

EQUAL JUSTICE UNDER THE LAW: WHY IOLTA PROGRAMS DO NOT VIOLATE THE FIRST AMENDMENT

HILLARY A.WEBBER*

TABLE OF CONTENTS

Introduction	492
I. An Overview of IOLTA.....	494
A. The Development of IOLTA.....	494
B. The Significance of IOLTA.....	498
C. Fifth Amendment Litigation Involving IOLTA Programs	502
1. The challenge to Texas's IOLTA program.....	502
2. The challenge to Washington's IOLTA program	504
II. Compelled Speech: Theories and Caselaw	505
A. Associated First Amendment Rights Protected by the Constitution	505
B. Compelled Financial Support Decisions.....	509
1. <i>Abood v. Detroit Board of Education</i>	509
2. <i>Keller v. State Bar of California</i>	510
3. <i>Board of Regents v. Southworth</i>	511
C. First Amendment Challenges to IOLTA Programs	512
III. First Amendment Analysis of IOLTA Programs	515
A. The Connection Between Forced Contributors to IOLTA and the Speech They Find Objectionable.....	516

* J.D. Candidate, May 2005, *American University, Washington College of Law*, A.B., 2000, *Princeton University*. Many thanks to Professor Stephen Wermiel for his input early in the process, to the editors and staff of *American University Law Review* for their thoughtful edits and comments, and, most of all, to my father, Rick Webber, my role model and the best lawyer I know.

B. Intermediate and Strict Scrutiny Analysis of IOLTA Programs	519
1. Intermediate scrutiny.....	520
2. Strict scrutiny	523
Conclusion	527

INTRODUCTION

Voting five to four, the United States Supreme Court granted proponents of free legal services for the poor a major victory in *Brown v. Legal Foundation of Washington*.¹ The Court upheld the constitutionality of Interest on Lawyers Trust Accounts (“IOLTA”),² a funding mechanism which produces millions of dollars annually for these legal services.³ IOLTA accounts consist of pooled, interest-bearing deposits of client funds that, individually, are so nominal in amount or are to be held for such a short period of time that they are not capable of generating net interest for the client.⁴ The proceeds of IOLTA accounts go to the state’s IOLTA program, which distributes the money to non-profit legal service providers.⁵ Every state, as well as the District of Columbia, uses IOLTA programs to fund legal services for the poor.⁶

The plaintiffs in *Brown* challenged Washington state’s IOLTA program on the grounds that it allegedly violated the Fifth Amendment Takings Clause.⁷ The Supreme Court rejected the

1. 123 S. Ct. 1406 (2003).

2. *Id.* at 1421.

3. *See id.* at 1412 (indicating that IOLTA-generated revenue exceeded \$200 million in 2001).

4. *See* COMM’N ON INTEREST ON LAWYERS’ TRUST ACCOUNTS, AM. BAR ASS’N, WHAT IS IOLTA? [hereinafter WHAT IS IOLTA?], at <http://www.abanet.org/legalservices/iolta/ioltback.html> (last modified Apr. 4, 2002) (on file with the American University Law Review) (explaining that if a client’s funds are capable of earning interest for the client after any banking and administrative charges, an attorney may not deposit those funds in an IOLTA account); *see also* David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CAL. L. REV. 209, 226-27 (2003) (noting that prior to the advent of IOLTA, interest that a client could not collect defaulted to the bank); Kristi L. Darnell, Note, *Pennies From Heaven—Why Washington Legal Foundation v. Legal Foundation of Washington Violates the U.S. Constitution*, 77 WASH. L. REV. 775, 778-80 (2002) (describing the mechanics of IOLTA accounts).

5. *See* WHAT IS IOLTA?, *supra* note 4 (noting that IOLTA programs distribute their funds to not-for-profit organizations through a local grant process).

6. *Brown*, 123 S. Ct. at 1411; *see also* Darnell, *supra* note 4, at 778 (confirming presence of IOLTA programs in all fifty states).

7. *See Brown*, 123 S. Ct. at 1415 (noting that the plaintiffs alleged that IOLTA programs take the interest earned on IOLTA accounts without providing just compensation, thereby violating the Takings Clause). Although the plaintiffs’ complaint also alleged that Washington’s IOLTA program violated their First Amendment rights, the Supreme Court declined to address the First Amendment claim. *Id.*

argument, explaining that even if the transfer of clients' pooled interest earnings to a legitimate state foundation constituted a taking, the state did not owe the clients any just compensation because they had suffered no net monetary loss.⁸ Each client's individual funds would not have earned that client net interest in the first place.⁹

Justice Kennedy issued a dissent in which he cautioned that IOLTA programs may constitute a "serious violation" of the First Amendment.¹⁰ He claimed that Washington's IOLTA program "grants to itself a monopoly which might then be used for the forced support of certain viewpoints."¹¹ Justice Kennedy cited two cases concerning compelled financial support to suggest that IOLTA programs may violate the First Amendment—*Abood v. Detroit Board of Education*¹² and *Keller v. State Bar of California*.¹³ In *Abood* and *Keller*, the Court held that a union and a bar association, respectively, could use mandatory dues only to fund activities germane to the purpose of the organization.¹⁴ It is unclear whether the Washington Legal Foundation, the organization that spearheaded most of the litigation against IOLTA programs, will pursue a new First Amendment claim

8. *See id.* at 1419-21 (measuring just compensation by the property owner's pecuniary loss rather than by the gain to the government). Justice Scalia, joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Thomas, dissented, stating that interest accumulated on IOLTA accounts was the property of the client and that just compensation should be measured by the fair market value of the interest, not the net loss to the owner. *See id.* at 1422-24 (Scalia, J., dissenting) (maintaining that petitioners are due the "value of the property on the date it is appropriated," rather than the "interest petitioners would have earned had their funds been deposited in non-IOLTA accounts").

9. *See id.* (stating that Washington's IOLTA rules require an attorney or Limited Practice Officer ("LPO") to deposit client funds in a non-IOLTA account if they are capable of generating net interest for the client).

10. *Id.* at 1428 (Kennedy, J., dissenting).

11. *See id.* (positing that had the state not established an IOLTA program, "the free market might have created various and diverse funds for pooling small interest amounts" that a client could then use as he pleased).

12. 431 U.S. 209 (1977).

13. 496 U.S. 1 (1990).

14. *See Abood*, 431 U.S. at 234 (stating that the union could not use required fees to finance activities "unrelated to its duties as exclusive bargaining representative"); *Keller*, 496 U.S. at 13-14 (finding that the State Bar could use mandatory dues only for activities related to "regulating the legal profession and improving the quality of legal services").

against such programs.¹⁵ However, at least one Justice believes that a First Amendment claim against IOLTA programs likely has merit.¹⁶

This Comment argues that IOLTA programs do not violate the First Amendment and challenges Justice Kennedy's suggestion that the same potential First Amendment violation exists in IOLTA as exists in the *Abood* and *Keller* circumstances. Part I describes the development and operation of IOLTA programs and examines their significance in funding civil legal services for the needy. Part I also reviews pre-*Brown* litigation concerning IOLTA. Part II discusses the concept of compelled speech, reviewing three landmark cases concerning compelled financial support: *Abood*, *Keller*, and *Board of Regents v. Southworth*.¹⁷ Part II then addresses two lower courts' treatment of compelled speech claims against IOLTA in particular.¹⁸ Part III analyzes the possible application of the First Amendment to IOLTA programs under both intermediate and strict scrutiny standards and concludes that courts should uphold IOLTA programs under either analysis in the event of a challenge.

I. AN OVERVIEW OF IOLTA

A. *The Development of IOLTA*

Attorneys often need to hold client funds for various periods of time. For instance, an attorney may hold a retainer fee from which he will deduct costs, or he may hold a client's settlement award in a trust account.¹⁹ Rules of legal ethics prohibit an attorney from

15. See Marcia Coyle, *Battle Over IOLTA Could be Renewed: Using Funds for Indigent Clients Might be Seen as "Compelled Speech"*, NAT'L L.J., Mar. 31, 2003, at A5 (suggesting that "a First Amendment claim against IOLTA programs would be long and difficult"). *But see* Margaret Graham Tebo, *Victory For IOLTA: Supreme Court Upholds Funding Mechanism for Legal Aid*, A.B.A. J. E-REPORT, Mar. 28, 2003 ("The First Amendment issue is very much alive."), available at Westlaw, 2 No. 12 ABAJEREP 2 (on file with the American University Law Review).

16. See *Brown v. Legal Found. of Wash.*, 123 S. Ct. 1406, 1428 (2003) (Kennedy, J., dissenting) (asserting that "[o]ne constitutional violation (the taking of property) likely will lead to another (compelled speech)"). According to Justice Kennedy's dissenting argument, requiring clients to contribute interest to an organization that funds legal services for the poor amounts to compelled speech because the clients may not agree with that funding. *Id.*

17. 529 U.S. 217 (2000).

18. See *Wash. Legal Found. v. Mass. Bar Found.*, 993 F.2d 962, 978 (1st Cir. 1993) (holding that Massachusetts' IOLTA program did not violate freedom of speech or association); *Wash. Legal Found. v. Tex. Equal Access to Justice Found.*, 86 F. Supp. 2d 624, 633 (W.D. Tex. 2000) (rejecting the plaintiffs' First Amendment claim against the Texas state IOLTA program).

19. See James D. Anderson, *The Future of IOLTA: Solutions to Fifth Amendment Takings Challenges Against IOLTA Programs*, 1999 U. ILL. L. REV. 717, 721 (1999) (citing types of funds that attorneys hold for clients in trust accounts, including

commingling his own money with client funds.²⁰ Prior to 1980, attorneys typically held their clients' funds in non-interest bearing accounts due to the fact that Congress did not permit federal banks to pay interest on checking accounts.²¹ Often, attorneys pooled funds of multiple clients into one account, as it was expensive to hold each client's funds in a separate account.²² Since these accounts did not bear interest, banks benefited from free use of the clients' funds while they held them.²³ In 1980, Congress approved the creation of Negotiable Order of Withdrawal ("NOW") accounts,²⁴ allowing federally-insured banks to pay interest on deposits so long as the interest went to charitable organizations.²⁵

Following the change in banking laws, states began to establish IOLTA programs.²⁶ States with mandatory IOLTA programs require attorneys to deposit certain client funds in IOLTA accounts—essentially, NOW accounts used for client deposits.²⁷ The only funds that an attorney may place in IOLTA accounts are those which are so nominal in amount or will be held for such a short period of time that the funds will not generate interest for the client net of banking and administrative fees.²⁸ If a client's funds could earn the client interest after banking and administrative fees, then his attorney must

settlement awards, fees advanced for future services, and funds to pay court fees).

20. See MODEL RULES OF PROF'L CONDUCT R. 1.15(a) (1989) (stating that "[a] lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property"). *But see* *Brown v. Legal Found. of Wash.*, 123 S. Ct. 1406, 1411 (2003) (noting that it is not unethical for an attorney to combine several clients' funds).

21. 12 U.S.C. § 371(a) (1978). See *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 160-61 (1998) (pointing out that a lawyer typically held large client funds in an interest bearing savings account because the interest earned on the deposit justified the nuisance of not being able to write checks on the account).

22. WHAT IS IOLTA?, *supra* note 4.

23. See *Brown*, 123 S. Ct. at 1411 (stating that the value of the interest earned on clients' funds used to default to the bank, but that under IOLTA programs, this money now goes to charitable legal service providers).

24. See 12 U.S.C. § 1832 (2000) (authorizing owners of deposits to make withdrawals in order to transfer the interest to charitable entities).

25. See *id.* § 1832(a)(2) (stating that NOW accounts are permitted for "funds in which the entire beneficial interest is held by one or more individuals or by an organization which is operated primarily for religious, philanthropic, charitable, educational, political, or other similar purposes and which is not operated for profit"). See generally *Anderson*, *supra* note 19, at 720-22 (describing Congress's authorization of NOW accounts and a related IRS revenue ruling).

26. See *Brown*, 123 S. Ct. at 1411 (noting that Florida established the first IOLTA program in 1981, only one year after congressional approval of NOW accounts); see also *FLA. BAR R. 5-1.1* (2002 Supp.) (adopting IOLTA program by rule approved by highest state court).

27. See *infra* note 38 (listing the states that currently have mandatory IOLTA programs).

28. WHAT IS IOLTA?, *supra* note 4.

place the funds in a non-IOLTA account.²⁹ Therefore, because the interest earned on IOLTA accounts could not have been earned on the clients' individual funds, the client suffers no monetary loss.³⁰ Attorneys are responsible for evaluating whether a client's funds should be held in an IOLTA account.³¹

Consistent with the specific state's law, banks submit the interest earned on IOLTA accounts to the state IOLTA organization, which then distributes the funds to charitable legal service providers.³² Thus, banks no longer benefit from free use of non-interest bearing accounts.³³ Moreover, the Internal Revenue Service ("IRS") does not tax interest on IOLTA accounts so long as the client does not control whether his attorney places his funds in an IOLTA account or which IOLTA recipients receive the interest on his funds.³⁴

Today, all fifty states and the District of Columbia have established IOLTA programs.³⁵ A state may create an IOLTA program either by statute through its legislature or by state supreme court order.³⁶

29. *Id.*

30. *See Brown*, 123 S. Ct. at 1421 (holding that a client's pecuniary loss from IOLTA programs is zero).

