Supreme Court incorporated the fifth amendment's just compensation and public use limitations.[98] Two analytical points deserve emphasis. First, the fifth amendment taking clause incorporated in the fourteenth amendment due process clause has a vitality separate and distinct from procedural and substantive due process standing alone.[99] Having described the latter two does not preempt discussion of the former. Second, a comprehensive understanding of the fifth amendment incorporated into the fourteenth amendment taking analysis convinces us that much of equal protection and procedural and substantive due process shines through. It is almost as if the incorporated clause reincorporates the incorporating amendment.[100] Put another way, the incorporated fifth

---

97. *See* Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 144 (1928); Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67 (1931); Grant, *The Natural Law Background of Due Process*, 31 COLUM. L. REV. 56 (1931); Haines, *The Law of Nature in State and Federal Judicial Decisions*, 25 YALE L.J. 617 (1916); Kratovil & Harrison, *supra* note 56; Lenhoff, *Development of the Concept of Eminent Domain*, 42 COLUM. L. REV. 596 (1942). The taking clause has strict historical antecedents in the writings of such seventeenth and eighteenth century jurisprudents as Grotius, Pufendorf, Bynkershoek, Burlamaqui, and Vattel. *See* Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 54-57 (1964); Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 559-69 (1972). For a historical discussion of taking law in common-law England and in the colonies, see generally *id.* Texas courts also recognize a natural law source for property rights. *See, e.g.*, Spann v. City of Dallas, 111 Tex. 350, 356, 235 S.W. 513, 515 (1921).

98. *See* Holden v. Hardy, 169 U.S. 366 (1898) (employment restrictions); Chicago, B. & O. R.R. v. Chicago, 166 U.S. 226 (1897) (just compensation); Missouri Pac. Ry. v. Nebraska, 164 U.S. 403 (1896) (public use). Later holdings enshrined these declarations. *See* Buzzo v. Allegheny County, 369 U.S. 84 (1962); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). Any doubt about incorporation was put to rest in Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980). *See also* Fountain v. Metropolitan Atlanta Rapid Transit Auth., 678 F.2d 1038 (11th Cir. 1982) (inverse condemnation); Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981) (just compensation). For a thorough treatment of incorporation, see generally 1 L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN 169 (2d ed. 1953); Sax, *supra* note 97; Scheiber, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts*, 5 PERSPECTIVES IN AMERICAN HISTORY 329 (1971); Stoebuck, *supra* note 97.

99. *See* Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1975) (en banc), *cert. denied*, 422 U.S. 1011 (1975) (distinguishing between due process generally and specifically incorporated right).

100. We find some support for the novel proposition that incorporated taking analysis reincorporates due process and equal protection a la the phenomenon in Bolling v. Sharpe, 347 U.S. 497 (1954), in the following sources, at least by analogy: Loretto v. Teleprompter Manhattan CATV Corp., 102 S. Ct. 3164, 3179 (1982); Texaco, Inc. v. Short, 102 S. Ct. 781 *passim* (1982); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981); Modesett v. Emmons, 292 S.W. 855 (Tex. Comm'n App. 1927, holding approved); E. BAR-

amendment takes its analysis from equal protection and due process principles. Keeping in mind that the taking analysis thus paradoxically is both independent and dependent of what has been previously analyzed, we turn to the most difficult constitutional challenge for TEX-IOTA.

As in other areas, the fourteenth amendment establishes a constitutional minimum.[101] Because under our scheme of government it is "the province and duty of the judicial department, to say what the law is,"[102] we must consider the judicial interpretations of the due process incorporation of the prohibition that "private property [not] be taken for public use, without just compensation."[103] As is perhaps true of constitutional law generally, the modern era of constitutional taking jurisprudence[104] has been characterized as more philosophy than doctrine.[105] Our purpose here is not to philosophize, but rather to emphasize doctrine and the constitutional framework within which TEX-IOTA must be analyzed. We are not concerned with the wisdom or efficiency of TEX-IOTA and have no quarrel with TEX-IOTA's goals or their importance. TEX-IOTA may be Pareto-optimal and improve the situaton of its beneficiaries without damaging further the situation of anyone else,[106] but that is not the constitutional approach to evaluation, and it will not be ours.[107]

RETT & W. COHEN, CONSTITUTIONAL LAW 565 (1981); Berger, *supra* note 91, at 167; Dunham, *supra* note 56, at 70-71; Hulen, *supra* note 75, at 220; Lavine, *supra* note 56, at 377; Michelman, *Property as Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1098 (1981); Olson, *The Role of "Fairness" in Establishing a Constitutional Theory of Taking*, 3 URB. LAW. 440 (1971).

101. 1 L. ORGEL, *supra* note 98, at 33. *See also* J. NOWAK, *supra* note 58, at 446 (describing factors which determine compensation constitutionally due).

102. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (reaffirmed in United States v. Nixon, 418 U.S. 683, 705 (1974)). *See supra* note 56.

103. U.S. CONST. amend. V. *See supra* text accompanying notes 96-101.

104. Justice Harlan's seminal opinion in Mugler v. Kansas, 123 U.S. 623 (1887), marks the beginning of the modern era of Supreme Court adjudication. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 149 n.3 (1971). For an account of taking from the separation of powers/judicial review viewpoint, see generally Hulen, *supra* note 75.

105. One author has suggested that when dealing with property law and constitutional theory, "[a]nalysts must become philosophers if they wish to remain lawyers." B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 5 (1977). Many of the sources cited elsewhere in this article struggle with the philosophy of taking law. One of the best received has been Michelman, *supra* note 57.

106. Michelman, *supra* note 57, at 1176.

107. Our narrow concern is the change from the present system to TEX-IOTA. We do not consider whether the present system of bar-sanctioned trust deposits works a taking by

1. Taking and Taxing

Obviously, there is a great deal of artificiality in attempting to classify modern exercises of the sovereign power into Year Book pigeonholes. Some exercises do not fit into any holes, some fit into several, and there is nothing to put in some holes. Nevertheless, to understand the phenomenon of taking, some sense of context, and within context some line drawing, is necessary if only to identify the analysis to follow. Thus, to better understand what a taking is, it is useful to describe what a taking is not. A taking is neither a tax nor a police power regulation. The "how" and "why," or more accurately the "how not" and "why not," provide necessary background.[108] The taxing, police, and taking powers have one thing in common: together they are the *sine qua non* for the government function to protect the health, safety, and general welfare of the public.[109]

Taxing and taking are much the same power with one important difference. The difference is not the distinction between exacting money and exacting property because money is property.[110] Then how does one avoid the impasse that characterizing taxation as a taking would require compensation exactly equal to the tax? The answer is found not in the difference between money and things but in the nature of a tax. Taxing is the power to "raise

---

the banks who have free use (interest) of clients' money. In any event, it cannot be argued seriously that a constitutional remedy for any taking by the banks will be afforded by a taking by the bar foundation. Just compensation is the constitutional remedy for a taking, not substituting another taker. *But cf.* Memorandum to Committee on Client Protection from Robert L. Byrd (May 19, 1982) (suggesting that TEX-IOTA is a remedy for the present "taking") [hereinafter cited as Robert L. Byrd Memorandum]. "Requiring compensation when a conflict among competing users . . . is resolved against them, inevitably skews the political resolution of conflicts over resource use and discriminates against public rights." Sax, *supra* note 104, at 160.

108. We recognize that the correlative approach to defining takings as what is neither a tax nor a regulation has been criticized. *See* Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Controversies*, 75 COLUM. L. REV. 1021 (1975). Nevertheless, the Court still operates in the main along the lines we have selected.

109. For a discussion of the triumvirate of sovereignty and their role in taking, see generally A. JAHR, LAW OF EMINENT DOMAIN (1953); I. LEVEY, CONDEMNATION IN U.S.A. (1969); J. LEWIS, THE LAW OF EMINENT DOMAIN (3d ed. 1909); H. MILLS & A. ABBOTT, MILLS ON THE LAW OF EMINENT DOMAIN (2d ed. 1888).

110. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980); Sniadach v. Family Fin. Corp., 395 U.S. 337, 340 (1969). *But see* Friedman v. American Surety Co., 137 Tex. 149, 160, 151 S.W.2d 570, 577 (1941).

funds for public expenses by exacting a contribution, based upon a uniform rule of apportionment, either upon the residents or upon the property in a locality."[111] In contrast, a taking exacts more than the property owner's proportionate share of the public burden.[112] The difference is between even and uneven exaction.[113] When an individual is forced to contribute more than his proportionate share the government becomes a debtor for the property taken; for taxes, no compensation is owed beyond the protection and benefits generally provided by government.[114]

If TEX-IOTA is a tax it would not be subject to the taking restrictions and no compensation would be owed. The "tax" could be an exaction on the successful litigant who has been paid a money judgment; however, the realities dispute this characterization. Unlike other state plans, TEX-IOTA would exempt these funds.[115] Typically, an unsuccessful defendant's insurance company issues a draft to plaintiff and plaintiff's attorney. Plaintiff's attorney's bank now often provides a cash advance while the draft is processed. If the bank would have to pay interest on the attorney's trust account, this practice of advances likely would be disrupted and successful plaintiffs would be paid later. Such payments under TEX-IOTA would be exempted chiefly to protect the relationship between the attorney and the bank. If TEX-IOTA is a tax, it taxes what is nonexempt: fee advances, cost advances, and other escrow deposits. Viewed realistically, it is a tax on legal assistance, whether a client is sued, suing, or seeking to avoid suit. Perhaps the bar leadership can justify such a "justice tax" imposed on a small class,[116] but so far it has not tried. Serious policy issues, not to mention public relations problems, are involved in the taxing approach.[117] Whatever the justification ultimately put forward, it is clear that merely mislabeling the measure as a tax will not

---

111. Sackman, *The Right to Condemn*, 29 ALB. L. REV. 177, 177 (1965).

112. *Id.* at 178; Sax, *supra* note 97, at 75-76.

113. Stoebuck, *supra* note 97, at 571-72.

114. Sackman, *supra* note 111, at 178. *See* Pan Am. Prod. Co. v. Texas City, 157 Tex. 450, 454, 303 S.W.2d 780, 783 (1957). For a discussion of federal constitutional restraints on a state's power to tax, see generally J. NOWAK, *supra* note 58, at 282-374.

115. *See infra* Appendix A.

116. *See supra* text acompanying notes 69-70.

117. The equal protection concern for "access to the courts" is one problem. *See supra* note 66.

turn a disproportionate taking into a proportionate tax.[118]

2. Taking and Regulation

The distinction between a police power regulation and a taking is even more vague and undefined.[119] It is well settled that compensation is required for a governmental taking of property and not for losses that result from regulation. The generality of the theory, however, frustrates any attempt at reconciling the decided cases. Commentators have eschewed the "welter of confusing and apparently incompatible results"[120] in the "crazy-quilt pattern of Supreme Court doctrine."[121] The Court itself has confessed its failing by admitting that "no rigid rules"[122] or "set formula"[123] have been developed.[124] Circular definitions highlight the confusion. It is not enough to say, however emphatically, that "[t]he primary distinguishing characteristic between eminent domain and the police power is that the former involves the *taking* of property because it is needed for public use, while the latter involves the *regulation* of

---

118. The Constitution forbids such a mastery:

> "When *I* use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean—neither more nor less." "The question is," said Alice, "whether you *can* make words mean different things." "The question is," said Humpty Dumpty, "which is to be master—that's all."

L. CARROLL, THROUGH THE LOOKING GLASS (1977) (quoted in United States v. Kindrick, 576 F.2d 675, 677 n.2 (5th Cir. 1978)). *See supra* text accompanying note 113.

119. Commentators have tried mightily to distinguish the two. *See* E. FREUND, THE POLICE POWER—PUBLIC POLICY AND CONSTITUTIONAL RIGHTS §§ 504-60, at 540-86 (1904); A. JAHR, *supra* note 109, at 6-8; I. LEVEY, *supra* note 109, §§ 5-5.01, at 46-51; R. ROETTINGER, THE SUPREME COURT AND THE POLICE POWER (1957); 1 J. SACKMAN, *supra* note 63, § 1.42[2], at 1-158 to 1-195; Mercer, *Regulation (Police Power) v. Taking (Eminent Domain)*, 6 N.C. CENT. L.J. 177 (1975). One eminent commentator has characterized the distinguishment task as "the most haunting jurisprudential problem in the field of contemporary land use law." C. HARR, LAND-USE PLANNING 766 (3d ed. 1977).

120. Sax, *supra* note 97, at 37.

121. Dunham, *supra* note 56, at 63.

122. United States v. Caltex, Inc., 344 U.S. 149, 156 (1952).

123. Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962).

124. More recent Supreme Court opinions have persisted. *E.g.*, Andrus v. Allard, 444 U.S. 51, 65 (1979) ("it calls as much for the exercise of judgment as for the application of logic"); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) ("ad hoc, factual inquiries"); United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958) ("question properly turning upon the particular circumstances of each case"); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922) ("cannot be disposed of by general propositions"). Perhaps one explanation for the incongruities in case law is that taking issues have never constituted a large portion of a Term's docket or the Court's work. Hence, competing lines of analysis have been parallel and intermittent. *See* Dunham, *supra* note 56, at 64.

property in promoting public health, morals, safety or general welfare."[125] Some courts and commentators have suggested a distinction between impairment and appropriation; a police power regulation restricts the right of an individual to use or enjoy property in a way injurious to the public, while a taking transfers the property to the government to be used beneficially for the public.[126] It is a distinction without a difference to classify between averting public detriment and promoting public advantage and the decided cases hold as much.[127] All the taking/regulation dichotomy decides is when the government may "invoke the petty larceny of the police power"[128] and avoid compensation. Furthermore, the two categories are not mutually exclusive. Indeed, a governmental act couched in the form of a regulation may be better viewed as a taking instead of, or even in addition to, an exercise of the police power.[129]

Under some of the traditional tests TEX-IOTA may look more like a regulation than a taking. If the resemblance is close enough we may have a petty larceny and no compensation would be owed. So far, no one has come up with a rationale for TEX-IOTA under the police power regulation.[130] Under the applicable substantive

---

125. Sackman, *supra* note 111, at 178. *See* I. LEVEY, *supra* note 109, § 501, at 46-51.

126. E. FREUND, *supra* note 119, § 511, at 546-47; 1 J. SACKMAN, *supra* note 63, § 1.42[2], at 1-158; Sackman, *supra* note 111, at 179; Stoebuck, *supra* note 97, at 570.

127. Kratovil & Harrison, *supra* note 56, at 608. Case analysis also refutes any argued distinction between a taking, adding benefit to the public, and a police power regulation preventing harm to some established public interest. *Id.*

128. The Holmesian aphorism is from a draft opinion in Jackman v. Rosenbaum Co., 260 U.S. 22 (1922). Justice Holmes deleted the phrase in the final opinion and explained "[m]y brethren, as usual and as I expected, corrected my taste." 1 HOLMES-LASKI LETTERS 457 (M. Howe ed. 1953), *quoted in* G. GUNTHER, CONSTITUTIONAL LAW 545 n.2 (10th ed. 1980). *See also* Tyson & Bros. v. Banton, 273 U.S. 418, 445-46 (1927) (Holmes, J., dissenting). The deletion has become more famous than the case. *See* P. FREUND, A SUTHERLAND, M. HOWE & E. BROWN, CONSTITUTIONAL LAW 1095 (4th ed. 1977); G. GUNTHER, CONSTITUTIONAL LAW 545 n.2 (10th ed. 1980). The earlier theory, whose chief architect was Justice Harlan, relied on traditional legal concepts of property law and torts to create a difference in kind. Holmes approached the issue pragmatically on a case-by-case basis. Both theories have flaws. Harlan's theory is formalistic. Holmes' theory is historically questionable and has never been followed consistently, even when he was on the Court. *See* Sax, *supra* note 97, at 37-38. For a discussion of the two approaches and the Holmes watershed in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), see generally F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE 105-40 (1973).

129. Stoebuck, *supra* note 97, at 571. *See also* Steele v. City of Houston, 603 S.W.2d 786 (Tex. 1980) (destruction of private property to apprehend escaped convicts).

