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Regulatory Takings After *Brown*

by John D. Echeverria

This Article attempts to unpack the meaning and significance of the recent decision in *Brown v. Legal Foundation of Washington*,[1] in which the U.S. Supreme Court rejected a takings challenge to Washington State's Interest on Lawyers' Trust Accounts (IOLTA) program.

The decision's greatest significance lies in the fact that it preserves state programs that provide approximately $200 million per year in funding for legal services for the poor. In terms of immediate, real-world impact, *Brown* is one of the Court's most important takings decisions. *Brown* also is remarkable because it represents the second case in a row in which the Court has rejected a regulatory takings claim after a seemingly relentless string of government defeats spanning more than a decade.[2]

However, the legal significance of the decision, particularly for environmental and land use regulations, is more subtle. The Court ruled that the taking claim failed because the plaintiffs could not demonstrate that the IOLTA program inflicted any economic harm on them and, therefore, could not demonstrate that they had been denied any "just compensation" to which they were entitled under the Takings Clause of the Fifth Amendment to the U.S. Constitution. The conclusion that the Takings Clause is not violated if a government action imposes no economic harm will sometimes be significant in eminent domain and physical occupation cases. But this principle will rarely (if ever) come into play in takings cases involving restrictions on the use of land and other resources.

At the same time, the decision provides some suggestive guidance on a variety of other takings issues. Language in the opinion supports the argument that the ostensible "substantially advance" takings test is not a genuine takings test at all, but rather a due process test. The decision also will help local governments defend against claims that condemnations of property for transfer to private individuals violate the "public use" requirement of the Takings Clause. In addition, the decision provides some indirect support for the concept of reciprocity of advantage as a defense to a takings claim, as well as for the requirement in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*[3] that a taking claimant must exhaust available state procedures for obtaining compensation before suing under the Takings Clause. Finally, the Court's decision in *Brown*, following on the heels of several decisions that suggested that the Court favored an ad hoc rather than a per se approach to takings analysis, creates some confusion about which approach the Court prefers.

The Case and the Decision

The Washington Legal Foundation (Foundation), a conservative legal advocacy group, launched this litigation with the explicit goal of dismantling state IOLTA programs. The Foundation's basic objection has been that IOLTA programs force corporations and individuals to help finance the prosecution of legal claims that may be contrary to their interests or that they may oppose for philosophical reasons. The Foundation's legal arguments have been that IOLTA programs "take" the interest earned on client funds deposited in IOLTA accounts, and that they violate the First Amendment. The Court's recent decision only addresses the takings issue.

Washington State, like every other state in the nation, established an IOLTA program to help finance legal services for the poor. Starting in the 1980s, these programs were created to take advantage of a new federal banking law that for the first time allowed federally insured banks to pay interest on checking accounts under certain circumstances. Prior to the new law, attorneys holding client funds for short periods of time generally put the funds in noninterest-bearing checking accounts, with the banks benefitting from the interest-free deposits. Under the new law, interest can be earned on these accounts if the interest is paid out to individuals or the interest goes to charitable organizations. For-profit corporations and partnerships are still prohibited from earning interest on checking accounts. IOLTA programs take advantage of these provisions by requiring that where the costs of tracking and distributing interest would exceed the amount of interest that can be earned on client funds, lawyers must deposit the funds in special IOLTA accounts. The interest earned on IOLTA accounts is paid to nonprofit IOLTA organizations in each state that in turn distribute the funds to legal services programs.

IOLTA programs impose no actual economic burden on the clients because, under the rules of the programs, funds are deposited in IOLTA accounts only where the clients could not earn interest on the funds in the absence of the programs. If a lawyer is holding a large enough amount of a client's money to justify keeping track of the interest and dis-

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

2. *See* Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 32 ELR 20627 (2002). For in-depth analyses of the *Tahoe-Sierra* decision, see John D. Echeverria, *A Turning of the Tide: The* Tahoe-Sierra *Regulatory Takings Decision*, 32 ELR 11235 (Oct. 2002); Joel R. Burcat & Julia M. Glencer, Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency: *Is There a There There?*, 32 ELR 11212 (Oct. 2002).