31. *See, e.g., MD. LEGAL SERVS. CORP., FAQ—QUESTIONS AND ANSWERS*, at <http://www.mlsc.org/faq.htm#3> (last modified Oct. 30, 2003) (on file with the American University Law Review) (estimating that it costs fifty dollars in administrative costs to maintain an individual interest bearing account for a client). Therefore, attorneys in Maryland must assess whether their client's funds will be held long enough to generate more than fifty dollars in interest. *Id.* A client's principal of \$10,000 will take approximately ninety-two days to form fifty dollars in interest; a \$30,000 principal will take approximately thirty days to earn fifty dollars in interest; a \$100,000 principal will take approximately nine days to earn fifty dollars in interest. *Id.* Depending on a particular state's IOLTA rule, an attorney may be liable to the client for interest generated on funds that an attorney mistakenly deposits in an IOLTA account. *Brown*, 123 S. Ct. at 1414-15.

32. *See* WHAT IS IOLTA?, *supra* note 4 (stating that the net interest collected on IOLTA accounts, after paying administrative bank fees, is remitted to the state IOLTA program). State foundations are operated by volunteers and distribute the funds through local grants to non-profit organizations that provide legal services for the needy. *Id.*

33. *See Brown*, 123 S. Ct. at 1412 (explaining that IOLTA programs transfer the interest earned on IOLTA accounts to charitable legal service providers); *see also* Erin E. Heuer Lantzer, *IOLTA Lost the Battle but Has Not Lost the War*, 33 IND. L. REV. 1015, 1016-17 (2000) (providing a numerical example to illustrate the process by which interest on a client's funds is channeled to legal service providers).

34. *See* Rev. Rul. 87-2 1987-1 C.B. 18 (stating that interest earned on IOLTA accounts is not includible in the gross income of either the client or the attorney); *see also* Wash. Legal Found. v. Tex. Equal Access to Justice Found., 86 F. Supp. 2d 624, 628-29 (W.D. Tex. 2000) (discussing the mechanics of the IOLTA program in Texas).

35. *Brown*, 123 S. Ct. at 1411.

36. COMM'N ON INTEREST ON LAWYERS' TRUST ACCOUNTS, AM. BAR ASS'N, CURRENT STATUS OF IOLTA PROGRAMS [hereinafter CURRENT STATUS OF IOLTA PROGRAMS], at <http://www.abanet.org/legalservices/iolta/ioltus.html> (last modified May 9, 2003) (on file with the American University Law Review). Five states created their IOLTA program through their legislature. *See* CAL. BUS. & PROF. CODE § 6211(a) (West

There are three types of IOLTA programs: mandatory, opt-out, and voluntary.³⁷ Twenty-seven states have mandatory IOLTA programs, in which lawyers within the program's jurisdiction are required to participate.³⁸ An additional twenty-one states and the District of Columbia have opt-out programs, in which attorneys must opt-out if they wish not to participate.³⁹ Two states and the Virgin Islands have voluntary IOLTA programs, in which an attorney may choose whether to deposit client funds in an IOLTA account.⁴⁰ Because mandatory IOLTA programs compel attorneys to deposit certain client funds in IOLTA accounts, opponents of IOLTA have targeted mandatory programs in their legal challenges.⁴¹

1990); CONN. GEN. STAT. § 51-81c (Supp. 2002); MD. CODE ANN., BUS. OCC. & PROF. § 10-303 (2000); N.Y. JUD. LAW § 497 (McKinney Supp. 2003); OHIO REV. CODE ANN. § 4705.09(A)(1) (Anderson 2000). The rest of the states created IOLTA programs through state supreme court order. See ALA. RULES PROF. CONDUCT 1.15(g) (1996); ALASKA RULES PROF. CONDUCT 1.15(d) (2001); ARIZ. SUP. CT. R. 44(c)(2) (2002); ARK. RULES PROF. CONDUCT 1.15(d)(2) (2002); COLO. RULES PROF. CONDUCT 1.15(e) (2002); DEL. RULES PROF. CONDUCT 1.15(h) (2002); D.C. RULES OF COURT, App. B(a) (2002); FLA. BAR R. 5-1.1 (2002 Supp.); GA. BAR R. 1.15(II) (2002); HAW. SUP. CT. R. 11 (2002); IDAHO RULES PROF. CONDUCT 1.15(d) (2002); IND. RULES PROF. CONDUCT 1.15(d) (2000); IOWA CODE PROF. RESPONSIBILITY DR 9-102 (rev. ed. 2002); KAN. RULES PROF. CONDUCT 1.15(d)(3) (2002); KY. SUP. CT. R. 3.130, RULES PROF. CONDUCT 1.15 (2002); LA. RULES PROF. CONDUCT 1.15(d) (West Supp. 2003); ME. CODE PROF. RESPONSIBILITY 3.6(e)(4) (2002); MASS. RULES PROF. CONDUCT 1.15 (2002); MICH. RULES PROF. CONDUCT 1.15(d) (2002); MINN. RULES PROF. CONDUCT 1.15(d) (2002); MISS. RULES PROF. CONDUCT 1.15(d) (2002); MO. SUP. CT. RULES PROF. CONDUCT 4-1.15 (2002); MONT. RULES PROF. CONDUCT 1.18(b) (2002); NEB. CODE PROF. RESPONSIBILITY DR 9-102 (2000); NEV. SUP. CT. R. 217 (2000); N.H. SUP. CT. R. 50 (2002); N.J. RULES GEN. APPLICATION 1:28A-2 (2003); N.M. RULES PROF. CONDUCT 16-115(D) (2002 Supp.); N.C. RULES PROF. CONDUCT 1.15-4 (2001); N.D. RULES PROF. CONDUCT 1.15(d)(1) (2002); OKLA. RULES PROF. CONDUCT 1.15(d) (2002); ORE. CODE PROF. RESPONSIBILITY DR 9-101(D)(2) (2002); PA. RULES PROF. CONDUCT 1.15(d) (2002); R.I. RULES PROF. CONDUCT, Art. V, 1.15(d) (2001); S.C. APP. CT. RULES 412 (1990); S.D. RULES PROF. CONDUCT 1.15(e) (1995); TENN. SUP. CT. RULE 8, CODE PROF. RESPONSIBILITY DR9-102(C)(2) (2002); TEX. RULES PROF. CONDUCT 1.14 (2002); UTAH RULES PROF. CONDUCT 1.15 (2002); VT. RULE, CODE PROF. RESPONSIBILITY DR 9-103 (2002); VA. SUP. CT. RULES, pt. 6, § II, RULES PROF. CONDUCT 1.14 (2002); W. VA. RULES PROF. CONDUCT 1.15(d) (2002); WIS. SUP. CT. R. 20:1.15 (2002); WYO. RULES PROF. CONDUCT 1.15(d) (2002).

37. CURRENT STATUS OF IOLTA PROGRAMS, *supra* note 36.

38. See *id.* (listing that the following states have mandatory IOLTA programs: Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Texas, Vermont, Washington, West Virginia, and Wisconsin).

39. See *id.* (stating that the District of Columbia and the following states have opt-out IOLTA programs: Alabama, Alaska, Delaware, Idaho, Indiana, Kansas, Kentucky, Maine, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Rhode Island, South Carolina, Tennessee, Utah, Virginia, and Wyoming).

40. See *id.* (indicating that Oklahoma and South Dakota have voluntary IOLTA programs).

41. See, e.g., *Brown v. Legal Found. of Wash.*, 123 S. Ct. 1406 (2003) (challenging the mandatory IOLTA program in Washington state); *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998) (examining the constitutionality of Texas's mandatory IOLTA

B. The Significance of IOLTA

The largest source of funding for civil legal services for the poor is the Legal Services Corporation ("LSC"), created by Congress in 1974.⁴² Congress charged the LSC with providing "equal access to the system of justice in our Nation for individuals who seek redress of grievances" by making available high quality legal services to those that are unable to afford them.⁴³

Since its inception, the LSC has faced attacks from those suspicious of the activities it funds.⁴⁴ For instance, in the 1980s the Reagan administration proposed to cut LSC funding entirely in several budget requests.⁴⁵ Congress, in response, cut LSC funding by twenty-

program); *Wash. Legal Found. v. Mass Bar Found.*, 993 F.2d 962 (1st Cir. 1993) (assessing claims against Massachusetts's mandatory IOLTA program).

42. Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378 (1974) (codified as amended at 42 U.S.C. § 2996 (1994)). See generally Alan W. Houseman, *Civil Legal Assistance for Low-Income Persons: Looking Back and Looking Forward*, 29 FORDHAM URB. L.J. 1213, 1221-22 (2002) (detailing how the increased Legal Services Corporation ("LSC") funding during the late 1970s and early 1980s made possible the expansion of civil legal service programs throughout the United States). In 2001, the LSC's annual budget was approximately \$330 million. *Id.*

43. See Legal Services Corporation Act of 1974 (declaring that the provision of free legal services for the poor serves the ends of justice, improves opportunities for low-income persons, and reaffirms faith in the rule of law). See LEGAL SERVS. CORP., SERVING THE CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS: A SPECIAL REPORT TO CONGRESS I (2000) [hereinafter SPECIAL REPORT], available at <http://www.lsc.gov/pressr/EXSUM.pdf> (on file with the American University Law Review).

44. See NAT'L LEGAL AID & DEFENDER ASS'N, HISTORY OF CIVIL LEGAL AID, at http://www.nlada.org/About/About_HistoryCivil (last visited Aug. 14, 2003) (on file with the American University Law Review) (explaining that the expansion of LSC was met with fear that providing legal services to the poor would adversely affect the status quo); Robert Hornstein et al., *The Politics of Equal Justice*, 11 AM. U. J. GENDER SOC. POL'Y & L. 1089, 1095-99 (2003) (stating that politicians such as then-Governor Ronald Reagan and President Richard Nixon were angered by the success of legal service attorneys during the early 1970s in protecting the poor's civil rights and property rights and expanding benefits for women, children, immigrants, the elderly, and the disabled). Vice President Spiro Agnew referred to legal service attorneys as "ideological vigilantes." *Id.* at 1094. When Congress passed the Legal Services Corporation Act, the program provided that law reform would not be a goal of the program. *Id.* at 1095. Deborah M. Weissman, *Law As Largess: Shifting Paradigms of Law for the Poor*, 44 WM. & MARY L. REV. 737, 755-56 (2002) (discussing opposition to the provision of legal services for the poor that existed prior to the formation of the LSC and continued after the LSC was established). Some individuals and groups questioned the political and ideological motivations of legal service providers and disliked legal service providers' attempts to reallocate rights of the wealthy and poor. *Id.*

45. See NAT'L LEGAL AID & DEFENDER ASS'N, *supra* note 44 (asserting that President Reagan's hostility towards the LSC was due, in part, to his belief that government should limit its involvement in social programs); see also William P. Quigley, *Legal Services: The Demise of Law Reform and the Triumph of Legal Aid*, 17 ST. LOUIS U. PUB. L. REV. 241, 255-57 (1998) (noting that President Reagan sought to replace the LSC with a local system of legal aid and that the administration created an LSC board that was hostile to its own agency).

five percent in fiscal year 1982.⁴⁶ In 1995, congressional leaders led another effort to eliminate the LSC.⁴⁷ The Senate rejected elimination of the LSC,⁴⁸ but Congress imposed a new set of restrictions that significantly limited the types of cases LSC-funded entities could undertake and the clients they could represent.⁴⁹ For instance, since 1996, LSC-funded organizations may not represent clients in redistricting matters or in abortion-related litigation, nor may they represent certain classes of aliens (including many who are legal), persons who are incarcerated, or persons charged with drug crimes in public housing evictions.⁵⁰ Recipients of LSC funds also may not participate in any class action suits, nor may they challenge welfare reform.⁵¹ Further, Congress's 1996 restraints provided that recipients of LSC funds could not use non-LSC funds to engage in any activities for which LSC funds were prohibited.⁵² These restraints

46. See NAT'L LEGAL AID & DEFENDER ASS'N, *supra* note 44 (stating that funding was cut from \$321 million in fiscal year 1981 to \$241 million in fiscal year 1982, forcing many programs to close); see also Margot Hornblower, *Legal Services Reprieve Voted; Legal Services Corp. Reprieved by House; House Ignores Veto Threat*, WASH. POST, June 19, 1981, at A1 (discussing the vote by the House to continue the existence of the LSC with a substantially reduced budget in spite of President Reagan's desire to abolish the program).

47. See NAT'L LEGAL AID & DEFENDER ASS'N, *supra* note 44 (noting that the House proposed a budget in which LSC funding would be cut by one third during the 1996 fiscal year, by two thirds the next year, and entirely the following year).

48. See Mauricio Vivero, *From "Renegade" Agency To Institution of Justice: The Transformation of Legal Services Corporation*, 29 FORDHAM URB. L.J. 1323, 1330-31 (2002) (stating that the Senate vote was 60-39 in favor of retaining the LSC and imposing new restrictions on the agency).

49. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504, 110 Stat. 1321, 1353-57 (1996) (listing numerous restrictions placed upon the funds granted to the LSC, including engaging in lobbying; representing clients in class actions; and participating in cases concerning welfare reform); see also Nicole B. Casarez, *Public Forums, Selective Subsidies, and Shifting Standards of Viewpoint Discrimination*, 64 ALB. L. REV. 501, 566-67 (2000) (noting that the LSC restrictions were a compromise between members of Congress desiring continued support of the LSC and those members who wished the complete dissolution of the corporation); Luban, *supra* note 4, at 222 (referring to the LSC restrictions as "silencing doctrines").