130. *See In re* Interest on Trust Accounts, 402 So. 2d 389, 395-96 (Fla. 1981). *But cf.* Robert L. Byrd Memorandum, *supra* note 107 (exhorting Texas to do so without specifying

due process restraint on the police power, TEX-IOTA must be a rational means to achieve a legitimate police power purpose.[131] Proponents conveniently have emphasized the easy half of the analysis. Again, although the legitimacy of the supposed regulatory purposes is beyond peradventure,[132] the critical constitutional question revolves around the rationality of TEX-IOTA as a regulatory means to further these purposes. It is not enough to say that the goals are substantial and important. The constitutionality of the means is not established by the constitutionality of the purposes. Perhaps, with a little imagination TEX-IOTA might fit into the regulatory pigeonhole if the basic premise that it is not a taking can withstand consitutional scrutiny.

3. Taking Isolated

The most difficult constitutional question TEX-IOTA raises is whether the fifth/fourteenth amendment taking limits are applicable. If the scheme passes general constitutional restrictions and is neither a tax nor a police power regulation, taking is all that is left.[133] The "universally accepted definition" of taking is "the power of the sovereign to take property for public use without the owner's consent upon making just compensation."[134] We will break this definition down into its component parts by considering the

---

what should be). No police power justification was offered in Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 163 (1980).

131. *See supra* text accompanying notes 88-94.

132. *See supra* text accompanying notes 69-70.

133. Our analysis of the taking issue includes some reliance on a leading recent case, Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980), which we will weave throughout the taking analysis. Under the authority of a Florida statute, a county kept the interest accrued on interpleader funds deposited in the registry of the county court in addition to a fee based on the amount of the principal. The deposited money was concededly private and deposit was required by statute. The Court concluded that earnings of the funds were incidents of property ownership of the funds. *Id.* at 159. The unanimous Court determined that neither the state legislature by statute nor the state courts by judicial decree could accomplish what was a taking by simply recharacterizing the deposited fund as "public money" because it was held temporarily by the court. *Id.* at 164. *Beckwith* obviously is a key precedent in the debate over TEX-IOTA. *See* Robert L. Byrd Memorandum, *supra* note 107 (designed to distinguish *Beckwith* and TEX-IOTA). Exactly because it has received important attention, we choose to widen the scope of debate in the remaining discussion.

134. Sackman, *supra* note 111, at 177. The Texas Constitution explicitly incorporates each of these elements. *See* TEX. CONST. art. 1, § 17.

taker, the taken, and the takee.[135]

One characteristic which distinguishes a taking from some other forms of property transfer is that taking occurs between the government and the individual. The states possess an inherent sovereign power to take private property without the owner's consent.[136] Because the power is that of the state acting as sovereign, a taking occurs only if "the body politic is involved and chooses to exercise its power."[137] Thus, because a state actor is the taker, state action is evident.[138]

There is, however, one remaining state action problem. It might be argued that the taking under TEX-IOTA is performed by a private actor, the attorney, in behalf of a private actor, the designated private foundation. Despite some confusing signals from the Supreme Court,[139] we do not think this delegation argument amounts to much. First, a challenge of the TEX-IOTA enabling statute would be rife with state action.[140] Second, delegation has always been a major part of taking jurisprudence and a delegation does not undo constitutional restraints on government taking.[141] It cannot be seriously controverted that the constitutional taker under TEX-IOTA is the state and its delegate.[142]

---

135. There are innumerable public policies which could be considered with the taking issue. *See* Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1 (1943). Our approach primarily is doctrinal and constitutional.

136. Dunham, *supra* note 56, at 71; Hulen, *supra* note 75, at 200; Lavine, *supra* note 56, at 369. Other constitutional provisions, such as due process, impose some limits on state sovereignty. For example, a state has power to take only within its own territory. *See* Pollard v. Hagen, 44 U.S. (3 How.) 212 (1845). Presumably, constitutional limits would exist on TEX-IOTA concerning out-of-state attorneys representing out-of-state clients. *See* Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Shaffer v. Heitner, 433 U.S 186 (1977). The point was raised but went unresolved in the proceedings of the Florida Supreme Court. *See In re* Interest on Trust Accounts, 402 So. 2d 389, 392 (Fla. 1981).

137. Stoebuck, *supra* note 97, at 558. *See generally* A. JAHR, *supra* note 109, at 26-27 (every state possesses power of eminent domain within its boundaries).

138. *See supra* text accompanying notes 42-55.

139. *Compare* Lugar v. Edmondson Oil Co., 102 S. Ct. 2745 (1982) (corporate creditor and president found to have acted under state action in depriving debtor of property) *with* Flagg Bros. v. Brooks, 436 U.S. 149 (1978) (warehouseman's proposed sale of goods entrusted to him by statute found not to be state action).

140. *See supra* text accompanying notes 42-55.

141. Hulen, *supra* note 75, at 200-01; Lavine, *supra* note 56, at 371. *See also* A. JAHR, *supra* note 109, at 27-31; 1 J. SACKMAN, *supra* note 63, §§ 3.22-3.24, at 3-103 to 3-250.

142. There is another delegation doctrine which might have some application. As we have suggested, the attorney is the state delegate in collecting trust account income. We have suggested that the distinction between those who are forced to contribute and others poses problems for equal protection and due process analysis. *See supra* text accompanying

The next step in the analysis involves determining what the taker took.[143] Although a taking involves a forced transfer of "property," "[t]he concept of property never has been, is not, and never can be of definite content."[144] Nevertheless, the Supreme Court has developed a modern constitutional analysis of the property concept as used in the fifth and fourteenth amendments. For a time, the Court gave a rather crabbed meaning to "property" in taking analysis.[145] Intervening decisions have given "property" a very broad reading in the fourteenth amendment area of procedural due process.[146] A few years ago, Professor Tribe opined that "[t]here seems no good reason why the broader definition should not be extended to the takings context."[147] We submit first, that there are good reasons to do so and second, that the Court has done so.

"Property" is "a thoroughly nonspecific term, one for which the judges have to 'supply content.' "[148] It would be a strange constitution indeed in which the same word in the same amendment was *not* given the same meaning when applied in two similar situations. This is especially true of "property" in the taking context

---

notes 70 & 89-93. The attorney ordinarily would decide which clients would contribute by deciding which would be required to prepay. This may be such unfettered discretion that the statute might violate what is left of the old federal delegation doctrine. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Jaffe, *An Essay on Delegation of Legislative Power: II*, 47 COLUM. L. REV. 561, 578 (1947). Texas has its own version of the delegation doctrine. *See* Moody v. City of Univ. Park, 278 S.W.2d 912 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.).

143. The epigram is from Hulen, *supra* note 75, at 200.

144. Philbrick, *Changing Conceptions of Property Law*, 86 U. PA. L. REV. 691, 696 (1938). *See* W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 28 (W. Cook ed. 1919); Cohen, *Property and Sovereignty*, 13 CORNELL L. REV. 8, 11 (1927). The concept of "property" in taking analysis necessarily is bound-up with the concept of "taking." To suggest that property "means every species of interest in land and things of a kind that an owner might transfer to another private person," truly is to say that "[p]roperty, like beauty, exists in the eye of the beholder." Stoebuck, *supra* note 97, at 600, 606. We view property in the larger, constitutional scheme of things. Within the constitutional realm, finespun distinctions about property found in the Restatement scheme largely are ignored. *Compare* Michelman, *supra* note 57, at 1185-86 n.41 (distinguishing meanings of property) *with* Buchanan v. Warley, 245 U.S. 60 (1917) (property includes things owned and rights in it).

145. *See, e.g.*, Flemming v. Nestor, 363 U.S. 603, 608-11 (1960) (social security expectations not property subject to compensation under taking law); United States v. Petty Motor Co., 327 U.S. 372, 379-80 (1946) (leasehold renewal expectation not property). *See generally* Sackman, *supra* note 111, at 183-87.

146. *See infra* note 177.