3. 473 U.S. 172 (1985).

tributing it, or to justify setting up a separate term account, the lawyer is required to do so rather than deposit the funds in an IOLTA account.

The question addressed in *Brown* was whether this arrangement results in a taking of the client's money. The Court decided this question against the backdrop of its 5 to 4 decision in *Phillips v. Washington Legal Foundation*.[4] In that case, applying the maxim that "interest follows principal," the Court held that interest earned on client funds in an IOLTA account represents the "property" of the client for the purpose of the Takings Clause. The Court in *Phillips* did not reach the questions of whether the IOLTA program effected a taking and, if so, whether just compensation would be due.

In *Brown*, the Court reached the issues pretermitted in *Phillips*, and, by a vote of 5 to 4, rejected the taking claim, affirming a decision by the U.S. Court of Appeals for the Ninth Circuit.[5] Justice Sandra Day O'Connor, who has been a frequent swing vote in recent takings cases,[6] switched her vote for the plaintiff in *Phillips* to a vote for the government in *Brown*. The Court assumed for the sake of argument that the plaintiffs (clients whose funds had been deposited in IOLTA accounts) could establish a "taking" of their property. The Court said, however, that even when a taking has been established, the Takings Clause "imposes two conditions" on the exercise of "the state's authority to confiscate private property": the taking must be for a "public use" and "just compensation" must be paid to the owner.[7] The Court said that the public use requirement was "unquestionably satisfied." It continued:

> Even if there may be occasional misuses of IOLTA funds, the overall, dramatic success of these programs in serving the compelling interest in providing legal services to literally millions of needy Americans certainly qualifies the Foundation's distribution of these funds as a "public use" within the meaning of the Fifth Amendment.[8]

However, the Court ruled that the plaintiffs could not satisfy the "just compensation" condition for a successful taking claim. Based on the evidence that the program avoided imposing any "net" loss on clients whose funds were deposited in IOLTA accounts, the Court concluded that the plaintiffs could not show that they had been denied just compensation to which they were entitled. Therefore, the Court rejected the claim that the Takings Clause had been violated.

There is, it must be acknowledged, something of a tension between *Phillips* and *Brown*. In a technical sense, there is no conflict between the decisions because *Phillips* addressed the definition of "property" whereas *Brown* addressed the takings and compensation issues. Nonetheless, there is a conflict in approach. For example, in *Phillips*, in deciding the property issue, the Court dismissed the argument that the interest would have no value to the client, saying that even though the property "may have no economically realizable value to its owner, possession, control, and disposition are nonetheless valuable rights that inhere in the property."[9] By contrast, in *Brown*, focusing on the issue of compensation, the Court rejected out of hand the notion that nonpecuniary losses could support the conclusion that the Takings Clause had been violated.[10]

Because the Court in *Brown* found no violation of the Takings Clause, the Court had no need to reach the second issue on which it granted certiorari: whether the plaintiffs would have been entitled to an injunction if they had established a violation of the Takings Clause or whether, instead, they would have been limited to relief in the form of monetary compensation. The latter position has somewhat stronger support in current precedent, but we will have to await the Court's definitive resolution of this issue in some future case.

The Court's decision does not mean the end of the *Brown* litigation. As discussed, the plaintiffs also are challenging the Washington IOLTA program under the First Amendment. It seems unlikely, however, given the failure of the takings claim, that the First Amendment claim will succeed.

The Decision's Significance and Implications

Enormous Practical Importance

As mentioned, the *Brown* decision is enormously important because the case involved a very serious threat to approximately $200 million in annual funding for civil legal assistance programs. If the claim had succeeded, it is unlikely, in the current political environment, that the lost funding could have been restored easily from other sources. Thus, especially in view of the sharp division in the lower courts over these programs,[11] the result in *Brown* represents a major victory for IOLTA programs and their supporters.