50. Omnibus Consolidated Rescissions and Appropriations Act of 1996 § 504(a)(11), (14), (15), (17).

51. See Omnibus Consolidated Rescissions and Appropriations Act of 1996 § 504; see also Gordon J. Beggs, *Defend the Rights of the Poor*, 37 CATH. LAW. 1, 2 (1996) (stating that the restrictions imposed upon the LSC have rendered the poor as the only class of citizens in this country unable to bring class action lawsuits); Alan W. Houseman, *Restrictions By Funders and the Ethical Practice of Law*, 67 FORDHAM L. REV. 2187, 2201 (1999) (emphasizing that the 1996 restrictions on class actions, welfare reform, and attorney's fees are absolute and have no exceptions); Weissman, *supra* note 44, at 764-65 (noting that welfare-related restrictions were particularly contentious and that accusations were made that LSC money was used to "undermine local government programs relating to eliminating entitlement programs").

52. See Omnibus Consolidated Rescissions and Appropriations Act of 1996 § 504(d)(2)(B).

forced many legal service providers to break into separate entities, one that operates within the federal LSC restrictions and the other that keeps its “freedom of action” by giving up its LSC grant and using alternate sources of funding.⁵³ On top of the new restrictions, Congress cut funding for the LSC by almost a third in 1996, leading to significant cutbacks in staff and office space.⁵⁴

Congress cut funding for the LSC despite a huge demand for free legal services for the poor. The Census Bureau estimates that in 2002, approximately 34.6 million Americans lived below the poverty line.⁵⁵ An estimated ten million additional Americans potentially qualify for free legal services.⁵⁶ Recent studies have reported that even with current federal, state, and private funding, between seventy and ninety percent of this population’s legal needs go unmet.⁵⁷ In light of the huge demand for legal services and the recent federal restrictions and funding cuts affecting the LSC, alternative sources of funding play an increasingly important role in funding legal services for the needy.⁵⁸

53. See Luban, *supra* note 4, at 221-22 (explaining that the split organizations were significantly weaker than the original organization because the new congressional requirements mandated physical and financial separation of the two organizations); see also Houseman, *supra* note 51, at 2201-02 (explaining that in order to use the non-LSC funds the new organization must be a separate legal entity with its own staff, office space, equipment, financial records, and operational name).

54. See NAT’L LEGAL AID & DEFENDER ASS’N, *supra* note 44 (stating that Congress cut funding from \$400 million in fiscal year 1995 to \$278 million in 1996); see also Quigley, *supra* note 45, at 260-61 (noting that after the 1996 budget cuts, the LSC was forced to close over 100 offices and layoff fourteen percent of their attorneys and sixteen percent of their paralegals); Weissman, *supra* note 44, at 765 (calling the federal cutbacks a “crippling loss” to legal service providers).

55. Press Release, U.S. Census Bureau, Poverty, Income See Slight Changes; Child Poverty Rate Unchanged, Census Bureau Reports (Sept. 26, 2003), available at <http://www.census.gov/Press-Release/www/2003/cb03-153.html> (on file with the American University Law Review).

56. See SPECIAL REPORT, *supra* note 43, at 12 (explaining that in addition to those who fall below the poverty level, individuals who earn between 100 and 125% of the poverty level may also qualify for legal aid); see also 45 C.F.R. § 1611.3(b) (2003) (mandating that an LSC funded legal services provider, in determining eligibility for free legal services, may not establish a maximum annual income greater than 125% of the Federal Poverty Income Guidelines).

57. See Brief for AARP et al. as Amici Curiae in Support of Respondents at 8-9, *Brown v. Legal Found. of Wash.*, 123 S. Ct. 1406 (2003) (No. 01-1325) [hereinafter Brief for AARP] (providing citations for studies of unmet legal need); see, e.g., Lynn E. Cunningham, *Legal Needs for the Low-Income Population in Washington, DC*, 5 UDC/DCSL L. REV. 21, 58 (2000) (stating that almost ninety percent of the poor’s legal needs in Washington, DC are not being met); LEGAL SERVS. OF NORTH TEX., QUESTIONS & ANSWERS ABOUT DALLAS VOLUNTEER ATTORNEY PROGRAM, at <http://www.lsn.org/nav/volist.asp> (last visited Oct. 29, 2003) (on file with the American University Law Review) (noting that in 1991 Texas failed to meet the legal needs of approximately seventy percent of its poor citizens).

58. See Houseman, *supra* note 42, at 1217 (noting the growing importance of state-level funding of civil legal services).

IOLTA funds provide a critical alternative source of funding for civil legal services.⁵⁹ In 2001, IOLTA programs generated over \$200 million nationwide.⁶⁰ They constitute the second largest source of funding for legal services after the LSC.⁶¹ Also, IOLTA funding gives legal service providers leverage to acquire funds from additional sources.⁶² An organization that receives IOLTA funds acquires legitimacy, making additional grantors more likely to donate.⁶³ Moreover, IOLTA funds are important because legal service providers can use them to finance basic activities and costs for which other sources of funding are not available.⁶⁴

IOLTA funds support the provision of civil legal services for issues concerning basic human needs, such as domestic relations, housing, and medical benefits.⁶⁵ Other IOLTA funds support legal-related activities, including staff training and the provision of self-help materials.⁶⁶ IOLTA funds are especially important for populations

59. See Brief for Forty-Nine State Bar Ass'ns and the Nat'l Ass'n of IOLTA Programs as Amici Curiae in Support of Respondents at 1, *Brown v. Legal Found.*, 123 S. Ct. 1406 (2003) (No. 01-1325) (stressing the importance of IOLTA in light of funding cuts on the LSC); see also Anderson, *supra* note 19, at 720 (citing IOLTA programs as an example of states' attempts to develop alternative sources of funding to provide legal services to the poor in the wake of LSC budget cuts during the early years of the Reagan administration).

60. *Brown*, 123 S. Ct. at 1412.

61. See NAT'L LEGAL AID & DEFENDER ASS'N, IOLTA AND OTHER FUNDING, at http://www.nlada.org/Civil/Civil_IOLTA/IOLTA_IOLTA/IOLTA_IOLTA_Home (last visited Oct. 25, 2003) (on file with the American University Law Review) (discussing alternative sources of funding for civil legal services including IOLTA, state funding, foundation grants, non-LSC federal funding, and private bar campaigns); see also Katharine L. Smith, *IOLTA in the Balance: The Battle of Legality and Morality Between Robin Hood and the Miser*, 34 ST. MARY'S L.J. 969, 981 (2003) (comparing IOLTA funds, raising over \$200 million in 2001, with the LSC's budget for 2002 which exceeded \$300 million).

62. See WHAT IS IOLTA?, *supra* note 4 (stating that IOLTA funds "encourage public and private funders to join the partnership"); Brief for AARP, *supra* note 57, at 20 (describing the use of IOLTA funds as a platform from which to pursue matching funds and attract private donors).

63. See Brief for AARP, *supra* note 57, at 20 (maintaining that a legal service provider who has been approved by an IOLTA grant committee "gives comfort to other charities with funds to allocate that the grantee is serving a needy community well").

64. See *id.* (stating that IOLTA funds can be used to fill gaps in legal coverage and for the "bread and butter work," whereas corporate grants are often earmarked for specific popular causes).

65. See *id.* at 14 (indicating that the majority of cases that IOLTA funds finance are in the areas of family law, domestic violence, housing, public benefits and income maintenance, and consumer protection); see also Heuer Lantzer, *supra* note 33, at 1019-20 (stating that IOLTA funds have been used to litigate various cases including, *inter alia*, wrongful housing evictions, and issues involving disabled children, domestic violence, and gay rights).

66. Brief for AARP, *supra* note 57, at 14.

most in need of legal services, such as children and the elderly,⁶⁷ and are critical to small and rural legal service providers.⁶⁸

C. Fifth Amendment Litigation Involving IOLTA Programs

IOLTA programs have been the subject of numerous lawsuits since their inception.⁶⁹ Washington Legal Foundation (“WLF”), a non-profit group that advocates for free enterprise principles and property rights,⁷⁰ spearheaded much of that litigation. Most notably, the WLF challenged the IOLTA programs in Texas and Washington. These challenges focused on a Fifth Amendment claim against IOLTA.⁷¹

1. The challenge to Texas’s IOLTA program

About the time that congressional leaders began their quest to eliminate the LSC in the mid-1990s,⁷² the WLF initiated *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*,⁷³ a lawsuit challenging the Texas IOLTA program.⁷⁴ Although the WLF’s original challenge to the Texas IOLTA program included both First and Fifth Amendment claims, the courts concentrated almost exclusively on the Fifth Amendment claim.⁷⁵ In 1995, a federal

67. See SPECIAL REPORT, *supra* note 43, at 14 (explaining that the elderly frequently need legal assistance to handle health, income, and social needs unique to their population); see also Brief for AARP, *supra* note 57, at 15-17 (describing specific examples of cases funded by IOLTA that benefited children and the elderly); Kristin A. Dulong, *Exploring the Fifth Dimension: IOLTA, Professional Responsibility, and the Takings Clause*, 31 SUFFOLK U. L. REV. 91, 119 (1997) (stating that IOLTA funds provide an invaluable service to individuals unable to afford legal services, most notably children and families).

68. See Brief for AARP, *supra* note 57, at 19-20 (explaining that large corporate donors and foundations tend to overlook small and rural service providers).

69. See, e.g., *Brown v. Legal Found. of Wash.*, 123 S. Ct. 1406 (2003) (challenging the IOLTA program in Washington state); *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998) (examining the constitutionality of Texas’s IOLTA program); *Wash. Legal Found. v. Mass. Bar Found.*, 993 F.2d 962 (1st Cir. 1993) (assessing claims against Massachusetts’s IOLTA program); *Cone v. State Bar of Fla.*, 819 F.2d 1002 (11th Cir. 1987) (attacking the constitutionality of Florida’s IOLTA program).

70. Information on the Washington Legal Foundation may be found on its website at <http://www.wlf.org>. The WLF describes itself as “the nation’s preeminent center for public interest law, advocating free-enterprise principles, responsible government, property rights, a strong national security and defense, and balanced civil and criminal justice system.” WASH. LEGAL FOUND., WLF MISSION, at <http://www.wlf.org/Resources/WLFMission> (last visited Aug. 20, 2003) (on file with the American University Law Review).

71. See Coyle, *supra* note 15 (stating that, according to the WLF counsel, the “primary reason for the IOLTA challenge” was the property rights issue).

72. See *supra* Part I.B (discussing congressional leaders’ battle against IOLTA in the mid 1990s).

73. 873 F. Supp. 1 (W.D. Tex. 1995).

74. *Id.* at 3.

75. See *id.* (stating that plaintiffs claimed the Texas IOLTA program violated their

district court in Texas granted summary judgment in favor of the defendants, stating that the plaintiffs failed to establish that clients have a property right to the interest formed on the IOLTA account.⁷⁶ On appeal, the Fifth Circuit reversed the district court, holding that clients have a constitutionally recognizable property right to the interest accumulated in IOLTA accounts.⁷⁷

The case reached the Supreme Court in 1998 in *Phillips v. Washington Legal Foundation*, where the WLF prevailed in part.⁷⁸ The Supreme Court affirmed the Fifth Circuit's determination that the interest formed on lawyers' trust accounts was the private property of the client,⁷⁹ but declined to determine whether the IOLTA program constituted a taking for which the state owed just compensation.⁸⁰ On remand for determination of that issue, the district court found that the IOLTA program did not constitute a taking of property because the client suffered no compensable loss.⁸¹

On appeal, the Fifth Circuit again reversed the district court and held that Texas's IOLTA program was a *per se* taking of private property that warranted declaratory and injunctive relief.⁸² The Texas Equal Access to Justice Foundation filed a petition for a writ of certiorari to the U.S. Supreme Court in 2002.⁸³ While entertaining the petition, the Court decided *Brown v. Legal Foundation of Washington*,⁸⁴ discussed later,⁸⁵ which held that IOLTA programs do not require just compensation because there is no pecuniary loss to

First and Fifth Amendment rights and sought declaratory judgment, injunctive relief, interest earned on plaintiffs' money held in IOLTA accounts and attorneys' fees); *see also* Wash. Legal Found. v. Tex. Equal Access to Justice Found., 86 F. Supp. 2d 624, 632 (W.D. Tex. 2000) (noting that "[n]either the Fifth Circuit nor the Supreme Court directly addressed Plaintiffs' First Amendment challenge to IOLTA").

76. *Tex. Equal Access to Justice Found.*, 873 F. Supp. at 7.

77. *Wash. Legal Found. v. Tex. Equal Access to Justice Found.*, 94 F.3d 996, 1000 (5th Cir. 1996).

78. *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998).

79. *Id.* at 159.

80. *See id.* at 172 (stating that, "We express no view as to whether these funds have been 'taken' by the State; nor do we express an opinion as to the amount of 'just compensation,' if any, due respondents. We leave these issues to be addressed on remand.").

81. *See* Wash. Legal Found. v. Tex. Equal Access to Justice Found., 86 F. Supp. 2d 624, 643 (W.D. Tex. 2000) (asserting that "without IOLTA the interest generated . . . would possess no economically realizable value"). The district court also rejected the plaintiffs' First Amendment claim. *Id.* at 636. *See infra* Part II.C (discussing the district court's analysis of plaintiffs' First Amendment claim).