147. L. TRIBE, *supra* note 45, § 9-3, at 459 n.11.

148. Michelman, *supra* note 57, at 1109.

since that analysis really reincorporates policies from due process and equal protection.[149] What will be constitutionally protected in each of these three contexts depends on the same anglo-american tradition of property law and equitable principles of fundamental fairness.[150] To establish this unified theory of constitutional property, we rely in part on the long line of cases which hold that what constitutes fifth amendment property in a federal condemnation proceeding must ultimately be determined by state law.[151] But we need not rely on analogy exclusively. Mirroring the approach of prominent commentators,[152] the Supreme Court has applied the procedural due process property analysis in recent taking cases.[153]

The property definition developed in procedural due process decisions and now applied in taking decisions involves what constitutional law buffs like to call a two-tiered test.[154] First, "the underlying substantive interest is created by 'an independent source such as state law . . . .' "[155] Second, "federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' . . . . "[156] We will consider these tiers separately.

State law, decisional and statutory, creates and defines the dimensions of property through "existing rules and understand-

---

149. *See supra* text accompanying notes 99-100.

150. J. NOWAK, *supra* note 58, at 449.

151. *See* United States *ex rel.* Tennessee Valley Auth. v. Powelson, 319 U.S. 266, 279 (1943) ("Though the meaning of 'property' as used in . . . the Fifth Amendment is a federal question, it will normally obtain its content by reference to local law."). This is described as the general rule in Annot., 1 A.L.R. FED. 479, 482-85 (1969).

152. *See* R. BROWN, THE LAW OF PERSONAL PROPERTY 6-8 (3d ed. 1955); 1 J. SACKMAN, *supra* note 63, § 4.5[3], at 4-22; Michelman, *supra* note 57, at 1099-104; Sackman, *supra* note 111, at 185. Litigants view the property concept as sufficiently interchangeable between due process and taking to apply precedents in the latter category to the former. Brief of Amicus Curiae *passim*, Parratt v. Taylor, 451 U.S. 527 (1981). *Cf.* Chrysler Corp. v. Fedders Corp., 519 F. Supp. 1252, 1260 (D.N.J. 1981) (plaintiff arguing some property rights not entitled to due process protection).

153. *See* Texaco, Inc. v. Short, 102 S. Ct. 781, 789-91 (1982); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980).

154. *See* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9 (1978); Bishop v. Wood, 426 U.S. 341, 344 (1976); Perry v. Sindermann, 408 U.S. 593, 602 (1972); Board of Regents v. Roth, 408 U.S. 564, 577 (1971). *See generally* Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405, 434-44 (1977) (discussing the development and application of the two-tiered test).

155. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9 (1978) (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972); Perry v. Sindermann, 408 U.S. 593, 602 (1972)).

156. 436 U.S. at 9.

ings."[157] On this level, TEX-IOTA proponents argue that there is no property to be owned by the client since trust accounts presently are maintained without interest. However, one cannot begin by deciding that a claim is not property because that is really the question to be answered;[158] "under our constitutional system, some property rights have names and others do not."[159] TEX-IOTA would generate interest, which in the form of money surely may be considered property. The conclusion that no property presently exists does not answer the question of ownership in the event that property is created.

TEX-IOTA does not create the right to receive interest income from client trust funds. It merely seeks to allocate it to the designated foundation. In Texas the right to interest from a fund is a constitutionally protected private property right of the owner of the fund.[160] The property nature of the right to income is deeply rooted in anglo-saxon jurisprudence. At common law the right to receive income from the land *was* ownership.[161] This concept was readily transferable into the personal property realm, leading one Texas court, in 1920, to say that "[i]nterest, according to all the authorities, is an accretion to the principal fund earning it, and, unless lawfully separated therefrom, becomes a part thereof."[162] Texas courts and legislative enactments have also recognized, in analogous situations, the property nature of the right to receive interest.[163] With reference to trust funds, it is generally accepted

---

157. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

158. Kratovil & Harrison, *supra* note 56, at 616.

159. *Id.* at 612.

160. Sellers v. Harris County, 483 S.W.2d 242, 244 (Tex. 1972). The court quoted approvingly from the Supreme Court of North Carolina: "The earnings on the fund are a mere incident of ownership of the fund itself. The constitutional provision . . . applies to the earnings in the same manner, and with the same force, as it applies to the principal." *Id.* at 243-44 (quoting McMillan v. Robeson County, 262 N.C. 413, ___, 137 S.E.2d 105, 108 (1964)). This right, of course, is subject to waiver, as when the owner of funds agrees to accept a stipulated rate of interest even though the debtor may be (and probably is) earning a higher rate, and is also subject to regulation, as in usury statutes.

161. United States v. Dresser Indus., Inc., 324 F.2d 56 (5th Cir. 1963). *See also* Himely v. Rose, 9 U.S. (5 Cranch) 313, 317 (1809) ("In equity, interest goes with the principal as the fruit with the tree.").

162. Lawson v. Baker, 220 S.W. 260, 272 (Tex. Civ. App.—Austin 1920, writ ref'd). *See, e.g.*, TEX. ATT'Y GEN. OP. NOS. MW-481 (1982), MW-47 (1979), H-1174 (1978), C-610 (1966). *See also* Annot., 5 A.L.R.2d 257 (1948) (dealing with the liability of a public officer for interest received on public money in his possession).

163. *See, e.g.*, City of Austin v. Austin Nat'l Bank, 503 S.W.2d 759, 761 (Tex. 1974) (a

that the beneficiary of a trust has a right to income earned automatically as a matter of law without the necessity of any agreement to spell it out.[164] Difficulty in ascertaining or distributing interest should not be a factor in deciding who is entitled to it.[165]

A better argument on this level for proponents would characterize TEX-IOTA as a change in the law which defines the property.[166] "[N]ew social circumstances can justify legislative modification of a property owner's common-law rights, without compensation, if the legislative action serves sufficiently important public interests."[167] This argument, however, makes little effort to escape an ends-justify-the-means logic which is not well taken in constitutional law. Still, the explicit premise of the fourteenth amendment that individuals can have property not only among themselves but also vis-a-vis the government has arrayed against it the implicit premise that individual ownership is always subject to the risk of redistribution of value by the government.[168]

The best argument proponents raise involves the common-law maxim *de minimis non curat lex*.[169] The notion that the law does not care for or take notice of very small or trifling matters is part of the substantive Texas law to be considered on the first constitutional tier.[170] As a question of substantive common law, the de

---

devise of income arising from personalty is an absolute gift of the corpus); TEX. PROB. CODE ANN. § 239 (Vernon 1956) (income to be paid to owners of assets).

164. *See* Wignall v. Fletcher, 303 N.Y. 435, 103 N.E.2d 728 (1952); Blaustein v. Pan Am. Petroleum & Transp. Co., 174 Misc. 601, 21 N.Y.S.2d 651 (1940); Lonsdale v. Speyer, 249 A.D. 133, 291 N.Y.S. 495 (1936).

165. Bordy v. Smith, 150 Neb. 272, ___, 34 N.W.2d 331, 334 (1948).

166. This approach comes close to Justice Rehnquist's position that the claimant must accept all of the state law and "take the bitter with the sweet." Arnett v. Kennedy, 416 U.S. 134, 154 (1974). *See also* UNIF. EMINENT DOMAIN CODE § 608, 13 U.L.A. 73 (1980) (describing procedure for determining owner of interest on eminent domain deposits). This approach has commanded a majority only in its rejection. *See* Bishop v. Wood, 426 U.S. 341, 355 (1976) (White, J., dissenting). This rejection does much to undermine the argument in the text.

167. Loretto v. Teleprompter Manhattan CATV Corp., 102 S. Ct. 3164, 3186 (1982) (Blackmun, J., dissenting) (citing United States v. Causby, 328 U.S. 256, 260-61 (1946); Munn v. Illinois, 94 U.S. 113, 134 (1876)). *See* Kratovil & Harrison, *supra* note 56, at 598.