Relatively Narrow Holding

At the same time, the central holding—that a property owner cannot bring a successful taking claim if she cannot prove actual economic injury supporting a demand for just compensation—is relatively narrow. Long-standing precedent supports the conclusion that a showing of actual economic injury to the owner is necessary to establish an entitlement to compensation pursuant to the Takings Clause. As the Court has frequently said, the key question in a takings case "is, What has the owner lost?, not What has the taker gained?"[12] Even though the public obviously benefits enormously from IOLTA programs, the clients whose monies support the programs have lost nothing. IOLTA programs only exploit the time-value of the clients' property when doing so will have no net adverse effect on them.

Reaffirmation of the principle that a successful takings claim requires a showing of actual economic loss will be useful in eminent domain and physical occupation cases, in

4. 524 U.S. 156 (1998).

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

6. *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 32 ELR 20516 (2001).

7. *Brown*, 123 S. Ct. at 1417.

8. *Id.*

9. 524 U.S. at 170.

10. 123 S. Ct. at 1419.

11. In Phillips v. Washington Legal Found., 270 F.3d 180 (5th Cir. 2001), *reh'g en banc denied*, 293 F.3d 242 (5th Cir. 2002), *judgment vacated & remanded*, 123 S. Ct. 1654 (2003), the U.S. Court of Appeals for the Fifth Circuit, contradicting the Ninth Circuit, ruled that the Texas IOLTA program effected an unconstitutional taking.

12. Boston Chamber of Commerce v. City of Boston, 217 U.S. 189, 195 (1910).

which a taking can sometimes occur without causing any economic injury.[13] On the other hand, in regulatory takings cases involving use restrictions, in which a showing of extreme economic impact is generally required to establish a taking,[14] the no just compensation argument will rarely apply.

One interesting question is whether the outcome in *Babbitt v. Youpee*[15] might be altered by *Brown*. In *Youpee*, the Court struck down as an unconstitutional taking the U.S. Congress' attempt to deal with the problem of fractionated Indian lands in the Indian Land Consolidation Act. If the Court were to reanalyze the case by focusing on the compensation issue instead of the takings issue, the Court might conclude that the value of some fractioned interests (net of reasonable accounting costs) is less than zero and, therefore, the elimination of such interests would not constitute a violation of the Takings Clause.

Helping to Inter the Substantially Advance Theory

The decision offers encouragement to those (generally on the defense side of the takings issue) who believe the Court may be prepared to reject the theory that a taking can be established by demonstrating that the government action "fails to substantially advance a legitimate government interest."[16] In general, takings law focuses on the issue of the burdensomeness of a government action. Thus, for example, the Court has said that a taking will be found if a regulation destroys the value of private property,[17] or if the government effects a physical occupation of private property.[18] Another theory of takings liability, with weaker support in the case law, is that government effects a taking when it acts in an arbitrary or irrational manner, that is, when government action "does not substantially advance legitimate state interests . . . ."[19]

While one can point to several Court precedents supporting this ostensible takings test, careful analysis shows that the substantially advance test was derived from due process precedents. In addition, in terms of substantive legal doctrine, the test simply restates the test for a due process violation. The test also fits awkwardly into takings law because a takings claim is generally understood to presuppose that the government is acting for some valid public purpose.

The discussion in *Brown* about the "public use" requirement provides support for challenging this ostensible takings test. The first significant point is the Court's repeated characterization of "public use" as a "condition" that must be satisfied in order for a claimant to invoke the Takings Clause.[20] The second significant point is the Court's repeated statement that public use must be defined, at least in part, in terms of the "legitimacy" of the government action.[21] The Court's message appears to be that one condition for a viable taking claim is that the government action must serve a "legitimate" purpose. If the illegitimacy of a government action takes the action completely *outside* the scope of the Takings Clause, as *Brown* suggests, then the illegitimacy of the action (in other words, that the government action fails to "substantially advance a legitimate government interest") cannot logically provide a basis for claim *under* the Takings Clause. Thus *Brown* (which does not explicitly refer to the substantially advance takings test) appears to implicitly reject this test.