82. *Wash. Legal Found. v. Tex. Equal Access to Justice Found.*, 270 F.3d 180, 182 (5th Cir. 2001).

83. *See* Wash. Legal Found. v. Tex. Equal Access to Justice Found., 270 F.3d 180 (5th Cir. 2001), *petition for cert. filed*, 71 U.S.L.W. 3622 (U.S. June 26, 2002) (No. 02-01) (asking the court to review the Fifth Circuit's opinion).

84. 123 S. Ct. 1406 (2003).

85. *See infra* notes 96-100 and accompanying text.

the client.⁸⁶ In light of the *Brown* decision,⁸⁷ the Court granted certiorari to *Texas Equal Access to Justice Foundation* in March 2003, immediately vacated the Fifth Circuit's decision and remanded the case back to the Fifth Circuit for review.⁸⁸ The Fifth Circuit subsequently dismissed the case.⁸⁹

2. *The challenge to Washington's IOLTA program*

In 1997, the WLF, along with a group of other plaintiffs, also brought suit against the state of Washington's IOLTA program.⁹⁰ The district court, in a ruling just prior to the Supreme Court's decision in *Phillips*, granted summary judgment for the defendants on the basis that the plaintiff clients did not have a property interest in the earnings generated from the IOLTA accounts.⁹¹ On appeal to the Ninth Circuit, a three-judge panel ruled that the clients did have a property right to the interest formed on IOLTA accounts and that the IOLTA program committed a *per se* taking of that property.⁹² The Ninth Circuit then granted a rehearing en banc and reversed the panel decision.⁹³ The en banc court held that the IOLTA program did not amount to a taking in violation of the Fifth Amendment.⁹⁴ Although the plaintiffs brought their original suit under both the

86. *Brown*, 123 S. Ct. at 1421.

87. *See id.* (affirming the Ninth Circuit's ruling that because compensation for the plaintiffs would be negligible, there was no real 'taking' of the plaintiffs' property).

88. *Phillips v. Wash. Legal Found.*, 123 S. Ct. 1654 (2003).

89. *See* Press Release, Texas Equal Access to Justice Foundation, Fifth U.S. Circuit Court of Appeals Dismisses Case Against Texas IOLTA Program (Nov. 7, 2003) (stating that the parties signed a joint dismissal agreement).

90. *See* *Wash. Legal Found. v. Legal Found. of Wash.*, 236 F.3d 1097, 1100 (9th Cir. 2001) (noting that the plaintiffs appealed the case from the United States District Court for the Western District of Washington, D.C. No. CV-97-00146-JCC); *see also* COMM'N ON INTEREST ON LAWYERS' TRUST ACCOUNTS, AM. BAR ASS'N, WASHINGTON STATE IOLTA LITIGATION [hereinafter WASHINGTON STATE IOLTA LITIGATION], at <http://www.abanet.org/legalservices/iolta/waliti.html> (last modified Dec. 2, 2002) (on file with the American University Law Review) (providing the procedural history of the Washington IOLTA litigation and links to information and analysis about the litigation). In addition to WLF, the plaintiffs included four Limited Practice Officers ("LPOs"), individuals who periodically hold clients' funds in real estate transactions much like lawyers temporarily hold client funds. *Brown*, 123 S. Ct. at 1415. The Washington state IOLTA rules are applicable to LPOs in addition to lawyers. *Id.*

91. WASHINGTON STATE IOLTA LITIGATION, *supra* note 90.

92. *Wash. Legal Found. v. Legal Found. of Wash.*, 236 F.3d 1097, 1115 (9th Cir. 2001).

93. *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835 (9th Cir. 2001) (en banc).

94. *See id.* at 864 (noting that "even if the IOLTA program constituted a taking of . . . private property, . . . just compensation is nil").

First and Fifth Amendments, the appellate court declined to address the First Amendment issue.⁹⁵

The Washington litigation reached the U.S. Supreme Court in 2003 in *Brown v. Legal Foundation of Washington*.⁹⁶ The Court addressed the issues it left out of the *Phillips* decision—namely, whether the IOLTA program’s transfer of money to legal service providers constituted a taking, and whether client contributors were entitled to just compensation.⁹⁷ The Court determined that the transfer of interest earned on clients’ IOLTA funds to a legitimate charitable organization may amount to a taking that entitles the client to just compensation.⁹⁸ However, the Court held that clients’ just compensation was zero because they suffered no pecuniary loss at the hands of the IOLTA program.⁹⁹ Absent the IOLTA program, the clients would not have accrued any net interest.¹⁰⁰ Neither the majority nor the primary dissent in *Brown* addressed the First Amendment compelled speech claim against IOLTA, leaving it open to further litigation.

II. COMPELLED SPEECH: THEORIES AND CASELAW

A. *Associated First Amendment Rights Protected by the Constitution*

The First Amendment to the Constitution states that “Congress shall make no law . . . abridging the freedom of speech.”¹⁰¹ The Supreme Court has held that the First Amendment also protects associated rights not explicitly mentioned in the text of the Amendment.¹⁰² For example, in 1958 the Court formally recognized a freedom of association.¹⁰³ The Court has also held that the First

95. See *Legal Found. of Wash.*, 236 F.3d at 1103-04 (“We do not reach the First Amendment questions, because we conclude that plaintiffs are entitled to relief on their Fifth Amendment claim.”).

96. See *Brown v. Legal Found. of Wash.*, 123 S. Ct. 1406, 1415 (2003) (explaining that the Court limited its discussion to the claims brought by plaintiffs Allen Brown and Greg Hayes because no parties challenged the Court of Appeals holding that WLF and two other plaintiff individuals did not have standing).

97. *Id.* at 1411.

98. *Id.* at 1421.

99. *Id.*

100. *Id.*

101. U.S. CONST. amend. I.

102. See generally ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 11.5 (2d ed. 2002) (reviewing the First Amendment’s protection of freedom of association); KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 1323 (14th ed. 2001) (discussing rights ancillary to freedom of speech).

103. See *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (holding that Alabama’s order requiring the NAACP to reveal the names and addresses of its members was an

Amendment protects the corollary of the freedom to speak and associate—that is, the freedom *not* to speak and *not* to associate.¹⁰⁴ The Court explained in *Wooley v. Maynard*, “The right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind.”¹⁰⁵ Later, in *Aboud v. Detroit Board of Education*,¹⁰⁶ the Court reasoned that “an individual should be free to believe as he will, and that in a free society one’s beliefs should be shaped by his mind and his conscience rather than coerced by the State.”¹⁰⁷

A compelled speech violation may occur when the government forces an individual to affirm a belief.¹⁰⁸ In *West Virginia State Board of Education v. Barnette*,¹⁰⁹ the Supreme Court held unconstitutional a state law requiring students to salute the flag because it required “affirmation of a belief and an attitude of mind.”¹¹⁰ Similarly, in *Wooley*, the Court ruled that a Jehovah’s Witness could not be criminally sanctioned for covering the motto on his New Hampshire license plate—“Live Free or Die.”¹¹¹

Despite the absolute language of the First Amendment, freedom of speech and association and their corollary rights are not absolute

unconstitutional violation of those members’ right to freedom of association).

104. See *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (stating that the “right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all”).

105. *Id.*; see also Howard M. Wasserman, *Compelled Expression and the Public Forum Doctrine*, 77 TUL. L. REV. 163, 169 (2002) (reviewing four categories of compelled expression: (1) compelled utterance or presentation of a message; (2) compelled subsidization of private expression; (3) compelled subsidization of private expression pursuant to a government program; and (4) compelled subsidization of government’s expressive and nonexpressive activities).

106. 431 U.S. 209 (1977).

107. *Id.* at 234-35.

108. See Gabriel J. Chin & Saira Rao, *Pledging Allegiance to the Constitution: The First Amendment and Loyalty Oaths for Faculty at Private Universities*, 64 U. PITT. L. REV. 431, 464-65 (2003) (stating that protection against compelled speech is an important aspect of modern free speech jurisprudence and reviewing landmark cases regarding compelled speech); Abner S. Greene, *The Pledge of Allegiance Problem*, 64 FORDHAM L. REV. 451, 451-52 (1995) (suggesting that the pledge of allegiance is unconstitutional when led by teachers in public schools because the psychological pressure on students to recite the pledge violates their right not to speak); Tobias Barrington Wolff, *Compelled Affirmations, Free Speech, and the U.S. Military’s Don’t Ask, Don’t Tell Policy*, 63 BROOKLYN L. REV. 1141, 1193-1203 (1997) (arguing that the Don’t Ask, Don’t Tell policy, in requiring gay service members to remain silent about their sexual identity, effectively compels them to make false affirmations of their identity and beliefs in violation of the First Amendment).

109. 319 U.S. 624 (1943).

110. *Id.* at 633.

111. See *Wooley v. Maynard*, 430 U.S. 705, 713 (1977) (finding that a state may not “constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property”).

rights.¹¹² For instance, in *Roberts v. United States Jaycees*,¹¹³ the Supreme Court held that a State may infringe upon an individual's First Amendment rights to "serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."¹¹⁴ There, the Court upheld a Minnesota statute requiring a traditionally male organization to admit women on the grounds that Minnesota's interest in eliminating gender discrimination justified the infringement on the male members' freedom of association.¹¹⁵

Compelled financial support of organizations participating in expressive activities also has the potential to impact First Amendment interests.¹¹⁶ As Thomas Jefferson once stated, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."¹¹⁷ But, forcing an individual to subsidize speech is not necessarily a violation of the First Amendment.¹¹⁸ In *Board of Regents v. Southworth*,¹¹⁹ the Supreme Court upheld a program that distributed mandatory student activity fees to student organizations, some of which engaged in political and

112. See *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49 (1961) (rejecting the interpretation of freedom of speech and association as absolute rights); see also Donald E. Lively, *The First Amendment at its Third Century: Reckoning with the Ravages of Time*, 18 HASTINGS CONST. L.Q. 259, 264 (1991) (suggesting that the qualified nature of First Amendment freedoms allow for use of analytical reference points that would be precluded if the guarantees were absolute).

113. 468 U.S. 609 (1984).

114. *Id.* at 623.

115. See *id.* (explaining that the statute protects Minnesotans from serious social and political harms).

116. See Jay Carlson, *Interest or Principles: The Legal Challenge to IOLTA in Washington State*, 74 WASH. L. REV. 1119, 1129 (1999) (observing that the Supreme Court has ruled that organizations involved in "expressive activities" are limited in their ability to compel members to provide financial support for those activities); Monte Arthur Mills, Note, *The Student, the First Amendment, and the Mandatory Fee*, 85 IOWA L. REV. 387, 394 (1999) (stating that mandatory student fees implicate the freedom of association by compelling students to provide financial support to private organizations).

117. IRVING BRANT, JAMES MADISON: THE NATIONALIST 354 (1948). The Court quotes this statement of Jefferson's in *Aboud v. Detroit Board of Education*, 431 U.S. 209, 235 n.31 (1977).

118. See *Hays County Guardian v. Supple*, 969 F.2d 111, 123 (5th Cir. 1992) (noting that the view that the government violates the First Amendment every time it compels one to subsidize speech would implicate state subsidies of public universities); *Keller v. State Bar of Cal.*, 496 U.S. 1, 12-13 (1990) (stating that if everyone could insist that organizations receiving public funds could not express an unpopular opinion, then public debate over important issues would be significantly curtailed); see also Christine Theroux, *Assessing the Constitutionality of Mandatory Student Activity Fee Systems: All Students Benefit*, 33 CONN. L. REV. 691, 696 (2001) (noting that the government subsidizes the speech that takes place in a public university forum).

119. 529 U.S. 217 (2000).

ideological speech, because of the university's important interest in maintaining an open forum for speech.¹²⁰

First Amendment suits involving IOLTA fall in the compelled financial support category. Opponents of IOLTA object to being forced to pay for speech and expression with which they disagree.¹²¹ They view litigation as an inherently expressive activity.¹²²

Although the Supreme Court has not examined the compelled speech claim against IOLTA, it has decided cases concerning compelled financial support in several other contexts, including union fees,¹²³ bar association dues,¹²⁴ and student activity fees.¹²⁵ The remainder of this section will examine these Supreme Court cases and then discuss two lower court decisions involving compelled speech-based challenges to IOLTA programs.

120. See *id.* at 231 (determining that viewpoint neutrality in the allocation of program funding protects the students' First Amendment rights).

121. See *Brown v. Legal Found. of Wash.*, 123 S. Ct. 1406, 1415 (2003) (noting that the plaintiff asserted that IOLTA funding violates the freedom of association by forcing individuals to associate with the Recipient Organizations); see also Fundraising letter from Washington Legal Foundation (Sept. 4, 2002), reprinted in Brief for AARP, *supra* note 57, at Appendix C (soliciting funds to "deal a death blow to the single most important source of income for radical legal groups all across the country" including "groups dedicated to the homeless, to minorities, to gay and lesbian causes, and any other group that has drawn money from hard-working Americans like you and me to support its radical cause"). The letter further states, "It's an abomination that IOLTA can take money that is rightly the property of Americans like you and me and use that money to support programs we oppose." *Id.*; Charles Lane, *Washington State's Legal Aid Program Challenged; Conservative Group's Suit Has Broad Import for How States Raise Funds to Defend the Needy*, WASH. POST, Dec. 10, 2002, at A4.