168. Michelman, *supra* note 57, at 1110.

169. Robert L. Byrd Memorandum, *supra* note 107 (suggesting that TEX-IOTA is too insignificant to be a "taking").

170. *See, e.g.*, Fort Worth Neuropsychiatric Hosp., Inc. v. Bee Jay Corp., 587 S.W.2d 746, 757 (Tex. Civ. App.—Fort Worth 1979), *rev'd on other grounds*, 600 S.W.2d 763 (Tex. 1980); Anguiano v. Jim Walter Homes, Inc., 561 S.W.2d 249, 255 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.); Love v. Spur Indep. School Dist., 143 S.W.2d 793, 796 (Tex.

minimis maxim applies to small amounts of money.[171] By definition, the sums collectively held in a TEX-IOTA account would be impractical and uneconomical individual investments. For example, $500 held for one week would generate less than sixty cents, not even enough to pay for accounting and bookkeeping.[172] Arguably, such trifles are so negligible as not to be cognizable property under state law.[173]

State law, however, does not control the property issue. The second tier of property analysis is controlled by federal constitutional law and asks whether the state-created interest rises to the level of federally protected property. It is immaterial that some clients conceivably would want their sixty cents interest unless there is a state rule of property which creates legitimate client expectations. "[A] mere unilateral expectation or an abstract need is not a property interest entitled to protection" under the due process and taking clauses.[174] Just as an individual may not unilaterally claim a property interest, however, neither may the state unilaterally ignore or extinguish property interests.[175] The constitutional "hall-

---

Civ. App.—Amarillo 1940, no writ).

171. *E.g.*, Doe v. Marshall, 622 F.2d 118 (5th Cir. 1980) ($15.00); Young v. Fidelity Union Life Ins. Co., 597 F.2d 705 (10th Cir. 1979) ($0.01); Northern v. Nelson, 448 F.2d 1266 (9th Cir. 1971) ($1.05); FDIC v. Freudenfeld, 492 F. Supp. 763 (E.D. Wis. 1980) ($1.00). Presumably, the same maxim would obtain in Texas. *See* Anguiano v. Jim Walter Homes, Inc., 561 S.W.2d 249 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.); Thornhill v. Sharpstown Dodge Sales, Inc., 546 S.W.2d 151 (Tex. Civ. App.—Beaumont 1976, no writ).

172. Comment, *supra* note 16, at 539 n.3.

173. *See* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) (involving interest in excess of $100,000). No state law concept of de minimis was raised, for the obvious reason.

174. *Id.* at 161 (citing Andrus v. Allard, 444 U.S. 51 (1979); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978); United States v. Willow River Power Co., 324 U.S. 499 (1945); Fox River Paper Co. v. Texas Railroad Comm'n, 274 U.S. 651 (1927)).

175. There is an obvious tension between the two tiers; between a deference to state law in determining the scope of the interest, on the one hand, and applying an objective federal measure of the legitimacy of the claimed entitlement. This tension is manifest when the two inquiries conflict. In such situations, the second tier controls. Recent decisions suggest that the fourteenth amendment is a limit on state sovereign power to create, change, and transfer property under state law. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 102 S. Ct. 3164, 3178 (1982); Texaco, Inc. v. Short, 102 S. Ct. 781, 798-99 (1982) (Brennan, J., dissenting); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164-65 (1980). One district court already has suggested that the logic of this development portends the emergence of a constitutionally based property right. *See* Rowe v. Fauver, 533 F. Supp. 1239, 1243 n.4 (D.N.J. 1982). The artificiality of the two-tiered property analysis seems to be collapsing like the house of cards that it is. For a provocative argument that property was, is, and should be defined directly by the Constitution, see generally

mark of property . . . is an individual entitlement grounded in state law, which cannot be removed except 'for cause.' "[176] Once this characteristic exists, fourteenth amendment "property" exists. This characteristic is shared by varied interests,[177] both tangible and intangible, relating " 'to the whole domain of social and economic fact,' "[178] including personal property[179] in the form of money interest.[180] Although proponents of TEX-IOTA have not yet made the distinction, their de minimis argument may have some legitimacy at the second level of the constitutional analysis. The argument would suggest that finespun theories of property become gossamer at some point.[181] Some commentators have suggested that there is a fourteenth amendment plimsoll line of property below which the Constitution has no application.[182] There is some Supreme Court,[183] lower federal court,[184] and state supreme

---

Michelman, *supra* note 57.

176. Logan v. Zimmerman Brush Co., 102 S. Ct. 1148, 1155 (1982). *Cf.* Wellington, *The Nature of Judicial Review*, 92 YALE L.J. 486, 491 (1982) (property interest dependent upon possessor's reliance upon its security and inviolability).

177. *See, e.g.*, Barry v. Varchi, 443 U.S. 55, 64 (1979) (horse trainer's license); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 11-12 (1978) (utility service); Mathews v. Eldridge, 424 U.S. 319, 332 (1976) (disability benefits); Gross v. Lopez, 419 U.S. 565, 573 (1975) (high school education); Connell v. Higginbotham, 403 U.S. 207, 208 (1971) (government employment); Bell v. Burson, 402 U.S. 535, 539 (1971) (driver's license); Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (welfare benefits).

178. Logan v. Zimmerman Brush Co., 102 S. Ct. 1148, 1155 (1982) (quoting National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting)).

179. I. LEVEY, *supra* note 109, § 9, at 94-96.

180. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980). *See also* 1 L. ORGEL, *supra* note 98, § 5, at 19-23 (just compensation requires interest on amount representing value of property taken).

181. For a summary and critique of property theory in taking law, see generally Michelman, *supra* note 57, at 1202-13.

182. *See* Callies & Duerksen, *Value Recapture as a Source of Funds to Finance Public Projects*, 8 URB. L. ANN. 73, 85 (1974); Dunham, *supra* note 56, at 80; Kratovil & Harrison, *supra* note 56, at 612; Michelman, *supra* note 57, at 1109-11; Sackman, *supra* note 111, at 188-89; Sax, *supra* note 97, at 51-52. *Cf.* 2 J. SACKMAN, *supra* note 63, § 5.1[2], at 5-21 to -22 (every person with an interest in the subject matter of the taking must be compensated).

183. *See* Loretto v. Teleprompter Manhattan CATV Corp., 102 S. Ct. 3164, 3183 n.6 (1982) (Blackmun, J., dissenting); Goss v. Lopez, 419 U.S. 565, 576 (1975); Eisen v. Carlile & Jacquelin, 417 U.S. 156, 185 (1974) (Douglas, J., concurring and dissenting); Fuentes v. Shevin, 407 U.S. 67, 90 n.21 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 339, 342 (1969) (Harlan, J., concurring); Tumey v. Ohio, 273 U.S. 510, 531 (1927).

184. *See* Rose v. Nashua Bd. of Educ., 679 F.2d 279, 282 (1st Cir. 1982); Planned Parenthood League v. Bellotti, 641 F.2d 1006, 1014 (5th Cir. 1981); O'Grady v. City of Montpelier, 573 F.2d 747, 751 (2d Cir. 1978); Nickens v. White, 536 F.2d 802, 803 (8th Cir.

court[185] authority to support the argument that the de minimis maxim somehow applies to the protections of the fourteenth amendment, although it would be inaccurate to say that the point is clearly established and well defined. The argument simply stated is that the Constitution does not protect trifles. The answer to this argument is not so simple. It makes sense that finespun theory should give way to pragmatism at some point before the threshold of absurdity. There is some authority, however, to answer that the de minimis concept should have no relevancy to relations between individual and government, at least so far as procedural due process is concerned.[186] In fact, the Supreme Court recently held that the fourteenth amendment applied in a case in which the property was valued at $23.50.[187] Less than six thousand dollars held in an interest-bearing account for about a month would generate more interest.[188] At the very least, the de minimis issue should be raised concerning TEX-IOTA. So far it has not been correctly raised, let alone resolved.

The next step in the taking analysis is the "take" itself. When the government goes "on the take" in the constitutional sense, the transfer of property must amount to a taking and serve a public purpose. The paradigm fifth/fourteenth amendment taking "occurs when a government entity formally condemns a landowner's [real] property and obtains the fee simple pursuant to its sovereign power of eminent domain."[189] The taking rubric, however, covers

---

1976); Kimbrough v. O'Neil, 523 F.2d 1057, 1060 n.1 (7th Cir. 1975) (Swygert, J., concurring); Muscare v. Quinn, 520 F.2d 1212, 1215 (7th Cir. 1975). *Contra In re* Gifford, 669 F.2d 468, 473 (7th Cir. 1982); Evans v. City of Chicago, 522 F. Supp. 789, 796 (N.D. Ill. 1980); Hayes v. City of Wilmington, 451 F. Supp. 696, 704 (D. Del. 1978); Hillman v. Elliot, 436 F. Supp. 812, 815 (W.D. Va. 1977).