This understanding of the Court's position is consistent with the Court's 5 to 4 ruling in *Eastern Enterprises v. Apfel*,[22] rejecting the plaintiff's effort to challenge the Coal Industry Retiree Health Benefit Act (Coal Act) of 1992 under the Takings Clause. Justice Anthony M. Kennedy, in his concurring opinion, stated that because "the constitutionality of the Coal Act appears to turn on the *legitimacy* of Congress' judgment rather than on the availability of compensation, . . . the more appropriate constitutional analysis arises under general due process principles rather than under the Takings Clause."[23] Likewise, Justice Stephen G. Breyer, speaking for the four dissenters in the case, stated that "at the heart of the [Takings] Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing *compensation* for *legitimate* government action that takes 'private property' to serve the 'public' good."[24] While these views were articulated in concurring and dissenting opinions, they represent a holding endorsed by a majority of the Court.[25]

The Court's decision in *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*,[26] decided the day before *Brown*, also provides some indirect support for the theory that the Court is prepared to repudiate the substantially advance takings test. The Court in *Buckeye* rejected a substantive due process challenge to a voter referendum on a local land use issue. The significant aspect of the case is that while the Court rejected the due process claim it expressed no misgivings about entertaining such a claim, implicitly rejecting the position of some courts, notably the Ninth Circuit, that

13. *See, e.g.*, Hendler v. United States, 175 F.3d 1374, 29 ELR 21185 (Fed. Cir. 1999).
14. The accuracy of this statement depends in part on whether the Court ultimately rejects the "substantially advance" takings theory, an issue on which *Brown* sheds some light. *See infra* notes 16-29 and accompanying text.
15. 519 U.S. 234 (1997).
16. John D. Echeverria, *Does a Regulation That Fails to Advance a Legitimate Governmental Interest Result in a Regulatory Taking?*, 29 Envtl. L. 853 (1999).
17. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 22 ELR 21104 (1992).
18. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
19. Agins v. City of Tiburon, 447 U.S. 255, 260, 10 ELR 20361, 20362 (1980).
20. *See, e.g.*, *Brown*, 123 S. Ct. at 1417.
21. *See, e.g., id.*; *see also id.* at 1421 (using the phrase "legitimate public use").
22. 524 U.S. 498 (1998).
23. *Id.* at 545 (emphasis added).
24. *Id.* at 554 (first emphasis in original, second emphasis added).
25. As many commentators and litigators have observed, the force of the precedent set in *Eastern Enterprises* is not undermined by the Court's 1999 decision in City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 29 ELR 21133 (1999). In that case, the Court upheld a finding of a taking based on jury instructions (to which the defendant city waived its objections) incorporating the substantially advance theory. But five of the Justices in the case (not the same five Justices in the majority on the takings issue in *Eastern Enterprises*) either wrote opinions or joined in opinions reserving the question of the validity of the substantially advance test, thereby indicating that the result in *City of Monterey* should not be taken as an endorsement of this test. *See id.* at 732 n.2, 29 ELR at 21142 n.2 (Scalia, J., concurring); *id.* at 753 n.12, 29 ELR at 21146 n.12 (Souter, J., dissenting).
26. 123 S. Ct. 1389 (2003).

the Takings Clause completely preempts the Due Process Clause of the Fourteenth Amendment.[27]

The preemption position, though certainly not inseparable from the substantially advance takings theory, supports the theory because it leaves the Takings Clause as one of the few constitutional provisions available for challenging government regulation. By the same token, rejection of the preemption position appears to undermine the substantially advance theory because it is implausible that takings and due process claims could coexist in the law and that claims that, in reality, raise due process issues could be pursued, at the claimant's option, either under the rubric of due process or takings. Thus, the decision in *Buckeye* appears to undermine the ostensible substantially advance test.