122. See Coyle, *supra* note 15 (quoting Richard Samp, counsel for Washington Legal Foundation, arguing that forcing people to fund litigation they believe to be objectionable is a violation of the First Amendment). See generally Maximillian A. Grant, *The Right Not to Sue: A First Amendment Rationale for Opting Out of Mandatory Class Actions*, 63 U. CHI. L. REV. 239, 249 (1996) (discussing the Supreme Court's recognition of litigation as a form of expression protected by the First Amendment).

123. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235-36 (1977) (holding that a union may not use mandatory dues for activities unrelated to its purpose of collective bargaining).

124. See *Keller v. State Bar of Cal.*, 496 U.S. 1, 14 (1990) (finding that a bar association may not use mandatory fees to fund activities not germane to the bar's purpose of regulating the legal profession).

125. See *Bd. of Regents v. Southworth*, 529 U.S. 217, 221 (2000) (holding that a public university may use mandatory student fees to fund student organizations as long as it distributes funds in a viewpoint-neutral manner).

*B. Compelled Financial Support Decisions**1. Abood v. Detroit Board of Education*¹²⁶

In 1977, the Supreme Court considered a First Amendment challenge to state legislation that mandated all local government employees to pay a service fee to their union, regardless of whether or not they were union members.¹²⁷ For union members, the service fee constituted union dues; however, non-union members were also required to pay the same amount.¹²⁸ The plaintiffs, who refused to pay the dues, argued that the state-enacted system for union representation violated the First Amendment rights of employees who did not support collective bargaining or other activities funded by the fees.¹²⁹

The Court acknowledged that requiring non-union members to financially support the union implicated non-members' First Amendment rights because non-members might oppose the position that the union takes as bargaining agent.¹³⁰ The Court determined, however, that the impact on First Amendment rights was justified because the system played an important role in labor relations and because, absent mandatory dues, non-union members would benefit for free from the work of the union.¹³¹ Therefore, the union could require non-members to pay dues that the union used for collective bargaining activities.¹³²

At the same time, the Court held that the union could not use non-member dues to finance activities "unrelated to its duties as exclusive bargaining representative."¹³³ The Court explained that the only dues the union could use to express political views and engage in activities not germane to its ultimate purpose as a collective bargaining agent were those from employees who supported the union's views and activities.¹³⁴ The Court cautioned that drawing a line between

126. 431 U.S. 209 (1977).

127. *See id.* at 211 (explaining that such an arrangement between a union and a local government employer is called an "agency shop" arrangement).

128. *Id.*

129. *Id.*

130. *See id.* at 222 (describing potential objections that an employee may have to union activity, such as objecting to the terms that a union negotiates concerning the right to strike).

131. *See id.* (rationalizing that absent a union shop agreement, employees would have incentive not to contribute to the union, because they would still receive its benefits).

132. *See id.* at 223 (stating that an individual could not revoke his contribution to a union just because he disagreed with its strategy).

133. *Id.* at 234.

134. *Id.* at 235-36.

activities related and unrelated to collective bargaining would be a difficult task.¹³⁵

2. *Keller v. State Bar of California*¹³⁶

The Supreme Court used reasoning similar to that used in *Abood* to decide a First Amendment challenge to the State Bar of California.¹³⁷ California's bar was an "integrated bar," meaning that the ability to practice law in the state was contingent on bar membership and dues.¹³⁸ The plaintiffs in *Keller* argued that the bar's use of their dues toward certain ideological and political activities with which they disagreed violated their right to free speech.¹³⁹ The Court, following the standard that it articulated in *Abood*, held that the California bar could use mandatory dues to finance activities, so long as the funded activities were germane to the goals of the bar.¹⁴⁰ Thus, the impact on the bar members' First Amendment interests was "justified by the State's interest in regulating the legal profession and improving the quality of legal services."¹⁴¹ The State bar could not, however, use the dues to finance non-bar related, ideological activities.¹⁴²

Again, the Court noted the difficulty in distinguishing between activities that advanced, and those that did not advance, the essential purpose of the organization.¹⁴³ This time, however, the Court gave examples of what would or would not be considered germane to the organization.¹⁴⁴ Examples of permissible activities were disciplining bar members and developing rules of conduct for attorneys; activities not germane to the State Bar's purpose included endorsing a gun control or nuclear weapons freeze initiative.¹⁴⁵

135. *See id.* at 236 (declining to establish a dividing line between permissible and impermissible uses of union funds).

136. 496 U.S. 1 (1990).

137. *See id.* at 13-14 (finding that mandatory bar dues, like the mandatory union dues at issue in *Abood*, serve a substantial public interest—in this case, the regulation of the legal profession).

138. *Id.* at 5.

139. *Id.* at 4.

140. *Id.* at 14.

141. *Id.* at 13.

142. *Id.* at 14.

143. *Id.* at 15.

144. *See id.* at 15-16 (maintaining that while the separation between permissible and impermissible activities is not easy to determine, the "extreme ends of the spectrum are clear").

145. *Id.* at 16.

3. Board of Regents v. Southworth¹⁴⁶

More recently, in *Southworth*, the Supreme Court distinguished *Aboud* and *Keller* from a challenge to a public university's mandatory student activity fee.¹⁴⁷ The University of Wisconsin charged its students a student activity fee used in part to fund student groups that engaged in political and ideological speech.¹⁴⁸ A group of Wisconsin students that objected to some of the viewpoints of the funded groups argued that the mandatory fee violated their rights to free speech, free association, and free exercise.¹⁴⁹ The Court rejected the students' argument, holding that the infringement on the students' First Amendment rights was justified by the "important and substantial purposes of the University, which seeks to facilitate a wide range of speech."¹⁵⁰

In upholding the student activity fee, the Court determined that the standard of germane speech that it used in *Aboud* and *Keller* was unworkable in the university context.¹⁵¹ The Court stated that it was not in a position to decide what speech was germane to the goals of a university.¹⁵² Instead, the Court concluded that the proper standard for protecting the students' First Amendment interests was viewpoint neutrality.¹⁵³ As long as the university distributed the funds to student groups in a viewpoint-neutral manner, the university could continue to collect mandatory student activity fees.¹⁵⁴

146. 529 U.S. 217 (2000).

147. *See id.* at 230 (stating that while *Aboud* and *Keller* "identify the interests of the protesting students, the means of implementing First Amendment protections adopted in those decisions are neither applicable nor workable in the context of extracurricular student speech at a university").

148. *See id.* at 221-23 (providing examples of student groups receiving money, including the Future Financial Gurus of America, the International Socialist Organization, the College Democrats, the College Republicans, and the American Civil Liberties Union Campus Chapter).

149. *Id.* at 227.

150. *See id.* at 231-32 (describing the speech the university sought to facilitate as "distinguished . . . by its vast, unexplored bounds").

151. *See id.* (determining that the germane standard does not adequately protect the First Amendment rights of either the objecting students or the University program because it is nearly impossible for the court to determine what speech is germane to the University's purpose).

152. *See id.* at 232 (asserting that attempting to determine what speech is germane to a university runs counter to the university's goal of "stimulating the whole universe of speech and ideas").

153. *See id.* at 233 (remarking that the mandatory student fee was justified by the viewpoint-neutral purpose of creating a mechanism for open dialogue).

154. *Id.* at 233-34.

C. *First Amendment Challenges to IOLTA Programs*

Only two courts have evaluated First Amendment claims against IOLTA programs.¹⁵⁵ In *Washington Legal Foundation v. Massachusetts Bar Foundation*, the First Circuit articulated a two-step process for analyzing the legality of the state's IOLTA program.¹⁵⁶ The first step was to determine whether the program violated First Amendment interests "by forcing expression through compelled support of organizations espousing ideologies or engaging in political activities."¹⁵⁷ If so, the second step was to apply strict scrutiny to determine whether the IOLTA program was narrowly tailored and germane to a compelling state interest.¹⁵⁸

The First Circuit held that the Massachusetts IOLTA program did not violate First Amendment freedoms of speech and association.¹⁵⁹ Writing pre-*Phillips*, the court stated that "the interest earned on IOLTA accounts belong[ed] to no one, but had been assigned [to the Massachusetts IOLTA program]."¹⁶⁰ Thus, the IOLTA program did not compel the client to financially support any of the recipient organizations because the interest earned on IOLTA accounts was not deemed the property of the client.¹⁶¹ It followed that no connection existed between the plaintiffs and the IOLTA recipients such that the plaintiffs could reasonably believe they were supporting the recipients' viewpoints.¹⁶² The court distinguished the case from *Abood* and *Keller*, where the plaintiffs became involuntarily associated with the ideological and political activities of the union and bar association.¹⁶³

The First Circuit did not consider whether the program met strict scrutiny because it found in the first step of its analysis that the IOLTA program did not burden protected speech.¹⁶⁴ However, in light of the Supreme Court's ruling in *Phillips* that the interest

155. *Wash. Legal Found. v. Mass. Bar Found.*, 993 F.2d 962, 968 (1st Cir. 1993); *Wash. Legal Found. v. Tex. Equal Access to Justice Found.*, 86 F. Supp. 2d 624, 627 (W.D. Tex. 2000).

156. 993 F.2d at 977.

157. *Id.*

158. *Id.*

159. *Id.* at 980.

160. *Id.* The court characterized the IOLTA program as "an anomaly created by the practicalities of accounting, banking practices, and the ethical obligation of lawyers." *Id.*

161. *Id.*

162. *Id.* at 979.

163. *See id.* at 980 (observing that plaintiffs have not been forced to "join, affirm, support or subsidize ideological expression of IOLTA recipient organizations in any way").

164. *Id.* at 980.

formed on IOLTA accounts is the property of the client,¹⁶⁵ the main premise of the First Circuit's reasoning has been invalidated.

Seven years later, in 2000, a federal district court in *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*¹⁶⁶ evaluated a First Amendment claim against Texas's IOLTA program using a different analysis.¹⁶⁷ Because the Supreme Court had decided *Phillips* by the time the district court in Texas decided the case, the district court began with the premise that the interest generated on each deposit in an IOLTA account belonged to the owner of its principal.¹⁶⁸ The court stated that a valid claim of compelled financial support required a showing that an involuntary contribution was used to support a political or ideological message that did not advance a governmental interest.¹⁶⁹

In the first step of its analysis, the district court assumed that the plaintiff client was forced to contribute involuntarily to IOLTA because he did not even know about the IOLTA program until some time after his funds were placed in an IOLTA account.¹⁷⁰ Next, the court examined the plaintiffs' contention that litigation is an innately expressive activity and that therefore the IOLTA program, which facilitates litigation, implicates the compelled speech doctrine.¹⁷¹ In particular, the plaintiffs argued that IOLTA funds supported ideological and political activities such as representing illegal aliens in deportation cases.¹⁷² The district court determined that, in general, the provision of civil legal services for the poor did not constitute expression or political or ideological activity.¹⁷³ However, the district court found that the IOLTA program's support of certain litigation having political and ideological elements could qualify as expression and be subject to a First Amendment claim.¹⁷⁴

165. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 172 (1998).

166. 86 F. Supp. 2d 624 (W.D. Tex. 2000).

167. *Id.* at 627.

168. *Id.*

169. *See id.* at 634 (noting that the government violates the First Amendment when it forces one to finance another's ideological expression in order to promote that message and not a legitimate government interest).

170. *Id.* at 634-35. *See* Cecily W. Kerr, Note, *Nothing Taken, Something Gained: State Action as an Alternative Defense for IOLTA Programs in the Aftermath of Phillips v. Washington Legal Foundation*, 31 CONN. L. REV. 1543, 1553 (1999) (stating that the client in *Phillips* gave his attorney a retainer in December of 1992 but did not discover that his money was placed into an IOLTA account until 1994, at which time he commenced a lawsuit).

171. *See Tex. Equal Access to Justice Found.*, 86 F. Supp. 2d at 635.

172. *Id.* The plaintiffs also contended that IOLTA funds had been used to support a lawsuit to overturn election results. *Id.*

173. *See id.* ("The concept of helping ensure equal access to the justice system for low income citizens is in itself a non-controversial idea.")

174. *Id.*

In part three of the district court's analysis, the court considered whether the IOLTA-funded activities were "germane to an otherwise lawful regulatory program" and whether the activities "support[ed] a substantial public interest—that of supplying legal services to the poor."¹⁷⁵ The court concluded that facilitating the provision of legal services was a "vital policy interest" and that the activities which IOLTA funded were germane to that interest.¹⁷⁶ In contrast to the bar association in *Keller*, Texas's IOLTA program did not use funds to lobby and influence legislation.¹⁷⁷ Because the compelled financial support of IOLTA did not significantly burden free speech, the district court rejected the plaintiffs' First Amendment claims.¹⁷⁸

Although the district court in Texas did not directly articulate a level of scrutiny in its three step analysis of the plaintiffs' First Amendment claims, it did address the application of levels of scrutiny in a footnote, stating that the IOLTA program is content neutral and therefore intermediate scrutiny is the appropriate level of analysis.¹⁷⁹ The court then determined that the IOLTA program advanced an important government interest and that the program impacted First Amendment rights no more than necessary to achieve that interest.¹⁸⁰ Although the court appeared to imply that the IOLTA program would pass strict scrutiny analysis,¹⁸¹ it declined to so state explicitly, noting that the parties had not advanced any arguments based on strict scrutiny.¹⁸²

Texas Equal Access to Justice Foundation is the starting point for this Comment's First Amendment analysis of IOLTA programs. Like the federal district court in Texas, this Comment concludes that IOLTA programs do not violate the First Amendment. However, the district court's analysis in *Texas Equal Access to Justice Foundation* did not consider all possible results that a court might reach. It did not address the relationship between compelled contributors and objectionable speech in the context of compelled financial support.¹⁸³

175. *Id.* at 636.