185. *See* Hilbers v. City of Anchorage, 611 P.2d 31 (Alaska 1980); Kash Enter. v. City of Los Angeles, 19 Cal. 3d 294, 562 P.2d 1302, 138 Cal. Rptr. 53 (1977); Roundhouse Constr. Corp. v. Telesco Masons Supplies Co., 168 Conn. 371, 362 A.2d 778 (1975); Barry Properties, Inc. v. Fick Bros. Roofing Co., 277 Md. 15, 353 A.2d 222 (1976); Robbinsdale Educ. Ass'n v. Robbinsdale Fed'n of Teachers, Local 872, 307 Minn. 96, 239 N.W.2d 437 (1976) (en banc); Town of Bethlehem v. Tucker, 119 N.H. 92, 409 A.2d 1334 (1979); Mobile Components, Inc. v. Layon, 623 P.2d 591 (Okla. 1980); Klimko v. Virginia Employment Comm'n, 216 Va. 750, 222 S.E.2d 559 (1976); State *ex. rel.* Yanero v. Fox, 256 S.E.2d 751 (W. Va. 1979).

186. *See supra* text accompanying note 86. *See also* United States v. Lamb, 294 F. Supp. 419 (E.D. Tenn. 1968) (de minimis doctrine applies to questions of minimal damage and transactions between persons, not between a person and a sovereign).

187. *See* Parratt v. Taylor, 451 U.S. 527 (1981).

188. Comment, *supra* note 80, at 126 n.91.

189. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 651 (1981) (Bren-

much more than this. A notion of de facto eminent domain labels as a taking any governmental action benefitting the public which results in destruction of the use and enjoyment of significant interests in private property.[190] The Supreme Court has long maintained that "the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*."[191] Thus, the taking analysis may be satisfied even though TEX-IOTA is not proposed or enacted as a taking measure because the reach of the fifth/fourteenth amendments is not limited to announced, intentional takings.[192] The legislature may not think it is exercising the taking power, but if the power in fact has been exercised, the measure will be evaluated by its true nature and effect.[193]

There are few absolutes in this area beyond the core of sovereign condemnations of land. TEX-IOTA would involve only the interest on the trust account funds, namely, a temporary profit from use of the money. While a governmental deprivation of the right to use and obtain a profit does not automatically establish a taking, it is very relevant.[194] The issue is whether " 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."[195] Justice Holmes characteristically preached a healthy pragmatism for both taker and takee. The individual takee must acknowledge "that the constitutional requirement of compensation when property is taken cannot be pressed to its grammatical extreme; that property rights may be taken for public purposes without pay if you do not take too much;

---

nan, J., dissenting) (citing Berman v. Parker, 348 U.S. 26, 33 (1954)).

190. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 653 (1981) (Brennan, J., dissenting).

191. Hughes v. Washington, 389 U.S. 290, 298 (1967) (Stewart, J., concurring). *See also* Davis v. Newton Coal Co., 267 U.S. 292, 301 (1925) (incantation not of controlling importance; primary concern is accomplishment).

192. "Its purpose, more particularly, is to protect . . . use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property . . . . " Fuentes v. Shevin, 407 U.S. 67, 81 (1972). *See* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980); Carey v. Piphies, 435 U.S. 247, 259-60 (1978).

193. Hulen, *supra* note 75, at 206 n.36.

194. *Compare* Loretto v. Teleprompter Manhattan CATV Corp., 102 S. Ct. 3164 (1982) (installation of cables pursuant to New York law requiring landlord's consent considered a taking) *with* Andrus v. Allard, 444 U.S. 51 (1979) (prohibition of sale of avian artifacts not a taking as owner retains substantial, though not most profitable rights).

195. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

that some play must be allowed to the joints if the machine is to work."[196] At the same time, the government taker must recognize that the play in the joints "must have its limits, or the . . . due process clauses are gone [and] private property disappears."[197]

We count nine separate theories of taking[198] and we probably have missed some.[199] Of the nine, five apply to TEX-IOTA.[200] First, the physical invasion approach defines a compensable taking whenever government "occupies, uses or in some manner takes physical possession" of the private property.[201] A "forced contribution" of the earnings of the trust account funds which is not reasonably related to the costs of administering the accounts obviously passes this test.[202] Second, the noxious use test holds the government immune from compensation claims when the private use prevented is harmful to the public health, safety, or morals.[203] To suggest that a client's earning of interest on trust accounts falls within this category would be to return to the days when earning interest was a sin. Third, the diminution in value theory allows government diminishment of existing private property interests without compensation so long as the government does not destroy all or substantially all of the value of the property.[204] TEX-IOTA

196. Tyson & Bros. v. Banton, 273 U.S. 418, 445-46 (1927) (Holmes, J., dissenting).

197. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413, 415 (1922).

198. Our laundry list is taken from Berger, *supra* note 91, at 170-95. He evaluates the economic usefulness of the various formulations. We do not. Texas adds another dimension to this. The Texas Constitution proscribes not only taking but also damaging property without adequate compensation. TEX. CONST. art I, § 17. The Texas Supreme Court refuses to differentiate between an exercise of police power and eminent domain and provides compensation when the cost of community benefits is not distributed impartially among all members of the community. *E.g.*, Steele v. City of Houston, 603 S.W.2d 786 (Tex. 1980); City of Austin v. Teague, 570 S.W.2d 389 (Tex. 1978); Du Puy v. City of Waco, 396 S.W.2d 103 (Tex. 1965); San Antonio River Auth. v. Lewis, 363 S.W.2d 444 (Tex. 1963); Brazos River Auth. v. City of Graham, 163 Tex. 167, 354 S.W.2d 99 (Tex. 1962).

199. For helpful background discussion of just what is taking, see Kratovil & Harrison, *supra* note 56, at 599-604; Mercer, *supra* note 119, at 185-90; Michelman, *supra* note 57, at 1184-1201; Sackman, *supra* note 111, at 183-87.

200. Four theories in Professor Berger's list do not apply to TEX-IOTA: the spillover theory is limited to real property, Berger, *supra* note 91, at 179-82; the cheapest cost avoider economic test is applied in the pollution context, *id.* at 185-91; the developments right transfer approach is applied to zoning and land use regulation, *id.* at 191-93; the first-in-time approach is applied to the equity notion of coming to the nuisance, *id.* at 193-95.

201. *Id.* at 170-71.

202. *See* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 163-65 (1980).

203. Berger, *supra* note 91, at 172.

204. *Id.* at 175.

does not take the principal in trust accounts, which would destroy all the value when the property is money.[205] Interest on money, however, is substantially all the value in possessing money and when all interest is taken the destruction is complete. Fourth, the enterprise-arbitral theory distinguishes between two types of governmental functions.[206] In its enterprise functions, government performs its public welfare missions, while by its arbitral functions government resolves disputes between private parties. Government must pay its own way in the former, but not in the latter. TEX-IOTA could be characterized as an arbitral function in deciding the competing claims of the client and designated private foundation to trust account interest upon its creation. This seems too facile, however, since the purposes behind TEX-IOTA and the creation of a fund where none had existed are such obvious examples of government providing for our general welfare. Fifth, a blend of economics and philosophy would decide what is a taking by considering a calculus of efficiency gains, demoralization costs, and settlement costs.[207] The three factors in this theory point in opposite directions when applied to TEX-IOTA. The excess benefits for those groups helped by the TEX-IOTA funding exceeds the small amounts lost by individual clients so that gains are efficient if we do not aggregate both sides of the equation. Demoralization of clients and attorneys over TEX-IOTA may be insignificant, although public relations would have to be handled gingerly.[208] The settlement costs, the time, effort, and resources required to reach compensation settlements and avoid demoralization (the costs of allocating the interest to the clients) would be substantial, assuming that available technology is inadequate.[209] Under this approach, we are not sure whether compensation in TEX-IOTA would be efficient and just and therefore required.

