> have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a ''personal'' right, whether the ''property'' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.[2]

Initially, the takings clause applied only to the federal government. But, because a person's right to property is fundamental, the Court held that this clause applies to the states as well.[3]

The framers wanted limits on the power of government to use the people's money, and the takings clause is one of those limits. It provides a check on the government: the clause gives government the power to take a person's property, *if* the government (a) takes it for ''public use,'' and (b) pays ''just compensation.'' For example, if the government wants to build a road through my house, it can take my property, but first it must pay the fair market price for the land that it requires.[4] The purpose of the takings clause is ''to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.''[5] Thus, if the government wants the road badly enough so that it is willing to pay the market price for my land, the takings clause poses no roadblock.[6]

[2]Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972), citing, *inter alia*, JOHN LOCKE, OF CIVIL GOVERNMENT 82–85 (1924); JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA, in F. COKER, DEMOCRACY, LIBERTY, AND PROPERTY 121–32 (1942); and 1 WILLIAM BLACKSTONE, COMMENTARIES, *138–140.

[3]Chicago, B. & Q.R. Co. v. City of Chicago, 166 U.S. 226 (1897) (a state court judgment, although authorized by statute, that takes private property for public use without compensation, lacks due process of law. When the state court affirms such a judgment, it denies a right secured by the federal constitution).

[4]Roger Pilon, *Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles*, 68 NOTRE DAME L. REV. 507, 542–43 (1993).

[5]Armstrong v. United States, 364 U.S. 40, 49 (1960). *See also* Steven J. Eagle, *The Development of Property Rights in America and the Property Rights Movement*, 1 GEORGETOWN J. OF L. & PUBLIC POLICY 77 (2002).

[6]Ronald D. Rotunda, *The Impairments Clause and the Corporation*, 55 BROOKLYN L. REV. 809 (1989).

How is the government to determine what it must pay for the property it has taken? The Supreme Court tackled this takings issue in *Brown v. Legal Foundation of Washington.*[7] The issue in *Brown*[8] is, ultimately, this takings issue. The Court had to decide what the government owed, that is, what it had to pay, for property that the Washington State Supreme Court had taken. It is important to understand that all nine justices conceded that property had been ''taken,'' but the five-person majority, surprisingly, found that the state government had to pay nothing for this property, although it was worth millions of dollars to the government.

Brown is a relatively short opinion that is much more complex than it first appears.[9] It is written so that lower courts could read it very narrowly, substantially limiting its applicability and growth. Granted, lower courts may ignore the caveats written throughout this opinion and simply see it as a green light for state courts and legislatures to ''take,'' without compensation, the interest that grows out of the principal. But, the Court gives us many reasons why this case should be read narrowly, with the majority conceding that the government cannot take the principal (which belongs to the owners of that principal) unless it pays just compensation, and cannot even take the interest, except under the peculiar facts of this case.

The Court upheld the constitutionality of what is called ''Interest on Lawyers' Trust Accounts'' (IOLTA). The state court of Washington, by court rule, took the interest from these trust fund accounts. All nine justices agreed that what the state court had ordered was a ''taking'' of property. As Justice Stevens, for the Court, bluntly acknowledged, quoting an earlier decision, ''the interest earned in the IOLTA accounts 'is the private property of the owner of the principal.' ''[10] But then, five members concluded that the value of the money was worth zero to the owners of the principal out of which

[7] 123 S.Ct. 1406 (2003).

[8] 123 S.Ct. 1406 (2003).

[9] It could have been even more complex. Originally, the name of the case was ''Washington Legal Foundation v. Legal Foundation of Washington,'' but a procedural ruling changed the name of the petitioner. *See* 123 S.Ct. at 1415 and n. 4. *See also* Brief of Petitioner, in Washington Legal Foundation v. Legal Foundation of Washington, 2002 WL 1974400 (Appellate Brief), (U.S. Pet. Brief Aug 22, 2002) (NO. 01-1325).

[10] Brown v. Legal Foundation of Washington, 123 S.Ct. 1406, 1419 (2003).

the interest grew, so, the majority concluded, the compensation that the state owed these people was also ''zero.''

Yet the Washington State Court and other IOLTA jurisdictions did not collect zero from IOLTA accounts. Washington IOLTA accounts generate between $2.5 and $4.0 million per year.[11] In the year 2000 alone, IOLTA programs throughout the United States generated more than $148 million through interest on nominal or short-term client funds.[12] By 2001, the figure had grown to more than $200 million.[13] The states treated this money as free money or found money, something akin to money you might find on the street corner: it just comes, like manna from heaven; one does not have to earn it. In this case, the state court collects this money without the necessity of imposing a tax, which is the normal way that the government ''earns'' money. The state court, in its view, created something out of nothing, a feat unrivaled since Genesis.

Before we turn to the decision, we must discuss the complicated historical and legal background.

The Historical Road Leading to IOLTA

IOLTA accounts are a relatively recent phenomenon made possible by a series of changes in trust law and tax law provisions.

As a matter of trust law, the general rule has long been that lawyers, who are fiduciaries of their clients, must not mix up, blend, or ''commingle'' their funds with their clients' funds.[14] Sometimes a client will have the lawyer hold a great deal of money in trust, and the lawyer will put that money in a trust fund established in that client's name. It is not necessary, however, that the lawyers establish a separate named trust account for each client. Lawyers typically combine small accounts from each client when the amounts from each client are small. These funds are usually held for only a

[11] Brief of Petitioners, Washington Legal Foundation v. Legal Foundation of Washington, 2002 WL 1974400 (Appellate Brief), (U.S. Pet. Brief, Aug 22, 2002)(NO. 01-1325), at 4.

[12] AMERICAN BAR ASSOCIATION, COMMISSION ON INTEREST ON LAWYERS' TRUST ACCOUNTS, IOLTA HANDBOOK 5 (2001).

[13] AMERICAN BAR ASSOCIATION, COMMISSION ON INTEREST ON LAWYERS' TRUST ACCOUNTS, IOLTA HANDBOOK 98, 208 (2002 update).

[14] *See* RONALD D. ROTUNDA, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY §16-1 (ABA-West Group, 2nd ed. 2002).