176. *See id.* (claiming that plaintiffs provided no evidence of any situation in which IOLTA funds were not used for the provision of legal services).

177. *Id.*

178. *Id.*

179. *Id.* at 636 n.6.

180. *See id.* at 636 (suggesting that the provision of free legal services would be accomplished less effectively without the IOLTA program).

181. *See id.* (stating that, "The Court is prepared to determine if the IOLTA program is narrowly tailored to the compelling state interest of making legal services accessible to all citizens").

182. *Id.*

183. *See id.* at 633-34 (addressing, instead, the relationship between the plaintiffs and the objectionable speech in the "right not to speak" line of cases).

Moreover, it addressed intermediate scrutiny briefly in a footnote but included no discussion of strict scrutiny.¹⁸⁴ With a Supreme Court divided on the constitutionality of IOLTA programs, and with no established standard for evaluating compelled financial support claims, it is unclear whether a court would even find that IOLTA programs substantially implicate First Amendment rights in the first place.¹⁸⁵ If a court were to find that First Amendment rights are implicated, it is not evident whether it would analyze IOLTA programs using intermediate or strict scrutiny. Taking from the lower court decisions and from the Supreme Court's treatment of compelled financial support in other contexts, this Comment suggests that a First Amendment challenge to IOLTA programs lacks merit under either level of scrutiny.

III. FIRST AMENDMENT ANALYSIS OF IOLTA PROGRAMS

In evaluating a compelled financial support claim against IOLTA programs, one must first determine whether the forced subsidy implicates an IOLTA contributor's First Amendment rights.¹⁸⁶ A court may conclude that it does not, as the connection between the forced contribution and any expressive speech is an attenuated one.¹⁸⁷ If a sufficient connection is found, the court will analyze whether the government program justifies the impact on First Amendment rights using either an intermediate or a strict scrutiny level of review.¹⁸⁸ In general, a court will use intermediate scrutiny to analyze a content-neutral regulation.¹⁸⁹ Content-neutral regulations are unrelated to

184. *See id.* at 636 n.6 (finding that the Texas IOLTA program withstands an intermediate scrutiny analysis, but making no explicit findings as to strict scrutiny).

185. *See Brown v. Legal Found. of Wash.*, 123 S. Ct. 1406, 1421 (2003) (voting 5-4 on the constitutionality of the IOLTA accounts under the Takings Clause of the Fifth Amendment).

186. *See Bd. of Regents v. Southworth*, 529 U.S. 217, 231 (2001) (stating that the mandatory student activity fee implicates students' rights to free speech); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977) (finding that requiring employees to pay union dues impacts employees' First Amendment interests); *Tex. Equal Access to Justice Found.*, 86 F. Supp. 2d at 634-35 (assuming that plaintiff was required to involuntarily contribute to the Texas IOLTA program and that certain of the program's activities could qualify as expressive, thereby implicating plaintiff's First Amendment rights).

187. *See infra* Part III.A (suggesting that if the compelled contributor and the objectionable speech lack a clear connection, the IOLTA program does not implicate the contributor's First Amendment rights).

188. *Compare Wash. Legal Found. v. Mass. Bar Found.*, 993 F.2d 962, 980 (1st Cir. 1993) (viewing IOLTA as content based and applying strict scrutiny), *with Tex. Equal Access to Justice Found.*, 86 F. Supp. 2d at 636 n.6 (viewing IOLTA as content-neutral and appropriate for intermediate scrutiny).

189. *See Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994) (explaining that content-neutral regulations are subject to intermediate scrutiny, and not strict scrutiny, because they do not create the same danger of purging particular views

the content of the speech.¹⁹⁰ If, on the other hand, a regulation is content based, it must survive strict scrutiny to stand.¹⁹¹ A content-based regulation is one that restricts speech based on its message.¹⁹² This Comment considers both intermediate and strict scrutiny to demonstrate that IOLTA programs are constitutional.

A. *The Connection Between Forced Contributors to IOLTA and the Speech They Find Objectionable*

The courts in *Texas Equal Access to Justice Foundation* and *Massachusetts Bar Foundation* distinguished compelled financial subsidy situations, like that of IOLTA programs, from compelled speech cases involving direct affirmations of a belief.¹⁹³ Both courts concluded that IOLTA programs do not force contributors to affirm a belief and rejected assertions that IOLTA contributors were directly identified with expressions to which they objected.¹⁹⁴ Nevertheless, the courts permitted the plaintiffs to challenge IOLTA programs on

from public dialogue as do content-based regulations). See generally CHEMERINSKY, *supra* note 102, § 11.2.1 (explaining that a higher level of scrutiny is needed where there is a risk that the government may try to suppress unpopular ideas).

190. See *Turner Broad. Sys.*, 512 U.S. at 642 (stating that a court decides how to evaluate a regulation by ascertaining whether the government established the regulation because it agreed or disagreed with its message). For example, the Supreme Court determined that an ordinance which prohibited posting signs on public utility poles was content neutral because it did not differentiate based on the message of the signs. *Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 817 (1984). See also Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 656 (1991) (noting that if the harm the government is trying to prevent arises from the “communicative impact” of the speech then the regulation is content based, whereas regulations not directed at the communicative impact of speech and without “discriminatory purpose” towards speech are content-neutral).

191. See *Turner Broad. Sys.*, 512 U.S. at 642 (stating that the Court applies strict scrutiny to “regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content”). See generally RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 20.47, at 579 (3d ed. 1999) (explaining that a state must show both that its content-based regulation serves a compelling state interest and that it is narrowly tailored to that interest).

192. See *Turner Broad. Sys.*, 512 U.S. at 642 (stating that in addition to prohibitions on speech, “[laws] that compel speakers to utter or distribute speech bearing a particular message” are subject to strict scrutiny).

193. See *Mass. Bar Found.*, 993 F.2d at 977 (describing direct compelled speech and forced subsidies of organizations engaging in expressive speech as separate issues); *Tex. Equal Access to Justice Found.*, 86 F. Supp. 2d at 633 (referring to the right not to speak and the right not to be forced to financially support others’ speech as “two distinct lines of cases”).

194. See *Mass. Bar Found.*, 993 F.2d at 977 (concluding that direct compelled speech is not a concern in the context of IOLTA because IOLTA programs do not compel contributors to affirm a belief); *Tex. Equal Access to Justice Found.*, 86 F. Supp. 2d at 633-34 (determining that the plaintiff failed to demonstrate that he was being identified with the speech to which he objected).

the premise that compelled financial support of organizations alone implicates First Amendment rights.¹⁹⁵

The courts in *Texas Equal Access to Justice Foundation* and *Massachusetts Bar Foundation* did not address the connection between forced contributors and objectionable speech as it relates to claims of compelled financial support. However, Justice Souter, in his concurrence in *Southworth*, did address the issue in the context of student activity fees.¹⁹⁶ Justice Souter distinguished the connection between forced contributors and objectionable speech in *Southworth* from that in *Abood* and *Keller*.¹⁹⁷ In *Abood* and *Keller*, the forced contributor paid money directly to the union or bar association, the very organization espousing the objectionable message, while in *Southworth*, the student paid money to a program which then distributed money to various student groups.¹⁹⁸ The program to which students paid the activity fee did not in itself engage in any social, political, or ideological activities.¹⁹⁹ Therefore, Souter argued, the “clear connection” between compelled contributor and offensive message in the union and bar association cases was not evident in the context of student activity fees.²⁰⁰

The lack of a clear connection between forced contributor and offensive speech in the student activity fee context is similarly absent in the IOLTA context. Interest earned on IOLTA accounts is transferred to a state-established foundation or organization that facilitates the distribution of funds to legal service providers in the state.²⁰¹ Like the program to which students paid activity fees in *Southworth*, IOLTA programs themselves do not engage in political and ideological activities, nor do they advocate a particular point of view; rather, they act as distributing agencies.²⁰² As the federal district court in Texas stated “[t]he concept of helping ensure equal access

195. See *Mass. Bar Found.*, 993 F.2d at 977 (outlining a two-step process for analyzing plaintiffs’ First Amendment claims); *Tex. Equal Access to Justice Found.*, 86 F. Supp. 2d at 634 (setting forth a three-prong test for analyzing compelled contribution cases).

196. See *Bd. of Regents v. Southworth*, 529 U.S. 217, 236-43 (2001) (Souter, J., concurring) (arguing that viewpoint neutrality is an important consideration in the context of mandatory student fees and, in this case, acts to sufficiently protect students’ First Amendment rights).

197. See *id.* at 240.

198. *Id.*

199. *Id.*

200. *Id.*

201. See WHAT IS IOLTA?, *supra* note 4 (explaining how IOLTA programs distribute IOLTA funds).

202. See *Wash. Legal Found. v. Tex. Equal Access to Justice Found.*, 86 F. Supp. 2d 624, 633 (W.D. Tex. 2000) (finding “no specific message is dictated by the variety of legal services that TEAJF funds with IOLTA dollars”).

to the justice system for low income citizens is in itself a non-controversial idea, and therefore does not qualify as a political or ideological activity.”²⁰³

Even if, as the court in *Texas Equal Access to Justice Foundation* accepted, particular litigation may contain ideological elements, a compelled contributor cannot readily prove a connection between the contributed funds and the offensive speech.²⁰⁴ An IOLTA program distributes funds to legal service providers throughout the state.²⁰⁵ A compelled contributor cannot show which legal service provider receives the contributor’s money.²⁰⁶ Because the great majority of legal services for the poor cannot reasonably be characterized as political or ideological speech, the contributor cannot assert that his or her money has more than a small possibility of supporting the objectionable speech.²⁰⁷ Nor does a compelled contributor have reason to know whether the legal service provider is using a source of funds other than IOLTA to finance particular litigation that may be objectionable.²⁰⁸ For these reasons, the contributor may not be able to demonstrate a connection between his or her contribution and the objectionable speech.

Justice Souter’s concurrence did not rest entirely on the lack of a clear connection between the compelled contribution and objectionable speech.²⁰⁹ However, the lack of connection in the IOLTA context suggests that the compelled financial support claim may not raise First Amendment interests. If a court does not view the attenuated connection between the compelled contribution and

203. *Id.* at 635.

204. *See* Luban, *supra* note 4, at 235 (contending that “[f]unding speech, indirectly and at a distance is not the same as associating with the speaker”).

205. *See* WHAT IS IOLTA?, *supra* note 4 (explaining that funds generated by IOLTA accounts are earmarked for access to justice and are distributed through local grant processes to state non-profit organizations).

206. *See* Luban, *supra* note 4, at 235 (noting that because IOLTA grants are used to fund civil legal services for the poor generally, and are not directed at individual providers or services, contributors to IOLTA do not know who specifically receives IOLTA money or what issues lawyers working with IOLTA funds will argue).

207. *See* *Tex. Equal Access to Justice Found.*, 86 F. Supp. 2d at 635 (determining that the provision of legal services for the poor in itself is not a political or ideological activity, but that certain litigation may have ideological elements).

208. *See* Luban, *supra* note 4, at 235 (likening IOLTA contributors to taxpayers and consumers who are “thinly and anonymously connected to any particular expenditure of their money”); NAT’L LEGAL AID & DEFENDER ASS’N, *supra* note 61 (listing sources of funding other than the LSC and IOLTA of which legal service attorneys make use).

209. *See* *Bd. of Regents v. Southworth*, 529 U.S. 217, 240-43 (2001) (discussing reasons in addition to the attenuation argument for which Souter would uphold the student activity fee program, namely its purpose of facilitating broad public dialogue, the clear educational value of the program, and the setting of the program within a university).

objectionable speech as sufficient to preclude a First Amendment challenge against IOLTA programs, it will evaluate IOLTA programs using either intermediate or strict scrutiny to determine whether the government's interest justifies the forced contribution.

B. Intermediate and Strict Scrutiny Analysis of IOLTA Programs

IOLTA programs do not fit neatly into either the content-neutral or content-based categories.²¹⁰ A court might view IOLTA programs as content neutral, on the basis that legal representation, while perhaps an expressive activity, is not an expressive activity about a particular subject.²¹¹ Recipients of IOLTA funds represent poor clients in a broad range of matters.²¹² The purpose of IOLTA programs is to provide legal representation on behalf of indigent clients, not to promote a message.²¹³

Alternatively, a court might hold that IOLTA programs are content based because the provision of legal services has, over the years, taken on political and ideological overtones.²¹⁴ In its complaint in *Phillips*, the WLF claimed that the Texas IOLTA program forced clients to finance "various 'liberal' causes, such as the expansion of anti-discrimination rights" and the "expansion of the rights of undocumented aliens."²¹⁵ A court may regard states that have implemented mandatory IOLTA programs as having "taken sides in the culture war."²¹⁶ Indeed, Justice Scalia, in his dissent in *Brown*,

210. See *supra* Part II.C (showing that the First Circuit treated the Massachusetts IOLTA program as content-based, while a district court in Texas treated the Texas IOLTA program as content-neutral).

211. See *supra* notes 179-82 and accompanying text (describing the view that the Texas IOLTA program is content-neutral).

212. See *supra* notes 65-68 and accompanying text (providing examples of issues for which IOLTA funded attorneys provide representation).