Second, Justice Antonin Scalia, in a concurring opinion in *Buckeye*, took an even stronger position, suggesting that the only constitutional basis for challenging arbitrary government action is the Equal Protection Clause of the Fourteenth Amendment:

> I write separately to observe that, even if there had been arbitrary government conduct, that would not have established the substantive-due-process violation that respondents claim. It would be absurd to think that all "arbitrary and capricious" government action violates substantive due process—even, for example, the arbitrary and capricious cancellation of a public employee's parking privileges. The judicially created substantive component of the Due Process Clause protects, we have said, certain "fundamental liberty interests" from deprivation by the government, unless the infringement is narrowly tailored to serve a compelling state interest. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Freedom from delay in receiving a building permit is not among these "fundamental liberty interests." To the contrary, the Takings Clause allows government confiscation of private property so long as it is taken for a public use and just compensation is paid; mere regulation of land use need not be "narrowly tailored" to effectuate a "compelling state interest." Those who claim "arbitrary" deprivations of nonfundamental liberty interests must look to the Equal Protection Clause, and *Graham v. Connor*, 490 U.S. 386, 395 (1989), precludes the use of "'substantive due process'" analysis when a more specific constitutional provision governs.[28]

In all frankness, this passage, which is uncharacteristically opaque for a Justice Scalia opinion, is difficult to decipher. However, what Justice Scalia appears to be saying is that *neither* the Due Process Clause *nor* the Takings Clause can support constitutional challenges to regulations that allegedly fail to advance a legitimate government interest. Only the Equal Protection Clause, apparently, can serve that function.

The validity of the substantially advance test is now at issue in a number of pending takings cases around the country.[29] It will be interesting to see how the discussion in *Brown* (and *Buckeye*) will affect the outcome of these cases.

27. *See* Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1996) (en banc), and its extensive Ninth Circuit progeny.

28. 123 S. Ct. at 1397 (emphasis omitted).

29. *See, e.g.*, Chevron USA, Inc. v. Cayetano, 198 F. Supp. 2d 1182 (D. Haw. 2002), *appeal docketed sub nom.* Chevron USA, Inc. v. Lingle, No. 02-15867 (9th Cir. May 3, 2002); Seiber v. United States, 53 Fed. Cl. 570 (Fed. Cl. 2002), *appeal docketed*, No. 03-5010 (Fed. Cir. Nov. 1, 2002); City of Glenn Heights v. Sheffield Dev. Co., 61 S.W.3d 634 (Tex. Ct. App. 2001), *appeal docketed*, No. 02-0033 (Tex. July 3, 2002).

Expansive Reading of Public Use

The *Brown* decision represents a potentially significant setback for efforts by property owners to challenge transfers of condemned property to private firms as violations of the "public use" requirement. In order to promote urban renewal, cities and towns sometimes condemn blighted properties and transfer them to private firms for redevelopment. The Court in *Hawaii Housing Authority v. Midkiff*[30] established a fairly deferential standard for review of these types of condemnations. But a concerted campaign, led by the Institute for Justice, is seeking to put greater teeth in the public use requirement, if not completely prohibit condemnations involving property transfers to private owners.

In *Brown* the Court said that the IOLTA program "unquestionably" satisfies the public use requirement. The Court observed that if the government had imposed a tax to support legal services for the poor, "there would be no question as to the legitimacy of the use of the public's money."[31] The fact that the funds might be used, for example, to pay the legal fees of an individual in a legal conflict with the plaintiffs in *Brown* "would not undermine the public character of the 'use' of the public's money."[32] The Court's reasoning plainly contradicts the argument that there is something inherently illegitimate about the transfer of condemned properties for private use.[33]

Underscoring the Importance of Reciprocity of Advantage

Another important feature of *Brown* is that it reinforces the concept of reciprocity of advantage. The Court coined the phrase in *Pennsylvania Coal Co. v. Mahon*,[34] and reaffirmed the concept most recently in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.[35] The basic notion is that the fairness of government actions under the Takings Clause should be assessed by considering both the burdens imposed and the benefits conferred by governmental activity.[36]

Brown speaks to the concept of reciprocity of advantage by emphasizing that the question of whether the plaintiffs were entitled to "just compensation," and therefore could establish a violation of the Takings Clause, had to be evaluated by looking at the "net" effect of the program on the plaintiffs. The plaintiffs' entitlement to compensation could not be calculated simply by looking at the value of the interest earned by IOLTA accounts, the Court said, but also had to consider the transaction costs that would be entailed in tracking and distributing small amounts of interest to individual clients. Only if the interest minus the transaction costs was a positive figure, the Court reasoned, could the plaintiffs demonstrate an entitlement to just compensation.