We must conclude that if a government actor is the taker, and

---

205. Interestingly, the Australian plan which originated the IOTA concept requires a portion of the trust to be transferred to the law society. Comment, *supra* note 16, at 543-44. Of course neither Australian nor Canadian jurisdictions are burdened with due process considerations such as are discussed in this article. *Id.* at 544, 547.

206. Berger, *supra* note 91, at 177-78.

207. *Id.* at 182-85.

208. The cover of the February 1982 issue of *The Florida Bar Journal* is an example. It shows a check made out to "The People of Florida" for "The Public Good" and is signed "Concerned Members of the Florida Bar."

209. *But see supra* note 38.

if trust account interest is property, then the TEX-IOTA transfer is a taking under these various approaches. Making the program mandatory and declaring private foundation ownership of the newly created property cannot make a taking something else. "[A] State, by *ipse dixit*, may not transform private property into public property without compensation, even for [a] limited duration . . . . "[210] Such a "simple fiat" would be a taking.[211]

Once government takes private property the taking must have a public purpose.[212] The public purpose limit on taking is tantamount to the legitimate government purpose required to satisfy due process.[213] No one could seriously argue that funding legal services for the poor, client security accounts, and improved client grievance procedures are beyond the ken of the government.[214]

On the other hand, the fifth/fourteenth amendment requirement that the takee be compensated does act as an effective limit on the taking power.[215] The constitutional phrase "just compensation" has left to the courts the task of providing content.[216] The

---

210. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980).

211. Texaco, Inc. v. Short, 102 S. Ct. 781, 798 (1982) (Brennan, J., dissenting). Still, the de minimis doctrine may be applied again, although it more aptly enters property analysis. Some governmental frustrations of property rights do not amount to takings in recognition of "the universal understanding of the people when the constitutions were adopted that participation in the protection and other benefits which an organized government affords is the only compensation to which an individual is entitled for the interference with certain of his property rights." 2 J. SACKMAN, *supra* note 63, § 6.1, at 6-5. *See supra* text accompanying notes 181-82. *See also* Noble State Bank v. Haskell, 219 U.S. 104, 110 (1911) ("comparatively insignificant taking"); Interstate Consol. St. Ry. v. Massachusetts, 207 U.S. 79, 87 (1907) ("the infliction of some fractional and relatively small losses").

212. The doctrine has been chronicled mostly to trace its denouement and explain its desuetude. *See* F. BOSSELMAN, D. CALLIES & J. BANTA, *supra* note 128, at 256-65; Dunham, *supra* note 56, at 65-71; Hulen, *supra* note 75, at 208-16; Lavine, *supra* note 56, at 380-81; Sackman, *supra* note 111, at 181-83; Stoebuck, *supra* note 97, at 588-89; Note, *Balancing Public Purposes: A Neglected Problem in Condemnation*, 35 ALB. L. REV. 769 (1971); Note, *The Public Use Doctrine: "Advanced Requiem" Revisited*, 1969 L. & SOC. ORDER 688; Note, *Public Use—Why and What*, 3 WILLAMETTE L.J. 11 (1964); Note, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599 (1949). Texas jurisprudence has its own counterpart. *See* TEX. CONST. art. I, § 17.

213. *See supra* text accompanying notes 89-93.

214. Comment, *supra* note 16, at 540-41.

215. The just compensation requirement prevents the taker from taking any more than it can pay for. Hulen, *supra* note 75, at 212-13.

216. *See* 2 L. ORGEL, *supra* note 98, § 246, at 251-61; E. RAMS, VALUATION FOR EMINENT DOMAIN (1973); Hale, *Value to the Taker in Condemnation Cases*, 31 COLUM. L. REV. 1 (1931); McCormick, *The Measure of Compensation in Eminent Domain*, 16 MINN. L. REV. 461 (1933).

theory behind the clause is the just share; a citizen should be required "to bear no greater cost of government than other citizens."[217] The government may not force individuals to bear a burden which should be borne by the public as a whole.[218] At a minimum, the Constitution requires the individual's compensation so that economically he is placed in the same position as if the property had not been taken.[219] The requirement "is not precatory: once there is a 'taking,' compensation *must* be awarded."[220]

In TEX-IOTA the amount of just compensation is the same measured by either of the two mutually exclusive theories—the owner's loss or the taker's gain.[221] What the client/owner lost is exactly the amount that the taker/government gained: the amount of interest earned on the trust account.[222] It is easy to see that the just compensation requirement, if applicable because TEX-IOTA is a taking, makes the program unfeasible. This is true because economic redistribution is itself the purpose of the government's intervention.[223] At least this is so if the deprivation involved is not so de minimis as to be not entitled to compensation.[224]

The only remaining alternative to just compensation in the taking analysis is the takee's consent.[225] Very often, a state statute

---

The Texas Constitution phrase "adequate compensation" has been held synonymous to "just compensation" under the Federal Constitution. *See* State v. Hale, 96 S.W.2d 135, 141 (Tex. Civ. App.—Austin 1936), *modified on other grounds*, 136 Tex. 29, 146 S.W.2d 731 (1941).

217. Stoebuck, *supra* note 97, at 584.

218. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 656 (1981) (Brennan, J., dissenting); Armstrong v. United States, 364 U.S. 40, 49 (1960).

219. Dunham, *supra* note 56, at 91. *See* Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 473-74 (1973); United States v. Reynolds, 397 U.S. 14, 16 (1970).

220. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 654 (1981) (Brennan, J., dissenting). *See* Griggs v. Allegheny County, 369 U.S. 84, 84-85 (1962); Jacobs v. United States, 290 U.S. 13, 16 (1933).

221. Kratovil & Harrison, *supra* note 56, at 615-20.

222. *See* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980).

223. Michelman, *supra* note 57, at 1181. *See* Beckwith v. Webb's Fabulous Pharmacies, Inc., 394 So. 2d 1009 (Fla. 1981).

224. Loretto v. Teleprompter Manhattan CATV Corp., 102 S. Ct. 3164, 3183 n.6 (1982) (Blackmun, J., dissenting). "[T]o insist on full compensation to every interest which is disproportionately burdened by a social measure dictated by efficiency would be to call a halt to the collective pursuit of efficiency." Michelman, *supra* note 57, at 1178.

225. The power to take is itself best viewed as a power delegated to a citizen's representatives to transfer property rights on the condition of just compensation. *See* Stoebuck, *supra* note 97, at 572-88.

requires a bona fide effort by the government to procure a voluntary conveyance as a condition precedent to the exercise of the taking power.[226] Waiver is a concept basic to constitutional law. Just as an individual may waive general constitutional protections,[227] the assurance of just compensation may be waived. The government, however, may not arbitrarily declare a blanket waiver or consent for a taking.[228] While attractive from the standpoint of taking jurisprudence, client consent apparently is not a real solution to the taking issue in TEX-IOTA. If clients were given notice and informed of an option to participate, the program would be rendered ineffective because of the tax problem. It seems that if TEX-IOTA effects a taking there may be no practical way to go forward with the program and follow the dictates of the fifth/fourteenth amendments.

IV. CONCLUSION

We have raised more questions than we have answered, which is the luxury of commentators. Our purpose, however, is not to suggest answers. Rather, we have endeavored to raise constitutional questions too long avoided or ignored. We must never lose sight of our basic charter, no matter how laudable the purpose or how pressing the need. We have suggested the framework for debate but have not sided with one viewpoint or the other nor have we made a prediction of the outcome on many of these issues. Our humble hope is that our study will set the agenda and describe the contours of constitutional debate over TEX-IOTA. That will be enough. Our concern is not how these issues will be decided, but that they receive the attention and consideration they demand. A wise decision on TEX-IOTA requires nothing less. "Without adequate study there cannot be adequate reflection. Without adequate reflection there cannot be adequate deliberation and discussion. And without these, there cannot be a full interchange of minds which is indispensable to a wise decision and its persuasive formu-

---

226. Hulen, *supra* note 75, at 214-16.

227. *See supra* text accompanying notes 77-78; Comment, *supra* note 80, at 129.