213. See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542 (2001) (determining that an attorney providing free legal services speaks on behalf of his client, not on behalf of a governmental message); *Wash. Legal Found. v. Tex. Equal Access to Justice Found.*, 86 F. Supp. 2d 624, 636 (W.D. Tex. 2000) (stating that the only purpose of the Texas IOLTA program is to finance legal representation for indigent persons).

214. See *Luban*, *supra* note 4, at 234 (commenting that opponents of IOLTA consider lawyers for the indigent "political adversaries"); *Weissman*, *supra* note 44, at 761-67 (describing the attack on legal services in the mid 1990s as motivated by ideological objectives and argued along political lines).

215. Joint Appendix at 9-10, *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998) (No. 96-1578) (filed Feb. 7, 1994). See *Weissman*, *supra* note 44, at 762 (noting that in congressional debates over the funding of the LSC, opponents of the LSC accused it of "taking money away from law-abiding, hard-working taxpayers and then giving it to the likes of convicted felons, delinquent fathers, illegal aliens, and even to drug dealers" and of "exacerbate[ing] illegal immigration").

216. See *Lawrence v. Texas*, 123 S. Ct. 2472, 2497 (2003) (Scalia, J., dissenting) (accusing the Court of having abandoned its role as neutral observer and adopted the "law profession's anti-anti-homosexual culture"); Charles Lane, *Civil Liberties were*

suggests that IOLTA programs constitute “Robin Hood Taking[s], in which . . . the object of the government’s larcenous beneficence is so highly favored by the courts . . . that the normal rules of the Constitution protecting private property are suspended.”²¹⁷

1. *Intermediate scrutiny*

If a court construes IOLTA programs to be content-neutral, it will apply an intermediate level of scrutiny to assess its impact on First Amendment freedoms.²¹⁸ To pass an intermediate level of scrutiny, a regulation must advance important government interests unrelated to the suppression of speech, and it must not burden substantially more speech than necessary to further those interests.²¹⁹

Facilitating the provision of legal services for the needy should be viewed as an important governmental interest.²²⁰ The Supreme Court, in *Keller*, determined that “improving the quality of legal service to people of the State . . . is a legitimate end of state policy.”²²¹ In *Texas Equal Access to Justice Foundation*, the federal district court found that IOLTA upheld the “government’s ‘vital policy interest’ of making legal services accessible to all.”²²² Numerous organizations, such as the American Bar Association and the Association for the Advancement of Retired Persons (“AARP”) have affirmed the importance of providing legal services for the poor.²²³ The provision

Term’s Big Winner: Supreme Court’s Moderate Rulings a Surprise, WASH. POST, June 29, 2003, at A18 (stating that “[c]onservatives had denounced [IOLTA] as a forced subsidy of left wing lawyers”).

217. *Brown v. Legal Found. of Wash.*, 123 S. Ct. 1406, 1428 (2003) (Scalia, J., dissenting).

218. *See, e.g., Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994) (stating that a court determines if a regulation is content neutral by ascertaining whether the government established the regulation because it agreed or disagreed with its message).

219. *Compare Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (upholding a city’s volume control ordinance against a First Amendment claim because it was narrowly tailored to advance the government’s important interest of preventing excessive sound volume at a concert), *with Schneider v. State*, 308 U.S. 147 (1939) (finding that the governmental purpose of maintaining clean streets was insufficient to justify the burden on speech created by an ordinance that prohibited distributing literature in streets and other public places).

220. *See Luban, supra* note 4, at 234 (arguing that the provision of legal services to the needy is a “core function of the judicial system”).

221. *Keller v. State Bar of Cal.*, 496 U.S. 1, 8 (1990).

222. *Wash. Legal Found. v. Tex. Equal Access to Justice Found.*, 86 F. Supp. 2d 624, 636 (W.D. Tex. 2000) (quoting *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507 (1991)).

223. *See WHAT IS IOLTA?*, *supra* note 4 (contending that IOLTA programs uphold a “cornerstone of democracy” by providing access to the rule of law to those who could not afford it otherwise); *see also* Brief for AARP, *supra* note 57, at 7-11 (stating that IOLTA programs are central to “the fulfillment of this country’s aspirations to provide a fair and open system of justice”).

of lawyers for indigent persons is critical because the existence of laws alone do not provide protection against their violation.²²⁴ Rather, “[l]aws . . . require aggrieved parties to advance their claims for resolution in order to provide form and content to the concept of legal rights.”²²⁵ IOLTA programs make it possible for hundreds of thousands of indigent individuals to bring claims with capable representation.²²⁶ Absent IOLTA programs, indigent clients likely would be unable to secure alternate counsel.²²⁷

Even if a court finds the provision of legal services to the poor to be an important governmental interest, it must still assess whether that interest justifies infringement on First Amendment rights.²²⁸ IOLTA programs do not burden substantially more speech than necessary to promote the government’s interest in facilitating the provision of legal services for the needy. In *Abood* and *Keller*, the Court determined that the union and bar association could finance with mandatory dues those activities and speech germane to the purpose of the institutions.²²⁹ Under the germane standard, then, states may use interest on IOLTA accounts toward activities germane to the purpose of IOLTA—namely, “maintaining and improving access to the justice system in communities across the United States.”²³⁰ In both *Abood* and *Keller*, the Court noted the difficulty in determining whether an activity is germane to the institution’s purpose.²³¹ While no court has yet established a guideline for identifying activities germane to IOLTA’s purpose, funding legal service providers who represent indigent clients is a logical way to promote equal access to

224. See Weissman, *supra* note 44, at 747 (arguing that because laws are not self-serving, lawyers are necessary to give meaning to the rule of law).

225. *Id.*

226. See WHAT IS IOLTA?, *supra* note 4 (describing how IOLTA programs strengthen the community by facilitating the provision of legal services for the poor).

227. See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 546 (2001) (asserting that without a free legal service provider, the poor often have no other way to learn about their rights relating to a claim).

228. See, e.g., *Wooley v. Maynard*, 430 U.S. 705, 715-16 (1977) (evaluating whether New Hampshire’s interest in forcing plaintiffs to display the state motto on their license plates outweighed plaintiffs’ First Amendment protections).

229. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977); *Keller v. State Bar of Cal.*, 496 U.S. 1, 13-14 (1990).

230. See COMM’N ON INTEREST ON LAWYERS’ TRUST ACCOUNTS, AM. BAR ASS’N, IOLTA AT WORK, at <http://www.abanet.org/legalservices/iolta/ioltspot.html> (last visited Aug. 14, 2003) (on file with the American University Law Review) (providing links to organizations and activities funded by IOLTA programs).

231. See *supra* notes 135, 143-45 and accompanying text (detailing the difficulty the court has experienced in distinguishing between activities which are essential to the institution’s purpose, and those activities which are not essential and are therefore impermissible).

the justice system and should therefore be considered germane to IOLTA.²³²

Still, opponents of IOLTA may object to the use of their interest to fund particular activities and speech they deem ideological or political.²³³ In light of opposition over the years to the provision of legal services for the poor, states have instituted guidelines for how IOLTA recipient organizations may use IOLTA funds.²³⁴ Common restrictions prohibit organizations from using IOLTA funds to represent clients in class actions, to support political candidates, and to undertake activities to influence legislation.²³⁵ Therefore, state IOLTA programs have rules in place to prevent IOLTA funds from being used for activities and speech that have real potential for falling outside the bounds of content-neutral activities.

In contrast to *Abood* and *Keller*, the Court in *Southworth* determined that the germane standard was unworkable in the university setting.²³⁶ Instead, it decided that viewpoint neutrality in the allocation of funding provided sufficient protection of students' First Amendment rights.²³⁷ As in the university setting, a court may determine that the

232. See *Wash. Legal Found. v. Tex. Equal Access to Justice Found.*, 86 F. Supp. 2d 624, 636 (W.D. Tex. 2000) (holding that activities that the Texas Equal Access to Justice Foundation funds are germane to the government's interest in providing legal services for the poor); Luban, *supra* note 4, at 234 (stating that the provision of legal representation "should be regarded as a core function of the judicial system, not a partisan political act").

233. See, e.g., *Tex. Equal Access to Justice Found.*, 86 F. Supp. 2d at 635 (stating that plaintiffs objected to the use of IOLTA funds to finance representation for illegal aliens); see also Luban, *supra* note 4, at 234 (quoting a Washington Legal Foundation press release which states that "the use of the plaintiffs' funds violates their First Amendment rights by forcing them to finance ideological causes with which they disagree").

234. See, e.g., Houseman, *supra* note 51, at 2196-97 (discussing state-imposed restrictions on the use of IOLTA funds in Texas and Washington).

235. See, e.g., TEX. EQUAL ACCESS TO JUSTICE FOUND., RULES GOVERNING THE OPERATION OF THE TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION 4 (stating that IOLTA funds may not be used "to directly fund class action suits, lawsuits against government entities, or lobbying for or against any candidate or issue"), available at http://www.txiolta.org/about/docs/Rules_Govern_TEAJF_Amended_March_20_02.pdf (last visited Oct. 25, 2003) (on file with the American University Law Review); THE IOLA FUND OF THE STATE OF NEW YORK, GRANTEES, at <http://www.iola.org/grantees.shtml> (last visited Oct. 11, 2003) (on file with the American University Law Review) (noting that grantees typically may not use IOLTA funds in fee-generating cases or to contribute to a political party or candidate for office); IOWA JUDICIAL BRANCH, LAWYER TRUST ACCOUNT COMMISSION, GRANT CRITERIA AND GUIDELINES, at <http://www.judicial.state.ia.us/regs/grantcrit.asp> (last visited Oct. 11, 2003) (on file with the American University Law Review) (stating that Iowa IOLTA funds may not be used to finance political campaigns, lobbying, or legislative activity).

236. See *Bd. of Regents v. Southworth*, 529 U.S. 217, 231 (2000) (explaining that it is too unmanageable for the court to determine what speech is germane to a university when the university seeks to promote the entire spectrum of speech).

237. See *id.* at 230 (holding that the exchange of ideas in a university setting is analogous to a public forum where First Amendment rights are afforded heightened

germane standard is unworkable in the IOLTA context because of the difficulty in deciding what types of representation and topics of litigation are germane to the mission of IOLTA programs.²³⁸ If so, IOLTA programs pass the viewpoint neutrality standard in their distribution of funds.

There is no evidence that states make determinations about allocations of IOLTA funding based on the viewpoints of the recipients. States have established a local grant process that uses viewpoint-neutral criteria for awarding grants.²³⁹ For example, Maryland disburses its IOLTA-generated funds according to the most pressing needs identified in a state report.²⁴⁰ Texas awards its grants on the basis of economic need within a geographic area, and it does not allow grants to be used for activities already funded by another entity.²⁴¹ As mentioned previously, recipients of IOLTA funds may not use those funds to finance class action lawsuits, challenges to government agencies, or political lobbying.²⁴²

Applying both the germane standard and the viewpoint neutrality standard, IOLTA programs do not burden substantially more speech than necessary to promote the government's important interest of providing free legal services to the indigent. Even if a court views IOLTA programs as content based, and therefore applies a strict scrutiny analysis, a court should still uphold IOLTA programs' constitutionality.

2. *Strict scrutiny*

If a court views the provision of legal services in itself, or the provision of legal services concerning certain issues, as ideological

protection).

238. See discussion *infra* Part III.B.2 (arguing that in order to provide adequate legal representation, a legal aid attorney must be able to raise all valid claims to advocate zealously).

239. See WHAT IS IOLTA?, *supra* note 4 (explaining the process through which IOLTA funds are generated and distributed); see, e.g., MAINE BAR FOUNDATION GRANT PROGRAM, GRANT PHILOSOPHY, at <http://www.mbf.org/grants.htm#program%20Information> (last visited Oct. 11, 2003) (on file with the American University Law Review) (providing that priority for 2001 grantees was given to those legal service providers who effectively used technology to support their clients and who provided services to rural populations).

240. See MD. ANN. CODE art. 10, § 45G (2002) (stating that no political test may be used to identify grantees).

241. See TEX. EQUAL ACCESS TO JUSTICE FOUND., *supra* note 235, at 3 (addressing persons eligible to benefit from the grants and criteria for grants).

242. See *supra* notes 234-35 and accompanying text (providing examples of limitations on how grantees may use IOLTA funds); see also Terence Doherty, *The Constitutionality of IOLTA Accounts*, 19 WHITTIER L. REV. 487, 521-24 (1998) (stating that Texas rules prohibit the use of IOLTA funds for political lobbying or class actions).

activity, it may evaluate IOLTA using strict scrutiny.²⁴³ To pass a strict scrutiny analysis, a regulation must be narrowly tailored to achieve a compelling government interest.²⁴⁴

Past decisions indicate that IOLTA programs serve a compelling state interest. For example, the Supreme Court in *Brown*, while discussing the Fifth Amendment takings clause, referred to IOLTA's "overall, dramatic success . . . in serving the compelling interest in providing legal services to literally millions of needy Americans."²⁴⁵ In *Texas Equal Access to Justice Foundation*,²⁴⁶ the court implied that "making legal services accessible to all citizens" is a compelling state interest.²⁴⁷ Recognition by the courts that IOLTA programs provide services critical to the rule of law, coupled with the high percentage of unmet legal needs among the poor, demonstrate that IOLTA programs serve a compelling government interest.