30. 467 U.S. 229, 14 ELR 20549 (1984).

31. 123 S. Ct. at 1407.

32. *Id.*

33. *See also id*. at 1423 n.2 (Scalia, J., dissenting) (arguing that the Court's analysis "reduces the 'public use' requirement to a negligible impediment indeed, since I am unaware of *any* use to which state taxes cannot constitutionally be devoted") (emphasis added).

34. 260 U.S. 393, 415 (1922).

35. 535 U.S. 302, 341, 32 ELR 20627, 20634 (2002).

36. *See also* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491, 17 ELR 20440, 20445 (1987) ("While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others.").

The approach in *Brown* of calculating the "net effect" is, to be sure, distinguishable from the usual application of the reciprocity of advantage concept. Reciprocity of advantage is typically invoked to help determine whether a taking has occurred, whereas in *Brown* the Court assumed a taking had occurred and used its calculations of net effect to determine whether compensation might be due. Moreover, reciprocity of advantage typically focuses on the benefits conferred on the claimant by the challenged regulation, whereas in *Brown* the focus was not on the reciprocal benefits of the IOLTA program (although the program arguably produces reciprocal benefits by improving the fairness of, and public confidence in the justice system), but rather on how offsetting transaction costs affect the amount of just compensation that might be due.

Nonetheless, the net calculation approach, like the concept of reciprocity of advantage, is based on the fundamental idea that, for the purpose of takings analysis, the impact of the government action must be evaluated in its totality. Under either approach, it is ultimately the net effect of the government action that matters. Thus, *Brown* is a useful precedent in support of the reciprocity of advantage argument.

Bolstering Williamson County

The decision in *Brown* also bolsters the state-exhaustion prong of the takings ripeness doctrine as defined in *Williamson County*.[37] Under *Williamson County*, "a property owner has not suffered a violation of the [Takings Clause] until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation."[38] This rule is based on the principle that the Takings Clause does not bar the taking of private property, but only bars a taking without just compensation. It cannot be determined whether or not a taking has occurred, according to *Williamson County*, unless and until the claimant has sought compensation from the state.

While *Williamson County*'s state-exhaustion requirement appears to be a firmly established part of Court takings doctrine,[39] the Court in *Brown* offers further support for the doctrine. The decision begins its discussion of the compensation issue by quoting *Williamson County*: "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation."[40] By reinforcing the theoretical foundation for the *Williamson County* state-exhaustion requirement, the Court in *Brown* has indirectly reinforced this prong of the takings ripeness doctrine.

Per Se Versus Ad Hoc Analysis

The decision in *Brown* appears to point in several directions, or perhaps none at all, on the issue of whether the Court favors per se or ad hoc analysis in takings cases. In two very recent takings decisions, *Palazzolo v. Rhode Island*[41] and *Tahoe-Sierra*,[42] the Court rejected per se claims but left the door open to potential ad hoc *Penn Central Transportation Co. v. New York City*[43] claims. Following these decisions, many observers said the Court appeared to be exhibiting a renewed commitment to ad hocery. For better or for worse, *Brown* provides little further guidance on whether the Court has a fundamental preference for one approach or the other.

The Court identified two separate takings claims in the case, one based on the requirement that client funds be placed in IOLTA accounts and the other based on the requirement that the interest earned by the accounts be transferred for use by the legal services program. The Court acknowledged the requirement that funds placed in IOLTA accounts could "conceivably" be viewed as raising an issue under *Penn Central*, but summarily rejected the claim.[44] The Court said: "It is clear that there would be no taking because the transaction had no adverse economic impact on petitioners and did not interfere with any investment-backed expectation."[45] Thus, if *Palazzolo* and *Tahoe-Sierra* point claimants down the path of *Penn Central*, as some have suggested, *Brown* indicates that this trip can, at least in some cases, be very short indeed.