228. *Cf.* Texaco, Inc. v. Short, 102 S. Ct. 781, 791-92 (1982) (State of Indiana did not act arbitrarily in passing a statute which provided that a severed mineral estate automatically terminated unless the owner took steps to establish his continuing interest in the property).

lation."[229] We have made the study. It is time for reflection, deliberation, discussion, and, it is hoped, a wise decision.

229. Kinsella v. Krueger, 351 U.S. 470, 485 (1956) (Frankfurter, J., reservation).

APPENDIX A*

A BILL TO BE ENTITLED
AN ACT

Relating to the use of interest from funds in certain trust accounts held by attorneys.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS SECTION I. Title 14, Revised Statutes, is amended by adding Article 317a to read as follows:

Art. 317a. INTEREST ON TRUST ACCOUNTS HELD BY ATTORNEYS

SEC. 1. FINDINGS: PURPOSE

The Legislature finds that on certain client trust accounts held by attorneys, interest income cannot reasonably be earned to benefit individual clients but can and should be used to provide additional legal aid to the indigent in civil matters, to improve the administration of justice for other law related programs which benefit the public.

SEC. 2. RULES

The Supreme Court shall promulgate the necessary rules and regulations to implement this Act. Such rules shall provide for the formation of a corporation, incorporated under the non-profit corporation laws of Texas to be the recipient and disbursing agent for the funds hereinafter mentioned. In addition to such rules and regulations as may be promulgated by the Supreme Court which shall provide for its formation and operation, such corporation shall at all times meet the following requirements:

(a) The corporation shall be an organization qualifying as tax exempt under the Internal Revenue Code.

(b) The exclusive purposes of the corporation shall be to provide legal services to the indigent in civil matters; to improve the administration of justice; and to provide for such other law related programs for the benefit of the public as are specifically approved

---

* After the submission of this article, a copy of a proposed TEX-IOTA statute was circulated to members of the Client Protection Committee. This draft of October 26, 1982, may differ slightly from that actually presented to the State Bar, but time constraints dictate that a point of reference be chosen.

from time to time by the Supreme Court for exclusively public purposes.

(c) The corporation shall be governed by a Board of Directors composed of the Chief Justice of the Supreme Court, the President of the State Bar, and such other persons as may be provided for by the Supreme Court. At least one third (⅓) of the members of such Board of Directors shall be nonlicensed attorneys, who do not have, other than as consumers, a financial interest in the practice of law.

(d) Amounts expended by the corporation for legal services to the indigent may not be used for any case or matter that, if undertaken on behalf of an indigent person by an attorney in private practice, reasonably may be expected to result in payment of a fee for legal services from an award to a client, from public funds, from the opposing party, unless it is determined that adequate legal services would otherwise be unavailable.

(e) Neither the corporation nor any project funded by it shall take any action or require any attorney to take any action in violation of the Code of Professional Responsibility.

(f) The records of the corporation, including applications for funds, whether or not granted, shall be open for public inspection subject to such rules and regulations as the Supreme Court may promulgate.

(g) The corporation may expend funds for the actual administrative costs of the program including any costs incurred after the adoption of this Act and may provide a reasonable reserve for administrative costs.

SEC. 3. CLIENT FUNDS

An attorney or law firm, which, in the course of the practice of law in Texas receives or disburses client trust funds, shall establish and maintain an interest bearing demand trust account and shall deposit therein all client funds that are nominal in amount or are on deposit for a short period of time. All such client funds may be deposited in a single unsegregated account. The interest earned on all such accounts shall be paid in accordance with and used for the purposes set forth in this Act. Funds to be deposited under this Act do not include those funds evidenced by banking instruments such as drafts, until such instruments are fully credited to the bank in which the trust account is maintained.

SEC. 4 DEPOSITORIES

An attorney who, or a law firm which, establishes an interest bearing demand trust account pursuant to Sec. 3 hereof, shall comply with all the following provisions:

(a) The interest bearing trust account shall be established with a bank or such other financial institution as shall be authorized by the Supreme Court.

(b) The rate of interest payable on any interest bearing demand trust account shall not be less than the rate paid by the depository institution to regular depositors. Higher rates offered by the institution to customers whose deposits exceed certain time or quantity qualifications, such as those offered in the form of certificates of deposit, may be obtained by an attorney or law firm so long as there is no impairment of the right to withdraw or transfer principal immediately (except as accounts generally may be subject to statutory notification requirements), even though interest may be sacrificed thereby.

(c) The depository institution shall be directed to do all of the following:

(1) To remit not less than quarterly interest on the average daily balance in the account, less reasonable service charges, to the corporation described in Sec. 2 of this Act.

(2) To transmit to the said corporation with each remittance a statement showing the name of the attorney or law firm for whom the remittance is sent, the rate of interest applied, and the amount of service charges deducted, if any.

(3) To transmit to the depositing attorney or law firm at the same time a report showing the amount paid to the said corporation for that period, the rate of interest applied, the amount of service charges deducted, if any, and the average daily account balance for each month of the period for which the report is made.

SEC. 5. ATTORNEY LIABILITY

An attorney shall not be liable to any person for depositing client funds in accordance with Sec. 3 hereof unless such action is taken recklessly or in bad faith. Nothing contained in this Act shall affect the obligations of attorneys with respect to client trust funds other than client trust funds reasonably determined by the responsible attorney to be nominal in amount or on deposit for a

short period of time.

SEC. 6. CORPORATE LIABILITY

In the event client funds are improperly deposited in the account provided for in Sec. 3, that is, client funds which are neither nominal in amount nor on deposit for a short period of time, the liability of the corporation in such event shall be limited to the amount of interest attributable to such client funds actually paid by the depository to the corporation.

SEC. 7. EFFECTIVE TIME

Secs. 3 and 4 shall not take effect until the first day of the first month that begins more than ninety (90) days after a ruling is obtained from the Internal Revenue Service that the program authorized by this Act will not result in taxable income to clients whose funds are included in the program.

SECTION 2.(a) The Supreme Court may appoint a commission to:

(1) prepare and publish a preliminary drafts [sic] of the rules and regulations;

(2) distribute the draft with notices of public hearings to commercial banking institutions and potential fund recipients; and

(3) hold public hearings in which interested parties are afforded an opportunity to present oral or written testimony regarding the rules and regulations.

(b) The program authorized by this Act shall become operative only after the Supreme Court has promulgated and adopted rules and regulations to conform the program to applicable tax and banking statutes, regulations, and rulings.

(c) The initial distribution of funds under this Act shall be made at a time when, in the determination of the Supreme Court, there are sufficient funds to provide an adequate distribution.

SECTION 3. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

APPENDIX B

	Florida	California	Maryland
1. Authorization	Supreme court-Integration Rule 11.02(4)(d)	Legislature-Business & Professional Code §§ 6210-6228	Legislature
2. Lawyer involvement	Voluntary	Mandatory, but lawyer has sole responsibility for determining eligibility of funds for criterion 3	Voluntary
3. Client funds involved	Funds "nominal in amount or to be held for a short period of time"	Funds "nominal in amount or are on deposit for a short period of time"	Funds which will generate less than $50 interest per year
4. Notice to or consent of client required	No client consent required; notice provision specifically removed	No client consent required; notice provision specifically removed	No client notice or consent required
5. Income tax consequences	Not included in income of attorney or client by virtue of Rev. Rule 81-209	No revenue ruling yet obtained	No revenue ruling yet obtained
6. Recipient of funds	Florida Bar Foundation	State Bar of California	Maryland Legal Services Corp.
7. Authorized uses	Legal aid to poor, student loans, improving the administration of justice, and such other programs for the benefit of the public as the supreme court approves	Legal services to the indigent	Legal services to the indigent

Idaho	Texas (Proposed)
Supreme court-amending DR 9-102	Supreme court as directed by legislature
Voluntary	Mandatory
Funds "nominal in amount or to be held for a short period of time"	Funds "nominal in amount or to be held for a short period of time"
No client notice or consent required	No client notice or consent required
No revenue ruling yet obtained	No revenue ruling yet obtained
Idaho Law Foundation	Not yet determined
Not specified in rule	Legal aid to the poor, improving the administration of justice, and other programs for the benefit of the public as the supreme court approves