Even accepting that the provision of legal services to the poor is a compelling governmental interest, authors have argued that IOLTA programs fail a strict scrutiny analysis because they are not narrowly tailored to achieve their objective.²⁴⁸ They contend, for example, that IOLTA programs could be funded through alternative means such as tax revenues or increased bar dues.²⁴⁹ Others suggest that states with mandatory IOLTA programs should replace them with voluntary or opt-out programs so that attorneys can choose whether to place their clients' funds in an IOLTA account.²⁵⁰ Still another argument is that attorneys should be required to obtain client consent before depositing client funds into an IOLTA account.²⁵¹ None of these

243. See *supra* text accompanying notes 214-17 (discussing the treatment of IOLTA programs as content based, thereby necessitating strict scrutiny).

244. See, e.g., *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813-14 (2000) (holding unconstitutional a provision of the Telecommunications Act that required cable operators to scramble or limit the hours of sexually explicit channels because the provision was not narrowly tailored to the compelling government interest of preventing children from seeing sexually explicit images).

245. *Brown v. Legal Found. of Wash.*, 123 S. Ct. 1406, 1417 (2003).

246. *Wash. Legal Found. v. Tex. Equal Access to Justice Found.*, 86 F. Supp. 2d 624 (W.D. Tex. 2000).

247. See *id.* at 636 n.6 (suggesting that, had the parties not abandoned such a claim, the court would have held that the IOLTA program met a strict level of scrutiny).

248. See, e.g., *Doherty*, *supra* note 242, at 527 (suggesting that a legal services program funded through taxes is less restrictive than an IOLTA program).

249. *Id.*; see also *Darnell*, *supra* note 4, at 807 (suggesting that states could impose additional bar dues to finance legal services).

250. See *Lantzer*, *supra* note 33, at 1040 (arguing that voluntary and opt-out IOLTA programs can achieve the same objective as mandatory programs and do not violate First Amendment rights because they do not compel an attorney to participate in the IOLTA program).

251. See *Darnell*, *supra* note 4, at 806-07 (proposing that Washington state retain its mandatory IOLTA program but require clients to sign a consent form permitting

proposed changes, however, accomplish the goals of IOLTA in a manner less burdensome or restrictive to the client.

IOLTA programs are narrowly tailored to achieve the states' interest in facilitating the provision of legal services. The district court in *Texas Equal Access to Justice Foundation* recognized, "The government's interest in making legal services accessible would be achieved less effectively absent the existence of IOLTA."²⁵² IOLTA programs are less restrictive than taxes or additional bar fees because IOLTA programs do not use money that clients could ever access.²⁵³ Further, it is illusory to believe that voluntary or opt-out programs would be less restrictive on clients, because even in those programs it is the attorney who decides whether to deposit funds in an IOLTA account.²⁵⁴ Also, requiring states to convert mandatory programs to voluntary or opt-out ones would lead to a decrease in the amount of interest generated by IOLTA.²⁵⁵ Further, requiring clients to consent to IOLTA runs counter to the related IRS tax provision such that if a client controls the placement of his funds in an IOLTA account, he will have to pay tax on the interest formed.²⁵⁶

Another proposed alternative to mandatory IOLTA programs is to give clients the option to choose the litigation funded by their money.²⁵⁷ While such a scheme would give clients more First

deposit of their funds in an IOLTA account); Brent Salmons, *IOLTAs: Good Work or Good Riddance?*, 11 GEO. J. LEGAL ETHICS 259, 271-73 (1998) (suggesting that IOLTA programs should allow clients to choose the type of account in which their money will be held, but noting the tax consequences of the change); Smith, *supra* note 61, at 1004-05 (suggesting that attorneys add a clause in their fee agreement regarding the placement of certain client funds in IOLTA accounts).

252. *Tex. Equal Access to Justice Found.*, 86 F. Supp. 2d at 636-37 n.6.

253. *See* Brown v. Legal Found. of Wash., 123 S. Ct. 1406, 1421 (2003) (stating that clients' pecuniary loss as a result of IOLTA programs is zero). Unlike IOLTA funds, additional tax to fund legal services is money that a taxpayer could otherwise spend.

254. *See* Smith, *supra* note 61, at 1004 (noting that mandatory, opt-out, and voluntary IOLTA programs, as they currently operate, presume that clients do not need to approve the transferring of their interest on IOLTA accounts to the state IOLTA program).

255. *See* *Tex. Equal Access to Justice Found.*, 94 F.3d at 999 (explaining that Texas changed its IOLTA program from voluntary to mandatory in 1989 because the revenue yielded by the voluntary program was insufficient). After the state implemented a mandatory IOLTA program, revenue increased from \$1 million per year to approximately \$10 million per year. *Id.* *See also* Weissman, *supra* note 44, at 775 (predicting that efforts of IOLTA opponents to limit the use of funds will lead to a drop in IOLTA funds).

256. *See* Salmons, *supra* note 251, at 271-73 (lobbying for Congress to amend the tax code so that clients who control the disposition of their funds will not have to pay tax on interest generated by those funds). *But see* J. David Breemer, *IOLTA in the New Millennium: Slowly Sinking Under the Weight of the Takings Clause*, 23 HAWAII L. REV. 221 (2000) (arguing that a tax on interest would not seriously undermine an IOLTA program that requires client consent).

257. Breemer, *supra* note 256, at 244-46 (proposing that IOLTA programs provide a diverse choice of beneficiaries from which IOLTA depositors may choose the

Amendment protection, it would likely be so inefficient and expensive that it would make IOLTA programs ineffective.²⁵⁸ In *Southworth*, the Supreme Court stated that the University was free to establish a system by which students could list those student groups that they did and did not want to support.²⁵⁹ However, the Court declined to impose such a system on the University, explaining that it could be “so disruptive and expensive” that the entire university program of creating open dialogue through the funding of student groups would be unsuccessful.²⁶⁰ The Court stated, “The First Amendment does not require the University to put the program at risk.”²⁶¹ Similarly, states should not have to jeopardize the effectiveness of their IOLTA programs by imposing an elective system.

Moreover, allowing individual clients to withhold their funds from litigation concerning issues they find objectionable runs counter to the government’s interest in improving access to the justice system for all.²⁶² If legal aid attorneys are prevented from raising an otherwise valid claim because insufficient IOLTA funds are designated for that issue, then they cannot provide adequate legal representation.²⁶³ Justice Kennedy articulated such a sentiment in the majority opinion of *Legal Services Corporation v. Velazquez*.²⁶⁴ There, the Court held that an LSC restriction banning challenges to welfare laws violated the First Amendment.²⁶⁵ The Court explained that such a

recipient of their interest); Risa I. Sackmary, *IOLTA’s Last Obstacle: Washington Legal Foundation v. Massachusetts Bar Foundation’s Faulty Analysis of Attorneys’ First Amendment Rights*, 2 J.L. & POL’Y 187, 211 (1994) (suggesting that the state give attorneys a “checklist of programs” from which they can choose the organizations they wish to support).

258. See WHAT IS IOLTA?, *supra* note 4 (stating that allowing clients to earmark their funds for particular issues would require a tracking system and manpower that IOLTA programs do not possess). IOLTA programs are run by volunteer board members. *Id.*

259. See *Bd. of Regents v. Southworth*, 529 U.S. 217, 232 (2000) (addressing students’ claim that the University must give students the option to choose whether to fund student groups with whose message they disagree).

260. *Id.*

261. *Id.*

262. See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001) (asserting that attorneys ought to raise “all the reasonable and well-grounded arguments necessary for proper resolution of the case”).

263. See *id.* (stating that precluding the analysis of certain legal issues “prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power”).

264. See *id.* at 533 (challenging the 1996 LSC restriction that prohibited recipients of LSC funds from representing a client in a challenge to the validity of existing welfare laws).

265. See *id.* at 537 (finding that the restriction constituted viewpoint-based discrimination).

restriction severely threatened judicial integrity because it prevented attorneys from arguing otherwise legitimate claims and from raising certain issues that might be relevant to a client's case.²⁶⁶ In *Southworth*, the Court justified the invasion of students' First Amendment rights because of the University's substantial interest in maintaining an open forum for dialogue.²⁶⁷ IOLTA-funded legal service providers must be able to supply a diverse and open menu of legal services, just as universities maintain an open forum for student speech.²⁶⁸ Clients who depend on IOLTA-funded attorneys are unlikely to find alternative representation if an IOLTA-funded attorney is limited in the issues in which he can represent his client.²⁶⁹ States' interest in improving access to the justice system and in maintaining judicial integrity, as well as the absence of any less restrictive alternative to IOLTA programs, justifies any impact on clients' First Amendment rights.

CONCLUSION

Inscribed over the entrance to the Supreme Court are the words "Equal Justice Under the Law." Former Supreme Court Justice Lewis Powell, Jr. stated once that those words were "perhaps the most inspiring ideal of our society."²⁷⁰ Still, the vast majority of poor people's legal needs remain unmet.²⁷¹ IOLTA programs alone will not solve the problem of unmet legal needs, but in the wake of cuts

266. See *id.* at 546 (suggesting that the public would come to doubt the "adequacy and fairness" of attorneys).

267. See *Bd. of Regents v. Southworth*, 529 U.S. 217, 233 (2000) (sustaining the University's program for funding student groups so long as it distributed funds using a viewpoint neutral process).

268. See *Velazquez*, 531 U.S. at 546 (ruling that restrictions preventing legal aid attorneys from raising all valid claims during a suit compromises the fair administration of justice).

269. See *id.* (stating that, if an indigent client may not retain the services of an LSC attorney for welfare claims, he will likely have no source of information about his rights).

270. See Laurence E. Norton II, *Not Too Much Justice for the Poor*, 101 DICK. L. REV. 601, 601 (1997) (quoting Justice Lewis Powell Jr. as stating, during his tenure as president of the American Bar Association, that "[i]t is fundamental that justice should be the same, in substance and availability, without regard to economic status").

271. See, e.g., Brief for AARP, *supra* note 57, at 11-12 (explaining that between seventy and ninety percent of this country's needy have unmet legal needs); Richard C. Baldwin, *Needs and Deeds*, OR. ST. B. BULL., Dec. 2000, at 11 (finding that only 18.2% of low to moderate income Oregonians are able to obtain legal services when they need them), available at <http://www.osbar.org/publications/bulletin/00dec/feature.htm> (on file with the American University Law Review); Cunningham, *supra* note 57, at 58 (determining that the legal needs of the poor in Washington, D.C. are substantially not met by comparing the estimated amount of legal need in Washington, D.C. to that being met by pro bono work and law school clinics).

and restrictions on federal funding for legal services, IOLTA funds have become increasingly important in keeping existing legal service providers in operation.²⁷²

IOLTA programs are an intelligent and popular way for funding legal services for the poor,²⁷³ as evidenced by the creation of IOLTA programs in every state and the District of Columbia.²⁷⁴ It is important to remember that IOLTA programs do not take earnings from clients that clients would otherwise have received, since client funds deposited in IOLTA accounts are only those which could not earn the client net interest.²⁷⁵ Rather, IOLTA programs transfer the interest from banks to charitable organizations that provide legal services for the poor.²⁷⁶

Attacks on IOLTA programs, like attacks on the LSC, have largely become battles along political lines and should not lead the Court to view IOLTA programs as content based.²⁷⁷ The provision of legal services is not in itself a political or ideological activity, and a court should treat IOLTA programs as content neutral. IOLTA programs do not engage in lobbying or activities to support political candidates, unlike the situations in *Abood* and *Keller*. As such, Justice Kennedy's implication that the same potential for First Amendment violations exists in the IOLTA context as in *Abood* and *Keller* is mistaken. Even if a court views IOLTA programs as content based, the programs survive a strict scrutiny analysis; IOLTA programs support a compelling government interest, and their impact on First Amendment rights is no greater than necessary to achieve that interest.²⁷⁸

272. See Houseman, *supra* note 42, at 1217 (discussing the rise in importance of state funding for free legal services).

273. See Wash. Legal Found. v. Legal Found. of Wash., 236 F.3d 1097, 1115 (2001) (describing IOLTA programs' rapid spread); Luban, *supra* note 4, at 227 (calling IOLTA programs "ingenious").

274. See Brown v. Legal Found. of Wash., 123 S. Ct. 1406, 1411 (2003) (noting that, in most states, IOLTA programs were established by each state's supreme court); see also *supra* note 36 (listing IOLTA programs in existence in each state and the District of Columbia).

275. See WHAT IS IOLTA?, *supra* note 4 (explaining that IOLTA programs use funds generated from attorney-held accounts that traditionally did not generate interest).

276. *Id.*

277. See Joseph A. Dailing, *Their Finest Hour: Lawyers, Legal Aid and Public Service in Illinois*, 16 N. ILL. U. L. REV. 7, 18-21 (1995) (explaining that the Reagan administration changed LSC policies in order to inhibit the perceived left-wing liberals who, the administration believed, controlled legal aid services); Christine A. Klein, *Beating a Dead Mouse: Do IOLTA Programs Create an Unconstitutional Taking of Private Property?*, 1999 L. REV. MICH. ST. U. DET. C. L. 1, 2-3 (noting that some view IOLTA programs as part of a perceived liberal agenda).

278. See discussion *supra* Part III.B.2 (applying strict scrutiny to IOLTA programs).

2003]

EQUAL JUSTICE UNDER THE LAW

529

For now, IOLTA programs continue to operate in all fifty states. But, Justice Kennedy's dissent in *Brown* and the tenacity of the WLF suggest that it is only a matter of time before the Supreme Court revisits the constitutionality of IOLTA programs.