With respect to the second claim, the Court assumed, without definitively deciding the issue, that a per se approach applied. The Court said that "[w]e agree that a per se approach is more consistent with the reasoning in our *Phillips*' opinion than *Penn Central*'s ad hoc analysis," and, therefore, the Court "assume[d]" that the interest had been taken.[46] No doubt, in future cases involving similar circumstances, takings claimants will encourage the lower courts to embrace the Court's categorical assumption. But the Court's reluctance to actually decide whether per se analysis applied seems both telling and important. Evidently a majority of the Court was not willing to embrace per se takings analysis definitively. This is hardly surprising given that Justice David H. Souter, for the four dissenters in *Phillips*, all of whom were part of the five-Justice majority in *Brown*, explicitly stated in *Phillips* that the takings challenge to the IOLTA program should be governed by *Penn Central*, and not by a per se rule.[47]

The Court's refusal to commit itself on this issue no doubt relates to the difficulty the Court has had in figuring out how to apply the Takings Clause to money generally. In *Eastern Enterprises*,[48] a majority of the Justices embraced the view that government-imposed financial liabilities are completely outside the scope of the Takings Clause because they do not involve an effect on a "specific property interest." In addition, the Court has traditionally viewed taxes as largely (if not completely) immune from takings challenges, a view endorsed, for example, in Justice Scalia's dissenting opinion in *Brown*.[49] Likewise, user fees appear to be largely immune from takings challenges.[50] On the other hand, the Court has been more receptive to takings claims when the government action relates to a separately identifiable fund

37. 473 U.S. at 172.
38. *Id.* at 195.
39. *See, e.g.*, City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 699, 29 ELR 21133, 21135 (1999).
40. 473 U.S. at 194.
41. 533 U.S. 606, 32 ELR 20516 (2001).
42. 535 U.S. at 302, 32 ELR at 20627.
43. 438 U.S. 104, 8 ELR 20528 (1978).
44. Brown v. Legal Found. of Wash., 123 S. Ct. 1406, 1418 (2003).
45. *Id.* at 1429.
46. *Id.* (emphasis omitted).
47. *See Phillips*, 524 U.S. at 176.
48. 524 U.S. at 542 (Kennedy, J. concurring); *see also id.* at 554 (Breyer, J. dissenting).
49. *See* 123 S. Ct. at 1423 n.2.
50. *See id.*

of money, as with the IOLTA program in *Brown*.[51] Yet in *United States v. Sperry Corp.*,[52] also involving a separate fund, the Court explicitly rejected a per se approach, stating that "[i]t is artificial to view deductions [from] a monetary award as physical appropriations of property" because "[u]nlike real or personal property, money is fungible."[53] In applying a categorical approach, arguendo in *Brown*, the Court appears to be contradicting *Sperry*.

In the end it seems most sensible to read the Court's assumption that there was a per se taking in *Brown* for what it was, a convenient device to allow the Court to reach the "just compensation" issue, a relatively noncontroversial basis for disposing of the entire case. Thus, it would probably be a mistake to read *Brown* as evincing a genuine commitment to the use of per se analysis in analyzing alleged takings of money.

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

52. 493 U.S. 52 (1989).

53. *Id*. at 62 n.9.

The Court's ultimate resolution of the case relied, in a sense, on a per se rule, that is, that a claimant cannot sue under the Takings Clause unless that person can show economic injury supporting a claim for just compensation. For the reasons discussed, however, this per se rule is unlikely to have much importance in the general run of regulatory takings cases.

Conclusion

Writing in the pages of the *Environmental Law Reporter*® a year ago, I suggested that the Court's decision in the *Tahoe-Sierra* case appeared to reflect a turning of the tide on the direction of regulatory takings law.[54] The *Brown* decision, by handing takings claimants yet another defeat, seems to confirm this shift. After years of controversy, is it possible that the regulatory takings agenda has reached the limits of its ambition?

54. Echeverria, *supra* note 2.