

KENNEDY, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 01–1325

ALLEN D. BROWN AND GREG HAYES, PETITIONERS
v. LEGAL FOUNDATION OF WASHINGTON ET AL.

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

[March 26, 2003]

JUSTICE KENNEDY, dissenting.

The principal dissenting opinion, authored by JUSTICE SCALIA, sets forth a precise, complete, and convincing case for rejecting the holding and analysis of the Court. I join the dissent in full.

It does seem appropriate to add this further observation. By mandating that the interest from these accounts serve causes the justices of the Washington Supreme Court prefer, the State not only takes property in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States but also grants to itself a monopoly which might then be used for the forced support of certain viewpoints. Had the State, with the help of Congress, not acted in violation of its constitutional responsibilities by taking for itself property which all concede to be that of the client, *ante*, at 17; *Phillips v. Washington Legal Foundation*, 524 U. S. 156, 172 (1998), the free market might have created various and diverse funds for pooling small interest amounts. These funds would have allowed the true owners of the property the option to express views and policies of their own choosing. Instead, as these programs stand today, the true owner cannot even opt out of the State's monopoly.

The First Amendment consequences of the State's action have not been addressed in this case, but the potential for

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a serious violation is there. See *Abood v. Detroit Bd. of Ed.*, 431 U. S. 209 (1977); *Keller v. State Bar of Cal.*, 496 U. S. 1 (1990). Today's holding, then, is doubly unfortunate. One constitutional violation (the taking of property) likely will lead to another (compelled speech). These matters may have to come before the Court in due course.